**The University of New South Wales**

**Master of Laws Thesis**

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# Athlete Endorsement Restrictions as Unreasonable Restraints of Trade

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# Preface

The subject of athlete endorsement as a common law restraint of trade has been a largely ignored area of academic research or professional examination, in contrast to the plethora of articles and theses dealing with restraints of trade in sport, in particular salary caps and draft systems. As the first detailed analysis of the topic I have been very conscious that a broad approach to the subject matter was more valuable than a focus on a distinct aspect of it. It was necessary therefore, given the word limit of a Masters thesis, to pass over or merely touch upon material that, while relevant, was less important to the topic than that which is included. Issues concerned with inequality of bargaining power or insufficiency of contractual consideration as these relate to athlete endorsement are clearly relevant but were omitted to provide space to engage with the broader topic.

For reasons of word length it has not been possible to consider in detail those arguments likely to be raised by sporting organisations that go to the question of reasonableness. Endorsement restraints are applied as a norm of the sports industry which itself suggests that the starting point of any research on this topic is to question the status quo.

The imposition of endorsement restraints on athletes concerns matters of policy and fact that, although debated from time to time by athletes or in the media, has never been litigated. This thesis aims to consider the issue of athlete endorsement realising that, in common with most novel matters heard under the restraint of trade doctrine, this is the beginning of a process of refinement and adjustment over time. Although many are aware of the *Nordenfelt* principle of 'reasonableness' it is not often realised that the debate on a 'test' of reasonableness had been on-going for much of the 19$^{th}$ century before fact and policy finally brought change in 1894. Nor is it commonly realised that once the test of reasonableness had been established that further argument brought adjustments or 'improvements' requiring, for example, that a covenantee seeking enforcement bear the onus of proving a restraint was reasonable in respect to its interests replacing the contrary rule established in *Tallis v Tallis* in 1853. It was not until fifteen years after *Nordenfelt* that an enforceable interest was recognised in what was known as a covenantor's 'subjective property'. The propositions of this thesis must be seen in a similar light: the arguments examined and considered will find modification over time as the issue of athlete endorsement gains greater emphasis under the influence of the communications revolution.

**ORIGINALITY STATEMENT**

‘I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.’

Signed …… David Thorpe……..

Date …… May 2013…….....

# Table of Contents

## Single Factors bearing upon Endorsement Restraints of Trade 121

## Table of Cases

*Forbes v NSW Trotting Club Ltd* (1979) 143 CLR 242.
*Foschini v Victorian Football League and South Melbourne Football Club* (unreported, VSC 15 April, 1983.
*Gaumont-British Picture Corporation v Alexander* [1936] 2 All ER 1686.
*George Weston Ltd v Baird* (1916) 31 DLR.
*Grieg v Insole* [1978] 3 All ER 449.
*Haelen Laboratories Inc v Topps Chewing Gum Inc* (1953) 202 F.2d 866 (2nd Cir).
*Hall v Victorian Football League and Clarke* [1982] VR 64.
*Hallam v Harvey* (1901) 1 SR (NSW) Eq 155.
*Harper & Row publishers Inc v Nation Enterprises* (1985)105 S.Ct. 2218.
*Hawick v Flegg* (1958) 75 WN (NSW) 255.
*Heine Bros (Aust) Pty Ltd v Forrest* [1963] VR 383.
*Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.
*Henry Leetham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322.
*Hepworth Manufacturing Co v Ryott* [1920] 1 Ch 1.
*Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.
*Herbert Morris v Saxelby* [1916] AC 688.
*Adamson and Others v New South Wales Rugby League and Others* (1991) 103 ALR 319.
*Hitchcock v Coker* (1837) 112 ER 167.
*Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169.
*Hughes v Western Australia Cricket Association* (1986) 69 ALR 660.
*Hughes v Western Australian Cricket Association (Inc)* 1986 ATPR 40-376
*Ipswich Tailors case* (1614) 77 ER 1218.
*John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995.
*Johnstone v Cliftonville Football and Athletic Club* [1984] NI 9.
*Lennox v Megray pty Ltd* (1986) ATPR 40-640.
*Lido-Savoy Pty Ltd v Paredes* [1971] VR 297.
*Lindner v Murdock's Garage* (1912) 14 CLR 628.
*Love v Miami Laundry Co* 160 S 32.
*Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA.
*Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 SA 874.
*Mason v Provident Clothing and Supply Co* [1913] AC 724.
*Maynard v Goode* (1926) 37 CLR 529.
*McEllistrim v Ballymacelligott Cooperative Agricultural Dairy Society Ltd* (1919) AC 548.
*Mitchell v Reynolds* 24 ER 347.
*Mulligan v Corr* [1925] 1 IR 172.
*News Limited v Australian Rugby Football League* (1996) 135 ALR 33.
*Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535.
*Nova Plastics Ltd v Froggatt* [1982] IRLR 146.
*Office Angels Ltd v Rainer-Thomas and O'Connor* (1991) IRLR 214.
*Peters (WA) v Petersville Ltd* (1999) ATPR 41-714.
*Petrofina (Great Britain) Ltd v Martin* [1996] Ch 146.
*Petrofina (Gt Britain) v Martin and Another* [1966] Ch. 146 at 181.
*Printing & Numerical Registering Co v Sampson* LR 19 Eq 462 (1875) 465.
*Prior of Dunstable's Case* (1433) YB II hen 6.
*Procter v Sargent* (1840) 2 Man & G 20.
*Queensland Wire Industries Pty Ltd v BHP Co Ltd* (1989) 167 CLR 177.
*Ramsey Butchering Services Pty Ltd v Blackadder* (2003) 127 FCR 381.
*Richardson v Mellish* (1824) 2 Bing 229.
*Rogers v Maddocks* [1892] 3 Ch 346.

*Ropeways Ltd v Hoyle* (1919) 120 LT 538.
*Roussillon v Roussillon* (1880) 14 Ch D 351.
*Routh v Jones* [1947] 1 All ER 758.
*Silberman v Citigroup* [2011] VSC 426.
*Sir W C Leng & Co v Andrews* [1909] 1 Ch 763.
*Tallis v Tallis* (1853) 118 ER 482.
*Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 WLR 814.
*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52.
*Torpedoes Sportswear Pty Ltd v Thorpedo Enterprises Pty Ltd* (2003) 204 ALR 90.
*Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429.
*Vancouver Malt & Sake Brewing Co v Vancouver Breweries Ltd* [1934] AC 181.
*Vandervell Products Ltd v McLeod* [1957] RPC 185.
*Walker Crystal Palace Football Club Ltd* (1910) 1 KB 87.
*Ward v Byrne* 151 Eng Rep 232.
*Watchum v Attorney-General of the East Africa Protectorate* [1919] AC 533.
*Wessex Dairies Ltd v Smith* [1935] 2 KB 80.
*Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45.
*Whittaker and another v Howe* 49 Eng Rep 150 1829-165.
*Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666.
*WR Carpenter Aust Ltd v Kleisterlee* [1988] ATPR 40-913.
*Young v Timmons* (1831) 1 Cr & J 331.

# Abstract

Towards the last quarter of the 20th century the revenue stream of major sporting organisations increasingly moved away from gate receipts towards sponsor endorsement. The shift was due to developments in the communications industries, in particular colour television and then two decades later the digital revolution, both of which placed the images of sport and the products it endorsed before audiences at times numbering into the millions.

Psychological studies reveal that the more a consumer 'identifies' with a sport the more likely he or she is to purchase sponsors products associated with that sport. The association between product and sport is the basis of the lucrative 'endorsement market'.

The sporting organisation and the athlete are competitors in endorsement marketing. To combat this competition sporting organisations, as the dominant party, incorporated terms into player contracts restraining their athletes from engaging in endorsement marketing. This thesis argues that such restrictions are unreasonable under the common law restraint of trade doctrine. This thesis also considers the unique relationship between athletes and their sporting organisation and how changes in technology prompted courts to accept sport as an industry amenable to the restraint of trade doctrine.

The application of the restraint of trade doctrine is a matter of policy. It is argued that an historical freedom of trade and the response of courts to changing technological paradigms are pertinent guides as the world enters the uncertain commerce of the digital age. A '21st century' policy response under the restraint of trade doctrine is argued as necessary.

It is argued that certain endorsement concessions granted by sporting bodies to athletes that give the appearance of a 'partial restraint of trade' are in fact so impractical that the overall unreasonableness of endorsement restraints cannot be offset.

It is proposed that the athlete's persona, a trait that makes endorsement marketing so effective, is in fact an extension of the athlete's 'subjective property' and cannot be claimed by the organisation.

This thesis considers in some detail the sporting organisations contractual claim to what is referred to as the 'cyber-markets'. These 'new' market structures require a modern policy reappraisal argued to favour the athlete.

The thesis closes by examining what are referred to a 'multiple restraints of trade in sport' suggesting that any review of the reasonableness of endorsement restraints can only accurately be appraised by considering the accumulated impact of multiple restraints on individual athletes.

# Chapter 1: Introduction

In the latter quarter of the twentieth century two events transformed the commercial landscape of sport: the innovation of colour television and the rise of the digital revolution. The first, by attracting mass audiences increased the revenues of sporting organisations to shift sport from a pastime to full professionalism. The second reshaped sport from a localised industry into a globalised business. In each instance the marketing of sport extended beyond the game itself to embrace product sponsorship and endorsement.

As the financial potential of these markets became evident, the major Australian sporting organisations introduced terms into their player contracts to restrain athletes from offering their services as product endorsers to the increasingly profitable sponsorship market. Endorsement marketing had been around for some time in nascent form but was, with developments in the multimedia technologies, ripe for full commercial exploitation. For the dominant contracting party, the sporting organisations, what better way to secure an endorsement monopoly than through contractual terms imposed on a 'take it or leave it' basis. The athlete, with skills pertinent to a specific market, was rarely in a position to object. To paraphrase the words of New South Wales Rugby League in the celebrated and seminal case of *Buckley v Tutty*,[1] a player could accept the deal or 'obtain employment as a labourer'. This thesis seeks to examine critically the current legal framework as it applies to athletes and restraints on endorsement and the reasonableness of these trade limitations under the common law restraint of trade doctrine.

Endorsement restraints operate against a background of truncated careers and inequality of bargaining power. Athletic longevity, unlike professions where experience is rewarded, is marked by declining performance and diminished earnings. For an athlete there may be one opportunity to trade image for income before his or her physical capacity, already in decline by the age of twenty-five, precludes entry into the lucrative endorsement market.

Under the *Nordenfelt* principle[2] all restraints of trade are void unless reasonable in the interests of the parties and the interests of the public. A sporting organisation will claim in its defence that the restraint on its athlete is necessary to permit the sport to develop and expand – in the organisation's view, a legitimate interest reasonably protected.

But is this claim mere sporting melodrama? Sport was once a pastime and for athletes, amateur or semi-professional, match fees were at best a supplement to a 'proper' occupation. In contrast, sport today is an industry rivalling manufacturing and steel production as a source of national income.[3] While athletes remain the raw material of this industry, they are denied

[1] *Buckley v Tutty* (1971) 125 CLR 353 at 373. The judgement found for the player, Tutty.
[2] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 565 per Lord Macnaghten (*Nordenfelt*).
[3] The income from sport and related services in Australia was calculated at $8.8 billion: ABS Media Release 29 August 2006 <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8686.0Media%20Release12004-05?opendocument&tabname=Summary&prodno=8686.0&issue=2004-05&num=&view=>

the possibility of earning substantial income through the use of their 'subjective property', their reputation and persona; ironically excluded from a commercial enterprise that is not, in fact, the subject matter of their contractual engagement. As the dominant contracting party sporting organisations historically dictated how, when, and if, an athlete can exploit his or her 'subjective property' in the endorsement market. For the sporting organisation, a restraint on endorsement represents monopoly revenue where sponsors who seek to promote their products through an association with sport face a market unresponsive to the competitive forces of supply and demand.[4] For the athlete, perhaps possessing few marketable traits other than a prodigious physical talent, a restraint on endorsement also represents a long term loss – that of a financially comfortable post-sport life.

This thesis presents the argument that the current freedom sporting organisations possess to impose restraints on athletes who wish to engage with sponsors in endorsing goods and services are, in fact, unreasonable restraints of trade.

In considering the reasonableness of endorsement restraints, this thesis will argue that technological change has largely determined the policy direction of the restraint of trade doctrine since the first cases of the 15th century through to the present day.

This thesis deals primarily with restraints of trade imposed on employee athletes, for example those playing in the National Rugby League competition. Endorsement restraints on non-employees, such as those athletes competing in specific tournaments like the Olympic or Commonwealth Games, is also briefly considered. The analysis in most instances is applicable to both forms of restraint. As JD Heydon, judge of the High Court of Australia, remarked extra-judicially: 'The principles applying to restraints on employees are usually also applied by analogy to restraints on persons who are not employees ...'[5]

Chapter Two considers the factual context of marketing goods and services through the medium of sport. The psychological theories of marketing, the advantages of sports marketing and a brief history of sports marketing are examined. It is the capacity of sport and athletes to further sales of goods and services that motivates the imposition of restraints of trade by sporting organisations on athlete endorsement. This Chapter also explores the connection between sports marketing and mass communications giving particular emphasis to the increasing role of the digitalised media.

Chapter Three, 'The Rise and Rise of Freedom of Trade', reviews the 'contest' between 'freedom of trade' and 'freedom of contract' over time as these concepts apply to the enforcement of trade restraints to suggest that the tilt of the law has been towards the

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As one commentator stated: 'Sport is now a global business worth more than three percent of world trade.': Blackshaw I, Protecting Sports Image Rights in Europe (2005) 6(2) *Business Law Review* at 271.

[4] The economic market structure known as 'monopoly' is characterised by a single seller of a good or service. Typically the monopolist is able to manipulate the market by restricting supply to increase price and hence revenue. As such the basic wrong of monopoly is that fewer goods are placed on the market and at a higher price than occurs under full competition. There are few 'true' monopolies as substitutes can be found for most goods and services. The term is used predominantly in this thesis to indicate an endorsement monopoly within a given sport, notwithstanding some level of general competition between different sports.

[5] Heydon JD, *The Restraint of Trade Doctrine,* 3rd ed, LexisNexis Butterworths, Australia, 2008 at 92.

encouragement of trade – a fact pertinent to discussions on how endorsement marketing in general and the modern use of digitalised markets should be approached by future courts.

The development of the restraint of trade doctrine under the influences of technological and philosophical change is a theme of this thesis. Restraints 'general' in scope have been, with some exceptions, unenforceable under both ancient and modern authority. The challenge for the courts, given the pervasiveness of modern digital communication, is the extent to which it should permit a covenantee sporting organisation to sequester to its own benefit increasing portions of the endorsement market – a market which today exists in both geographic space and cyberspace. For over three hundred years, as a factor relevant to the question of reasonableness, the enforceability of a restraint of trade hinged on the existence of some market beyond the boundaries of the covenantee's commercial interests in which the covenantor could freely trade. This very principle is threatened as localised markets rapidly vanish and products are marketed on a global basis through the digitalised media.

Chapter Three draws upon the historical record as a tool to examine the effect of technological change on the restraint of trade doctrine. Sport, as a global industry where 'star-power' extends beyond national boundaries, is an ideal mechanism for marketing goods and services internationally and for this reason is sought to be controlled by commercially rational sporting organisations.

Chapter Four reviews the unique legal treatment of restraints of trade in sport. The theme of this Chapter, linked to the relationship between technology and the restraint of trade doctrine, is the gradual emergence of sport from a pastime where 'trade' was not thought an applicable descriptor, to a modern globalised business amenable to the restraint of trade doctrine. Emphasis is placed on the period of the late 1960's into the mid 1970's. It was in this period that Australian courts threw-off the nomenclature 'pastime' to accept sport as a business to which 'trade' was applicable. A contextually relevant question is the extent to which sport 'the pastime' will re-emerge as courts consider the internationalisation of 'sport the product' in the digital communications era under the increasing expansion of sporting conglomerates.

Chapter Five, 'The Athlete and the Organisation', considers the complex legal relationship between the sporting organisations and its athletes. The Chapter commences by reviewing exemplars of the player contracts of the National Rugby League and the Australian Rugby Union to pose the question, 'what is the athlete employed to do?' This Chapter draws a demarcation between the athlete as on-field performer and an athlete as private endorser. The treatment of the relationship is a precursor to more in depth discussion in succeeding Chapters. This Chapter asks whether an athlete is in fact employed as a purveyor of endorsement to look at the specific requirements of sport employment, the status of a restraint operable during the currency of employment and the mutual obligation of fidelity as between the employer organisation and the athlete. It is suggested that the athlete's obligation of fidelity is either non-existent or is to be reconfigured to such an extent that, with regard to the specifics of the sports industry, it equates with the demonstrably degraded obligation of the sport employer.

Chapters Six and Seven are both titled 'Enforcement and Reasonableness'. Chapter Six considers issues largely pertinent to 'Single restraints of trade'. Chapter Seven examines what of referred to as 'Multiple restraints of trade' as a separate issue going to reasonableness under the restraint of trade doctrine.

Chapter Six is divided into a number of sections. Each section deals with specific arguments regarding the reasonableness of restraints of trade imposed on athlete endorsement. Section 1 looks at 'Product Grouping' and the apparent concession granted athletes to endorse in product categories not in conflict with the organisation's sponsors. These concessions, it is argued, give the appearance of a partial restraint of trade suggestive of reasonableness. In practice, however, the organisation is able to appropriate to itself by the device of 'product categorisation', endorsement niches that would otherwise be secured by athletes. In addition, the sporting organisation as the dominant party, grants to itself contractual permission to 'sub-categorise' products to effectively increase the number of sponsors it supports. Such restraints, it is argued, are general in character and tending towards the unreasonable.

Section 2 considers 'Athlete Persona as Subjective Knowledge' to claim that an athlete's qualities of reputation and persona are 'subjective knowledge', traits recognised in *Mason v Provident Clothing and Supply Co*[6] as the employee's to own and exploit as he or she sees fit.

Section 3, titled 'Claiming the Digital Markets', explores the impact of world-wide digital marketing on the restraint of trade doctrine in general and in sport specifically. The rise of the 'sports conglomerate' is considered as a new phenomena bearing upon the reasonableness of endorsement restraints. The section questions whether the 'new' digital marketing platforms are in fact the organisation's to claim and suggests that should a court enforce a restraint within the digital markets it would in fact be removing competition from an increasingly important vehicle of commerce. Restraints imposed on digital marketing are argued to be general restraints. Section 3 proposes that the very diversity of the internet markets and the capacity of search engines to delineate to a fine degree, permits market segmentation to occur within which a series of partial restraints can be identified to serve the interests of both covenantee and covenantor.

Chapter Seven explores the reality that athletes in major sports are constrained by multiple restraints of trade such as salary caps, player drafts and residential requirements – a circumstance unique to sport. The question of the reasonableness of endorsement restraints, it is argued, must be considered against the backdrop of these multiple restraints of trade. This section focuses on how the law of the restraint of trade doctrine should adjust to the peculiarity of multiple restraints of trade impacting upon a single covenantor in respect to the question of reasonableness.

Overlaying the question of reasonableness is the impact of the digital technologies on the entitlement of an individual to trade in a least some part of the world – the question extends beyond athletes to include any occupation the services of which can be transmitted digitally.

[6] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 407 per Lord Shaw (*Mason).*

This thesis suggests that the pervasive scope of the digitalised communications is capable of expunging any notion of a geographically partial restraint. This thesis also proposes that the digital technologies have the potential to create ‘sub-markets’ for endorsement services, not based on geographic reach but in cyberspace. Business websites and like platforms are a new type of market existing as part of a general market, where, analogous to the partial restraint ‘rule’, the protectable interests of a covenantee are not unreasonably damaged when utilised by a covenantor.

The sporting organisations exploit their position of contractual dominance to monopolise endorsement marketing. Athletes, with a professional career of perhaps a few years at best, are deprived from accepting income from sponsors, those who would want nothing more than to directly engage with individual athletes and in so doing acquire endorsement services at the economically efficient price of where supply intersects with demand.

# Chapter 2: The Factual Context – Marketing and Endorsement

## 1. Introduction

Premier athletes of today inhabit a radically different commercial world to that of their forebears. In the 1930's, when modern sport marketing can rightly be said to have begun, athlete endorsements were rare, but where they did exist, an athlete could trade his or her name in the market for endorsements services free from the tight contractual restraints that characterise modern athlete contracts. When modern communications technologies emerged during the latter quarter of the twentieth century, athletes and sporting organisations were thrown into competition as endorsement providers. Around this time 'social identity marketing' became recognised as a tool to penetrate the booming post-World War II consumer market. By forming in a customer's mind an association between a product and the positive image of sport the marketer could expand sales. For the dominant contracting party, the sporting organisation, removing the competition of the athlete from the endorsement market seemed a sensible commercial ploy.

Radio, television and the digital media placed sporting events before audiences that would, by the later twentieth century, number into the billions. That quantity of consumers watching an Olympic event or just a few million viewing an AFL or NRL grand final was an audience too valuable to leave to the market forces of supply and demand. Athletes intruding into the endorsement market would, according to economic theory, increase the supply of endorsements services relative to demand and force down the organisation's revenues. Better for the sporting organisation to incorporate a trade restraint into its athlete contract and claim the monopoly price. A simple restraining term such as, 'the player may not use his personal image for purposes of promotion of any product that may conflict with the name, reputation, image, products or services of any of the Club's sponsors'[7] is sufficient to drive an athlete from most endorsement markets.

The use of these trade restraints in sport is relatively recent, occurring only with the increasing use of the television technologies in Australia during the 1960s and 70s. Prior to the arrival of mass media there was relatively little interest in athlete endorsement. When Donald Bradman endorsed a pair of men's slacks for the firm of FJ Palmer in 1930, the Cricket Board of Australia were more concerned that the batsman's commercialism would damage the image of the game than they were with the loss of a potential sponsor – indeed, the idea of exploiting cricket for commercial gain was abhorrent to many members of the Board.[8] Cricket Australia, the organisation now controlling cricket, is a sporting conglomerate with its logo on replica cricket bats and children's singlets, towels and kitbags, offering endorsement services to corporations called 'commercial partners', such as KFC

[7] Paraphrased from the NRL Playing Contract (2012), Section 3.4.
[8] Pollard J, *The Bradman Years*, The Book Company Publishing, Sydney, 2001at 272.

Chicken and Johnnie Walker scotch. In an ironic testimony to commercialism, at a time when the sporting world is disturbed at allegations of match fixing in cricket, Cricket Australia endorsed 'Betfair' the 'home of more than three million punters' at the same time denying (arguably rightly) its players the same opportunity. The marketers of cricket in 1930 would not have dreamed of engaging in such rank promotion. Driven by technological developments in the communications media, the commerciality and the mentality are today different. Technology from television to i-phones has opened new markets for sport and thereby markets for sports endorsement.

Until the advent of television, in particular colour television, sport secured most of its revenue from gate receipts. It was not uncommon in Sydney up until the 1970s for the so-called rugby league 'match of the day' to attract a near capacity crowd to the Sydney Cricket Ground (SCG). The record rugby league crowd at the SCG was 78,056 for a match between St George and South Sydney in 1965. The record SCG Cricket attendance was 58,446 in 1928 for a match between Australia and England.[9] Today, as the proportion of revenue increasingly flows from the sale of sponsorship rights, such levels of attendance are no longer necessary for the commercial survival of major sport (and do not occur). Rather, the revenue stream flowing from the sponsor/endorser relationship is that which the sporting organisation captures from their competitor in the market place, the athlete.

The athlete and the organisation offer roughly the same service to the endorsement market: an association between sport and products. The sporting organisation, given its contractual dominance, is able to secure to itself the larger share of the endorsement market by imposing restraints on athletes who would, otherwise, trade their name in a freely functioning market.

How has the law addressed these profound transformations? I will argue that the relevant rules, developed in the latter part of the 19th Century are quite obsolete when dealing with the revolutionary changes in communication technologies and practices of the 21st Century. In order to do this, it will be necessary first to look at the relevant position in contract law of the relationship between sportsperson and sports organisations. To be fair to the judges who developed the rules, they could not have anticipated developments in the communications technologies which, in the early twenty-first century, are securing geographic markets a nanosecond's distance that were, in the 1890's several weeks away by ship. Moreover, little account is taken of who should possess for purposes of trade the new and preponderant cyberspace markets where every website is a portal for endorsement.

## 2. Contractual Overview

In *Adamson and Others v New South Wales Rugby League*, Hill J observed of the relationship between players and the administrators of sport that, 'the history of professional sport, both in Australia and overseas, reveals a tendency to regulation in ways which interfere with the

[9] <http://www.scgt.nsw.gov.au/Record-Crowds.html>

freedom of players to contract.'[10] Most often this interference is in the form of salary caps, player drafts and residency requirements. Restraints on the freedom of athletes to trade their playing services to the highest bidder is argued as necessary to create a 'competitive balance' by spreading athletic talent between teams for the purpose of generating public interest through close contests. This thesis is concerned with a different restraint of trade: that of limitations preventing athletes from trading their reputations and persona in the market for endorsement services. Such restraints do not serve the purpose of competitive balance in the sporting arena but rather aim at directly removing a competitor, the athlete, from the endorsement market. Under this contractual scheme sponsors who seek to purchase the endorsement services of athletes must negotiate with a single provider; the sporting organisation.

Endorsement restraints take two forms: Contracts of employment such as that of the National Rugby League and contracts instituted with respect to a single event such as the Commonwealth Games or Olympic Games (classifiable as a form of contract for service). The predominant concern of this thesis is with employment contracts. Nevertheless, the application of the restraint of trade doctrine to both forms of contract is essentially the same.[11] Having stated this, courts will often view more cautiously restraints imposed on employees, concerned that inequality of bargaining power means, 'The employee is practically compelled, and often for very inadequate consideration, to accept any terms the employer may seek to impose upon him without, in many cases, knowing or appreciating what they involve.'[12]

The Collective Bargaining Agreement (CBA) between the Australian Football League (AFL) and the AFL Players Association incorporates a restraint of trade clause typical of Australian sporting contracts:[13]

Section 21: USE OF PLAYER IMAGE

21.1 (a) The Parties agree that a Player may use his own Image or license the use of his own Image provided that such use:

(i) does not conflict with an AFL Protected Sponsor;

(ii) does not conflict with an AFL Club Protected Sponsor;

(iii) it is not prejudicial to Australian Football;

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[10] *Adamson and Others v New South Wales Rugby League and Others [Trial]* (1991) 100 ALR 479 at 485 (*Adamson trial*). Although the decision was forcefully overruled on appeal, the observation of Hill J is nonetheless an accurate historical appraisal of the relationship between athletes and their sporting organisations.
[11] As noted in the introduction: 'The principles applying to restraints on employees are usually also applied by analogy to restraints on persons who are not employees ...'.Heydon JD, *The Restraint of Trade Doctrine,* 3rd ed, LexisNexis Butterworths, Australia, 2008 at 92.
[12] *Fitch v Dewes* (1920) 2 Ch 159 at 185-6.
[13] AFL Collective Bargaining Agreement (2007-2011) <http://www.afl.com.au/portals/0/ afldocs/aflhq/policies/ collective_bargaining_agreement_2007_2011.pdf>

(iv) does not use AFL Intellectual Property or Club Intellectual Property without the consent of the AFL or the relevant AFL Club; and

(v) does not use other AFL property (including, without limitation, playing and on field uniforms and other items within the AFL on field policy) without the consent of the AFL.

The restraint of trade is found in sub (i) and (ii), where terms prevent a player from endorsing products or services that conflict with a sponsor of the AFL or an AFL club. At first glance the restraint appears to be quite limited; a partial restraint in trade that should allow a player to engage with a large number of sponsors. In practice, this is far from reality. The restraints are, as argued in this thesis, extensive and restrictive.

The 2012 Australian Olympic Committee (AOC) Athletes Agreement for the London Olympic Games incorporates terms typical of a non-employment endorsement restraint.[14]

Section 12.1: Marketing and Sponsorship:

> 'Except as permitted by the AOC, I will not allow my person, name, picture or sports performance to be used for advertising purposes during the Games Period.'[15]

The purpose of this clause is to exclude Australian Olympic athletes from marketing their athletic notoriety for financial reward. The Athletes Agreement is a contract of adhesion[16] put to the athlete on a take it or leave it basis. In signing the Athletes' Agreement an Australian Olympian consents to forego all endorsement revenue for the period of time prior to, during and following the Olympic Games. In so doing the athlete cedes to the Australian Olympic Committee the use of his or her image, marketability and reputation and, in consequence, all endorsement earnings.

Section 12.3 permits the AOC to on sell the athlete's right of endorsement to third parties:

'I agree that:

> 'The Team Sponsors may use my Image to promote Australia's participation in the Games and in their advertising, promotion or marketing activities, provided that such use of my Image is limited to being part of the Team as a whole. This obligation applies even if a Team Sponsor competes with one of My Sponsors.'

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[14] <http://corporate.olympics.com.au/files/dmfile/2012 TeamMembershipAgreement_Athletes_ FINAL_16September2011_IncludingIOCMediaGuidelines.pdf>

[15] 2012 Australian Olympic Team membership Agreement – Athletes. <http://corporate.olympics.com.au/files/ dmfile/2012_ TeamMembershipAgreement _Athletes_FINAL 16September2011> IncludingIOCMediaGuidelines.pdf>

[16] Contract of adhesion: The covenantor in a standard form contract is 'stuck' with the term on a take it or leave it basis. See for example *Silberman v Citigroup* [2011] VSC 426 at [18]: 'That term I think means the ability of one party through a contract of adhesion or some other economic ascendancy to insist on certain terms which in the circumstances might be thought to be unfair or unjust.'

An aggrieved Olympic athlete could consider challenging the restraint in the several months between contracting and the end of the Games – the period when, it might be added, his or her public notoriety is at a peak. To complain, or to act in his or her commercial interest, is a big step for a would-be Olympian, for Section 5.2 (a) exposes the athlete to sanctions including 'termination of my membership of the Team' should he or she 'breach any term of this Team Agreement at any time other than during the Games Period, such breach and any disciplinary sanctions to be applied will be determined by the AOC (or its authorised delegate(s)) in its sole and absolute discretion.'[17]

The controls and the threat of sanction extend beyond the AOC. The Olympic Charter (the dominant contractual document of the International Olympic Committee) mandates that all athletes adhere to the 'TOP' program (acronym for 'The Olympic Partners) which grants to 'TOP companies ... exclusive *global* marketing rights and opportunities within their designated product category.'[18] Under Rule 40 of the Olympic Charter an athlete is not permitted to have their image, name or likeness used in advertising.[19] A breach of the IOC rules may cause the athlete to be removed from the Games.

TOP companies are invariably multinationals which benefit specifically from a world-wide interest in the Olympic Games.[20] The 2012 London TOP Partners, of which there are eleven, include Coca-Cola, VISA, Panasonic and Samsung. The exclusivity term aims to prevent athletes from entering into endorsement agreements with product sponsors in the same category as TOP partners and is, in itself, a restraint of trade arguably unenforceable under common law precedent. However, the threat of removal from the Games and other reprisals would seem to be sufficient to dissuade any potential litigation. Under 'Rule 23 of the Olympic Charter',[21] an athlete who breaches Rule 40 ('no athlete will permit his or her name, picture or sports performances to be used for advertising purposes during the Olympic Games') will face ''temporary or permanent ineligibility or exclusion from the Olympic Games'.

The threats of the AOC and IOC contracts are exemplars of the type of 'terror restraint' described by Lord Moulton in *Mason v Provident Clothing*: 'It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of the master.'[22]

Nonetheless, provided an athlete steers clear of the TOP Olympic product categories, litigation in respect to restraints imposed by the Australian Olympic Committee (AOC) is

[17] Australian Olympic Team membership Agreement 2012 – Athletes, section 5.1.
[18] <http://www.olympic.org/sponsorship?tab=The-Olympic-Partner-TOP-Programme> Emphasis added. Section 6.3 preserves the AOC property rights under the Olympic Insignia Act 1987, but the Act does not extend to the use of endorsement where the particular insignia are not used. 'I will comply with this legislation and I will not breach the intellectual property rights of the AOC, including without limitation, its statutory rights under this legislation which restricts my use of any Olympic words or designs without the permission of the AOC.'
[19] <http://corporate.olympics.com.au/files/dmfile/AOC_only_AnnualReport2011_8MayV2.0.pdf>
[20] 'Most major companies pay around $100 million in cash and in-kind services to become TOP sponsors over a four year period.': *SportsBusiness International* 13 January 2010.
[21] Rule 23.2.1: The Olympic Charter in force as from 7 July 2007
.<http://www.olympic.org/Documents/Reports/EN/en_report_122.pdf >
[22] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 745.

surely available. It must be remembered that the restraint of trade doctrine is not concerned with the 'morality' of abandoning an agreement freely given but rather whether a restraint is reasonable in protecting the legitimate interests of the parties and the public at large.[23]

Of course it could also be said that like other contractors who, during the negotiation period, find a term not to their liking the athlete may, with equal freedom, decide to pursue a different interest. To do so would be to abandon the most prestigious athletic championships in the world, a course of action so remote from the reality of an athlete's psyche as to be beyond contemplation.

Nor are endorsement restraints confined to male dominated sports. The Australian 'Women's National Basketball League Player Agreement' restricts endorsement through the clause:

> 'The Player will not do anything which may reasonably be considered as promoting or endorsing any product or service or providing promotional, marketing or advertising services of whatever nature (which) ... may reasonably be considered by the Club or WNBL to conflict with the interests of the Club or the WNBL and/or any sponsors of the Club or the WNBL.'[24]

Contractual terms such as those recorded above constitute a prima facie restraint of trade, described in *Petrofina (Great Britain) Ltd v Martin* as occurring where:

> '... a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses.'[25]

The purpose of the contractual provisions listed above is to promote the financial interests of the major sporting organisations, such as the Australian Olympic Committee or the National Rugby League, over the interests of their signatory athletes, the commercial sponsors of athletes and the Australian public at large.

Restraints of trade have, in general, been declared unenforceable at common law since at least the fifteenth century, essentially for the same reasons as today – to ensure covenantors are not deprived unnecessarily of income or the public denied the services of the restrained

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[23] 'The fact that the restraint can be said to have freely been bargained for by the parties to the contract provides no sufficient reason for concluding that the doctrine should not apply. All contractual restraints can be said to be of that character.' *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70 at [56] per Gleeson CJ, Gummow and Hayne JJ. It may be noted that under Section 19.1 and 19.2 of the AOC Athletes Agreement the proper law of contract is that of NSW: 'The Court of Arbitration for Sport will determine any dispute according to the laws applicable in the State of New South Wales.' Certainly the AOC assists in funding athletes for competition, for example, granting $20,000 to those athletes who win a gold medal at the London 2012 Olympics and assisting sports in attending international competition. Such points, which perhaps go to securing 'raw material' as it were, may go to the question of reasonableness as will those made by aggrieved athletes. The discussion is, however, large and be beyond the allowable word capacity of this thesis.

[24] WNBL Player Agreement, 2008, clause 17.3.

[25] *Petrofina (Great Britain) Ltd v Martin* [1996] Ch 146 at 180; [1966] 1 All ER 126 at 138; per Diplock LJ. It should be noted that the restraint of trade doctrine applies equally to those who are not parties to a contract but have, nonetheless, been restricted through that contract, from trading.

party.[26] The modern approach to the restraint of trade doctrine is that expressed in an oft quoted passage of Lord Macnaghten from the seminal case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition*:

> 'All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void. This is the general rule. But there are exceptions: It is sufficient justification, and indeed is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public ...'[27]

In sport, restraint of trade clauses typically give an appearance of reasonableness by granting to the athlete an entitlement to endorse product or services which do *not* conflict with the organisation's sponsors. In practice, however, athlete endorsement will almost always conflict with the commercial interests of the sporting organisation to tend towards, in the absence of a workable concession, an unreasonable restraint.

## 3. Sports Marketing

A restraint of trade placed on athlete endorsement is fundamentally a restraint on the use of sport and sporting prowess to market goods and services. It is not the promotion of sport itself but rather the utilisation of sport as a medium to achieve a commercial goal or to enhance public reputation that a marketer seeks.

The American Marketing Association defines marketing as:

> '... the process of planning and executing the conception, pricing, promotion and distribution of ideas, goods, and services to create exchanges that satisfy individual and organisational goals.'[28]

Marketing through sport, whether by the athlete or the athlete's sporting organisation, presents three broad advantages to sponsors not available by other means of promotion: One, a level of media and individual interest that 'consistently garners large audiences.'[29] Two, a psychological response known as 'identification' that prompts supporters to buy products associated with their sport.[30] Three, an association between the 'values available in the world of sport to drive brand-image development for diverse and often unrelated products and services.'[31] In addition, sport attracts large audiences ensuring extensive product exposure

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[26] See for example, *Dyers Case* (1414) 2 Hen 5; *Prior of Dunstable's Case* (1433) YB II hen 6; *Davenant v Hurdis (the Merchant Tailors' Case)* (1598) Moore KB 576.
[27] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition* [1894] AC 535 at 565 per Lord Macnaghten.
[28] American Marketing Association (1999) Definitions; reported in Pope N and Turco D, *Sport and Event Marketing*, McGraw-Hill Australia, 2001 at 3.
[29] Wolfe R, Meenaghan T, O'Sullivan P, 'The Sports Network: insights into the shifting balance of power' (2002) 55 *Journal of Business Research* 611 at 613.
[30] Hogg MA and Abrams D, *Social Identifications: A Social Psychology of Intergroup Relations and Group Processes*, Routledge, London (1950).
[31] Wolfe R, Meenaghan T, O'Sullivan P, 'The Sports Network: insights into the shifting balance of power' 55 (2002) *Journal of Business Research* 611 at 613.

where the cross-section of tastes and interests within the spectator clique permits a single campaign to reach a diverse clientele.

In essence, sport marketing attempts to facilitate the sale of goods and services to consumers through the vehicle of sport by creating a positive association between the product or service and the perceived image of the sport.

### 3.1 Sponsorship

To Chavanat the purpose of sponsorship is to build a range of marketing goals around 'corporate image, corporate social responsibility, brand exposure, marketing sales, and effects such as image building, goodwill generation or attitude change'[32] using the context of sport.

According to Wilmhurst:

> '... sponsorship is usually undertaken to encourage more favourable attitudes towards the sponsoring company or its products within a relevant target audience, such as consumers, trade consumers, employees or the community in which it operates.'[33]

The word *sponsor* in this thesis will refer to the owners of a product or service who seek to have their brand identified with sport for the purposes of sale and promotion, or, as it was referred to by Sleight: '... a business relationship between a provider of funds, resources or services and an individual, event or organisation which offers in return some rights and association that may be used for commercial advantage.'[34]

The word *endorsement* will refer to those entities, the sporting organisation or individual athlete which provide to a product or service an association with a particular sport.

### 3.2 The specific advantages of sports marketing

Meenaghan claims sports' influence on consumers is unique because it, 'engages the consumer differently by bestowing benefit on an activity with which the consumer has an intense emotional relationship.'[35] Portlock and Rose believe the rising popularity, globalisation and professionalism of sport coupled with increased media coverage has made sports sponsorship a relatively cost-effective marketing strategy: 'Events give access to major media audiences for sponsoring brands' whilst 'increases in traditional advertising costs, media clutter, channel swapping and consumer cynicism have all served to increase the use of sponsorship as a more direct means of audience access.'[36]

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[32] Chavanat N, Martinent A, Ferrand A, 'Sponsor and Sponsee Interactions: Effects on Consumers' Perceptions of Brand Image, Brand Attachment, and Purchasing Intention' (2009) 23 *Journal of Sport Management* 644 at 644.
[33] Wilmhurst J, *Below-the-line Promotion*, Butterworth/Heinemann, Oxford, 1993 at 377; reported in Shilbury (1998) at 199.
[34] Sleight S, *Sponsorship. What it is and How to Use it*, McGraw-Hill, London, 1989 at 4.
[35] Meenaghan T, 'Understanding Sponsorship Effects' (2001) 18(2) *Psychology and Marketing* 95 at 95.
[36] Portlock A and Rose S, 'The Effects of ambush marketing: UK consumers brand recall and attitudes to official sponsors and non-official sponsors' (2009) July, *International Journal of Sports Marketing and Sponsorship* 271.

One of the most recognised benefits of athlete endorsement is the low cost associated with acquiring the services of the athlete relative to the impact on sales. Tiger Woods for example earned $US87 million from endorsement deals in 2006 and has multi-year endorsement contracts of $US105 million and $US40 million with Nike and Buick respectively. Although the cost of Woods' endorsement is high, the return to sponsors was also high: 'Since Tiger Woods signed with Nike, annual sales for Nike Golf have grown to nearly $US500 with an estimated 24 percent per year growth in the first five years of the agreement.'[37]

It is the capacity of sports endorsement to convey a message without resort to words that is of unparalleled value to a marketer; a value indirectly recognised in *ACC v TPG Internet Pty Ltd*, a case which recognised that consumers may not necessarily study advertisements closely but rather absorb the generality of the communication: 'It is the impression or thrust conveyed to a viewer, particularly the first impression, rather than analysis of the cleverly crafted constituent parts of an advertisement that will be determinative of the message conveyed.[38]

Sport, given its general popularity, is able to overcome what has been called the 'fragmenting of the mass, homogeneous market', a condition associated with the 'increased number of women in the workforce, the changing family unit, the aging of the population, and the shrinkage of the middle class.'[39] In summary, it is the broad appeal of sport that allows a single advertising campaign to cover several demographic groups and to do so with great market penetration.

## 4. The psychological theories underpinning sports marketing

A knowledge of the psychology underpinning product marketing is necessary to understanding why endorsement restraints are placed on athletes by sporting organisations. Psychologically the follower of a particular sport gains a form of satisfaction when he or she consumes the goods or services that are associated with his or her sport. This association, and the satisfaction that is produced through it, can be gained through either the sport itself or the athlete; a fact that prompts the sporting organisation to incorporate endorsement restraints into its athlete contract.

A number of psychological variables are known to influence the decision to purchase a good or service – consumers do not buy purely on price. As Meenaghan and Shipley state: 'in effect, the consumer is being "sold" at two levels of values, viz. intrinsic values centering on perceived product attributes and quality levels, and extrinsic values focusing on the symbolic content of the brand.'[40] The extrinsic values are those attributes which are external to the product itself, 'values which largely derive from brand imagery'. It is these values that the

[37] Carlson BD and Donavan T, 'Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions' (2008) 17 (3) *Sports Marketing Quarterly* 154 at 154.
[38] *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2011] FCA 1254 at [38].
[39] Shani D and Chalasani, 'Exploiting niches using relationship marketing' (1992) 6(4) *The Journal of Services Marketing* 43 at 44.
[40] Meenaghan T and Shipley D, 'Media effect in commercial sponsorship' (1999) 33(3/4) *European Journal of Marketing* 328 at 330.

sponsor attempts to capture when contracting with sporting organisations or individual athletes. The values that are attached to brand imagery operate psychologically to deliver to the consumer a social identity not attainable within the self.

### 4.1 Image and symbolism

All events, sporting or cultural, possess 'personality attributes' which are conveyed to the audiences of those events, 'thus it could be suggested that motor sport is glamorous, exciting, colourful, dangerous and youthful while boxing might be regarded as bloody, macho, violent and aggressive.'[41] When selecting an event, a sponsor seeks to align the image he or she wishes to convey about the product with the image of a particular sport. The sponsor is 'essentially buying ready-made images "off-the-shelf".[42]

Where a sport possesses a positive public image, a product associated with that sport is thought to acquire the same positive image:

> 'In a sponsorship both the sponsor and the sponsored activity become involved in a symbiotic relationship with a transference of inherent values from the activity to the sponsor. The activity audience, finding the sponsor and his name, logo and other marks threaded through the event, learn to associate sponsor and activity with one another.
>
> The task facing the sponsor is ostensibly to ensure his presence is clearly associated with the activity and where necessary to drain the activity values onto the brand. ... Essentially sponsorship allows the sponsored brand to live in the reflection of the sponsored activity.'[43]

The qualities that the consumer admires in the sport or the athlete are, on a psychological level, transferred to the sponsor's product or service.

### 4.2 The Psychology of Identification

The theory underpinning athlete endorsement is known as 'identification'. Where a consumer identifies with an athlete or a sport, he or she is more likely to buy the products and services associated with that athlete or sport.

'Identification' has been described as 'the process that occurs when a person wants to define himself in terms of his relationship to some other person or group.'[44] So significant is identification that it has been described as 'central to human development.'[45] Identification describes a life-long motivation influencing a person to adopt new attitudes and to discard old

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[41] Meenaghan T and Shipley D, 'Media effect in commercial sponsorship' (1999) 33(3/4) *European Journal of Marketing* 328 at 334.
[42] Meenaghan T and Shipley D 'Media effect in commercial sponsorship' (1999) 33(3/4) *European Journal of Marketing* 328 at 334.
[43] Meenaghan T and Shipley D, 'Media effect in commercial sponsorship' (1999) 33(3/4) *European Journal of Marketing* 328 at 335.
[44] Holme J (ed), *Psychology Today*, 2nd ed. CRM Books, California at 508.
[45] Holme J (ed), *Psychology Today*, 2nd ed. CRM Books, California at 508.

attitudes, in short 'the child adopts [the attitudes] of the parent and the member adopts those of the group.'[46] The group a person identifies with is called a reference group or, alternatively a psychological group.[47] These groups need not be formal or face-to-face but may include any group possessing a common theme. In fact the most influential reference groups are 'often broad social categories such as racial, religious, occupational, and sex groupings. People often take great pride in such reference groups and tend to be very influenced by them in their day-to-day lives.'[48] The group a person perceives he or she belongs to will, 'help shape the self-definitions and personal values of its members as individuals.'[49]

The process of social identification is argued by Hogg and Abrams[50] to involve a three step process. First, individuals and other members of a group categorise themselves as belonging to a distinct social class. Second, the common attributes, behaviours and norms that make the group distinctive are learned by the members collectively and individually. Third, the members of the group 'self-stereotype' and adopt the perceived norms of the group. The greater the level of identification with, say a sport, the greater the sponsor's product will be associated with the sport by the identifying individual. At some stage, 'those fans with the highest level of identification with a sponsee [athlete or sport] will actually seek out corporate sponsors and reward them with their patronage.'[51] The point being that the consumer will wish to favour those who favour his or her group.

### 4.3 Marketing theory and identification

The importance of identification to sport marketers was explained by Madrigal as occurring through a manifestation of group norms: '... fans quickly learn that behaviours such a cheering for the home team and wearing clothes emblazoned with the team's logo show support for a favourite team. Fans understand that the more they are involved in these activities, the more they are seen as being committed to the team.'[52]

'Identity theory' in respect to endorsement proposes that a person attempts to establish and maintain an identity he or she associates with a celebrity or group.[53] According to Carlson and Donavon brands gain from the endorser-brand association when fans feel a connection with the athlete. Specifically, 'it is the fan's identification with the athlete, or celebrity, that ultimately makes an endorsement effective. Identification refers to the overlap between the

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[46] Holme J (ed), *Psychology Today,* 2nd ed. CRM Books, California at 508.
[47] Turner JC, 'Social identification and psychological group formation', *The Social Dimension: European Developments in Social Psychology* v 2 Henri Tajfel, ed, Cambridge University 518; reported in Madrigal R, *Journal of Advertising* (2000) 19(4) at 14.
[48] Holme J (ed), *Psychology Today* 2nd ed. CRM Books, California at 482.
[49] Holme J (ed), *Psychology Today* 2nd ed. CRM Books, California at 482.
[50] Hogg MA and Abrams D, *Social Identifications: A Social Psychology of Intergroup Relations and Group Processes*, London, Routledge (1950); reported in Madrigal (2000) 19(4) *Journal of Advertising* at 14.
[51] Madrigal R, 'The influence of social alliances with sports teams on intentions to purchase corporate sponsors products' (2000) 19(4) *Journal of Advertising* 1at 15.
[52] Madrigal R, 'The influence of social alliances with sports teams on intentions to purchase corporate sponsors products' (2000) 19(4) *Journal of Advertising* 1at 15.
[53] Kelman HC, 'Process of opinion change' (1961) *Public Opinion Quarterly* 25 at 57; reported in Carlson and Donavan (2008) 17(3) *Sports Marketing Quarterly* 154 at 155.

fan's self schema and the schema of the athlete.'[54] As such, the sponsor utilises endorsement marketing in the hope that consumers will identify with the athlete and through the athlete identify with the product. The more strongly the sports enthusiast identifies with an athlete, 'the more they tend to purchase the endorsed products.'[55]

### 4.4 Group identification

Sports marketing is concerned with meeting the psychological need of a person to feel a connection with a group. In the context of sport this need is met when an individual (fanatic, fan, supporter) forms a connection with a sport, a team or an athlete. On a psychological level, 'a person's sense of connectedness to a cause, event or sports team' is part of their 'extended self', suggesting that people 'form emotional attachments to physical possessions, places, people and groups.' In belonging to a group, possessions are not individually owned but include 'shared consumption objects such a political leaders, media stars, public monuments and sports teams.'[56] As described by Carlson, 'according to social identity theory, individuals satisfy a self-definitional role and made sense of the world by categorising themselves and others into groups (eg I am a Dallas Cowboys fan).'[57]

A number of descriptive variegations are used to convey the meaning of identification and are worth repeating: 'being, say, a loyal citizen or sports fan that serves as the basis for incorporating that status into (a person's) social identity. ... acting in ways that promote the groups best interests is based on one's social identity rather than personal identity.'[58] Bergami and Bagozzi describe identification as a form of 'cognitive state of self-categorisation' which occurs 'when fans feel belongingness with an entity, such as an athlete.'[59]

In consequence the consumer is influenced to buy those products associated with the group:

> 'By associating with an entity such as a reference group that is held in high esteem in society, fans elevate their social status and enhance their self-image. Moreover, fans may be attracted to and identify with athlete endorsers due to the symbolic aspirations to join a reference group. ... Athletes are effective as endorsers because they often represent an association with a symbolic reference group.'[60]

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[54] Carlson BD and Donavan T, 'Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions' (2008) 17(3) *Sports Marketing Quarterly* 154 at 154-155.
[55] Carlson BD and Donavan T, Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions' (2008) 17 (3) *Sports Marketing Quarterly* 154 at 154.
[56] Madrigal R, 'The influence of social alliances with sports teams on intentions to purchase corporate sponsors products' (2000) 19(4) *Journal of Advertising* 1at 14.
[57] Carlson BD and Donavan T, 'Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions' (2008) 17(3) *Sports Marketing Quarterly* 154 at 155.
[58] Madrigal R, 'The influence of social alliances with sports teams on intentions to purchase corporate sponsors products' (2000) 19(4) *Journal of Advertising* 1at 14.
[59] Bergami M and Bagozzi RP, 'Self-categorisation, affective commitment and group self-esteem as distinct aspects of social identity in the organisation' (2000) 39 *British Journal of Social Psychology* 555; reported in Carlson and Donavan (2008) 17(3) *Sports Marketing Quarterly* 154 at 155.
[60] Carlson BD and Donavan T, 'Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions',(2008) 17(3) *Sports Marketing Quarterly* 154 at 155.

Identification, as a sporting team or athlete, manifests in a number of reactions relevant to marketing exploitation. In the case of British soccer fans, 'support for the home team is more than an act, it is part of identification with the team and/or what it represents'.[61] Sport consumers with a strong sense of identification are more likely view their team's performance as a personal success or failure[62] and derive significant ego enhancement from an affiliation with 'their' team.[63] A series of studies by Wann and Branscombe show a number of personal reactions associated with a high level of identification. Fans will typically: experience greater physiological arousal while watching a favourite team than will fans with lower levels of identification; are more likely to show in-group favouritism toward other fans of their favourite team and to derogate from the spectators of other teams; to attribute biased attributes to their team after a game and are more likely to bask in reflected glory of a team win and less likely to distance themselves following a loss.[64]

It is worth noting, particularly in respect to athlete off-field misconduct, that because attitudes adopted through identification are based on a person's emotional attachment to another person or group, rather than on their own merit, identification can be fragile. The behaviour of the group may not be well integrated with the individual's deeper attitudes and values, 'if the emotional attachment to the person or group loses its importance, the attitudes are also likely to fade.'[65]

## 5. Market divisions

There is no single consumer market for all goods and services but many markets and sub-markets. For this reason sport, given its appeal across a number of market divisions, is highly sought after by sponsors. The multitude of markets and sub-markets from which athletes are routinely excluded is argued in Chapter 6 as relevant to the reasonableness of endorsement restraints in sport. [66]

Pope and Turco identify four main market divisions utilised by marketers:[67]

1. Geographic: region, state, country, town, locale.
2. Demographic: age, gender, ethnicity
3. Psychographic: characteristics such as attitudes, beliefs and lifestyles

[61] Hogg MA and Abrams D, *Social Identifications: A Social Psychology of Intergroup Relations and Group Processes*, London, Routledge, 1950; reported in Madrigal (2000) 19(4) *Journal of Advertising* 1at 15.
[62] Hirt ER et al, 'Costs and benefits of Allegiance: Changes in Fans' Self Ascribed Competencies after Team Victory versus Defeat' (1992) 63 (Nov) *Journal of Personality and Social Psychology* 714.
[63] Cialdini RB *et al*, 'Basking in Reflected Glory: Three Football Field Studies' (1976) 34 (Sept) *Journal of Personality and Social Psychology* 366.
[64] Branscombe NR and Wann DL, 'Collective Self-Esteem Consequences of Out-Group Derogation when a Valued Social Identity is on Trial' (1994) 24 (Nov/Dec) *European Journal of Social Psychology* 641; reported in Madrigal (2000) 19(4) *Journal of Advertising* 1.
[65] Holme J (ed), *Psychology Today* 2nd edn. CRM Books, California at 509-510
[66] See Chapter 6: 'Product grouping as a partial restraint of trade.'
[67] Generally recognised but taken from Pope N and Turco D, *Sport and Event Marketing*, McGraw-Hill, Australia, 2001 at 41.

4. Behavioural: hobbies and habits

Dividing a market into segments 'allows a marketer to decide on methods of communicating with a specific target group and of tailoring a product to a particular target group. ... Ideally the four basic methods should be used in combination.'[68] From a business perspective a method of advertising goods and services across all, or most, market divisions is financially beneficial; there need only by one marketing campaign. It is here that sports endorsement fits the bill.

The viewers of sport cover all demographic and psychographic groups. Consider for example the Olympic Games, arguably the archetypal sport-related endorser. According to *Fortune Magazine*, the International Olympic Committee (IOC) conducted global research stretching over a fifteen year period to 'better understand the public's perception of the Olympic image.' This research claims that the appeal of the Games is based in large part on sports' 'higher ideals' such as, 'determination, striving, being the best, participation and fair competition.' Related to sport but on a non-sport plane are concepts such as 'unity, peace, equality, multiculturalism and dynamism.' Finally more personal attributes define the character of the Games – 'friendship, dignity, honour, respect, trust and integrity.'[69] Many of these idealised traits are universally held permitting the development of a directed marketing campaign using the Olympic movement.

The (IOC) reported that the Athens Olympic Games had an audience of 3.9 billion television viewers in 220 countries (the 2000 Sydney Olympics had 3.6 billion viewers). Each television viewer watched an average of 12 hours of Olympic Games coverage. 300 television channels provided 35,000 hours of dedicated Olympic Games coverage over 17 days. Athens generated US$300 million in domestic sponsorship and sponsorship of the Olympic Torch Relay and over US$1,400 million in rights fees revenue. For the first time some broadcasts were in 3G technology to allow for streaming into mobile phone handsets. For the first time some broadcasters offered streaming via the internet and dedicated Olympic web sites in high-definition television.[70] Judging from these audience statistics and the perception of the Olympics across the global community, the Games' appear to meet every market division described by Pope and Turco.

Of course, some sports are less marketable than the Olympic Games but nonetheless, at least within their country or region, will appeal across age, gender and ethnicity divisions and be identified with many of the same attitudes, beliefs and ideals as the Olympics.

## 6. A brief history of sports marketing and the communications media

A study in sports marketing is very much a study in communications technologies. Each development in technology made sporting content more accessible to increasingly larger

[68] Pope N and Turco D, *Sport and Event Marketing*, McGraw-Hill, Australia, 2001.
[69] *Fortune*, 'An Ideal Partnership', February 18, 2002.he article is listed as 'Special advertising section' creating some doubt as to its objectivity'. Nonetheless the description is that which the Olympics holds its self out as possessing.
[70] http://www.olympic.org/en/content/The-IOC/Commissions/Marketing/Evolution-of-Marketing/?Tab=0

numbers of people and thereby more appealing to product sponsors. The original form of sponsorship was signage displayed at a local field. Those attending the game saw the advertisements along the side of the field – not dissimilar to that found at suburban rugby or netball grounds today. Adverts appeared in the surrounding area or in municipal newspapers to appeal to local sports enthusiasts and 'home team' supporters.

Whilst modern sports marketing is a 'product or service' orientated endeavour, its roots are far less benign. The Berlin Olympic Games of 1936 'hosted' by the Nazi Third Reich and characterised by Adolf Hitler's 'choreographed pageantry which stunned the world with both its powerful display and dangerous message'[71] introduced political advertising to sport. The political marketing began with the construction of the Olympic stadium followed by the Olympic village which 'was set in a majestic forest, with manicured lawns and artificial ponds' where athletes from all over the world 'ran, jumped and chatted oblivious to the atrocities that were brewing around them.'[72] No previous Games, said William Shirer, author of *The Rise and Fall of the Third Reich*, 'had seen such a spectacular organisation nor such a lavish display of entertainment.'[73]

The marketing of Nazi politics typified by vast constructions and loud parades is well known. What is less well known is that modern sports marketing also began at the Berlin Olympics - with athletes' shoes. Shoes known as Fosters Spikes, named after a cobbler in Bolton, England, 'shot to fame at the Paris Olympics in 1924 on the feet of Harold Abrahams.'[74] But in the depression years of the 1930's running shoes with spikes were little used for 'only the most fortunate among the athletes in Berlin could afford spikes.'[75] This market gap was exploited by Adi Dassler, soon to establish the firm Adidas, but who, at the time, was in partnership with his brother Rudolf in Dassler Shoes. Adi Dassler, 'awed by Jesse's Owens unprecedented performances was desperate to get his shoes on the runner's feet.'[76] Dassler convinced Owens to wear Dassler spikes - spikes which had 'two dark stripes of leather running down the sides.' Jesse Owens, the son of an Alabama cotton-cropper, went on to win medals in the long jump, 100 metres, 200 metres and 4 x 100 metres. Smit believes Owens' endorsement anchored the Dasslers' reputation for producing fine shoes among the world's most prominent athletes: 'The brothers milked their successes in their catalogues, inserting a complement by an unnamed coach of the US Olympic team. "These are outstanding shoes!" he crowed, confirming that Jesse Owens had been wearing them in Berlin.'[77]

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[71] Schaaf P, *Sports Inc.100 Years of Sports Business*, Prometheus Books, New York, 2004.
[72] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 16.
[73] Shirer W, *The Rise and Fall of the Third Reich*, 1960, The Reprint Society, London, at 233.
[74] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 18.
[75] Rudolf Dassler would go on to form Puma sports-wear following a feud with his brother. Rudolf believed Adi (Adolf) had informed American authorities at the close of WWII of Rudolf's involvement with the SD (intelligence service of the Gestapo), a post to which he had been sent when his regular army unit disbanded. This had in fact occurred but Rudolf deserted his SD post to return to the factory. US authorities interned Rudolf for several months. The motive, according to Rudolf, was so that Adolf could gain control Dassler shoes in his absence. The feud became intergenerational and sponsored a major business rivalry.
[76] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 19.
[77] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 20.

The stripes, used to strengthen the sides of Dassler Shoes, were unnoticeable as the shoe and the stripes were the same colour. A marketing revolution emerged as Adi Dassler 'figured out if the stripes were coloured white, they could be used to identify his spikes from afar.'[78] The three Adidas stripes were the progenitor of a marketing device duplicated in different form by each and every sporting goods manufacturer in the world from that point in time on.

Although the principle of athlete endorsement seemed clear from the Owens' example, the use by an athlete of any particular brand of athletic equipment was somewhat serendipitous: 'The teams just used whatever they could lay their hands upon, and it certainly would not have occurred to any of them to ask for payment to print a company's name on their shirts or to wear specific football boots.' When players were picked to play for Germany in the Soccer World Cup of 1954 'none of them thought of asking for an endorsement fee.'[79]

The 1930's introduced radio as a means of sports purveyance, a medium 'fully embraced by the sports industry' to presage 'the advent of television in the late 1940's and early 1950's, when sponsorship started to move into the national broadcasting of sporting events.'[80] The first television broadcast of cricket was the British Broadcasting Commissions (BBC) coverage in June 1938 of the Lord's test between Australia and England.[81] After the hiatus of World War II the BBC again moved into sports broadcasting on a limited scale buying the 1948 Olympic Games, primarily as news, for a mere £1,500 from the London Organising Committee – the first ever economic contribution paid by television to an Olympic authority.[82]

By the 1950's around 10% of homes in the United States had television. Boxing, suited to television broadcast because of its small arena, was packaged as "Friday Night Fights' and sponsored by Gillette razor blades leading the way to 'baseball's "Game of the Day" in the 1950's and "The Wide World of Sports" in the 1960's.' [83] The first World Series Baseball competition was shown in 1947 for a television fee of $65,000 – a fee that increased as the number of television sets increased. In 1958, the television medium had so grown that 45 million Americans watched the Professional Football final between the Baltimore Colts and the New York Giants.

The Melbourne Olympics of 1956 were the first Games shown widely on television. To take advantage of televisions' 'free' publicity, Adidas handed out running shoes by the hundred (one of the recipients being Australian Kevan Gosper, later IOC vice president and adviser to the successful bid of Sydney to host the 2000 Olympics[84]). The marketing methodology followed a simple plan – the more shoes on feet the greater the chance a winner's photo

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[78] Smit B, *Pitch Invasion*. *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 20. The three stripe motif was registered in Germany in March 1949.
[79] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 47.
[80] Schaaf P, *Sports Inc.100 Years of Sports Business*, Prometheus Books, New York 2004 at 22.
[81] Williams J, *Cricket and Broadcasting*, Manchester University Press, Manchester, 2011 at 15. Telecasts were confined to London given difficulties in transporting outside broadcast equipment. It was not until the 1950's that tests outside London were shown.
[82] Spa M, Rivenburgh N, Larson J, *Television and the Olympics*, John Libbey Publishing, London ,1995 at 20.
[83] Baker WJ, *Sports in the Western World*, University of Illinois Press,1988 at 311
[84] McGeoch R, Korporaal G, *The Bid*, William Heinemann, Australia 1994.

would show the Adidas symbol. The cost of securing athlete endorsement was zero; the Olympic athletes were amateur. In contrast the rewards to manufacturers were huge as the 'cost of handouts was peanuts compared to the benefits accruing from a snapshot of a gold medallist in three stripes.'[85] When 100 metres gold medallist Bobby Morrow was shown on the cover of *Life* magazine wearing Adidas spikes, the pattern of future sports marketing was set.

Well into the 1960's the major sports-wear manufacturers – in particular Adidas, Puma, Tiger and Umbro[86] - continued to compete to get athletes into their products, not by paying endorsement fees but by supplying quantities of free merchandise. The provision of equipment in these non-commercial times was usually secured through a company's personal relationship with coaches, managers and star athletes. In 1960 English Football Association allowed matches to be broadcast on television – limited to the first five minutes after kick-off and the entire second half.[87] The British Broadcasting Corporation paid £150,000 for the rights and the players, following the commercial example, threatened to strike unless their salary cap was increased. Satellite broadcasting of the Tokyo Olympics of 1964 brought 'another significant increase in television rights fees' as larger audiences viewed live content.[88]

When England and Germany played in the 1966 Football World Cup every player on the field was wearing Adidas. The contract to supply England was gained against rival manufacturer Bukta, which had made the reasonably generous offer for the times of a twenty per-cent discount on the usual price for soccer shirts. Adidas and Umbro, in partnership, offered the entire kit for free. But there was more, the England Football Association guaranteed the team £1,000, known as 'Adidas money', should they win the Championship – an unheard of amount when only a few years earlier players faced a £20 a match salary cap. The game was watched by an estimated TV audience of 400 million people.[89] The agreement lasted decades and 'guaranteed unprecedented exposure for the three stripes.'[90]

The movement from discounted apparel to free apparel to payment, marked the end of amateur endorsement. Leading up to the World Cup Puma offered England defender Ray Wilson £100 to wear its boots and advocate for Puma. It was not enough, though, to win over the team. England midfielder Alan Ball, in a comment foretelling the arrival of the new marketing paradigm said, 'Imagine that. I was just twenty-one, playing for England and carrying £1,000 upstairs for wearing Adidas boots.'[91] England goal-keeper Gordon Banks is reported to have seen the irony in being paid a £1,000 by the FA whilst 'a T-shirt peddler had

[85] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 64.
[86] 'Umbro' short for Humphrey brothers, the owners of a sports-wear firm in Cheshire, England. The firm later partnered with Adidas in the sale of football boots.
[87] Baker WJ, *Sports in the Western World*, University of Illinois Press, 1988 at 308
[88] Spa M, Rivenburgh N, Larson J, *Television and the Olympics*, John Libbey Publishing, London, 1995 at 21.
[89] Baker WJ, *Sports in the Western World*, 1988, University of Illinois Press, at 310.
[90] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 84.
[91] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 89.

made £1,500 during the competition.'[92] A tipping point had been reached and the era of the professional endorser had arrived.

The 'world game' led the way in endorsement marketing but it was not the only sport advantaged by an association with marketers. Golfing professionals had been around in the United States since 1933 when Walter Hagan won the US Open, but when Arnold Palmer arrived in the 1950's, at the same time as television, golf moved from an elite sport to popular spectacle: 'television made him and he made television.'[93]

So successful had television advertising become that in 1966 the IOC introduced a new distribution formula to the 'Olympic Charter' requiring that of the first million dollars a third would go to the IOC, a third to the national Olympic committee and a third to the international sports federations. The IOC took similar shares for the second and third million.[94]

By the 1968 Mexico Olympics an endorsement mindset was firmly in place impelled by the knowledge that the television coverage was now world-wide. Black American 200 metres gold medallist Tommie Smith became famous along with the third placed John Carlos for their 'Black Power' salute on the podium at the medal ceremony. To signify black poverty Smith and Carlos appeared shoeless on the dais - only in socks. To meet his obligations to his sponsor, Puma, Smith carried in his hands and placed on the podium a single Puma athletic shoe. [95]

Professional endorsement solidified in the 1970's – along with marketing tactics. To take advantage of the ever increasing television coverage, footballer Pele dropped to his knee to tie up his boots just before the kick-off in a Mexico World Cup match in 1970 – his Puma boots filled the screens of the world in close-up. Ironically Pele had shortly before been the victim of the 'Pele pact', an agreement between Adidas and Puma not to bid for the star's endorsement services for fear that a bidding war would explode out of control. The agreement was broken by Puma to their own commercial advantage just prior to the tournament.

So financially influential had endorsement marketing become that by the mid-70's, at the height of the Cold War, Adidas signed a supply agreement with East Germany earning the communist state a reported DM700,000 a year. In the 1970's business executives came to realise that products unrelated to sport could also be marketed through a relationship with sport. Much the better if the sport and the product were international. Benson & Hedges tobacco invested in cricket and snooker, Coca-Cola in football. New sporting brands such as Nike, Reebok and Le Coq Sportif emerged to exploit the growing interest in personal leisure. A multitude of sports channels on cable television required content and 'exotic' sports like

[92] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 89.
[93] Baker WJ, *Sports in the Western World*, University of Illinois Press, 1988 at 325.
[94] Spa M, Rivenburgh N, Larson J, *Television and the Olympics*, John Libbey Publishing, London, 1995 at 21.
[95] Australian Peter Norman, who came second, shared the podium, his Adidas three-stripped shoes contrasting with the black socks of the other placegetters.

triathlon, body-building, karate and surfing were added to the staples of football, cricket, rugby, baseball and athletics.

Around the middle of the 70's decade the ethos shifted from 'sport for sports' sake' to fully professional endorsement. At the 1974 Soccer World Cup for example, Adi Dassler 'was shocked to discover that players were bluntly demanding payment to wear Adidas. ... The players no longer cared about his boots. Everything seemed to revolve around money.'[96] Even the 'establishment' sports were touched by sponsorship. It is no surprise that the British Lawn Tennis Association transformed Wimbledon into a professional tournament in 1967 after the prize-money of rival tournaments, acquired through television deals, threatened the prestige of the Championships. In fact it was not long before the winner's purse was second to endorsement. Players like Bjorn Borg advertised the benefits of Tuborg beer on his headband, Scandinavian airlines on his shoulder patch, Bancroft racquets, Fila shirts and Tretorn tennis shoes, to earn nearly $2million.[97]

Communications companies in the 1990's found sporting content essential to attract advertisers, particularly those advertisers without a naming rights relationship with a major sport. In 1992, Rupert Murdoch's satellite broadcaster BSkyB paid £305m for the exclusive rights to Premier League Football for five years. In 2005 a fee of £1billion was paid by BSkyB for a further three years broadcast rights. In 2010 the fee jumped to £1.782 billon for three years. In the Barcelona Olympics of 1992 sponsorship revenue, at $US499.9 million, for the first time exceeded that of broadcast rights fees. The increase in 'sponsorship dollars was due, in large part, to the increasing popularity of television around the globe.'[98]

At the present time, in any given week, commercial contracts worth literally hundreds of millions of dollars are signed between the sport media, the organisations, the athletes and sponsors. To illustrate with three examples taken at random from August 2011: Metlife became the naming rights sponsor of the stadium to be used by the New York Jets and New York Giants National Football League teams for $1.6 billion. Bharti Airtel agreed to sponsor Indian Professional League Twenty20 Cricket for $8 million a year over 5 years and the US Professional Golfing Association signed a ten year broadcast rights contract with CBS Sports and NBC Sports. Golf's commissioner Tim Finchem encapsulated the endorsement business rationale when he said:

> 'A 10-year runway gives our sponsors a lot of confidence in where the television side of the sport is going to be, and that helps us in terms of creating value for our sponsors, maintaining continuity with our sponsors and extending our sponsors into the future.'[99]

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[96] Smit B, *Pitch Invasion*, Allen Lane/Penguin Books, London, 2006 at 132.
[97] Baker WJ, *Sports in the Western World*, University of Illinois Press, 1988 at 327.
[98] Spa M, Rivenburgh N, Larson J, *Television and the Olympics*, John Libbey Publishing, London, 1995 at 25-26. It is worth noting that the Olympic Games had been threatened by large financial losses since Munich in 1972. It was the sponsorship inspired by television access that was 'in fact necessary for the Games to survive'; at 27.
[99] <http://www.sportbusiness.com/news/184236/pga-tour-pens-long-term-extension-with-cbs-nbc>

If the brief history of sponsorship and endorsement reveals anything, it is a connection between sport and the communications industries. As a summation to the impact of technological change on sports marketing consider the example of two famous boxing matches, one in 1938, and the other in 2002. The bout between Joe Louis of the United States and Max Schmeling of Germany in 1938 'filled Yankee Stadium with fight fans. The gate soared to over $1 million, no easy feat in the depression. ... The bout (which lasted less than two minutes) brought in over $3 million of economic activity to the New York City area.'[100] In 2002, sixty-four years later, Mike Tyson and Lennox Lewis fought in Tennessee in a highly anticipated heavy weight bout. The contest became the highest grossing Pay-per-View event in the history of boxing, 'grossing $103 million on 1.8 million fight fans who payed an average of $57.22 for the cable hook-up.'[101] There was a packed stadium in each event but in the latter unlike the former, the bulk of revenue was generated through the 'new' communications platforms.

### 6.1 The arrival of Sports Marketing in Australia

Athletes appeared alongside pictures of products in magazines appeared as far back as the early 1900's in Australia. A double page in a Melbourne publication of 1908 displayed the AFL suburban team 'football captains' under the words, subtle by present standards, 'OT (cordial) is the best invigorator.'[102] A match program of a 1909 game between AFL teams St Kilda and Geelong, is entitled 'The Empire Cocoa Football Guide 1909,with the compliments of Robert Harper & Co.'[103] In 1912 an AFL magazine called the 'Football Record' was published for the first time, advertising on the front cover 'Bensdorp's Royal Dutch Cocoa' – 'the ideal winter beverage'.[104] Consumers were also exhorted to 'ask your grocer for Harper's Oatmeal – every bag bears Victorian Football Colours.'[105] In 1914 the endorsed product was 'Toblers Chocolate' with drawings of three players asking 'who is the finest footballer'.[106] In 1915 'Peter Pan Cigarettes' gave AFL fans a guide to 'Football Fixtures'. In 1925 the fixtures guide was sponsored by 'Capstan Cigarettes'. These forms of advertising were later referred to as 'brand promotion'. Each advertisement displayed the images of teams endorsing the sponsor's products rather than as individual athlete endorsers.

As in the United States, the technical innovation of sport broadcasts, arriving in Australian radio in the 1930's 'offered a huge range of people, who had been denied such luxury in the past the chance to live the game while it was actually taking place.'[107] According to Alan McGilvray, ex-NSW Sheffield Shield captain and later famous broadcaster, early 1930's radio 'gave cricket and those involved in cricket a new exposure, and added a considerable

[100] Schaaf P. *Sports Inc.100 Years of Sports Business*, Prometheus Books, New York, 2004, at 27.
[101] Schaaf P. *Sports Inc.100 Years of Sports Business*, Prometheus Books, New York, 2004, at 27-28.
[102] Photo displayed in Ross J (ed.) *100 Years of Australian Football*. 1996, Viking Press, Victoria, at 66. The magazines title is not revealed in the photo.
[103] Photo displayed in Ross J (ed.) *100 Years of Australian Football*, Viking Press, Victoria, 1996at 66.
[104] Photo displayed in Ross J (ed.) *100 Years of Australian Football*, Viking Press, Victoria, 1996at 79.
[105] Photo displayed in Ross J (ed.) *100 Years of Australian Football,* Viking Press, Victoria, 1996at 80.
[106] Photo displayed in Ross J (ed.) *100 Years of Australian Football*, Viking Press, Victoria, 1996at 84.
[107] McGilvray A, *The Game is Not the Same*, ABC Enterprises, Sydney, 1985 at 54.

new dimension to Australia's national game'[108] and 'extended the audience for cricket (into) thousands of homes.'[109]

In1930 at the age of twenty-two, Donald Bradman returned to Australia from a successful Ashes tour of England having scored ten centuries (four more than the next best batsman) at an test average of 139.14. Moreover Bradman scored a world record 334 runs in the Leeds test, where his first 200 runs came in 241 minutes (a record to the present day). All these statistics added up to 'star-appeal'. The Australian Cricket Control Board's profit from the tour, due largely to Bradman, was a record £20,619. On his return, in early testimony to the drawing power of athletic fame, 'Bradman was inundated with offers as the result of his unprecedented run-scoring. ... He was mobbed in theatres and major stores, with women jostling each other to get close enough to kiss him. A wide range of bats gloves, pads, shirts and slacks, which he endorsed, were swooped on by his fans. This had seldom been done before in Australia and there were no rules in the Control Boards' guidelines to cover it.'[110] Bradman was later presented with a two-seater car, a gift from General Motors. Symbolic of the non-commercial nature of Australian cricket at the time, the Board of Control fined Bradman £50 (from the £600 he, as with other players, were paid on tour) for writing a series of articles for the London *Star* newspaper against the wishes of the tour manager. There was clearly little concern with Bradman's endorsement, the Cricket Board at the time apparently believing such subjective property was not its to own.

As much as black and white television of the 1950's was a fillip for Australian sport, from a marketing perspective the period of the mid-1970's with the arrival of colour and instant replays was a watershed in professional marketing and, it might be added, marked a gradual realisation by courts of law that sport was a 'trade' for the purposes of the restraint of trade doctrine.[111] Shilbury points out that:

> 'As sports systems founded on the club-based models evolved from amateur to professional clubs, leagues and associations, there was a lengthy transition period between what is described as "kitchen table" administration and professional management. In Australia, this was the period pre 1970. ... During this period of voluntary administration the marketing function was non-existent.'[112]

Cricket administration during the 1970's exemplifies the gradual movement away from amateurism to the market-based model that now dominates the contractual relationship between players of Australian sport and the organisations governing Australian sport. Kerry Packer in 1977 created a breakaway cricket competition known as World Series Cricket

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[108] McGilvray A, *The Game is Not the Same*, ABC Enterprises, Sydney 1985 at 54. McGilvray covered the 1938 cricket tour of England from an office in Australia by reading from prepared 'decoded' telegram cables sent from England which described everything from the weather to ball-by-ball field positional changes. The broadcast style became known as 'synthetic cricket'. Noise effects of crowd cheers and boos were reproduced from recordings. The 'sound of bat on ball was duplicated by hitting the end of a pencil on a piece of wood located on the broadcasters table' (McGilvray (1985) at 57-58).
[109] Cashman R, *Paradise of Sport*, Oxford University Press, Melbourne, 2002 at 178.
[110] Pollard J, *The Bradman Years*, The Book Company Publishing, Sydney, 2001 at 211-212.
[111] See Chapter 4: 'Restraints of Trade in Sport'.
[112] Shilbury D, Quick S, Westerbeck H, *Strategic Sports Marketing*, Allen & Unwin, Sydney, 1998 at 10.

(WSC) formed to provide cricket content to the Nine Network. The Australian Cricket Board (ACB) had for decades been unconcerned with promoting the commercial side of cricket. However, when faced with Australian representative cricketers, the locus of the game, withdrawing their labour to join WSC, the ACB was forced to adopt a market orientated approach and the commercial age of Australian cricket began. Indeed, from that point in time Australian sport in general, given the example of WSC, refocused on a more commercial model of administration.

In 1980, when relations between the ACB and World Series Cricket normalised, 'PBL Marketing', a Kerry Packer company, was granted the rights to market Australian cricket. Taylor, who was managing director of 'PBL Marketing' at the time, observed as testimony to the non-commerciality of cricket administration that 'Five years ago the Australian Cricket Board did not have a published program. Last year more than 300,000 copies of the ACB program were sold. Work has been put into merchandise to top the $5 million in retail turnover.'[113]

The world entered a new paradigm in the 1990's as equally transforming as the Industrial Revolution of the 18th and 19th centuries; the age of digital communication. Although the influence of the digital technologies on the restraint of trade doctrine and endorsement marketing are discussed fully in Chapter 6, it is worth briefly mentioning the innovative applications that are so penetrative that few places on the globe cannot view the action of sport and sports' athletes (emblazoned as they are in the insignia of their commercial sponsors).

According to Schaff, 'in the short history of the internet, sports sites consistently rank among the leaders in terms of traffic and commercial activity.'[114] In this sense the marketing of sport, and thereby the products that use sport for purposes of endorsement, has moved beyond the confines of the physical world. In effect, on-site marketing is not entirely different to advertising on bill-boards at local sporting grounds; the main difference is in the number of sports consumers who can view the content of the marketing message through the digital media. The rationale remains the same: the sports fanatic 'on-site', as when reading a magazine, is exposed to products exploiting his or her interest in a sport as a marketing tool.

Because sporting contracts impose a general ban on endorsement, the websites of product and service providers are unavailable to athlete endorsers. The loss in athletes' potential earnings from restraints on website endorsement is revealed in a study of the Travel Industry Association of America which found that more 75 million Americans over the age of 18 visited at least one sport event in a three year period. Furthermore, in 2004 over 1 million international visitors made trips to Australia to participate in a sport or outdoor activity. At the same time 3.3 million Australians stayed overnight to either compete in or attend a

[113] Taylor L, 'The Marketing and sponsorship of Sport in Australia' *Sports Coach*, 8 (2) p12-14 at 13; reported in Shilbury 1998 at 11.
[114] Schaaf P, *Sports Inc.100 Years of Sports Business*, Prometheus Books, New York, 2001 at 27.

sporting event.[115] Research conducted by Filo *et al*, examined the role of web-site content in respect to 'sports event tourism', specifically the 'Indy 300' in Brisbane Queensland to show that '29% participants (in the study) indicated that they visited the event's Website before the study.'[116] In short, every website is a forum for endorsement.

The connection between technology and major sport is explained by comments of John Brody, Senior Vice President of Corporate Sales and Marketing for Major League Baseball in the United States, who was asked in interview, 'Can you talk about the role of technology and its impact in the world of sport marketing?' The reply: 'Technology is, in its simplest form, an enabler to allow people to have greater access to the sport in different ways. ... Our job on this side of the business is to try to find more access points for baseball and sports in general.'[117]

The figures above testify to the increasing importance of website marketing as a means to enhance product awareness and sales. Given the capacity of sport to influence consumers in their purchasing decisions, generalised restraints on website endorsement serve to exclude athletes from an expanding field of national and global marketing and in so doing make of sports organisations a monopoly provider.

To summarise, the business of sports marketing was transformed by developments in the communications technologies into one of the world's most significant industries. From home-ground signage to radio, to television and the internet, sport revenue has moved increasingly from gate receipts to endorsement.

## 7. Sports endorsement in a global market

The ideal form of marketing is a single campaign that appeals to the mores and values of every society in the world - one advertisement reaching all people.[118] Of all forms of marketing, sports endorsement marketing comes closest to meeting this commercial construct.

Many brands trade internationally but few have successfully run the same marketing campaign in all countries. According to Hollis, 'the formula that makes a strong brand in one country may not travel well. Consumer needs and values still differ dramatically from place to place. Few brand placements stretch across different cultures.'[119] For example, Jack Daniels bourbon, sold in 135 countries with half its revenues flowing from off-shore sales, ran a marketing campaign that focused on the values of authenticity, masculinity and fraternalism. According to Hollis, 'people from English speaking cultures had an immediate affinity with that positioning. ... In China however, the brand's strong persona is at odds with

[115] Travel Industry Association of America – Domestic Travel Facts (2003) Travel Trends for A to Z. http://www.tia.org, recorded from (2009) *Journal of Sport Management* 23 at 21.
[116] Filo K, Funk, D, Horby G, 'The role of Web Site Content on Motive and Attitude Change for Sports Events' (2009) *Journal of Sport Management* 23 at 30.
[117] Kadlecek J, 'Industry Insider: John Brody' (2010) 19 *Sports Marketing Quarterly* 183 at 185.
[118] Carlson BD and Donavan T, Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions' (2008) 17(3) *Sports Marketing Quarterly* at 154-155.
[119] Hollis N, *The Global Brand*, Palgrave Macmillan, New York, 2008 at 1.

local values and customs and the culture's concept of individualism. ... the story does not resonate with them.'[120]

Miscalculating the appeal of a marketing campaign can be costly as Pankaj Ghemawat of the Harvard Business School reported of an on-going international advertising of Coca-Cola: 'it took Coca-Cola the better part of a decade to figure out that 'glo-baloney' [a global marketing campaign] and its strategic implications were hazards to its health – in the course of which its market value declined by about $100 billion, or more than 40 percent from its peak.'[121] The error, with little doubt, was to believe that the 'Coke' campaign had universal appeal.

Conversely, the more a brand can 'embed itself in many different local cultures, the more successful it will be.'[122] Sports of international appeal are able to transcend cultures and in so doing encourage product identification independent of local mores. Indeed, sports of international appeal represent a viable means of overcoming what has been described as global marketing's main obstacle: 'the history, beliefs, customs, habits, values, and social behaviour of a group of people – [that] determines the way people will think, behave, and react to the world around them.'[123] Sport is its own culture and much of what is admired in an athlete or a sport is universal in its appeal.

Managing director of International Management Group (IMG) in Australia and New Zealand, Martin Jolly, pointed out that to be marketable on a global scale an athlete must 'be universally admired across all demographics and be a recognisable face around the world.'[124] Certainly there are a number of athletes with a profile sufficient to penetrate markets internationally, usually competing in sports played cross-culturally such as soccer, tennis, or athletics. There is in addition a number of sports played regionally or amongst countries with a common link, such as cricket or rugby in the nations of the British Commonwealth, where endorsement marketing has a broader base. Although sports and athletes of truly international appeal is limited, the on-going expansion of the visual communications mediums is creating a world-wide interest in sports such as the Tour de France giving sponsors greater opportunities to market their brands on a global scale. This point is discussed fully in section 3 of Chapter 6, 'Claiming the Digital Markets'.

## 8. Some contextual statistics

According to Carlson and Donavan, athletes endorse more products than other celebrity category including, musicians, actors and comedians: 'While 20 percent of all ads feature a celebrity, approximately 60 percent of celebrity endorsed advertising features an athlete, thus demonstrating the dominance of athletes as endorsers.'[125]

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[120] Hollis N, *The Global Brand*, Palgrave Macmillan, New York, 2008 at 29.
[121] Recorded in Hollis N, *The Global Brand*, Palgrave Macmillan, New York, 2008 at 23.
[122] Hollis N, *The Global Brand*, Palgrave Macmillan, New York, 2008 at 49.
[123] Hollis N, *The Global Brand*, Palgrave Macmillan, New York, 2008 at 89.
[124] *Business Review Weekly*, September 4-10, 2003 at 58.
[125] Carlson BD and Donavan T, 'Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions' (2008) 17(3) *Sports Marketing Quarterly* at 154

Where hired as a marketing tool, sponsors are prepared to spend a higher proportion of the overall campaign monies, around '10 percent', on the athlete's fees in comparison to that spent utilising other methods of marketing: 'Companies are willing to invest millions of dollars to associate their brands names with easily recognisable athletes.' For example, more than $US12 billion is spend on multi-year athlete endorsements by corporations, with more than $US1.6 billion committed by Nike alone. Some professional athletes make more money 'annually from endorsement deals than from salaries.'[126]

So financially significant is endorsement marketing that the Australian Rugby Union (ARU) has 'threatened' not to participate in future Rugby World Cups as fewer tri-nations matches and the loss of northern hemisphere touring teams due to World Cup commitments in 2011 'left the ARU $16 million worse off' from reduced revenues across 'sponsorship, broadcast and gate.'[127] New Zealand Rugby Union reported a $10.3 million loss for similar reasons.

On an individual level sports endorsement has the potential to provide, but for the imposition of trade restraints, the bulk of a 'star' athlete's income. For purposes of comparison consider the earnings of 'non-restrained' sports stars. Forbes magazine ranked golfer Woods as the world's sixth most powerful celebrity, 'raking in $US75m each year thanks to sponsorships with Nike, Electronic Arts and Upper Deck, a producer of sports cards and memorabilia. Among sportspeople, he was No 1 ... commanding $3m in appearance fees.'[128] Woods trailed only Lady Gaga, Oprah Winfrey, Justin Bieber, U2 and Elton John in celebrity earnings. Appearance fees, incidentally, are not merely a reward to the athlete for bringing in gate receipts but are the catalyst of global audiences across the plethora of digitalised viewing platforms. Woods, unlike most team athletes in Australia, is not confined by contractual terms restraining his capacity to trade his image and celebrity in the endorsement market.

Of course most Australian athletes, or world athletes for that matter, are not the marketable property that is the golfing reputation of Tiger Woods. Nevertheless, the potential earnings of Australian star athletes are substantial, as noted often outstripping match payments. As Ian Thorpe trained for a comeback in the London Olympics it is worth reflecting on the swimmer's worth to sponsors prior to his initial retirement. Business Review Weekly reported that Thorpe was paid 'an estimated $1 million a year to promote the (Adidas) brand by wearing Adidas clothes and swimming gear, appearing in Adidas's international marketing campaigns and appearing at special events.'[129] Thorpe had an additional 12 main sponsors and marketing deals across a range of Australian and foreign companies, including Telstra, Goodman Fielder, AMP and Qantas.

Over recent years growing disquiet amongst athletes denied access to the increasingly lucrative endorsement market has prompted complaints in the media. Consider for example

[126] Carlson BD and Donavan T, 'Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions' (2008) 17(3) *Sports Marketing Quarterly* at 154.
[127] Growden G, 'O'Neill has grim fears for future world cups', *Sydney Morning Herald*, 29 Sept, 2011.
[128] Read B, 'Fallen Tiger Caught in the Rough, *The Australian*, May 20, 2011.
[129] *Business Review Weekly*, 28 November, 2002, Fairfax Publishers, Australia.

comments by jockey Darren Beedman[130] who considered his earning capacity would increase by a minimum of $200,000 were he permitted to advertise on the side of his riding pants.

The level of endorsement income generated through a free market is illustrated in the example of Indian cricket, where players are largely free to engage in any sponsorship arrangement. Indian batsman Sachin Tendulkar has an endorsement contract with Publicis Groupe 'said to be worth US$41 million.'[131] Other Indian cricketers also command impressive endorsement fees. Rahul Dravid is reported to earn up to US$350,000 and Sourav Ganguly US$300,000 per endorsement. Although Australian cricketers are permitted to engage in some endorsement, essentially limited to products and services that do not compete against the organisation's sponsors, the field is far from open: the 2011 tour of South Africa is sponsored by VB, the 20/20 Big Bash and International 20/20 by KFC, the test series by Vodaphone and the Commonwealth Bank, BUPA sponsors the Sheffield Shield and Ryobi the one day internationals with a multitude of minor sponsors including Bunnings, Weet-Bix, Betfair, Gatorade, Ford, ASICS, Milo, and Coca-Cola, closing off a large section of sponsors advantaged by sports endorsement marketing.

As final testimony to the new industry of sports endorsement that has been fostered by the rapid developments in the communications technologies since the mid-1990's, the sporting giant Manchester United Football in August 2012 entered into a 'shirt' sponsorship agreement with US car manufacturer 'Chevrolet' (part of the General Motors group) for US$559 million over seven years. Prior to Chevrolet, Manchester United had a shirt sponsorship arrangement with insurance firm AON worth £80 for the years 2010-12. The previous record amount for a football sponsorship was that of Barcelona which entered into a five year deal with Qatar Foundation for US$230 million.[132] These figures and what they suggest of the growth of endorsement marketing speak for themselves.

There is a certain irony in the fact that a number of legal challenges have been made by athletes in the attempt to expand their income by challenging salary caps, retention systems and other forms of sport restraints of trade, but have not challenged the imposition of endorsement restraints which, all things being equal, would offer a far more lucrative return to the athlete should these be declared unenforceable.

## 9. Conclusion

Sport as a means of marketing goods and services offers to sponsors a unique methodology: an association between a brand and an activity thought likely to deliver a commercial advantage. The arrival of sports marketing in Australia is relatively recent, beginning in large scale in the 1970's with technological developments in the media, particularly the advent of colour television, and assisted by the marketing model of World Series Cricket in 1977.

[130] Fox Sports Television, '*The Backpage*', May 2006.
[131] *Sports Business Internationa*l, May 2006, Sports Business Group Publisher, London.
[132] *Sports Business Internationa*l <http://www.sportbusiness.com/news/186053/chevrolet-deal-set-to-generate-world-record-559-million-for-united> viewed August 2012.

Consumers purchase goods and services for a number of reasons, often for reasons that are not price related. An emotional or psychological process may prompt the decision to purchase goods and services; a process the purchaser may not be conscious of. Sport offers on a psychological level a unique combination of images and symbols sought after by sponsors who wish, in the words of Meenaghan , to have 'the product name, logo and other marks threaded through' the sport to create a positive association in the mind of the consumer.

The NRL, the ARU, Netball Australia and the AOC deliver through their endorsements a positive association between sport and product. Individual athletes supply the same service, and in addition, offer the more personal attributes of 'credibility' and 'attractiveness' with the bonus traits of 'expertise' and 'trustworthiness'. These entities of sport and athlete are, then, competitors in the endorsement services market. Through the contractual dominance of the sporting organisation the athlete is a competitor in name only as, on a 'take it or leave it' basis, he or she has no choice but to agree to the restraint or seek work elsewhere.

Having examined in detail the social and historical context within which sponsorship restraints have gradually developed, it is now necessary to consider the historical development of the legal rules governing the relationships between athletes and sports organisations.

# Chapter 3: The Rise and Rise of Liberalised Trade

## 1. Introduction: the Adjustment to Technological Change

As a product of human economic ambition, restraints of trade are as 'old as trade itself'[133] and, according to Lord Wilberforce writing extra-judicially, 'represent nothing more that the attempts of intelligent men to interfere, to their own advantage ... with the free working of supply and demand and with the results of competition.'[134] Historically, the approach of courts to restraints of trade concerned a policy choice: is it better that the restrained trader be kept to his or her promise or should the trader be permitted to avoid the promise and trade in competition against the covenantee? From the fifteenth century until the adoption of the modern test of reasonableness in 1894, the commercial concerns inherent in restraint of trade cases produced arguments of cold rationality based on sound economic principles of free commercial intercourse; arguments not out of place in modern economic theory. In each era the courts responded to technological change, not by maintaining the status quo, but by developing new policy approaches to the restraint of trade doctrine which, by and large, promoted freedom of trade over confinement.

Today, the restraint of trade doctrine stands at a policy cross-road not seen since 1894 when the House of Lords in *Nordenfelt*, forced by circumstances generated through the Industrial Revolution, reconsidered the usefulness of the 'partial restraint rule'. As continual advances in digital communications cause a paradigm shift in the supply of information, markets unimaginable less than a decade ago are now, in the short space of time since the invention of the micro-chip, the subject of trade restraints. Until the 21st century labour mobility was confined to the physical world of geographic space. Cyberspace is different. The markets of cyberspace generated through computer interface have no physical boundary. In cyberspace, labour is perfectly mobile and every computer is a portal for marketing goods and services.

How will courts respond to restraints imposed across these new 'cyber-markets'? Will, for example, the rise of global on-line markets see the acceptance of a general restraint on trade shutting out covenantors across an entire global system or will 'some part' of this world-wide market, to quote Parker CJ in *Mitchell v Reynolds*, be kept available for the covenantor.[135] If lessons of the past are to mean anything, the digital revolution now presents to courts the challenge of adjusting policy to ensure the liberalisation of trade in what is becoming a dominant market form.

The digital revolution is not the first time technological change has borne upon the restraint of trade doctrine. Three periods related to the technological state of the realm can be

[133] Lord Wilberforce, Campbell A, Elles N, *The Law of Restrictive Trade Practices and Monopolies*, Sweet & Maxwell, London, 1966 at 2.
[134] Lord Wilberforce, Campbell A, Elles N, *The Law of Restrictive Trade Practices and Monopolies*, Sweet & Maxwell, London, 1966 at 2.
[135] *Mitchell v Reynolds* (1711) 24 ER 347 at 347: 'a place ... where the party entering into such a bond may use his trade, without any prejudice to the obligee.'

identified: One; the pre-industrial period under which all restraints were void absolutely. Two; the period following the 'early' Industrial Revolution of the Elizabethan inspired mercantilism leading to the introduction of the 'partial restraint rule' in the 1711 case of *Mitchell v Reynolds*. Three; the technological state of the 'late' Industrial Revolution that saw the House of Lords in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* introduce a test of reasonableness, making the partialness of a restraint merely a factor to be considered.

Emerging largely as an indirect consequence of the Industrial Revolution was 'laissez-faire', a philosophy touted by several influential commentators to mandate freedom of contract over freedom of trade.[136] This Chapter questions the accuracy of these claims to state that while laissez-faire may have influenced the development of classical contract theory, the stakes were too high to restrict trade merely because the philosophy of the day favoured the enforcement of bargains freely constituted.

When in *Nordenfelt* the general restraint rule was abandoned and a world-wide restraint on the covenantor, Mr Nordenfelt, was upheld, the rule of reasonableness emphasised the primacy of unenforceability by causing, over time, the burden of proving reasonableness to be placed upon the complainant covenantee.[137]

This Chapter develops the argument that restraints of trade on athlete endorsement, a form of restriction not tested in a court of law, should be considered against the backdrop of an historical preference for liberalised trade as today's technological developments debilitate the policy approaches of the past. To preface Chapter 5, should a court determine, as a matter of policy, that a covenantee possesses a legitimate interest extending throughout the new entity of 'cyberspace' it would, in effect, be awarding the entirety of this increasingly influential market to monopoly interests. On a positive note, however, the very nature of the 'cyber-markets' is argued to offer a unique opportunity for courts to fashion policy responses specifically pertinent to the new paradigm and maintain the historical liberalising approach of freedom of trade.

## 2. *Mitchell v Reynolds*: establishing the 'partial restraint rule'

In 1414 Hull J struck down a restraint imposed by a Master on his apprentice with the words, 'By God, if the plaintiff were here he would go to prison until he paid a fine to the King'.[138] Given the stridency of the words, it is fair to ask whether this judgment came in fact to exemplify the judicial approach to the common law of restraint of trade over the ensuing 600 years. Were judges more intent on upholding contractual obligations or promoting the

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[136] For example: Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979; Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*, Law Book Co, Sydney, 1986; Blake HM, 'Employee Covenants not to Compete' (1960) 73 *Harv LR* 625.

[137] *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724. The burden of proving reasonableness is upon the party seeking to enforce the restraint, generally the covenantee. *Mason* overturned the existing rule requiring the complainant, the covenantee, to prove unenforceability: *Tallis v Tallis* (1853) 1 E&B 391. In contradistinction, the burden of proving unreasonableness in the public interest is on the party denying enforcement: *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 SA 874 (A).

[138] *Dyer's case* 2 Hen 5, f5, pl 26 (1414). Such vigorous comments were not uncommon in the early rolls according to Blake, quoting; Pollock, *Principles of Contract* 328 n.19 (13th ed).

freedom of the individual to trade his or her talents in an open market? Although it is argued below that, on balance, the common law has favoured freedom of trade at the expense of freedom of contract, the delineation is neither absolute nor constant, for the judicial approach to the restraint of trade doctrine has been influenced by the changing economic, philosophical and technological forces impacting upon Anglo-Australian legal thought since at least the fifteenth century. This thesis proposes that more than any other factor technological change, both directly and indirectly, influenced the policy positioning of the courts in respect to the enforceability of a restraint on trade.

### 2.1 Absolutism and the close market

The early restraint of trade cases are marked by a refusal of courts to enforce restraints of trade imposed on a covenantor. This absolutism, it is argued, was a necessary response to the dictates of the technological state existing in the fifteenth century. *Dyer's Case* (1414) concerned a six month restraint imposed to prevent an apprentice from practising in his Master's town. There was no discussion by the court of the reasonableness of the restraint, the judge commenting poignantly that the restriction was so egregious that had the plaintiff covenantee attended court he should, 'go to prison.'[139]

In the 1601 case of *Colgate v Bachelor*,[140] an apprentice's father promised to pay £20 to the covenantee should his son break an agreement not to trade as a haberdasher within the county of Kent or in the cities of Canterbury or Rochester before the year 1604. The court declared in the customary brevity of the time, any restraint on lawful employment, even where partial in time and place, void as it was '...against the benefit of the commonwealth; for being freemen it is free for them to exercise their trade in any place.'[141]

The importance of *Colgate v Bachelor* lies in the early recognition that a court is justified in interfering in private contractual arrangements where the interests of the State are adversely affected. An argument that the covenantor could easily avoid the impost of the restraint by paying the bond of £20 and that the restraint was only partial in duration and geographic reach was dealt with by the retort, 'it was all one; for he ought not to be abridged of his trade and living.'[142]

The rule of the period: all restraints of trade are unenforceable. As discussed in detail below, people lived predominately in villages isolated by primitive means of transport and unwilling to risk the dangers, physical and economic, of relocating beyond the region of their birth. To have enforced the restraint would be to enforce a monopoly and throw the covenantor onto Parish welfare relief. There is no greater impost on freedom of trade than a closed market. During the thirteenth century a legislative tradition began to outlaw 'monopolising' in its various forms. To increase the supply of vital resources forsestalling (buying prior to market day with the purpose of controlling supply), regrating (buying and selling within the one

[139] *Dyer's case* (1414) 2 Hen 5, f5, pl 26. Such comments were not uncommon in the early rolls according to Blake, quoting Pollock, *Principles of Contract* 328 n.19 (13th ed).
[140] *Colgate v Bachelor* 78 ER 1097.
[141] *Colgate v Bachelor* 78 ER 1097 at 1097.
[142] *Colgate v Bachelor* 78 ER 1097 at 1097.

market) and engrossing (buying up large quantities of supplies to hoard and speculate on prices) were prohibited. From the perspective of the traders of the day (and as recognised by economists of the 21st century) the purpose of monopolising was to keep prices high by curtailing competition. The statutes of the period illustrate an awareness of matters economic and a concern with the damaging effect shortages of goods, labour or other resources have upon national prosperity and, in respect to food, the peace of the realm.

In 1266 an Act of Henry III, 'set out prices of bread and ale in detail and laid stress that these prices should correspond with the price of corn. ... Another statute at the beginning of the fourteenth century brands forsestallers as "oppressors of the poor and the community at large and enemies of the whole country."'[143]

An Act of Edward III in 1353 required that, 'Merchants shall not ingross merchandises to enhance prices of them, not use but one sort of Merchandises.'[144] The purpose: to prevent the large stores from combining to dominate the market. By the time of Henry VIII those 'who do combine and confeder together in fairs and markets to set unreasonable prices'[145] were punished as criminals. These various Acts were directed at enlivening the economy as a whole by removing the incentive to monopolise.

## 3. Establishing the partial restraint rule

*Mitchell v Reynolds*[146] stands at a juncture in economic history, not dissimilar to that predicted in this thesis to face courts in the present century as restraints of trade imposed on digital marketing come, eventually, to be litigated. Heard in 1711, the case introduced into the restraint of trade doctrine a 'partial restraint rule'. Under this rule general restraints, those without a geographic limit, were unenforceable – what possible benefit could accrue in banning a covenantor from trading in geographic areas beyond the covenantee's commercial interests? Restraints 'partial' in geographic scope were, however, enforceable because the covenantor was not entirely deprived of an income or society of the covenantor's services.[147] Technological change, primarily in transport, made it possible to both enforce a restraint and permit the covenantor to trade without affecting the covenantee's interests (albeit bearing the inconvenience of geographic relocation). With the exception of *Nordenfelt*, *Mitchell v Reynolds* is with little doubt the most influential restraint of trade case in the legal record.

The facts were these: Reynolds agreed that he would not 'exercise the trade of a baker within the parish' after Mitchell purchased his bakery. Reynolds breached this promise prompting the covenantee, Mitchell, to begin an action of debt upon the bond.

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[143] Respectively, 51 & 52 Hen. 3, Stat. 1 and Stat. 6 reported in Lord Wilberforce, Campbell, Elles, *The Law of Restrictive Trade Practices and Monopolies*, Sweet & Maxwell, London, 1966 at 2.
[144] Lord Wilberforce, Campbell, Elles, *The Law of Restrictive Trade Practices and Monopolies*, Sweet & Maxwell, London, 1966 at 24.
[145] Lord Wilberforce, Campbell, Elles, *The Law of Restrictive Trade Practices and Monopolies*, Sweet & Maxwell, London, 1966 at 24.
[146] *Mitchell v Reynolds* 24 ER 347 at [131].
[147] One may consider the 'general restraint rule' as the inverse of the 'partial restraint rule'.

Parker CJ divided restraints of trade into two types, voluntary (where the covenantor agrees to accept the restraint) and involuntary (such as those instituted by law through Crown monopoly). Involuntary restraints were of three sorts, 'first by grant or charter; secondly, custom; thirdly, bye-laws.' It must be noted that the powerful town guilds were empowered to pass laws regulating the trades of a town or, in the case of a 'trade guild' the quality standards of a particular trade.

Restraints of trade were good or bad depending on the purpose or effect of their operation. For example, protecting 'newly invented' processes was good 'for a (period of) time ... for the public has an advantage in the invention of a useful trade and the inventor's industry is to be encouraged'. Restraints by custom, 'for the advantage of some particular person that has stock enough to serve the place or for the advantage of the corporation or community of a certain place' were good since overstocking a village would lead only to waste.[148] By-laws 'to cramp and lay difficulties upon trade are void but bye-laws to regulate trade are good, whether they are for the advantage of the town or of trade.'[149] Restraints depriving 'the party of a means of livelihood' or that enabled 'masters to lay hardship upon their servants and apprentices' were bad.

Looking beyond the absolute restraint rule, Parker CJ identified several circumstances where a restraint could be advantageous to some and not disadvantageous to others 'as for example where a man grown old and unable to carry on his trade without blunders, and having a good accustomed shop' sells it under a restraining covenant.[150] In an approach presaging the adoption of 'reasonableness' in the *Nordenfelt* decision, the right reason could make good an otherwise unenforceable restraint of trade.

This recognition as to 'why' a restraint was imposed contrasted fundamentally with the hitherto 'absolute rule', the concern of which was the maintenance of the public interest through productive employment:

> '... as the law [absolute rule] now stands they [restraints of trade] are prima facie void and for these reasons: ... the tender regard [the common law] has for liberty and the right of the subject; secondly, for the apparent mischief to one side and no visible advantage of the other side to counterbalance it; which mischief in the first place, is not barely a private one, but has an influence on the public, that being interested in a man's trade.'[151]

There was no point in denying a covenantor's personal liberty to trade if the public interest in attaining his wares were denied. It was this rule that was extinguished when Parker CJ proclaimed in *Mitchell v Reynolds* that a restraint was void should it operate 'through all of

[148] Heydon notes that, 'A by-law preventing persons from trading in a town unless a member of one of the craft guilds was valid if supported by a custom to that effect, but not if supported by royal charter.' Heydon JD, *The Restraint of Trade Doctrine,* 3rd ed, LexisNexis Butterworths, Australia, 2008 at 13.
[149] *Mitchell v Reynolds* 24 ER 347 at [131].
[150] *Mitchell v Reynolds* 24 ER 347 at [135].
[151] *Mitchell v Reynolds* 24 ER 347 at [136].

England because it is a monopoly' but was enforceable where confined 'from using ones trade in a particular place, if done fairly and upon good consideration... is good'.[152]

In more definitive terms:

> '... all contracts for restraint of trade over all England are void, whether by bond covenant, or promise; whether of that trade a man is brought up to, or any other trade he afterward falls into.'

The reason:

> 'without doubt *some place* or other may be found where the party entering into such a bond may use his trade, without any prejudice to the obligee ...'[153]

It was Chief Justice Parker's use of the words 'some place' that is the basis of the partial restraint rule; a rule that remains relevant to the present day as an indicator of *Nordenfelt* reasonableness.

*Mitchell v Reynolds* was heard against the backdrop of the early Industrial Revolution stretching forward from the time of Elizabeth I. Parker CJ referred to the 'newly invented processes', one of which was improved transportation, which made it possible for an individual to trade in 'some place' in England and not impinge on the interests of the covenantee.

The 'absolute rule' had become impractical as the Industrial Revolution mobilised labour and resources. These factors are discussed in more detail below. More important was the preparedness of the court to throw-off precedent and adjust the application of the restraint of trade doctrine to the practical circumstances of the time.

### 3.1 Technology and the 'Partial Restraint Rule' of *Mitchell v Reynolds*

Why was the change from the 'absolute' to the 'partial' rule made? What lessons can be drawn from this period of flux as the restraint of trade doctrine comes to confront the influences of the digital revolution in the twenty-first century? It is argued below that the 'new rule' of *Mitchell v Reynolds*, in a fashion not dissimilar to that predicted to confront courts as the advance of digital communications gathers speed, ensued from advances in technology, in particular the communications technologies.

To understand why the partial restraint rule was adopted, it is necessary to consider the economic, technological and political events that transpired in England over the 150 years leading up to *Mitchell v Reynolds* in 1711 and, despite certain economic advances, why these came ultimately to cause a shift in judicial policy.

The technological state of England in the 1500's was primitive by the standards of continental Europe. When Elizabeth I ascended the throne in 1558 at the age of twenty-five,

[152] *Mitchell v Reynolds* 24 ER 347 at [132].
[153] *Mitchell v Reynolds* 24 ER 347 at [136] emphasis added.

she began, for reasons of national security, a program of economic development designed to protect England from invasion.[154] Elizabeth's kingdom 'was near bankrupt and defenceless ... an exhausted Treasury, a depreciated currency and a society vitiated by lawlessness and vagabondage, and a countryside impoverished by a run of bad harvests.'[155] And so began 'mercantilism', a term describing the 'the commercial policy of the State in the sixteenth, seventeenth and eighteenth century' encompassing the early Industrial Revolution.[156]

Under the exhortations of Elizabeth decisions were taken in the early mercantilist period to pursue economic expansion through self-sufficiency and military independence. Growth was encouraged by freedom of entrepreneurialism and yet, at the same time, sections of the economy were retarded by restraints on trade imposed thought necessary by government to secure the broader goal of commercial growth. This period is arguably the most important in English economic history, for without the decision to advance trade England would have remained an economic backwater, dominated by the powers of Europe and denied its industrial revolution.

Spanning close to three-hundred years there is no one policy reflective of the mercantilist period other than a drive to expand economically. Enterprises important to economic growth were encouraged – the East India Company being granted by Royal Charter in 1599 'a monopoly for fifteen years of all trade with lands beyond the Cape of Good Hope or Magellan Straits.'[157] To increase exports and to minimise imports, Elizabeth supported the trade guilds to enforce a seven year indenture on apprentices, a form of quality control to encourage the sale of English goods at home and abroad.

Although of benefit to sectional economic interests, government control was bought at the cost of private efficiency. Labour, for example, became immobile as municipal guilds exercised their right to decide who would, and who would not, work in a particular town or village. The quest to achieve national imperatives hampered the free exchange of services, particularly in those occupations deemed essential to home security and economic growth. The 'early Mercantilist State', said Lipson, 'directed its energies to the task of maintaining the English peasantry on the land, of checking the rural exodus, of preventing the displacement of the population from its traditional mode of life.' Why: to secure the supply of food.

Grants of monopoly by royal prerogative were made to secure Elizabeth's political advantage, bolster trade and strengthen the military stocks of Britain. The latter two were

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[154] The rationale for adopting what came to be called Mercantilism (and the restraints of trade necessarily inherent in that school of thought) is found in the economic malaise Elizabeth inherited from her father Henry VIII, who, as 'an extrovert, bursting with self-confidence, extravagant and avid for pleasure ... Longing to shine ... at once started to get through his father's accumulated treasure by costly foreign adventures, including war with his kingdom's old rival of Plantagenet days, France' (Bryant, A, *The Elizabethan Deliverance*, William Collins & Sons, London, 1980 at 13). Henry VIII, Elizabeth's father, left England destitute: 'When the King died in 1547 the chickens hatched under his despotic and wilful rule came home to roost on the throne of his nine-year-old son, Edward VI. These were an empty treasury, rising inflation engendered by reckless expenditure on foreign wars and an unscrupulous debasement of the currency.'

[155] Bryant, A, *The Elizabethan Deliverance*, William Collins & Sons, London, 1980 at 24

[156] Lipson E, *The Economic History of England Vol III*, 6th ed. Adam and Charles Black, London, 1956.

[157] Bryant A, *The Elizabethan Deliverance*, William Collins & Sons, London, 1980 at 182.

symbiotic in attaining the political and commercial ends on which rested of a number of international trading monopolies, such as the Venice Company or the Levant Company.

In time the grant of monopoly, as the names suggests, impeded competition and trade. The Parliament of England, in a power contest with Elizabeth and her successors over rights and authority, to remove the Crown prerogative under the Statute of Monopolies of 1623. The courts themselves, taking the line of Parliament, also reasoned that restraints on trade emanating from the Crown were not tolerable. In *Darcy v Allen* (the Case of Monopolies) a monopoly to import playing cards granted by Elizabeth to her groom, Darcy, was declared unenforceable, the court stating, '...it is unlawful to prohibit a man not to live by the labour of his own trade.'[158]

The mercantilist restraints served (leaving aside restraints designed to deliver to the Queen some personal advantage) a macroeconomic plan designed to encourage the populous to work - there could be no lassitude as England sought security from expansionary Spain and France. Employment was boosted 'by the rule that no man might work at several trades simultaneously.'[159] On a microeconomic level trade was encouraged by the lowest internal tolls in Europe. Taxes too were low. Farm improvements were practiced as 'the owners of monastic acres which had passed to private hands in the reign of Elizabeth's father and brother now embarked on long term improvements in the soil.'[160] This policy, somewhat of a paradox considering the extent of broader economic controls, was prompted by a belief that 'letting the subjects wealth fructify in his own hands' was a better means 'of augmenting his income and wealth for his own and the general good than could be achieved by government administration.'[161] A belief in the 15th Century that entrepreneurial freedom assisted by the actions of the state could lead to economic growth was a revelation 'for it was the forces of individualism which marked out the path of progress. When the steam engine was harnessed to industry and transport it found an environment prepared for its inception.'[162] Furthermore, high tariffs that had been placed on foreign manufactures were removed on the import of raw materials to avoid burdening manufacturing with additional costs. Duties were removed on the export of many of England's finished goods. Embargoes were placed on the transportation of machinery and of skilled artisans, all designed to 'safeguard the English producer against his alien competitors.'[163]

The mercantilist period coincided with the technological innovations of the Renaissance and the acceptance in England of the 'scientific method', two factors which laid foundation for England's entry to the Industrial Revolution. Under the reign of Elizabeth there was 'a revival of engineering interests ... the English School of Mathematician-Surveyors was built.

[158] (1602) *Darcy v Allen* 74 Eng Rep [1378-1865] at 1135 and 1137; (1602) 11 Co Rep 84b.
[159] Letwin W, *Law and Economic Policy in America*, University of Chicago Press, Chicago, 1965 at 29.
[160] Bryant A, *The Elizabethan Deliverance*, William Collins & Sons, London, 1980 at 61.
[161] Bryant A, *The Elizabethan Deliverance*, William Collins & Sons, London, 1980 at 59.
[162] Lipson E, *The Economic History of England Vol II*, Adam and Charles Black, London, 1943 at xii.
[163] Lipson E, *The Economic History of England Vol II*, Adam and Charles Black, London, 1943 at xci.

... Mydleton built his famous water supply for London, fen drainage was begun, and foreign workers were brought in to initiate new industrial activities.'[164]

The very weight of scientific advance between the sixteenth to the eighteenth centuries must have made the containment of industrial innovation and trade all but impossible – at least in a society permitting freedom of thought and scientific expression. According to Ferguson, of the world's most important scientific breakthroughs '369 are mentioned in literally all reference works on the history of science – an astonishingly high proportion (38%) happened between the beginning of the Reformation and the beginning of the French Revolution.'[165]

By the end of mercantilism England was trading globally and looked increasingly to colonisation as a means of acquiring supplies, creating markets for its manufactures and later, most of all, as against the French, to determine which system of governance would guide the modern world. The gains were not, however, without longer term economic costs. From the Elizabethan period until the late 1700's centralised government encumbered business with legal and bureaucratic imposts. These controls become increasingly impractical with the advance of technology.

To illustrate the influence of technology on *Mitchell v Reynolds*, two broad areas of economic significance, 'transportation' and 'village isolation', are compared from the onset of the Industrial Revolution in the latter days of the Elizabethan period until around *Mitchell v Reynolds* in 1711. Through this comparison one gains an appreciation of how the development of technology led to labour mobility which in turn required courts to respond by enforcing restraints, being no longer concerned at damaging individual and national interests.

### a) A comparison in transport and communications

When considering the Industrial Revolution, the mind naturally pictures the great transportation innovations of steam powered railways and ships. There was, though, far more to expanding the 'economic convenience' of transportation than the innovations of steam power. To understand the impact of transport and communications on the restraint of trade doctrine as it developed in England prior to *Mitchell v Reynolds*, a brief review of the economics of transportation at this time is necessary.

The public horse drawn coach was not introduced to Britain until 1659. People unable to afford private means of transport would walk, or more commonly, not venture more than a short distance from their home village. In 1700's England it took a week to travel the 200 miles from London to York. The reason: 'Roads were regarded as local conveniences and unworthy of serious study... Roads in the northern areas of the world were almost impassable for much of the year.'[166] Wagons stuck fast in mud and potholes had to wait 'till a collection

[164] Finch KP, *The Story of Engineering*, Doubleday, New York, 1960, at 185.
[165] Ferguson N, *Civilisation*, Allen Lane, London, 2011 at 65.
[166] Finch JK, *Engineering*, Anchor Books, New York, 1960 at 208.

of them are in the same direction, that twenty or thirty horses may be tacked to each to draw them out one by one.'[167]

In addition to the physical hardships suffered by travellers, there was the very real threat of highwaymen: 'Courage, good health and physical strength were necessary as well. It was not for nothing that men made their wills before setting out on a lengthy journey.'[168] Above all, the duration and cost of the journey were prohibitive to the profitable transport of produce:

> 'Heavily laden wagons could make little progress on the soft uneven road-surfaces of those times, and bulky articles like coal or corn were carried in panniers slung on the backs of horses ... Cost of carriage under such conditions was heavy. In England it cost 20s. to convey a quarter of wheat 100 miles by road, while the expense of carrying coals to Manchester from the mines at Worsley eleven miles away, was sufficient to double its price.'[169]

The civil engineer Thomas Telford introduced a road base consisting of 'flat stones set on edge and wedged together to form a solid base for a surfacing of broken stone and gravel.'[170] In applying this method of road building, 'by the end of the eighteenth century the journey from London to Edinburgh had been reduced from a fortnight to seventy-two hours.'[171] A parallel is found in the early housing developments of Sydney where the high density accommodations of suburbs such as Paddington, Redfern or Pyrmont enabled habitants to walk to city employment. When train lines were laid in the late 1800's, housing followed the tracks to conglomerate within walking distance of the stations.

As technological advances were made in transportation, the regions of Britain once isolated from each other could be traversed with relative ease. The purpose of a restraint of trade is, in essence, to protect a market interest of the covenantee. The initial impact of advances in transportation was to make it possible for covenantors to leave the village market and in so doing enforce a restraint without damaging the covenantor's capacity to work.

### b) Village isolation and mobility

In the lead up to the Industrial Revolution village life was dominated by local custom. Confined to their village by the difficulties of long distance movement, people died often within walking distance of the place of their birth having worked a lifetime in the occupation of their forebears. As Atiyah spells out, 'a man had his place and role in a communal society; he inherited, usually his father's trade or craft or status.'[172]

The 'customary life' Atiyah spoke of had, itself, a tendency to cause immobility: 'In the relatively closed village community – still in the eighteenth century very much cut off from

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[167] Young A, *Southern Tour* (1768) reported in Birnie AB, *An Economic History of Europe 1760-1939* 4th ed. Methuen London, 1944 at 32.
[168] Birnie AB, *An Economic History of Europe 1760-1939* 4th ed. Methuen London, 1944 at 33.
[169] Birnie AB, *An Economic History of Europe 1760-1939* 4th ed. Methuen London, 1944 at 33.
[170] Birnie AB, *An Economic History of Europe 1760-1939* 4th ed. Methuen London, 1944 at 33. (Thomas Telford; 1756-1836)
[171] Birnie AB, *An Economic History of Europe 1760-1939* 4th ed. Methuen London, 1944 at 36.
[172] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 61-62.

the outside world by poor communications – trade was not an important feature of life at all.'[173] What a person produced would be sold in his or her local village. Trade with neighbouring villages was minor and uncommon, performed usually by itinerant vendors. Although subsistence farming had been diminishing since the 1600's, producers were still expected to sell their produce to village consumers for 'people did not buy or resell for trade within these communities.'[174]

There was, as might be expected, little parallel between the 16th and 17th century methods of provisioning the home and those of today. Again the isolation of the village and its rural surrounds, the absence of quick and reliable transport all ensured that goods grown locally were, by and large, sold locally. There was not, of course, any refrigeration to keep produce fresh. During most of the eighteenth century, trade was periodic and 'the bulk of commercial business was transacted through weekly markets and annual or biannual fairs'[175] with the occasional visit of a travelling pedlar.

There were no retail outlets, other than where tradesfolk like cobblers or tailors attached a stall to the side of their workshop. As commerce was localised there was little need or in fact inclination to leave the village such that 'nearly 75 per cent of the trading transactions of the eighteenth century were local in character.'[176]

The Poor Relief Act (1601) reinforced the parochialism of village life. The Act entitled an indigent stranger to unemployment relief after residing in a parish for a minimum forty days. Much better, thought the members of a parish, to move strangers on and avoid the financial strain of their parsimony; much better for a worker to remain in his or her village than risk rejection in a far-off parish.[177]

As transport improved with industrial advances, village isolation declined. The inertia caused by the hardship and apprehension of travel naturally dissipated as goods and people were seen to arrive safely at their destination. Trains, once fearful looking became familiar and improved road services led to 'the decline of many local markets.'[178] According to Blake, 'men had become more geographically mobile; to leave one's town no longer involved the economic risks and actual physical dangers of an earlier period. Local roots were less strong;

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[173] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 63.
[174] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 63.
[175] Birnie AB, *An Economic History of Europe 1760-1939* 4th ed. Methuen London, 1944 at 48.
[176] Birnie AB, *An Economic History of Europe 1760-1939* 4th ed. Methuen London, 1944 at 48.
[177] The Poor Relief Act was introduced in England in recognition of 'the principle that the destitute poor had a legal claim of society for support.' (Birnie AB, *An Economic History of Europe 1760-1939* 4th ed. Methuen London, 1944 at 200). The aim of the Act was 'to banish idleness, to advance husbandry and to yield to the hired person, both in times of scarcity and in times of plenty, a convenient proportion of wages.' Clark G, *The Wealth of England*, (London, 1946, reprinted 1965) at 83, quoted in Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979, at 68). The Poor Law required that each parish provide relief to the unemployed through a tax levied on those who occupied land or houses. The Act, administered by local justices, granted pauper children in trade training, and the indigent, raw materials for home production or provided outdoor work in return for food and shelter.
[178] Floud and Johnson (eds.), *The Cambridge Economic History of Modern Britain, Vol 1 1700-1860*, Cambridge University Press, Cambridge, 2004 at 327.

hostility to strangers less a factor.'[179] Travelling or relocating to work in a neighbouring village became, for the first time, practical and, with this practicality, policy adjustments to the policy of the restraint of trade doctrine were possible.

Improvements in land management, the consolidation of small allotments into large farms, and the invention of labour saving devices, such as Jethro Tull's seed-drill invented in 1701, released workers from the land to the new manufacturing industries of Northern England. As entrepreneurs took greater control of commerce the power of the trade guilds 'began to be considered an anachronism.'[180] The guilds' capacity to control employment diminished as manufacturing towns like Birmingham and Manchester, 'which were not wedded to the ancient customs, franchises and liberties'[181] developed. Apprentices, or journeymen, now mobile relocated to new towns and growing suburbs - as Floud and Johnson comment: 'the institution of apprenticeship facilitated the rural to urban migration.'[182]

One leading commentator, Trebilcock,[183] has proposed that changes in the judicial approach to the restraint of trade doctrine were due to developments in philosophical thought. As discussed fully below, while it is true that changing political and economic paradigms had an influence on the judicial approach to contract law in general, these movements did not transpose into a practical change in how the restraint of trade doctrine was administered. Trebilcock's theorem does not consider the impact of the greatest economic change the world had seen to that point in time: the Industrial Revolution.

The absolute ban on enforcing restraints on trade gave way to a new policy, that of enforcement where the restraint was confined to 'a particular place' if 'done fairly and upon good consideration.'[184] Technological innovation released workers from the land to find, fortunately for the preservation of a peaceful community, work in industries unknown only a generation before. Prior to these technological advances in transport, restraints of trade could be enforced only by visiting on parishes the expense of feeding the able bodied who had been denied the capacity to work.

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[179] Blake HM, 'Employee Covenants not to Compete' (1960) 73 *Harv LR* 625 at 638.
[180] Lipson E, *The Economic History of England Vol III*, Adam and Charles Black, London, 6th ed. 1956 at cxxxi.
[181] Lipson E, *The Economic History of England Vol III*, Adam and Charles Black, London, 6th ed. 1956 at cxxxiii. The Statute was abolished in 1835 by the Municipal Corporations Act. According to Lipson the guilds underwent a slow process of decay from the 1600s. Parliament did not legislatively destroy the guilds because they were 'too deeply rooted in the national consciousness for a frontal attack.' Vol II at cxxxiii. The ultimate demise of the Guilds came, arguably, from the indirect effects of the Industrial Revolution. The 'first result of the industrial revolution' according to Birnie, 'was an important change in industrial technique which may be briefly described as the substitution of machines for tools ... The chief difference is that the tool is set in motion by man's physical strength, the machine by some natural force like wind, water or steam' (Birnie AB, *An Economic History of Europe 1760-1939* 4th ed. Methuen London, 1944 at 4). The various trade Guilds were essentially domestic enterprises using the hand and the tool to produce a relatively small number of goods for a generally localised market. The advent of industrial operations spelt their end.
[182] Floud and Johnson (eds.), *The Cambridge Economic History of Modern Britain, Vol 1 1700-1860*, Cambridge University Press, Cambridge, 2004 at 339.
[183] See in particular Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*, Law Book Co, Sydney, 1986.
[184] *Mitchell v Reynolds* 24 ER 347.

These were the circumstances that confronted Parker CJ in *Mitchell v Reynolds* in 1711 making it both necessary and possible to introduce a new rule to the restraint of trade doctrine; the partial restraint rule. The policy response of the court, itself a response to technological change, has parallels in respect to the communications technologies of the 21st century which will again challenge the definition of what constitutes the boundaries of a protectable interest.

## 4. The Rise of Laissez-Faire

As the effects of the mercantilist period waned in the late eighteenth century and the influence of the Industrial Revolution took hold, the law of contract came under the influence of the laissez-faire philosophies.[185] A number of commentators suggest that laissez-faire lead to the enforcement of restraints of trade on the basis that 'freedom of contract' obliged a covenantor, as an independent and free-citizen, to keep his or her promise irrespective of the personal or societal costs.

This claimed willingness of courts to enforce restraints so as to accord with a contractual agreement stands as a bulwark to any suggestion that the restraint of trade doctrine was primarily influenced by the technological state of the nation and that the tilt of the law predominantly favoured liberalised trade over freedom of contract. It is argued below that whilst laissez-faire, 'leave alone', influenced developments in contract law broadly it had little if any impact on enforcement of a restraint that was not otherwise acceptable.

Although courts were mindful of the ideal that all contractors should be bound to a promise freely given, the practical ramifications of forcing able bodied covenantors out of the workforce remained a deterrent to enforcement as strongly in the laissez-faire period as at the time of *Dyers case* in 1414. We see for example in *Roussillon v Roussillon*,[186] heard in 1880 at arguably the zenith of the era of laissez-faire,[187] the court quite prepared to express the ideal that a covenantor should be held to his bargain, but nonetheless determining the matter according to the reasonableness of the restraint.

Commentators, in particular Atiyah and Trebilcock, point to changes in the law of the restraint of trade doctrine as a response to changes in philosophical thought. Although this perspective may partially explain legal change, this thesis suggests that the genesis of judicial

[185] A term ascribed to Vincent de Gournay meaning 'let do' or more fully, 'let people do as they please without government interference': Brue SL, *The Evolution of Economic Thought*, Dryden Press, Orlando, 6th ed. 2000 at 39. Vincent de Gournay [1712-1759]. Laissez-faire emerged from postulations on the 'rule of nature', reinforced by the scientific discoveries of seventeenth and eighteenth centuries, in particular those of Newton and Galileo, both of whom are credited with demonstrating the natural order inherent in all things – Newton in revealing the laws governing planetary motion and, in *Mathematical Principles of Natural Philosophy*, the laws of gravity; Galileo in demonstrating the laws that govern the motion of the Earth. Natural order became the guiding principle of the 'physiocratic school' of economic thought under which it was believed that all human activity should harmonise with the natural order. As Brue described it, 'the object of all scientific study was to discover the laws to which all the phenomena of the universe were subject' (Brue SL, *The Evolution of Economic Thought*, Dryden Press, Orlando, 6th ed. 2000 at 39).

[186] *Roussillon v Roussillon* (1880) 14 Ch D 351.

[187] Argued by Blake HM, 'Employee Covenants not to Compete' (1960) 73 *Harv LR* 625 at 642 and Trebilcock (1986) at 23.

change in respect to restraints of trade is better explained as a response to technological developments. These developments made it both practical and reasonable to enforce restraints of trade which , had they occurred in the pre-industrial age, would not have been enforced for fear of burdening parishes with welfare obligations and denying the State the benefit of workers' skills. The adoption of laissez-faire policies, it is suggested, did not emerge as a philosophical movement adopted by commerce, but a response of commerce to the plethora of regulatory imposts which had, over time, made business inefficient. Lipson, although not commenting in a legal sense, has also argued that the beginnings of the free trade movement in England 'were inspired by practical considerations; and abstract doctrines of economic freedom did not carry the weight with which they are generally credited.'[188]

In other words the push towards laissez-faire was based on the observation that government interference damaged the efficient functioning of industry. In 1772 a statute passed the House of Commons abolishing prohibitions of engrossing (akin to monopolising) with the revealing preamble:

> 'it have been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth, and to inhance (sic) the price of the same.'[189]

Nonetheless, despite a broad judicial approval of laissez-faire, it is argued below that this philosophy had little direct impact on the application of the restraint of trade doctrine where the enforcement of a restraint would have the effect of removing workers from employment into the responsibility of the local parish or into a Victorian workhouse.[190]

Whilst according to Marshall, 'by the beginning of the nineteenth century (the) principle of individual economic freedom was accepted as axiomatic'[191] laissez-faire did not, however, translate into the enforcement of contracts on the mere basis that a covenantor was increasingly recognised as an autonomous being. There remained different policy positions expressed generally in terms of individual self-interest. Consider for example the policy argument mounted by clothiers in 1756 who sought to enforce an employment contract under which their weavers (the makers of cloth) agreed to receive their wages in 'truck'.[192] The arrangement was disturbed when Parliament outlawed payment in kind: 'We think it ... repugnant to the liberties of a free people and the interests of trade than any law should supersede a private contract honourably made between a master and his workman. ... Trade is

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[188] Lipson E, *The Economic History of England Vol II*, Adam and Charles Black, London, 1943 at cii.
[189] 12 Geo. III, c 71 (1772); reported in Letwin W, *Law and Economic Policy in America*, University of Chicago Press, Chicago, 1965 at 37.
[190] 'Workhouses', introduced by the Poor Law of 1834 were described by Dicey as having the 'object to save the property or hardworking men from destruction by putting an end to the monstrous system under which laggards who would not toil for their support lived at the expense of their industrious neighbours, and enjoyed sometimes as much comfort.' But 'in popular imagination its chief result was the erection of workhouses, which, as prisons for the poor, were nicknamed Bastilles.' Dicey AV, *Law and Opinion in England*, MacMillan, London, 1940 at 203.
[191] Marshall TH, *Citizenship and Social Class*, Pluto Press, London, 1996 at 11.
[192] Truck wages: a term referring to the requirement that an employee buy with his or her wages, goods in kind from his or her employer.

a tender plant that can only be nursed by liberty.'[193] The argument by which the clothiers' sought to promote their self-interest was that of laissez-faire, later transposed to freedom of contract.

## 5. Freedom of contract or freedom of trade

Authoritative commentary referring to the laissez-faire period often uses the term 'freedom of contract' to illustrate the policy by which contractors, as free individuals, should be held to their agreement, including their agreement to restrain from trading.[194] The laissez-faire movement concerned as a concept the freedom of the individual; a concept extending naturally to the argument that contractual agreements freely given should be honoured. No longer, proclaimed this movement, was it the province of governments or courts to question a bargain given by an independent soul. The role of the courts in supervising the fairness of the bargain was thought inapplicable since the individual exercised personal responsibility for his or her decision; even if to their cost: 'Each man being as a rule the best judge of his own interest, his right to bind himself by contract should be left untouched, even though he mishit sometimes use the right so as to do himself injury.'[195]

When the term 'freedom of contract' is used in the traditional sense it refers to the inculcation of laissez-faire economic liberalism into the law of contract. On a philosophical level, having thrown off the constraints of mercantilism, it was not of the new order that those now independent would seek court assistance should there be a change of mind. Freedom of contract did not, however, mean that restraints of trade should, on the basis of a new economic philosophy, be removed entirely from the scrutiny of the courts. Below it is argued that laissez-faire had little if any impact on how the scope of a restriction (duration, geographic reach or reasonableness) was judicially viewed under the restraint of trade doctrine.

A number of cases heard throughout the 1800's reveal that the courts were not, during this period, concerned with enforcing restraints on the basis of 'freedom of contract'. Rather, a restraint was enforced according to the need to protect the legitimate interests of the covenantee and which, as exemplified in the case of *Roussillon v Rousillon*, often required the court to focus on the impact of developing technology.

In *Whittaker v Howe*[196] a solicitor, Howe, attempted to retain his client list after selling his practice. A restraint of trade clause required that he and his partner, Heptinstall, should not 'afterwards practice as solicitors or attornies (sic) in any part of Great Britain for the space of twenty years.' Lord Langdale enforced the restraint stating, 'in this case valuable consideration being given, the question is, whether the restraint intended to be imposed on Mr Howe is reasonable.' His Lordship found that the public interest was not affected by the restraint and that 'he ought not to be permitted to take the law into his own hands, and carry

[193] A state of the case relating to the rising of the weavers in the County of Gloucester (1757) reported in Lipson E, *The Economic History of England Vol. III*, 6th ed., Adam and Charles Black, London, 1956 at 268.
[194] See for example Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 697.
[195] Dicey AV, *Law and Opinion in England*, MacMillan, London, 1940 at 151 and 153.
[196] *Whittaker and another v Howe* 49 Eng Rep 150 1829-165 150.

on his business at his own pleasure.'[197] There is no mention in *Whittaker v Howe* of freedom of contract or of an overriding obligation of the covenantor to adhere to a promise freely given.

In the 1837 case of *Hitchcock v Coker*,[198] the plaintiff druggist employed an assistant restraining him from engaging in 'the trade or business of a chemist and druggist in the town of Taunton or within three miles thereof' on penalty £500. Neither Lord Denman CJ on the Kings Bench nor Tindale CJ on appeal, made any mention of a mandate that the free man was to keep his covenant.

*Archer v Marsh*, also heard in 1837, concerned a restraint placed on a carrier of 'rabbits as well as other things'. Lord Denman stated that the particular 'objection to the agreement ... was that the restraint was much more extensive than was necessary for the full protection of the plaintiff, the purchaser of the good will of the business.'[199] Counsel for the covenantee did not argue as to obligations flowing from freedom to contract.

In *Ward v Byrne* the defendant, employed as a 'town-traveller', contracted that he would not for a period of nine months after leaving the service of Ward, a coal merchant in London, 'follow or be employed in the said business of a coal merchant for the space of nine months.' The matter concerned the correct construction of the restraining term and the approach to be taken where a restraint is general as opposed to partial. Parke B found 'no authority for the position that any absolute restriction, limited only as to time, can be imposed',[200] making no mention that freedom of contract required that he enforce the restraint.

To the courts of the 1800's the laissez-faire movement did not dislodge concerns as to the practical damage in forcing an employee out of work on the mere pronouncement of a theoretical wrong.

## 6. Why did a modern belief in the pre-eminence of laissez-faire occur?

To explain the radical notion of why laissez-faire and freedom of contract wrongly came to be thought of as the guiding principle in the nineteenth century cases of restraint of trade, it is necessary to quote a number of longer passages from commentators and judgments.

Atiyah has described the idea of economic liberalism, laissez-faire, as an all encompassing philosophy which could, by extension, be thought applicable to questions of reasonableness:

> 'They were, in origin, ideas favouring freedom – freedom of property, freedom to trade and to work, freedom to lend money at interest, freedom from monopolies and combinations, freedom to make one's own decisions for good or ill, freedom from governmental and legal intervention.'[201]

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[197] *Whittaker and another v Howe* 49 Eng Rep 150 1829-165 150 at 155.
[198] *Hitchcock v Coker* (1837) 112 ER 167.
[199] *Archer v Marsh* 112 Eng Rep 366 at 369.
[200] *Ward v Byrne* 151 Eng Rep 232 at 238.
[201] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 113.

Universal acceptance arose from a belief, at least a belief prevalent during much of the 1800's, that laissez-faire was a panacea for economic if not social woes. There is no doubt that the movement was pervasive, however, as argued, the cases of the nineteenth century, when the laissez-faire movement was promulgated, do not support the notion of the predominant enforcement of restraints on the basis of 'freedom of contract'.

As stated, there has been a tendency to equate freedom of contract with the enforcement of restraints of trade on the basis of a 'free man's' obligation. This tendency partly arose, as argued here, from commentaries, such as those of Dicey and Trebilcock, which emphasise laissez-faire as a general concept but do not sufficiently highlight the fact that laissez-faire had little judicial impact upon the restraint of trade doctrine itself. Alternatively, some commentators appear to have assumed, perhaps in reliance on the previous commentary of others, that 'freedom of contract' was tantamount to enforceability of a restraint.

It has been argued that no greater damage was done to freedom of trade than the laissez-faire movement championed by such philosophers as Jeremy Bentham. Bentham's proclamation was that:

> 'Every person is in the main and as a general rule the best judge of his own happiness. Hence legislation should aim at the removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbours.'[202]

Bentham's 'utilitarian' philosophy is based on the overarching view that through 'individualism', the object of life, 'the greatest happiness of the greatest number',[203] could be achieved. According to Dicey, Bentham's 'eulogy of *laissez faire* ... was a war cry. It sounded the attack upon every restriction, not justifiable by some definite and assignable reason of utility, upon the freedom of human existence and the development of individual character.'[204]

Dicey, in *Law and Opinion in England*, devoted much space to discussing Bentham and 'individualism'. It is sufficient, though, to note a single revealing passage:

> 'extending contractual freedom ... was for Benthamite liberals, the readiest mode of abolishing a whole body of antiquated institutions, which presented, during the eighteenth century, a serious obstacle to the harmonious development of society. Individualistic reformers opposed anything which shook the obligation of contracts, or, what at bottom is same thing, limited the contractual freedom of individuals. ...'[205]

Dicey, however, an antagonist of Bentham's notion of laissez-faire and the effect it had on judicial determinations, thought otherwise. Irrespectively his criticism is likely to be

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[202] Bentham J, (1789) *The Principles of Morals and Legislation*.
[203] Maine, *Popular Government* pp85 -86 reported in Dicey AV, *Law and Opinion in England*, MacMillan, London, 1940 at 132.
[204] Dicey AV, *Law and Opinion in England*, MacMillan, London, 1940 at 149.
[205] Dicey AV, *Law and Opinion in England*, MacMillan, London, 1940 at 151.

overstated, for the cases of the period illustrate a continuing judicial concern with either the 'partial/general restraint rule' or with the nascent concept of reasonableness.

This view is supported in the general sense, rather than through references to cases, by Atiyah who states that it is 'emphatically not true that any influential body of persons ever believed in laissez-faire as a system ... that Government should confine itself to the minimum role of securing the national defence and maintaining law and order. ... The myth was propagated by Dicey who totally overlooked the extent of Parliamentary and Governmental interference ... with freedom of contract and the free market.'[206] However, although criticising Dicey for extending the 'freedom which marked the mid-eighteenth century' to justify 'the idea of freedom of contract',[207] Atiyah himself creates the impression that the judicial adoption of laissez-faire was a component in decision-making when he suggests that 'there is some evidence to support the view that ideas based on laissez-faire principles may well have had more influence on the judges and judge made law than they did on any other organ of the State.'[208] One hundred and forty odd pages further into his book, Atiyah speaks of the 'arrival of a newer generation of judges in the 1830s and even more in the 1840s' who 'had substantial commercial experience' and 'had been brought up in the England of the Industrial Revolution.'[209] After attempting to 'detect the underlying, and perhaps unconscious influences (of judges) at work'[210] and citing Bramwell's belief that 'the bargain struck by the employer and the workman for the workman's wages excluded any right to compensation for injury' as 'the workman was paid for taking the risk of injury because he did take the risk of injury'[211] Atiyah goes on to conclude that, 'judicial attitudes showed little sign of movement away from total adherence to the principle of freedom of contract until the twentieth century ...'[212]

The point apparently made by Atiyah was that despite the generalised form in which Dicey proclaimed the influence of laissez-faire and, indeed, the fact that other influences, in particular Parliament, negates the notion of a universal adoption of laissez-faire, at a judicial level freedom of contract was a well recognised approach of the 'newer judges'. The positioning of laissez-faire in such a manner by Atiyah is, as suggested above, an arguable cause for the belief that the scope of a restraint was not, in the nineteenth century, a factor for judicial consideration in the enforcement of a restraint but rather enforcement was merely a matter of the court enforcing a contract freely assented to.

Harlan Blake, an influential commentator on the history of the restraint of trade doctrine,[213] writing in the *Harvard Law Review*, also pressed strongly the role of laissez-faire in underpinning judicial determinations in respect to trade restraints. In referring to a decision

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[206] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 234. It might be noted that Dicey's chapter 'Period of Benthamism or Liberalism' made no mention of a single case by name.
[207] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 235.
[208] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 235.
[209] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 375.
[210] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 374.
[211] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 377.
[212] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 383.
[213] Harlan Blake, Professor of Law, has been quoted with approval by JD Heydon, MJ Trebilcock, W Letwin.

by Tindal CJ in *Mitchell v Reynolds* which had reversed the existing burden of proof to subsequently require the covenantor to show a restraint was unreasonable, Blake stated: 'This view, doubtless rooted in strong freedom of contract view, prevailed in England unto 1913 and is in part responsible for the fact that during the latter part of the nineteenth century in England virtually all such covenants, in employment contracts or elsewhere, were upheld.'[214] Another factor favouring laissez-faire, wrote Blake, 'was the currency of the general philosophical position exemplified by a pronouncement by Jessel MR, in an influential case ...'[215] This case was *Printing & Numerical Registering Co v Sampson*, a passage of which appeared to heavily favour freedom of contract:

> 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that there contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.'[216]

This section of Lord Jessel's speech is quoted in the 1968 House of Lords case, *Esso Petroleum v Harpers Garage*,[217] by Lord Morris, who in recognising the ideal of holding a covenantor to his or her contract, nonetheless emphasised the practical need to permit trade over the ideal of enforcing a restraint on grounds of freedom of contract:

> 'In general the law recognises that there is freedom to enter into any contract that can lawfully be made. The law lends its weight to uphold and enforce contracts freely entered into. The law does not allow a man to derogate from his grant. ... But when all this is fully recognised yet the law, in some circumstances, reserves a right to say that a contract is in restraint of trade and that to be enforceable it must pass a test of reasonableness. In the competition between varying principles possible applicable that which makes certain covenants in restraint of trade unenforceable will in some circumstances be strong enough to prevail. Public policy will give it priority. It will have such priority because of the reasonable necessity to ensure and preserve freedom of trade.'[218]

Quite clearly a covenantor should be obliged to keep to his or her promise, however, the fact that an exception applies in cases where a restraint of trade is unreasonable militates against suggestions that laissez-faire dictated the enforcement of restraints as a matter of principle.

A passage of similar purport is quoted by Trebilcock from the 1899 judgment of Lindley MR in *E Underwood & Son v Barker*:

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[214] Blake HM, 'Employee Covenants not to Compete' (1960) 73 *Harv LR* 625 at 640.
[215] Blake HM, 'Employee Covenants not to Compete' (1960) 73 *Harv LR* 625 at 640.
[216] *Printing & Numerical Registering Co v Sampson* LR 19 Eq 462 (1875) 465.
[217] *Esso Petroleum v Harper's Garage (Stourport) Ltd* [1968] AC 269.
[218] *Esso Petroleum v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 304-5.

> 'If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, prima facie at all events, contrary to the interests of any and every country. ... the public policy which allows a person who obtains employment, on certain terms understood and agreed to by him, to repudiate his contract conflicts with and must to avail the defendant prevail for some sufficient reason over the manifest public policy which, as a rule, holds him to his bargain.
>
> The fact that the person restricted is out of work, and is seeking employment, and is therefore at a disadvantage in making a bargain, cannot be a ground for holding his bargain invalid, unless some unfair advantage is taken of his position; and, so long as his bargain is reasonable, having regard to the protection of the employer, it cannot be truly said that any unfair advantage is taken. [219]

Two things should be emphasised is respect to the above passage. One, the obligation is not based on the laissez-faire notion of the unabridged enforcement of contractual rights and two, enforcement is only available, in words expressed in the second paragraph, 'so long as the bargain is reasonable.' This section of Lord Lindley's speech is not an exhortation to enforcement on the basis of freedom of contract; on the contrary it is proposing that freedom of contract will not prevail where the restraint is unreasonable. The case, heard after *Nordenfelt*, in fact recognises and directly quotes Lord Macnaghten's enduring proclamation of the reasonableness principle.[220]

Heydon, quoting Lord Jessel and seemingly drawing upon the work of Blake, has also credited laissez-faire with promoting freedom of contract. Heydon suggests that judicial indifference to the public interest during the early 1900s was an acknowledgement of laissez-faire principles:

> '... (judges) generally agreed with Sir George Jessel MR that "you care not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."... Like most of their generation they felt that the state should interfere as little as possible in the workings of the economy, and the state included the judiciary.'[221]

It may well be correct to say that judges of the period thought State interference less than desirable but that thought did not, as the foregoing cases illustrate, translate into judicial determinations in respect to restraints on trade.

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[219] *E Underwood & Son v Barker* 1 Ch 300 at 304-306.
[220] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 565.
[221] Heydon JD, *The Restraint of Trade Doctrine,* 3rd ed, LexisNexis Butterworths, Australia, 2008 at 26.

Trebilcock addressed freedom of contract in the form of a civil right which should permit individuals to decide the parameters of their contractual obligations:

> 'The normative power of the idea of freedom of contract in the political context spilled over into the economic sphere as well. How could the courts presume to tell two rational adults what did or did not constitute adequate consideration for their freely made exchange? This was not simply the epistemological problem of determining what fair and adequate consideration for a particular commodity really is; it was also the ethical problem of "paternalism" raised by the courts' invasion of the natural rights of sovereign individuals. ... it is understood to reflect the wills and values of the parties to the agreement ...'[222]

Trebilcock's point suggests a wider application: 'It was this liberal conception of justice which underpinned the "equitable" conception of contract law, replacing it with the "will" theory of contract.'[223] Freedom of contract in Trebilcock's view could only be challenged by events threatening the capacity of individuals to make a free deliberation: 'In the laissez-faire era, free consent was understood by the courts, and probably large segments of the middle class, as something quite untouched by the background of social and economic conditions against which a choice or promise was made. Provided that neither of the agents was the subject of force or fraud by the other party with respect to the agreement, that agent was held to have freely consented.'[224]

Trebilcock's argument concerned, in the main, the adequacy of consideration as it applied to contracts in restraint of trade, however, his discussion appears to take on a wider locus when the author states further: 'If free consent, as defined in the laissez-faire era, was now the sole basis for determining whether a restrictive covenant was equitable as between the parties, then virtually all contractual restraints of trade would be enforceable. There seems little basis, on this analysis, for any general public policy against enforcing restrictive covenants.'[225]

Trebilcock's notion of enforcement based on contractual consent is not entirely accurate; the basis of public policy was becoming, or indeed had become, that of reasonableness. As argued previously, the advance of technology had made it possible to enforce restraints, to hold a covenantor to his or her word as it were. In this sense the rationale supporting enforcement was the capacity of the courts to enforce a restraint without damaging the interests of local communities (parishes in the time of *Ipswich Tailors' Case* in 1614) rather than on the basis of freedom of contract. 'Consent' did not, it may be stressed, supplant the requirement of partiality of a restraint or, in the latter era, that of reasonableness.

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[222] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co Sydney, 1986 at 19.
[223] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co Sydney, 1986 at 20.
[224] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co Sydney, 1986 at 20.
[225] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co Sydney, 1986 at 23; *Tallis v Tallis* (1853) 118 ER 482.

Overall, Trebilcock's chapter entitled 'The Laissez-faire Era' arguably overstates the influence of freedom of contract on the restraint of trade doctrine – at least according to the inference one would naturally draw from the text. Consider a quote from Atiyah appearing in the nominated chapter of Trebilcock:

> 'it is scarcely possible that any educated man growing to maturity between (say) 1800 and 1850 would not have read a great deal of the new political economy and radical political utilitarianism. Many were profoundly influenced by simplified versions of these bodies of thought. Amongst those there were certainly a number of the most important figures of the nineteenth century, including many judges. ... Political economy, law, philosophy, political theory, and history were all expected to be within the grasp of the properly educated man.'[226]

Trebilcock's commentary on this quote, as the quote relates to 'free trade orthodoxy', was that laissez-faire 'did not provide much purchase on the issue of how to resolve the conflict between freedom of trade and freedom of contract associated with contractual restraints of trade. As will be seen when the cases are examined, it was freedom of contract which prevailed.'[227] The reason why it did not 'provide much purchase' was, according to Trebilcock, 'a devout belief in the "invisible hand" that it was impossible for many to conceive of the free pursuit of private interests ever emerging from the public interest. Probably more important however, was the changing ideology of the courts themselves. In the laissez-faire era, the law was increasingly regarded as a body of autonomous principles, universal and timeless in application on the model of natural laws. The purpose of the courts was to discover these principles, derive rules from them, and apply those rules in a uniform fashion to the particular facts of the case at hand'[228] Again, the ideal of freedom of contract was not pursued as the rationale determining the enforcement or otherwise of a restraint of trade.

Whatever the influence of laissez-faire on the general law of contract, the cases of the period do not reveal an obsession by courts with enforcing restraints of trade other than where the scope of the restraint was reasonable (including reasonable in the sense of partiality).[229] The courts continued, as they always had, in making determinations on the practicalities of the case in question. As an aside, had the courts been as intractable as the freedom of contract school suggests, there would be no point seeking judicial relief from an unreasonable

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[226] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co Sydney, 1986 at 16 quoting Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 507-508.

[227] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co Sydney, 1986 at at 16.

[228] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co Sydney, 1986 at at 16.

[229] To be fair to Trebilcock's excellent book, he does consider other cases and commentary which question the dominant role of laissez-faire, such as, 'public policy is a vague and unsatisfactory term and calculated to lead to uncertainty' (*Egerton v Earl Brownlow* 1853 10 ER 359) to state 'on this view the laissez-faire orthodoxy ... was irrelevant to the courts.' This comment is then hedged by the statement: 'to the extent that the courts took account of public policy consideration, the primacy of freedom of contract became the most important.' All quotes from page 18.

restraint, a fact belied by the plethora of restraint of trade cases throughout the 1800's and into the early 1990s.

What is being suggested is that despite the influence of laissez-faire on economic and political thought, and arguably on legal philosophy in general, the movement did not dictate to judges how the scope of a restraint should be considered.

## 7. Why was freedom of contract excluded from discussion of enforcement?

As argued, whilst the laissez-faire movement contributed to the development of what has been referred to as 'classical contract theory', it did not impinge upon the question of enforceability. To some extent the outcome is anomalous as it could be rightly expected that an influence on contract law in general would also impact upon the enforcement of a restraint of trade specifically. Two possibilities can be offered as to why enforcement of a restraint did not hinge on freedom of contract.

One, it is arguable that the 'public interest' in free trade, recognised since the 1400's, denied the contract of an essential feature of freedom of contract; that only the will of those who made the contract was to prevail. Classical contract theory was characterised as a form of 'pure contract' and, according to Atiyah, possessed certain features such as: 'the parties deal with each other at arm's length ... each relies on his own skill and judgment ... in the market place no man is his brother's keeper ... neither party owes any duty to the other ... each party must study the situation, examine the subject matter of the contract, and the general market situation, assess the future probabilities, and rely on his own sources of information ... It is assumed that the parties know their own minds, that they are the best judges of their own needs and circumstances, that they will calculate the risks and future contingencies that are relevant. ... It follows that unfairness of bargain – gross inadequacy or excess of price – is irrelevant, and that once made, the contract is binding "for them free dealing is fair dealing".'[230]

Classical contract theory concerned the perfection of the bargain in the market place – reflective of the natural school. Anything that diluted the bargain was, as if by definition, not of the bargain. As Atiyah records, 'A person is not liable for a benefit received at the hands of another unless he has agreed to pay for it. Nor conversely, is there much room for the protection of reliance unless it has been expressly bargained for.'[231]

This point is emphasised by Friedman commenting on the American experience:

> '"Pure" contract is blind to details of subject matter and person. It does not ask who buys and who sells, and what is bought and sold. ... In the law of contract it does not matter if either party is a woman, a man, an Armenian-American, a corporation, the government or a church. Again, as soon as it does matter ... we are no longer talking pure contract. ... When the relationship of parties to land is treated as creating

[230] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 403.
[231] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 404.

distinctive legal issues, simply because land is involved, this is land law or property law, but not contract.'[232]

To expand on this example of land dealings: where a contract involves interests beyond those of the parties, in this case the public interest, there is no purity of contract and it is idle to talk of freedom of contract such that the philosophical basis for enforcement is compromised.

The second reason concerns the practicalities of enforcing a restraint based solely on the contractual assent of the covenantor. 'English judges,' according to Atiyah, 'have always been stronger in doing justice in a pragmatic fashion, than they have been in theoretical justifications for what they are doing.' The ideals of the free market may have been noted by the judges of the time but 'there were occasions when it revolted and (the judge) refused to abide by those ideals. ... Even in the classical period, there always the chance that somehow substantive justice would be achieved, for example, by invoking equity or by finding the facts in an appropriate way.'[233]

It must also be remembered that the concept of laissez-faire, although a philosophy known to all educated persons, did not permit a judge to avoid precedent on the mere basis of a nascent philosophy tangential to policy. 'Occasions arose,' said Atiyah, 'even in the heyday of classical law, when older eighteenth century principles were adhered to simply because of legal inertia, or the weight of precedent of the conservatism of the particular judges who happened to be hearing an important case.'[234] To further argue this point, it will be noted that towards the close of the nineteenth century, when notions of freedom of trade were well established, the judges in *Nordenfelt* wrestled with the notorious restraint of trade cases of the seventeen-hundreds to 'discover' a guiding precedent in reasonableness.

Consider further the 1880 landmark case of *Roussillon v Roussillon*.[235] Trebilcock claims that 'the recasting of the doctrine in the laissez-faire era reached its high water mark in *Roussillon v Roussillon*.'[236] Whilst this is perhaps true in respect to courts abandoning examination of the adequacy of consideration flowing to the covenantor (the main point made by Trebilcock) it does not apply to the scope of a restraint. That is, the duration and geographic reach (or generally, matters going to reasonableness) of a restraint remained the major factors in determining enforceability. Trebilcock's claim, given its breadth, is prone to misinterpretation, in particular because the restraint was without a spatial limit but was nonetheless enforced by Fry J. The enforcement prompted Trebilcock to comment: 'the rule since *Mitchell v Reynolds*, that general restraints were always void, would no longer hold. With this, the last ground upon which restrictive covenants could be effectively challenged was greatly narrowed' and further, 'even covenants unlimited as to time and geographic

[232] Friedman L, *Contract Law in America*, p 20, reported in Atiyah (1979) at 405.
[233] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 404.
[234] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979 at 404.
[235] *Roussillon v Roussillon* (1880) 14 Ch D 351.
[236] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co Sydney, 1986 at 23. Blake also makes an identical comment: 'In the Rousillon case the absolute freedom of contract had reached its high point.'; at 641.

scope would be enforced if apparently freely entered into.'[237] It is quite clear that Trebilcock's emphasis is on an overarching freedom of contract methodology.

*Rousillon v Rousillon* concerned a young Swiss man employed by his uncles as a clerk and later as a salesman in the champagne trade. The terms of his employment required that he 'not represent any other champagne house for two years after having left (employment).' The restraint was open-ended in respect to geographic reach. The nephew travelled in England and Scotland on behalf of the business. When his uncles retired the nephew became, on his own account, a retail champagne merchant in London describing himself as 'of Ay Champagne'. He in fact had no business in Champagne but imported the wine from growers in the Champagne region. The reasoning of Fry J concerned, in the main, whether the authorities recognised a general restraint rule or whether the test was that of reasonableness (the case was a forerunner of *Nordenfelt*). After considering a number of determinations dealing with each test, his Honour found 'the cases in which an unlimited prohibition had been spoken of as void, relate only to circumstances in which such a prohibition had been unreasonable' to declare the restraint enforceable on the basis that 'it has not been shewn that this contract is larger than is necessary for the reasonable protection of the Plaintiffs.'[238] To Fry J the defendant nephew had the onus of proving the restraint was 'beyond what the plaintiffs interests required' because he 'is seeking to put a restraint upon the freedom of contract, and he who does that must, I think, shew that it is plainly necessary for the purposes of freedom of trade'. Importantly in the present discussion, Fry J also recognised 'the necessity of Courts being careful how they invade freedom of contract.' But clearly his Honour did not base the determination on this issue. Indeed, the case against 'freedom of contract' as the gravamen is all the stronger for the fact that Fry J recognised its import but nonetheless failed to make his determination accordingly.

As a relevant aside, the influence of technology on the restraint of trade doctrine in *Roussillon* is evident from the short statement:

> 'Looking therefore, at the extent of the trade carried on by the Plaintiffs, and its diffusion over the whole of England; looking at the facilities which now exist for carrying on trade in various places by means of freedom of communication which exists between them, I cannot see that it had been made plain and obvious to me that this contract exceeds in its extent that to which the Plaintiffs were entitled for the protection of their trade.'[239]

In short, a wide restraint was necessary because the new methods of communication, in the broad sense of the concept, had extended the boundaries needed to preserve the covenantee's interests.

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[237] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co Sydney, 1986 at 23. The latter quote is preceded with the words, 'The combined effects of *Hitchcock v Coker, Tallis v Tallis, Roussillon v Roussillon* and surrounding case law was that …'
[238] *Roussillon v Roussillon* (1880) 14 Ch D 351 at 366.
[239] *Roussillon v Roussillon* (1880) 14 Ch D 351 at 366.

Fry J referred to *Mitchell v Reynolds* the 1711 case that had laid down the partial/general restraint rule. Between *Mitchell v Reynolds* in 1711 and *Roussillon* in 1880, Britain had seen the most dramatic advances in its economic history. In the period 1715-1840 the transport of goods by horse drawn carriage, 'were often irregular and undertaken by small carriers, who sometimes combined this with cartage work on farms at harvest and other busy seasons. Distances covered were mostly as little as 25 or 30 miles.[240] By the mid-1830's around 22,000 miles of roads had become toll roads or been entrusted to Improvement Commissioners. Average travel times 'declined by 20 to 30 per cent over the period 1750 to 1830. ... Road transport costs were falling, perhaps by as much as a third.'[241] By the time of *Roussillon*, as stated by Fry J, 'there are many trades which are carried on all over the kingdom, which by their very nature are extensive and diffused.' In 1711 trains were yet to be invented. By 1880, there were 25,827 kilometres of rail increasing at a compound rate of 1.4% per annum carrying 596.6 million passengers a year and 232 million tons of freight.[242] Facts such as these represent the 'freedom of communication' Fry J referred to.

Blake also placed heavy emphasis upon *Rousillon v Rousillon* as furthering the laissez-faire concept, stating 'the rule of reason during the period (since *Mitchell v Reynolds*) derived much of its content from the predominant importance accorded freedom-of-contract ideas'[243] and further, that the *Nordenfelt* judgment 'contained a warning that the extreme freedom-of-contract position exemplified by the *Rousillon* case might not long survive.'[244] Again, it can be emphasised that Fry J in *Rousillon* did not make his determination on the mere basis of laissez-faire freedom of contract.

## 8. Freedom of contract confined to the issue of contract consideration

The manifestation of 'freedom of contract' was argued by Trebilcock to concern the abandonment by the court of its obligation to ensure the 'just price' of a bargain. Trebilcock offers no explanation other than that related to freedom of contract. However, in contradistinction, it is proposed in this Chapter that the abandonment was due to the courts' recognising the impossibility of adjudging what would and would not constitute fair consideration in the modern world. Again this argument emphasises the role of technological development in directing the early industrial consumer away from products that were knowable and predictable towards goods of increasing sophistication.

It is necessary in making this argument to briefly compare the complexity and type of goods acquired in the pre-industrial age with those available towards the end of the industrial revolution. Consider in proxy the extent to which the price of goods was controlled in sixteenth century England: 'Local authorities of manors, cities and guilds has customary

[240] Floud R and Johnson P, *The Cambridge Economic History of Modern Britain Vol 1*, 2004 Cambridge University Press, Cambridge, at 297 (per Ville S).
[241] Floud R and Johnson P, *The Cambridge Economic History of Modern Britain Vol 1*, 2004 Cambridge University Press, Cambridge, at 297 (per Ville S).
[242] Floud R and Johnson P, *The Cambridge Economic History of Modern Britain Vol 1*, 2004 Cambridge University Press, Cambridge, at 305 and 307 (per Ville S).
[243] Blake HM, 'Employee Covenants not to Compete' (1960) 73 *Harv LR* 625 at 643.
[244] Blake HM, 'Employee Covenants not to Compete' (1960) 73 *Harv LR* 625 at 645.

rights to control food prices; kinds issued proclamations and parliaments passed statutes for the same end; all these are implicitly confirmed in a statute of 1533 which gave certain members of the Privy Council as well the rights to set "reasonable prices" of "cheese, butter, capons, hens, chickens, and other victuals necessary for man's sustenance.'[245] These were the staples of life, few in number and relatively easy to accommodate within a price control system set at the district level prior to industrialisation. As England moved into the Industrial Revolution the number and complexity of goods made all but impossible a rational assessment of a just price. Bruland has noted the array of 'technical shifts' from 1750 in the agricultural sector alone: 'farm tools, cultivation implements, (ploughs, harrows, mowers, wheels for farm vehicles), sowing implements, harvesting equipment (reapers, rakes, hoes, scythes, winnowing and threshing devices), barn equipment and drainage equipment.'[246]

With the nineteenth century, 'steam-powered technologies appeared' to add to the complexity of manufactures. The textile industries produced by the middle of the nineteenth century 'cotton, flax, silk and woollen manufacturers plus lace and hosiery.' There were the luxury items of sugar, tea, coffee and tobacco to consider and the glass and kitchen wares unknown a century before. By the 1850's, according to Voth, 'Englishmen and women were accumulating clothing and other semi-durables at a higher rate' and 'probate inventories show that, during the second half of the eighteenth century at least, even the poor were dying in possession of a larger number of goods than they had half a century before.'[247]

Similar difficulties were argued to exist in attempting to exact a fair price of labour. When in 1756 the House of Commons heard debate so as to set the correct wage of 'weavers in the County of Gloucester' the employer clothiers pointed out the technical difficulties of a compulsory rate based on 'the number of threads contained in the warp or chain.' The true value of weaving, states Lipson, 'could not be ascertained on the basis of the number of threads alone. Many factors needed to be considered: the number and size of the threads, the weight of the chain, the fineness of the weft, the breadth of the cloth, and the mode of manufacture – the qualities and kinds of cloth being "too various to be reduced to any regular or fixed standard." '[248]

The difficulty of accurately assessing a just price is expressed in broad terms by Tindal CJ in the 1837 case of *Hitchcock v Coker*:

> '... if by adequacy of consideration ... the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves to differ from that doctrine. A duty would thereby be imposed upon the Court, in every particular case, which it has no means

[245] Letwin W, *Law and Economic Policy in America*, University of Chicago Press, Chicago, 1965, at 34
[246] Floud R and Johnson P, *The Cambridge Economic History of Modern Britain Vol 1*, 2004 Cambridge University Press, Cambridge, at 126 (per Bruland K).
[247] Floud R and Johnson P, *The Cambridge Economic History of Modern Britain Vol 1*, 2004 Cambridge University Press, Cambridge, at 282 (per Voth HJ).
[248] Lipson E, *The Economic History of England Vol. III*, 6th ed., Adam and Charles Black, London, 1956 at 267 quoting *House of Commons Journals*, xxvii. 730; *A state of the Case ... relating to the Rising of the Weavers in the County of Gloucester* (1757) 14, 21-23.

> whatever to execute. It is impossible for the court, looking at the record, to say whether, in any particular case, the party restrained had made an improvident bargain or not. The receiving instruction in a particular trade might be of greater value to a man in one condition of life than in another and another and the same may be observed as to other considerations.'[249]

The rationale of the determination is clearly expressed as being due to the impossibility of the court being able to assess whether or not a bargain was improvident.

At this point it is possible to suggest that Trebilcock may have again overstated the influence of laissez-faire on restraints of trade – in this instance on the issue of a 'just price'. The passage above, from *Hitchcock v Coker*, is referred to by Trebilcock as supporting a freedom of contract approach. Trebilcock prefaced the passage above with the words, '... the equity principle in the mercantilist era led to an approach in which the courts sought to assess the adequacy of consideration, and having done so, to enforce restrictive covenants only insofar as would balance the interests of the parties fairly. This approach survived in a few early nineteenth century cases ... (however) this test was decisively overruled in *Hitchcock v Coker*.'

Following discussion of these two passages Trebilcock states, 'So restraints no longer had to be the result of a fair exchange of consideration.' Quite correct, restraints were no longer considered as to the adequacy of consideration but the reasoning evident in the passage is not that of freedom of contract. As argued above, the better explanation is found in the increasing complexity of goods delivered through two centuries of technological development.

## 9. The Influence of Technological change on *Nordenfelt*

### 9.1 Introduction

In the 1894 seminal case of *Nordenfelt v Maxim Nordenfelt* the House of Lords confronted the impact of technological change as it played into the restraint of trade doctrine. The court dealt with this change by changing policy. The partial restraint rule had been effective in determining when, and when not, a restraint should be enforced. However, the usefulness of that rule, once thought flexible enough to deal with most contingencies, became increasingly impractical as developments in transport and communications expanded labour mobility and with it the scope of a covenantee's protectable interests.

In testimony to practicality, the restraint imposed on weapons-maker Thorsten Nordenfelt should have been voided under the existing partial restraint rule. To do so, however, was to threaten the sustainability of Britain's global interests. This could not be allowed and for reasons of national interest a new law was instituted; that of 'reasonableness'.

At sometime in the future superior courts in Australia will be called upon to adjust the policy setting of restraint of trade doctrine to account for the impact of modern technology. Rather than dealing with trade promoted through the power of steam, the challenge is to set a policy

[249] *Hitchcock v Coker* (1837) 112 ER 167 at 175.

to accommodate the digital communications mediums that have shrunk commercial distance in much the same way that railways and shipping extended the markets for English cotton in the 18th century.

For covenantors exposed to the digital industries, that corner of the world, that 'some place' Parker CJ spoke of in *Mitchell v Reynolds*, that region where the covenantee has no commercial interest, has vanished. The reasonableness test if applied in the traditional manner will inevitably award to contractually dominant covenantees the entirety of what is referred to here as the 'cyber-markets'.

It is argued that as the most flexible of approaches, it is unlikely a 'better' test than 'reasonableness' can be fashioned to apply to cyber-space marketing. Therefore, any adjustment must, it argued, come from redefining what is reasonable.

### 9.2 Technological change leading to *Nordenfelt*

Nothing illustrates the impact of three-hundred year of industrialisation on the restraint of trade doctrine as the words of Lord Morris: 'we have now reached a period when it may be said that science and invention have almost annihilated time and space'.[250]

The science that 'annihilated time and space' was steam-power and what it produced. This technology was, though, a double-edged sword. For covenantees, far-off markets were made near. Covenantors, whether as private capital or individual labour could access the very same markets and so, freed from the constraints of horse power and mobilised by rail and ship, relocated to regions of opportunity to threaten covenantee interests beyond the village, town or province that had once confined them.

In the 1800's people and business were on the move with impacts on the restraint of trade doctrine all but inevitable. Consider for purposes of exemplification how the development of rail transportation in England facilitated the movement of labourers from rural villages to the new industrial regions and the passage of goods from city to regions – a geographic shift unimaginable decades before. In 1830 there were 157 kilometres of rail in England. By 1870 a rail network of 21,558 kilometres was in place.[251] According to Ville, '... it soon became clear that the railway could offer long-distant transport to a wider portion of the population than the stage coach because of lower marginal costs of adding additional carriages, or just open trucks for third-class travel'.[252] Although the average rail journey in 1870 was 'of about 20-30 miles'[253] this was more than enough to shift the distance of an enforceable restraint of trade beyond the previously acceptable limits of the parish or village.

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[250] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 575 per Lord Morris.
[251] Mitchell BR, 1964 *European Historical Statistics*, 1750-1970. Reported in Floud and Johnson (eds.), *The Cambridge Economic History of Modern Britain, Vol 1 1700-1860*, Cambridge University Press, Cambridge, 2004, at 305.
[252] Ville S, in Floud and Johnson (eds.), *The Cambridge Economic History of Modern Britain, Vol 1 1700-1860*, Cambridge University Press, Cambridge, 2004, at 306.
[253] Hawke G, *Railways and Economic Growth in England and Wales*, 1840-70, Oxford, 1970; reported in Floud and Johnson Vol 1, at 307.

Employment in the traditional trades did not, however, diminish as a result of industrial growth – on the contrary, craft industries such as dress-making or carpentry were required in the industrial centres as much as in the rural village. Manufacturing employment in England in 1831 was dwarfed by employment in retail and trades. The former 'employed 314,000 males aged 20 and over compared with a total of 964,000 engaged in the latter.' The largest individual occupations in the latter in declining order of size in 1831 were: shoemaker, carpenter, tailor, publican, shopkeeper, blacksmith, mason, butcher, bricklayer and baker. The first four employed almost as many as the whole of manufacturing. Furthermore, 'employment in these ten trades collectively grew by 39.3 per cent between 1831 and 1851 a period during which the national population increased by only 26.2 per cent.'[254]

Skilled workers marginalised by small local demand, 'also moved to the towns and enlarged the ranks of the urban working force'[255] to grasp the opportunities of industrialisation. In the 18th Century agricultural innovations increased the supply of food crops to release labour from farming. The introduction of 'green crops and winter-roots made it possible to dispense with the fallowing process.'[256] Agricultural machinery and methods developed in the 1700's, like drill sowing, deep ploughing and machine hoeing, expanded production well into the 1800's further reducing the need for labour. Scientific animal breeding 'more than doubled the average weight of sheep and cattle'. In the 1800's the chemical staples of plant life, potassium, phosphorous and nitrogen were added to soils to make farmers less dependent on soil in its natural state. The introduction of machinery in the late 1800's 'economised the labour required for agricultural operations.'[257]

Population movement to the industrial centres of England, particularly in what was to become the 'industrial north', occurred as manufacturing located near heavy raw materials to reduce transport costs. Once established, large industry used support industries and later, service industries and retail outlets, all drawing workers and professionals to the new towns: 'Coal and Iron ore are magnets which attract all industries ... The industrial revolution shifted the centre of wealth and population from the south-east of England, hitherto the most important district, to the north-west.'[258]

The continual and massive relocation of labour throughout the eighteenth and nineteenth centuries was the natural occurrence of the Industrial Revolution. By 1894, when *Nordenfelt* was decided, market interests once locally confined extended across whole regions and in some cases, such as in *Nordenfelt* itself, internationally. As Lord Herschell commented, 'competition has assumed altogether different proportions in these altered circumstances.'[259]

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[254] Wrigley EA, in Floud and Johnson (eds.), *The Cambridge Economic History of Modern Britain, Vol 1 1700-1860*, Cambridge University Press, Cambridge, 2004, at 90.
[255] Cippola CM, *European Culture and Overseas Expansion*, Penguin Books England, 1970 at 13.
[256] Where a field is left unplanted one year in four to allow soils to 'recover' their vitality.
[257] All quotes in this paragraph from Birnie AB, *An Economic History of Europe 1760-1939,* 4th ed. Methuen London, 1944 at pp13-17.
[258] Birnie AB, *An Economic History of Europe 1760-1939,* 4th ed. Methuen London, 1944 at 10.
[259] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 547.

At the time of *Nordenfelt* to condemn a general restraint of trade per se, was to stifle trade and the innovation – the partial restraint rule could no longer meet the needs of an expanding industrial economy and had to be replaced. The question that faced the House of Lords in 1894, to promote or to retard trade, is one that will come again to confront courts in respect to trade in the cyber-markets.

**2. Technological change and the *Nordenfelt* decision**

The judges in *Nordenfelt* accepted, or more accurately were forced to accept, the impact of technological change upon the restraint of trade doctrine.[260] As Lord Macnaghten commented in respect to technological change: '... judges of former times did not foresee that the discoveries of science, with their practical results, might in time prove general restraints in some case to be perfectly reasonable.'[261]

The test of reasonableness, summarised in the judgment of Lord Ashbourne, came to replace the static partial/general restraint rule which had become unsuitable to the needs of modern commercialism:

> '... all covenants in respect of trade must, I am disposed to think, now ultimately turn upon whether they are reasonable, and whether they exceed what is necessary for the fair protection of the covenantees.'[262]

At the time of *Nordenfelt* the general restraint rule, whether as dicta or ratio, had been applied for over one hundred and eighty years - since the decision in *Mitchell v Reynolds* in 1711. Why then did the law change with *Nordenfelt*? In legal terms the answer concerned the impracticality of continuing a rule which had come to inflexibly favour the interests of the covenantor, to the great cost of the covenantee. This impracticality occurred for no other reason than the continuing technological developments of the previous two centuries, particularly in the transport industries, that had expanded the geographic area over which the covenantee could be seen to possess a legitimate interest worthy of protection.

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[260] In reading the *Nordenfelt* judgment, it is almost impossible not to be struck by the importance in the late nineteenth century of the subject matter underlying the dispute; machine guns, a subject matter that placed the court in a position of considering the 'realpolitik' of enforcing the restraint. The 'general restraint rule' operating at the time required that all restraints without a geographical boundary to be declared void by the court. The restriction on Mr Nordenfelt was a 'general' restriction which, under existing precedent, should not have been enforced. To not enforce the covenant would, however, have placed British machine gun technology into foreign possession. To avoid this consequence the judges in *Nordenfelt* instituted a test of 'reasonableness' and in so doing placed within the hands of the Court the capacity to overcome the general restraint rule', in Britain's interest. It is perhaps likely that the 'general restraint rule' would have yielded to a test of 'reasonableness' in time, but the immediate need, in 1894, was to keep the weaponry under British control. The concern was specifically raised by both Lord Watson and Lord Macnaghten. Lord Macnaghten stating in reference to the public interest component of of reasonableness: 'It can hardly be injurious to the public, that is the British public, that a person is prevented from carrying on a trade in weapons of war abroad.' At [1894] AC 574.

[261] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 571 per Lord Macnaghten.

[262] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 558 per Lord Ashbourne.

Moreover, in the broader policy terms of *realpolitik* the judges of the House of Lords, with little doubt, were cognisant that the needs of empire meant weapons technologies, the machine gun, could not be used to damage Britain's national interest.[263]

In *Nordenfelt*, much of the speech of Lord Herschell focused on how the changing technological environment, particularly of transport, had altered the parameters guiding enforcement:

> 'For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed condition of commerce and of the means of communication which have developed in recent years. To disregard these would be to miss the substance of the rule in blind adherence to its letter. Newcastle-on-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago[264]. An order can be sent to Newcastle more quickly than it could have been transmitted from one end of London to the other, and goods can be conveyed between two cities in a few hours and at a comparatively small cost. ... that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee.'[265]

The 'means of communication' Lord Herschell referred to was, of course, a reference to the effect of developing technologies on the geographic scope of a market. But more importantly, it was the recognition that 'substance' must triumph over the 'adherence to the letter' of the restraint of trade doctrine that continues to apply over successive technological developments.

Within the *Nordenfelt* judgment there are a number of indications that the court was perplexed as to how to appraise the technological developments that had, in effect, expanded the size of the market beyond anything previously envisaged. 'I have only to observe', said Lord Watson of the facts, 'that they are, from a legal standpoint of view, exceptional' such that the judges of the past 'never imagined that any business should attain such a wide

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[263] To give context to this concern, it is worth considering the number of military campaigns the British were involved in over the decades prior to the *Nordenfelt* judgment. From 1840 to 1894, Britain had engaged in wars with China (the Opium wars), the Sikhs in India, had fought in South Africa, in Burma, the Crimea against Russia, against the Maori in New Zealand, the Japanese in naval combat, in Bhutan and Central Africa, in the Persian Gulf and Syria, Sierra Leone, Gambia, Uganda, Nigeria, Crete and Borneo and several other campaigns: (Farwell B, *Queen Victoria's Little Wars*, Allen Lane, 1974. There were in fact 72 British military campaigns in the period of Queen Victoria's reign). During this period England remained in continual competition with France and Germany to project her trading and political influence on the world. As Joseph Chamberlain commented to the Birmingham Chamber of Commerce in 1896: 'The Foreign Office and the Colonial Office are chiefly engaged in finding new markets and defending old ones. The War Office and the Admiralty are mostly occupied in preparations for the defence of these markets, and for the protection of our commerce. ... Therefore it is not too much to say that commerce is the greatest of all political interests.' (Reported in Ferguson N, *Empire: How Britain Made the Modern World*, Penguin Books, London, 2003 at 255).

[264] Newcastle is approximately 400 km from London.

[265] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 547 per Lord Herschell.

dimension that it could not be reasonably protected from the invasion of the seller, except by subjecting him to a restraint unlimited in space.'[266]

Lord Ashbourne, on the basis that 'trade is ever finding new outlets and methods', believed the law must harmonise with the requirements of the times such that 'all covenants in respect of trade must, I am disposed to think, now ultimately turn upon whether they are reasonable.'[267]

A clear link between technological change and the need to modify the test for enforcement of a trade restraint is also found in the judgement of Lord Macnaghten who explained that the adoption of the general restraint rule occurred 'because nobody imagined in those says that a general restraint could be reasonable, not because there was any interest of distinction between the two.'[268]

The theme was continued by Lord Watson: 'Certainly it is no wonder that judges of former times did not foresee that the discoveries of science, with their practical results, might in time prove general restraints in some case to be perfectly reasonable.'[269]

Lord Morris in his brief speech also considered the impact of the changing technological environment in terms of time and geographical area:

> 'The generality of time or space must always be a most important factor in the consideration of reasonableness though not per se a decisive test.'[270]

In this last quote we see the partiality of a restraint, once the sole determinant of enforceability, now a component going only to the question of reasonableness.

Often it is argued that the judgment in *Nordenfelt* renounced the philosophy of laissez-faire which had guided developments in the restraint of trade doctrine from the end of the Mercantilist period. This is true; *Nordenfelt* created a new paradigm the value of which is a flexibility of application compared to the strict formalism that characterised the restraint doctrine over the previous several centuries. Before *Nordenfelt* restraints of trade were not judged according to the reasonableness of the contractual restraint but by and large according

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[266] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 553 per Lord Watson. A level of judicial notice of the background facts could not have failed to have been taken by the judges in *Nordenfelt*. The social position held my members of the House of Lords, their education and their circle of acquaintances, makes unimaginable that the judges' were not cognisant of the importance of weaponry to Britain and Empire. To illustrate, when the Maxim Company was established in 1884 Lord Rothschild was appointed to the board. In 1888 'his bank financed the £1.9 million merger of the Maxim Company with the Nordenfelt Guns and Ammunition Company.' (Ferguson N, *Empire: How Britain Made the Modern World*, Penguin Books, 2003 at 226-7). Cecil Rhodes, a close friend of Rothschild, applied the Maxim gun to establish influence over what was to become Rhodesia. When Hiram Maxim first demonstrated his machine gun in his London workshop those who accepted the invitation included the Prince of Wales, the Duke of Edinburgh, and the military Commander in Chief, the Duke of Cambridge. Today's judges are just as likely, if not more so, to be aware of the advances in technology that have altered the commercial landscape.

[267] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 558 per Lord Ashbourne.

[268] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 564 per Lord Macnaghten.

[269] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 571 per Lord Watson.

[270] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 575 per Lord Morris.

to the practicalities and consequences of removing the able bodied from the workforce under a generalised policy of enforcement.

A restraint imposed on contractors exceeding the bounds of the local parish was rightly unenforceable in an era where the means of transport was foot or horse. Following *Mitchell v Reynolds*, when an apprentice became a tradesman in an eighteenth century English village and was restrained from competing against his master in the local area, the restraint was upheld as reasonable and the journeyman was forced to locate to a neighbouring village. With the development of rail, a restraint on employment within regional villages or towns along the connecting rail network could well be reasonable.

In similar fashion, traders' interests were predominantly local. Advances in transport and communications permitted entrepreneurs to establish business interests in several towns and regions. The goodwill of a business required protection from a competing vendor not only at the place of manufacture but at any place of sale.

And so, the general restraint rule became impractical in a world where technology had 'annihilated time and space'. The alteration to the restraint of trade rules under *Nordenfelt* was more than a mere response to technological developments; it was an alteration necessary to preserve the usefulness of the doctrine itself and, in so doing, ensure that industrialists and employers of the time could continue to protect their legitimate interests. In the eyes of the court, and despite the public policy rationale of freedom of trade, the preservation of good will, confidential information and customer lists were deemed worthy of protection.

There are two aspects of the *Nordenfelt* decision that are of particular interest in the present technological age. One concerned the pre-eminence of the covenantee's position vis a vis the covenantor. That is, the partial restraint rule had to be replaced where, in the words of Lord Herschell, it was 'essential if there is to be reasonable protection to the covenantee.'[271] The other concerned the role of public policy which could not permit a restraint to be enforced if it 'was injurious to the public interest.'[272]

In respect to these legal positions, a pertinent question is this: Does the public interest now dictate that restraints on a global scale, including the multiple, diverse and often minute markets of cyberspace, require a new approach to the restraint of trade doctrine?

In cyberspace the village is the world and for the restrained tradesman there is no next village. In some industries there is, arguably, no longer a geographically delineated market. The restraint of trade doctrine in respect to such circumstances is at a point of impasse.

## 10. Conclusion

At the time of *Dyer's case* and *Colgate v Bachelor* a restraint imposed on a worker in his or her parish was in effect a general restraint. The parish was in reality the whole of the world

[271] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 547 per Lord Herschell.
[272] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 549 per Lord Herschell.

for the vast majority of the population. To sustain a trade restraint where labour was immobile was merely to drive a covenantor from the market entirely.

By the time of *Mitchell v Reynolds* in 1711, technological advances in agriculture, in industry, in chemistry, education and business management – in virtually all areas of commercial endeavour – served in time to make practical the enforcement of a partial restraint.

A restraint of trade extending beyond the local parish was unenforceable in an era when transport was by foot or horse. Over time with further developments in rail transport, a restraint on employment extending into the hinterland of a village or parish, or to towns along the connecting rail network could well be necessary to protect the covenantee's interests.

Trebilcock, in typography parallel to that of TH Marshall, believes the restraint of trade doctrine was dominated by the prevailing philosophical paradigms of each era from the Elizabethan period. Each philosophy was:

> 'labelled by reference to the conception of the public good – hence the conception of the appropriate economic role of the state, including the judiciary – which dominated in each one: the mercantilist period, from the Elizabethan era to about 1800; the laissez-faire period, from about 1800 to the turn of the twentieth century; and the modern period, running for the end of the laissez-faire period to the present day.'[273]

There can be little doubt that certain schools of thought in philosophy, economics and politics were known to the well-read judges of the 1800's. However, awareness was an entirely different proposition to practice. As argued, any claim that judges based the enforcement of trade restraints on philosophies such as laissez-faire is overstated, if not in doubt. The point finds support in comments of Lord Diplock in *A Schroeder Music Publishing Ltd v Macaulay*:[274]

> 'If one looks at the reasoning of the 19th century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it, and upheld it if they thought it was not.'

With respect to policy, the historical emphasis has always been on the practical; on liberalising trade rather than serving the mandates of inconstant philosophical thought.[275] It can therefore be proposed that restraints unreasonable in geographic reach became, over time,

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[273] Trebilcock MJ, *The Common Law of Restraint of Trade – A Legal and Economic Analysis*. Law Book Co, Sydney, 1986 at 3.
[274] *A Schroeder Music Publishing Ltd v Macaulay* [1974] 3 All ER 616 at 623.
[275] An historical approach transposed to the present: 'The application of the doctrine of restraint of trade does not depend "on legal niceties of theoretical possibilities" but is to be determined "by reference to the practical working of the restraint, irrespective of its legal form.' *Amoco Australia Pty Ltd v Rocca Bros* (1973) 1 ALR 385 at 406.

reasonable as technological developments allowed the public easy access to neighbouring towns.

The general consequence of *Mitchell v Reynolds* was that a graduate apprentice in an eighteenth century English village, facing the enforcement of a master's restraint would of necessity locate to a neighbouring village. Today, the village is the world and for the restrained covenantor there is no next village. In some industries there is no longer a precisely delineated geographic market. In such a case the market in some industries, such those of cyberspace, encompasses the globe. For the covenantee who markets to the world, a partial restraint of trade is of little value. How the 19th Century rules examined above came to be applied in the more confined world of late 20th Century sport will be the subject of the next chapter.

# Chapter 4: Restraints of Trade in Sport

## 1. Introduction

The common law doctrine of restraint of trade has been described as evolutionary, a law influenced by the prevailing philosophies of the day.[276] This description was never truer than in the judicial approach to sport under the restraint of trade doctrine. 'At its inception', one commentator correctly stated, 'the purpose of the doctrine was primarily to protect the right ... of individuals to utilise their labour.'[277] Although this right existed in general from the 'inception' of the restraint of trade doctrine it was not afforded Australian athletes until the case of *Buckley v Tutty* before the High Court of Australia in 1971.[278]

To fully understand the restraint of trade doctrine as it applies to sport, an appreciation of the evolution in judicial thought that came to recognise sport as an industry is necessary. This Chapter examines a period in time when developments in the Australian communications industries, in particular the medium of television, forced upon the judiciary a change in mindset that saw sport 'the pastime' become sport 'the trade' and amenable to the restraint of trade doctrine. By extension advances in digital media technologies over the past 10 years will again, it is argued, necessitate a review of the restraint of trade doctrine as it applies to sport generally and to endorsement restraints in particular.

Prior to the 1970's, sport in Australia was thought by the judiciary to be insufficiently commercial in character to fall within the jurisdiction of the restraint of trade doctrine. From the 1970's on, due largely to developments in the communications industries, sport took on a commercial outlook and began to market itself as a form of product, prompting a judicial reappraisal. The effective marketing of sport required close contests between teams to ensure spectator, and later, television viewer interest. To achieve this end restraints of trade, usually in the form of a salary cap, residency requirements or player draft, were introduced to ensure all teams had a sufficient number of good players to be competitive. As the maintenance of 'competitive balance' came to be recognised as an interest worthy of protection, so too, as a matter of consistency, were athletes empowered to challenge restraints of trade imposed on them by their sporting organisations.

Developments in the communications technologies during the 1970's in large part drove the creation of a modern 'endorsement market' and in consequence prompted sporting organisations to impose restraints on their athletes to limit competition in the endorsement market.

This thesis concerns restraints imposed on athlete endorsement. The wider question therefore is the extent to which, if at all, a 'sports application' that historically favoured the interests of sporting organisations remains.

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[276] Atiyah PS, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979, at 697.
[277] Trebilcock M, *The Common Law Restraint of Trade*, Law Book Co, Sydney 1986, at 1.
[278] *Buckley v Tutty* (1971) 125 CLR 353.

## 2. The 'doctrinal' recognition of sport: 1969-1971

Sport in Australia, with its roots in leisure activity had, until *Buckley v Tutty*[279] in 1971, been unworthy of the nomenclature 'trade' and in consequence relief under the restraint of trade doctrine was denied covenantor athletes aggrieved at restrictions placed on their earning capacities by their sporting organisations. As the commerciality of sport increased, so too were courts more willing to look upon sport as a 'trade' to which the restraint of trade doctrine should apply. Today, major sport has moved beyond its claimed status of quasi-charitable institution serving community needs to a complex commercial industry trading a product on national and international markets.

That sport between 1969 and 1971 came to be accepted as 'trade' is argued to be due to two related forces:

1. The development of sport from a semi-professional undertaking to that of an industry employing fully professional athletes, and
2. An acceptance by judges that the era where sport as securing a purely social function had passed.

As outlined in Chapter Three, technological developments drove the policy positioning of the restraint of trade doctrine from *Dyers case* in 1414 to *Nordenfelt* in 1894. In a similar way both the movement to professionalism and the ultimate acceptance by judges that modern sport was a trade based industry is a product of technology. Neither event, it is suggested, could have occurred without the introduction of the modern telecommunications systems that created a market where none previously existed.

The sporting cases, it might be noted in passing, are one of the few areas of commercial endeavour where all three arms of *Nordenfelt*, the interests of both parties and the interests of the public, are in legitimate contention. The interests of the parties are well known. The interests of the public are less obvious, ranging from the 'opportunity to see first class cricketers in action'[280] to the citizens of the 'young country' of New Zealand having 'the opportunity of gaining wider experience in their chosen field (rugby league) in the larger overseas countries'[281] to perhaps the mere availability of a team to support.

### 2.1 The 'special character' of sport

Burchett J in *News Limited v ARL* identified, at least in part, the 'special character' with which sports under the restraint of trade doctrine had been traditionally viewed:

> 'Like, for example, those in charge of a church or hospital, the board of the League is motivated in large part by considerations other than the pursuit of profit. It is concerned with the preservation and enhancement of the traditions of the game, just as

[279] *Buckley v Tutty* (1971) 125 CLR 353.
[280] *Hughes v Western Australian Cricket Association (Inc)* 1986 ATPR 40-376 at 48-055.
[281] *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547 at 555.

> a hospital has a religious and moral mission – the Good Samaritan delayed his business, and expended some of his funds to serve a higher duty.' [282]

Burchett J believed sport served a type of philanthropic function (a view demolished on appeal but one nonetheless exemplifying the 'non-trade' approach to sports restraints prior to the 1970's). In similar fashion, despite overwhelming factual indications that rugby league had reached full commercial status, in 1969, on the cusp of a paradigm shift, Hardie J in *Elford v Buckley*[283] could not perceive sport was not a trade to which the restraint of trade doctrine should attach. And yet within two years a complete reversal of opinion was expressed by the High Court of Australia.

The Australian approach to sport and competition law is mirrored in foreign jurisdictions. The 1922 United States case of *Federal Baseball Club v National League*[284] is perhaps the most influential competition-law judgment in sport. The Federal Baseball Club (FBC) was a member of the Federal Baseball League (FBL), a league established as the third major league baseball competition in the United States and a rival to the American League and the National League which had been established previously.[285] The established leagues in an apparent effort to ward off the competitive threat, blacklisted players in the FBL and were rumoured, although not proved, to have bought FBL teams for the purpose of removing them from the FBL.

Although *Federal Baseball* as a Supreme Court decision cemented in place the view of baseball as a non-trade activity, the judicial attitude behind the determination had been established several years earlier when, in 1915 the FBL attempted to raid the player rosters of the Major League clubs. It was largely unsuccessful in acquiring the players it wanted and sought, in response to intimidating conduct of the Major's, relief before the Illinois District Court claiming restraint of trade. Landis J (later baseball's first Commissioner) said, 'I am shocked because you call playing baseball labour.' A compromise was reached between the baseball entities but did not last. The matter returned to the District Court of Columbia which said, 'The fact that the owners produce baseball games as a source of profit … cannot change the character of the games. They are still sport not trade.'[286]

According to Schaaf:

> 'Those words haunted players for a long time. It gave the existing major leagues an effective monopoly on baseball.'[287]

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[282] *News Limited v Australian Rugby Football League* (1996) 135 ALR 33; Whilst the decision of Burchett J was overruled on appeal the sentiment remains an accurate appraisal of how sport had been viewed by the judiciary in what might be called the 'pastime era'.
[283] *Elford v Buckley* [1969] 2 NSWLR at 170 (*Elford*).
[284] *Federal Baseball Club v National League* 259 US 200 (1922) (*Federal Baseball*).
[285] According to Devine, baseball was an amateur game until 1865 when, 'the Philadelphia Athletics lured second baseman Albert Reach for the Brooklyn Atlantics in return of compensation. ... By 1869 the Red Stockings of Cincinnati had ten salaried players, with salaries ranging from $600 to $1400.' JR Devine Baseball's Labour wars in Historical Context ... (1994-1995) 5 *Marq Sports LJ* 1 at 7
[286] Reported in Schaaf P, '*Sports, Inc.100 Years of Sports Business*', Prometheus Books, New York, 2004 at 57.
[287] Schaaf P, '*Sports, Inc.100 Years of Sports Business*' Prometheus Books, New York, 2004 at 57.

The precedent had been set and despite changing commercial realities the decision was to remain. In 1972 in *Flood v Kuhn* the US Supreme Court noted that 'even though others might regard this as "unrealistic, inconsistent, or illogical" the aberration is an established one ... It is an aberration that has been with us for half a century, one heretofore deemed fully entitled to the benefit of stare decisis. ... We continue to loath ... to overturn those cases judicially when Congress, by its positive inaction, has allowed the decisions to stand for so long.'[288] Although the Supreme Court awaited legislative intervention its members may not have expected the response that came. According to Quirk, in testimony to an intransigent view that sport was somehow different, 'Between 1953 and 1972 more than fifty bills were introduced in Congress dealing with the question of extending antitrust regulation to baseball. Yet Congress failed to pass any of these measures.'[289] It is interesting to note that according to Dabscheck, although the decision went against Flood, 'his action was an important step along the path to economic freedom of both baseball players and those from other professional sports.'[290]

At other times this special character manifests itself in a subtle personal interest the judge takes in 'advising' the parties to sports related cases, as Wilberforce J appeared to do in *Eastham v Newcastle United Football Club*: '... it does not appear to me to be so very objectionable. … There is a restraint here but it would not take much to justify it. The case for it is really this … Looked at this way the system might be said to be in the interests of players themselves.'[291] Or as the High Court stated in *Tutty*: 'It may nevertheless be reasonable to lay down some qualifications for membership of a club, or to impose some restrictions on the transfer of professional players from one club to another or on the extent to which a club may entice players away from another club. It is not for a court to advise in advance what restraints would be reasonable; … In our opinion the rules now under consideration go beyond what is reasonable …'[292] Whilst not wishing to give 'advice in advance', the Court gave a fairly strong hint that, with a bit of tinkering, the restraint could be made reasonable.

Most prominently, sporting organisations are recognised as sharing a mutual interest in a 'balanced' competition between on-field teams in order to promote public interest and advertising revenue. Although teams compete to win and are competitive in providing the service of sport to the public for reward, courts have expressed the view that a legitimate interest exists in preserving a competitive balance between teams; one that is secured through the imposition a mutually agreed restraint across an entire league.[293] Mutuality of interest is of course unusual for business rivals (as teams competing for players and sponsors undoubtedly are) but in the case of sport is merely reflective of a distinctive character.

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[288] *Flood v Kuhn* 407 US 258 (1972) , 92 S Ct, 32 L.Ed2d 728 reported in Weiler and Roberts op cit at 152.
[289] Reported in Quirk (ed) *Sports and the Law, Major Legal Cases,* Garland Publishing, New York, 1996, at 158.
[290] Dabscheck B, *Reading Baseball*, 2011, Fitness Information Technology, WVU at 36.
[291] *Eastham v Newcastle United Football Club* [1964] Ch 413 at437.
[292] *Buckley v Tutty* (1971) 125 CLR 353 at 378.
[293] See for example, *Buckley v Tutty* (1971) 125 CLR 353; *Adamson and Others v NSW Rugby League Ltd* (1991) 103 ALR 319.

This thesis concerns restraints placed on athlete endorsement. The existence, or otherwise, of a continuing special character to sport has implications as to how the restraint of trade doctrine will be applied to restraints on athlete endorsement. It is argued in this Chapter that, with certain exceptions in respect to competitive balance, sport is now a fully commercial enterprise where the restraint of trade doctrine is to be applied as forcefully as in other industry groups.

## 3. The tipping point: from pastime to 'trade'

To contextualise the movement of sport from pastime to trade in Australia and the circumstances that underpinned the shift, it is necessary to briefly mention the 1964 English case of *Eastham v Newcastle United Football Club*,[294] the first determination to recognise an athlete's rights under the restraint of trade doctrine. The Football Association used a 'retain or transfer' system similar to that operating in the NSW Rugby League at the time. The retention system operated in tandem with a 'transfer system' to grant a club the right to charge a 'transfer fee' when one of its players was acquired by another club. A player on the retain list could not play for anyone else and could, in fact, be left in limbo, neither playing nor transferred. For present purposes it is sufficient to note that Wilberforce J found the 'retention system' substantially interfered with the player Eastham's right to seek employment and that the restraints were 'objectionable' under the restraint of trade doctrine.

*Elford v Buckley*,[295] the first case in Australia to consider the impact of restraints of trade in sport, stands in sharp contrast to the decision in *Eastham*. Hardie J found the New South Wales Rugby League in utilising a 'retain or transfer system' had no case to answer under the restraint of trade doctrine. Curiously, the restraint in question did not, in his Honour's opinion, apply to what on any factual measure were onerous restrictions on the player's capacity to freely trade his athletic services.

In a purely commercial sense the decision is inexplicable; the indicia of a restraint were present and the precedent of the English case of *Eastham v Newcastle United Football Club* should have assured the success of the player, Elford, over League president, Buckley.

Despite these facts that the judgment of Hardie J can be explained as a case on the threshold of change as sport embraced commercialism through the communications technologies to move from amateur and semi-professional to fully professional. Hardie J, it is argued, maintained a mindset of the past that was imbued with the abiding notion that sport was an extension of 19th Century social goals and defence policy.

The commerciality of Australian sport is inextricably connected to the mass audiences of television. Without the media platform of television, and more recently the visual digital platforms, a sporting organisation's income is confined to gate receipts - an experience shared with the United States: 'The only significant revenue source in the first phase of the modern

[294] *Eastham v Newcastle United Football Club* [1964] Ch 413.
[295] *Elford v Buckley* [1969] 2 NSWLR at 170.

sports industry was from attendance, or the gate. Promoters and owners would sell tickets on the day of the game and that was their revenue stream.'[296]

It is suggested below that as media technologies innovated in the period leading up to *Elford*, sport became more saleable, prompting its reclassification to a form of trade. During this period sports marketing moved beyond the confines of the local sporting oval to embrace the medium of television. The popularity of sport guaranteed an audience and an audience guaranteed the interest of advertisers. Although television existed at the time of *Elford*, the viewing audience was less than absolute and programming rarely stretched beyond midday to midnight. Lacking a large populace and without the penetration of mass-media, sport in Australia could be little more than semi-professional. National coverage and colour television were for the future. For Hardie J, however, hearing *Elford* in 1969 a critical mass, a tipping-point, was yet to be reached. Indeed, when reading the case, one is struck by Justice Hardie's complete denial of any aspect of sport as trade.

Two years later the High Court of Australia in *Buckley v Tutty*[297] criticised Justice Hardie's decision describing it as 'erroneous' and a determination that 'should be overruled'. How, it may be asked, could a judge, given the clear indicia proclaiming the commerciality of sport, be so wide of the mark? It is postulated below that Hardie J was merely applying the restraint of trade doctrine in accordance with an era of sport to the immediate past, an era where sport was a pastime and where technology was yet to give sport broad marketability.

It was seen in the *Nordenfelt* case that by the late 1800's a tipping point had been reached whereby the doctrines of the past, now under the influence of modern technology, gave way to a test of reasonableness. A similar tipping point occurred with the innovations in television technologies that made of sport a trade rather than a pastime. As a media-orientated industry, on-going technological innovations see sport today faced with the challenge of facilitating the right of covenantors to trade in the rapidly developing global communications web. What, in such circumstances, are the lessons of the past?

## 4. *Elford v Buckley*: a decision of a past era

*Elford v Buckley*[298] exemplified a judicial approach that classified sport as a pastime rather than a vehicle of commerce or trade. What is clear from *Elford* is that Hardie J did not see the playing of rugby league as a profession or the organisation of the League as a form of business susceptible to the restraint of trade doctrine. With the hindsight of *Buckley v Tutty*, a case of largely parallel facts heard two years after *Elford*, the decision of Hardie J appears almost absurd – there was a restraint on Mr Elford's earning capacity which by any standard was egregious. Although the High Court in *Tutty* overruled Hardie J, and in doing so was critical of his Honour's decision, there is another way to look at Justice Hardie's determination in *Elford*: as a decision on the cusp of a change in thinking that was yet to materialise – a change prompted by technological developments in the communications media.

[296] Schaaf P, *Sports Inc; 100 Years of Sports Business*, Prometheus Books, New York, 2004.
[297] *Buckley v Tutty* (1971) 125 CLR 353.
[298] *Elford v Buckley* [1969] 2 NSWLR at 170.

League player Elford was restrained by the NSW Rugby League from playing 'for a club of his own choice' under the League's constitution. His club possessed the contractual power, at its discretion, to either retain him or transfer him. A player on what was known as the 'transfer list' could be traded for a 'transfer fee' to another club. A player on the 'retain list', lacking the contractual power to force his inclusion or exclusion from a team, had to remain with his club irrespective of his wishes. Even when his contract concluded a player was not permitted to 'participate with another club in either competition or trial fixtures'[299] unless placed on his club's transfer list. These terms meant a non-contracted player was in limbo; neither playing the game nor on the transfer list.

### 4.1 The League as an unincorporated voluntary association

Hardie J dismissed recourse to the restraint of trade doctrine for the primary reason that the League was a voluntary association existing to promote the game of rugby league. From this fact all other rationales flow, including his Honour's finding that the Club and the Player were not in an employment relationship. The League was loosely characterised by Hardie J as a form of community service encouraging participation in the sport of rugby league. So classified, the League and its associated clubs could not, largely by definition, exist as trading entities for the purposes of the restraint of trade doctrine.

Being structured as a voluntary association supported the view that 'the Club and League are organisations of persons, both players and supporters, whose predominant interest and objectives are participation, either passive or active, in the sport of Rugby League Football, the encouragement of training of junior footballers, and the general promotion of the game.'[300] Rugby League did not thereby belong to the players alone but to those who supported the game, 'passive' and 'active' alike, all working towards the object of promoting the game.

Because of the 'nature, structure and functions of the League and the Balmain Club, and the numerical strength and diversity of their membership', Hardie J found the retain or transfer rules did 'not fall within the category of employment contracts or other obligation-creating transactions or instruments appropriate for the application of the doctrine of restraint of trade'.[301]

### 4.2 Not an employment relationship

Although players were paid for their services, neither the League nor clubs were employers: '... there are no contracts of employment between the clubs and players; there are no corporate entities involved, players and supports and honorary administrators are all members of the clubs and the League.'[302] It is worth noting that the administrators of the League were not themselves paid but rather were 'honorary'.

Hardie J drew a sharp distinction between an employer and an association of like minded individuals who, in forming a voluntary association, merely created a convenient means to

[299] *Elford v Buckley* [1969] 2 NSWLR at 173.
[300] *Elford v Buckley* [1969] 2 NSWLR at 176.
[301] *Elford v Buckley* [1969] 2 NSWLR at 177-178.
[302] *Elford v Buckley* [1969] 2 NSWLR at 177.

administer their joint interests: The 'voluntary associations or clubs to which the playing and non-playing members belong are in reality the means of organising the sport within the League and under its rules.' The players were not employees but 'members' of the organisation. The structure of the League had nothing to do with employment and hence, in his Honour's opinion, the restraint of trade doctrine was not applicable.

Although Hardie J recognised that the players and clubs 'intended to create enforceable legal obligations'[303] these were not based on mutual obligations between employer and employee - without employment, so the judgment reads, there could be no recourse to the restraint of trade doctrine. This is clearly wrong. Although later cases such as *Grieg v Insole*[304] and *Buckley v Tutty* made clear that the restraint of trade doctrine in respect of sport did not require an employment relationship between athlete and organisation there were, nevertheless, earlier non-sport cases which affirmed that the restraint of trade doctrine was not dependent on a contractual relationship between parties. In fact, the High Court in *Tutty* described the principle as existing through 'both ancient and modern authority for the proposition that the rules as to restraint of trade apply to all restraints, howsoever imposed', citing a number of cases.[305] The failure to rely upon this 'ancient and modern authority' testifies to a mindset that clearly places sport apart from other forms of industry that are more readily classifiable as 'trade'.

Of course the 'retain or transfer system' *did* limit the financial rewards available to players; a player could not place himself on the open market and accept bids for his services. However, this fact was apparently of little import as the League and the clubs, as voluntary associations, were, according to Hardie J, merely a means of organisation.

The finding in *Elford*, despite being later criticised by the High Court is not, though, without factual logic. The question that confronted Hardie J, in fact and law, was whether the playing of Rugby League was work for the purposes of the restraint of trade doctrine. A number of indicators suggest that it was not.

To Hardie J professional rugby league was not a full time job; rather a player's earnings were merely a 'supplement to income.'[306] On a factual basis his Honour's view is correct; the wages earned by the players of rugby league were relatively small during the period of *Elford* and of *Tutty*. According to Dabscheck, league player Dennis Tutty (of *Buckley v Tutty*) 'entered into a three year contract with Balmain. ... for a signing on fee of £500 for each season, plus up to £25 to £30 for first grade games. In all probability, during the period1965 to 1967 the income he earnt ranged from £800 to £950 ($1,600 to $1,900) per season. By way of comparison, in July 1966 the male minimum wage was increased to $36.37 per week; and in July 1967 to $37.37 a week.'[307] The higher yearly wage of $1,900 equates to $36.83 a

[303] *Elford v Buckley* [1969] 2 NSWLR at 177.
[304] *Grieg v Insole* [1978] 3 All ER 449.
[305] *Buckley v Tutty* (1971) 125 CLR 353 at [14]. Non-contract cases included: *McEllistrim v Ballymacelligott Cooperative Agricultural Dairy Society Ltd* (1919) AC 548 and *Esso Petroleum v Harpers Garage (Stourport) Ltd* (1968) AC 269.
[306] *Elford v Buckley* [1969] 2 NSWLR at 175.
[307] Dabscheck B, 'Righting a wrong: Dennis Tutty and his struggle against the New South Wales Rugby League', 2009 4(1) *ANZSLJ* 145 at 153; quoting Basic Wage, Margins and Total Wage Cases of 1966 (1966) 115 CAR 93; National Wage Case 1967 (1967) 118 CAR 655.

week – a wage below the average weekly earnings of a male worker in 1967. In fact Tutty's league earnings paid him less per week that his full time job as a storeman with the Egg Marketing Board where 'his take home pay was $45 to $46 a week.'[308]

Author Roy Masters when interviewing 'one of the games legends', Arthur Beetson, recorded facts germane to the period of *Tutty*. Beetson commented that Balmain (1966-70), '... had me five years for ... nothing. In that time I'd be lucky to have earned $10,000. Three of those five years I'd played for Australia.'[309]

The hours of rugby league 'work' was far less than that found in ordinary full time occupations again suggesting a paid hobby: 'If for no other reason than their secular employment, rugby league players traditionally trained for two hours, twice a week, with an expectation that they would do additional self-directed training themselves.'[310]

These facts contrast with those in *Eastham*, where the competition was 'organised on a fully commercial and profit making basis, employing full time professional soccer players.'[311] The NSW Rugby League and its associated clubs on the other hand were 'organisations of persons, both players and supporters, whose predominant interests and objectives are participation, either active or passive, in the sport of Rugby league football, the encouragement and training of junior footballers, and the general promotion of the game.'[312]

Whilst *Eastham* was a clear precedent supporting Elford's position, there were other cases, earlier cases, that may well have persuaded Hardie J to find against the player Elford. Although not argued in *Elford*, the English 'football' case of *Walker v Crystal Palace Football Club* drew a clear distinction between sport as a pastime and sport as a profession: 'It may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work.'[313] This statement of Fletcher Moulton LJ initially appears to support Elford's case but when examined closely is, in reality, a comparison between the professional and the semi-professional. The facts in *Walker* characterise the player concerned as a full time professional footballer, a point which if known to Hardie J could be assumed to have had some influence on his characterisation of Mr Elford as a part-timer.

*Walker v Crystal Palace Football Club* is not a restraint of trade case but is nonetheless useful for its description of the professional athlete, Walker, as a 'worker'. The plaintiff footballer was injured on his way to training and sought compensation under the Workmen's Compensation Act. Fletcher Moulton LJ found the relationship between club and player to be one of employment: 'Here is a company that carries on the game of football as a trade. ... they must of course have a team ... This they obtain by entering into contracts of service with definite persons who are called professional football players ...'[314]

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[308] Dabscheck B, 'Righting a wrong: Dennis Tutty and his struggle against the New South Wales Rugby League', 2009 4(1) *ANZSLJ* 145 at 154.
[309] Masters R, *Inside League*, Pan Books, Sydney1990, at 19.
[310] Dabscheck B, 'Righting a wrong: Dennis Tutty and his struggle against the New South Wales Rugby League', 2009 4(1) *ANZSLJ* 145 at 153.
[311] *Elford v Buckley* [1969] 2 NSWLR at 176.
[312] *Elford v Buckley* [1969] 2 NSWLR at 176.
[313] *Walker v Crystal Palace Football Club Ltd* (1910) 1 KB 87 at 93 (*Walker*) per Fletcher Moulton LJ.
[314] *Walker Crystal Palace Football Club Ltd* (1910) 1 KB 87 at 92.

The English Court of Appeal found for Walker. As the case did not concern a restraint of trade there is difficulty in extrapolating beyond the description of sport as work. What is enlightening, though, is the Court's use of indicia of employment, such as control over the employee's workday, rather than the subject matter of the employment, sport, as determining factors. This approach was not one afforded the rugby league player John Elford in the first restraint of trade in sport case to be heard in Australia.

### 4.3 The obligations of Membership

Intertwined with their status as non-employees was the players' alternate classification as 'members' of their Club and the League. As a voluntary association the rules of the League existed for the benefit the game, the supporters, and the players as members, not for the players as individuals. His Honour stated:

> 'The qualification system may operate to limit the pecuniary benefits and rewards which a playing member of the League is able to earn. However, such limitations flow from membership of the League and are for the benefit of all members, ie both players (professionals, amateurs and juniors) and supporters, and for the benefit of the sport.'[315]

Although Hardie J recognised that the players were paid, on the basis that their income was due more to the League's organisational skills than to the players trading their athletic skills for personal gain, his Honour found the restraint on Elford's capacity to trade was enforceable:

> '... the League which provides the playing professional members with the opportunity to use their athletic talents and skill with profit to themselves is under no legal duty to provide an organisation and a competition designed to enable playing members to sell their professional prowess and skill at the highest figure which the law of supply and demand can produce.'[316]

Rather than limiting the earnings of players, Hardie J found the rules: '... create rather than destroy opportunities for professional footballers, including the plaintiff, to utilise their talents for their own pecuniary profit.'[317] In other words, unless the League bothered to provide a competition, the players would earn no money at all.

The judgment of Hardie J transmits a sense that players should be grateful for the opportunity to participate in rugby league for reward. Objection was to bite the hand that feeds: 'the plaintiff ... has taken the full benefit of the rights and privileges as a Rugby League professional ... and is now seeking to take benefits ... greater than and different from those available to (other) playing members under the rules of the League.'[318]

The statement typifies an attitude to sport in Australia at the time; to play sport for money was a privilege far from a right enforceable at law. This attitude is reflected in statements

[315] *Elford v Buckley* [1969] 2 NSWLR at 177.
[316] *Elford v Buckley* [1969] 2 NSWLR at 177.
[317] *Elford v Buckley* [1969] 2 NSWLR at 177.
[318] *Elford v Buckley* [1969] 2 NSWLR at 177.

made by the NSW Rugby League in *Tutty* and responded to by the High Court in that case: 'It is not to the point to say that player may resign from the League. If he does resign he may perhaps obtain employment as a labourer or as a cricketer but he will not be able to obtain employment as a professional rugby league footballer ...'[319] The League's statement is ironically addressed to rugby league players dissatisfied with the rules who should, given their dissatisfaction, contemplate less glamorous employment on a building site.

Both Mr Tutty and Mr Elford sought relief without the backing of their team mates. The attitude of the League to players was 'take it or leave it'. Any challenge to the existing rules could result in their dismissal from a high profile profession. Limitations imposed under such conditions were described in *Mason v Provident Clothing* as restraints in terror: 'It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of the master.'[320] If nothing else the approach of the League was high-handed.

### 4.4 Not a form of trade

*Eastham v Newcastle Football Club*, a precedent favouring players who suffered under a similar trade restraint in England, was argued strenuously by Elford but in the opinion of Hardie J was inapplicable because the facts 'differed in a material sense'. That is, *Eastham* was applicable to 'an association of limited companies organised on a fully commercial and profit-making basis; employing full time professional soccer players under service agreements.'[321] Elford, as discussed, was a semi-professional playing in a competition organised by a voluntary association.

Although the contractual terms indicated an intention to create legal relations between player and club, Hardie J found the restraint of trade doctrine was not available. In fact, the doctrine was entirely avoided: 'the provisions ... do not fall within the category of employment contracts or other obligation-creating transactions or instruments appropriate for the application of the doctrine of restraint of trade.'[322]

### 4.5 The value of *Elford*

On almost every count Hardie J *could* have found for the player rather than the League. With the restraint clearly impinging on Elford's earning capacity, a contractual relationship between covenantor and covenantee and the available precedent of *Eastham v Newcastle United Football Club,* Hardie J steadfastly refused to acknowledge the playing of professional rugby league as a 'trade' amenable to the restraint of trade doctrine. Why, in the circumstances, would this be so? Clearly his Honour did not see the activity to which the restraint attached, sport, as a trade for the purposes of the restraint of trade doctrine – but why not?

[319] *Buckley v Tutty* (1971) 125 CLR 353 at 373.
[320] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 745.
[321] *Elford v Buckley* [1969] 2 NSWLR at 175.
[322] *Elford v Buckley* [1969] 2 NSWLR at 177-178.

Barely two years after *Elford*, in a case of almost identical facts, the High Court in *Buckley v Tutty* found in favour of the player to declare the decision of Hardie J 'erroneous'.[323] The precedent of *Elford*, the first case in Australia dealing with restraints in sport, was expunged from the record in a single sentence of a derisive joint judgment.

What then is the value of *Elford* to the analysis of the restraint of trade doctrine as it applies to sport in Australia? The judgment reveals a predisposition on the part of Justice Hardie, a predisposition perhaps more widely held within the judiciary, to view sport as a non-trade activity, a pastime, where the restraint of trade doctrine was inapplicable.

On the facts of the case and the available precedent of *Eastham*, the decision of Hardie J in *Elford* is at best perplexing. But, if one takes an 'era of occurrence' approach to the restraint of trade doctrine the assessment of *Elford* is less harsh. Under such an approach *Elford* occurs at the juncture of a change in philosophical thought as sport the pastime gives way to sport the profession, signified with increased earnings fostered by technological developments in the mass medium of television.

To the extent that the restraint of trade doctrine is influenced by the prevailing (or perhaps developing) philosophical norms of the era in which a case is heard, Hardie J was merely applying the doctrine in the manner applicable to a preceding era specifically relevant to sport. It should be noted that the movement from one era to another may not be immediately recognisable to a judge or commentator. Ultimate recognition may, in any instance, depend upon the accumulation of relevant facts and the capacity of the judiciary to discern the pattern of a new threshold. As Trebilcock commented, 'it is, of course, impossible to demarcate precisely the beginning and ending of each era. Fundamental changes in legal and political orientation do not take place from one year to the next, even in a single society.'[324]

The decision of Hardie J in *Elford* can be seen as a product of the pre-mass-media era. What is revealed by the decision in *Elford* is that sport was not, at the time, considered 'trade' in the conventional sense. There was a trading organisation but it was a voluntary association. There were paid players but they were semi-professional. If the indicators of a trade were more pronounced, professional rugby league may well have been classified by Hardie J as an occupation justiciable under the restraint of trade doctrine.

## 5. The pre-*Tutty* factual matrix

The concern of this brief part is not with highlighting the characteristics that now make sport a profession but how judges in the period leading up to *Elford v Buckley*, in particular Hardie J, considered sport in respect to the descriptor 'trade'. Today sport is a multiple billion dollar industry. This was not always the case. In fact it is only since the 1980s that high profile sports in Australia have become fully professional and highly marketable. As suggested previously, both these descriptors are due to developments in the media technologies which enabled the mass marketing of sport and the full professionalism of athletes.

[323] *Buckley v Tutty* (1971) 125 CLR 353 at 373.
[324] Trebilcock MJ, *The Common Law Restraint of Trade*, Law Book Co, Sydney, 1986 at 2.

For various reasons sport was considered different to other occupations – the reason why the restraint of trade doctrine had not been applied to what were, by today's standards, serious imposts upon athletes' freedom to trade. As this different approach has largely vanished, it is fair to ponder why the change in judicial perceptions occurred. Part of the answer lies in the flexibility of the restraint of trade doctrine and the influence of changing societal norms on the judiciary. It is clear, nonetheless, that policy and society change slowly and it is perhaps a brave judge to move ahead of the times.

### 5.1 The fact of sport

Coakley describes sport as, 'more than just games and meets; they are also a social phenomena that have meanings that go far beyond scores and performance statistics. Sports are related to the social and cultural contexts in which we live; they provide the stories and images that many of us use to explain and evaluate these contexts, the events of our lives, and our connections to the world around us.'[325]

A judge in the semi-professional era, aware of an amateur culture, is likely to see the 'phenomena' of sport as meeting a cultural ideal, rather than as an occupation to which the restraint of trade doctrine should necessarily apply.

From common experience it is clear that sports are not static but change to meet the needs, ideals or interests of a society: 'Like other cultural practices, sports are human creations that come into being as people struggle over what is important and how things should be done in their groups and societies. Sports have different forms and different meanings from one place to another and why they change over time.'[326]

By the 1960's sport as an arm of national defence may have been on the wane, if so, the moral dimension was as strong as ever. Sports, as Brasch states, 'have had their impact on social ethics. Not accidentally do we speak of "playing the game", "it is not cricket", to abide by the rules of the game", or "hitting below the belt" and "being a spoilsport".[327]

Whether apocryphal or not, the saying attributed to Wellington, 'the Battle of Waterloo was won on the playing fields of Eton',[328] largely sums up the broad cultural approach to sport in Australia prior to the adoption of full professionalism in the latter part of the twentieth century. Historically sport performed the task of preparing the populace for war or in earlier times, in securing sustenance. According to Brasch, 'man's wish to survive, in this world and the next, explains the origin of a majority of sports. They were not deliberately invented but arose, almost inevitably, out of man's quest to exist and overcome the countless enemies that threatened. ... A means to an end became an end in itself.'[329]

At the time of Justice Hardie's judgment in *Elford*, the Olympic Games were amateur and athletes competed 'in the true spirit of sport and the honour of our teams'.[330] The Olympic motto, '*citius, altius, fortius*' was fortified by the ideals of the Olympic Creed: 'The most

[325] Coakley J, *Sport in Society; Issues and Controversies*, 7th ed. McGraw Hill, 2001 at 2.
[326] Coakley J, *Sport in Society; Issues and Controversies*, 7th ed. McGraw Hill, 2001 at 3.
[327] Brasch R, *How did sports begin*, Fontana Collins Sydney, 1986, at 7.
[328] Fraser W, *Words on Wellington* (1889) attributed to the 1st Duke of Wellington.
[329] Brasch R, *How did sports begin*, Fontana Collins Sydney, 1986, at 2.
[330] The Olympic Oath.

important thing in the Olympic Games is not to win but to take part, just as the most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well.' There was a believed purity to the Olympic Games: the Munich massacre of 1972 was yet to occur, the games themselves had been stringently amateur where famous athletes such as decathlete Jim Thorpe had their names expunged from the medallist list for offences of professionalism. Dennis Tutty (of *Buckley v Tutty*) preserved his amateur status as a rower competing for Olympic selection by locking away his bank book in the strongroom of Balmain Leagues Club.[331] Although drug testing was conducted in the 1968 Mexico Olympics, where the only positive test was to the consumption of alcohol, the performance enhancer anabolic steroids were not banned until the 1976 Olympics. Commercialism was so avoided that the city of Montreal suffered a $US3.5 million loss in hosting the Games in 1976. Revealingly the loss became a $US225 million surplus in the Los Angeles Olympics of 1984 through the sale of sponsorship.

Amateur ideals dominated most sports in Australia and athletes played for the fun of competition and perhaps the glory of sport. All major tennis tournaments were amateur until the advent of the 'open era' in 1968. Australians who wished to compete for their country in the Davis Cup could not be professionals. In cricket the distinction between 'gentlemen' amateurs and professional 'players' was abolished in England only in 1963. Cricketers were professional but paid poorly until 1977 when Kerry Packer introduced World Series Cricket which resulted in Tony Grieg, who had been banned by the establishment, challenging the establishment under the restraint of trade doctrine.[332] Rugby union was amateur until formally declared professional in August 1995, often losing players until then to professional and semi-professional rugby league.

In an article entitled 'Sport and the Australian Identity', published in 1972, not a single comment is made of sport as a commercial entity within that identity. Rather, sport was about the identity of the nation: 'Donald Horne, in the *Lucky Country* (1965) commented that for many Australians 'sport is life, and the rest is a shadow. It is the one national institution that nobody criticises: to play, watch, read and talk about sport is to uphold the nation and build its character. ... Sport became a channel of national self-esteem. The country was unrecognised and uninfluential in world affairs, but in sport Australians competed as equals, and sometimes they excelled.'[333]

This, then, was the factual background to sport that may, consciously or otherwise, have informed the views of Hardie J in the case of *Elford*.

## 6. The media and the growth of commercialism in sport

Nothing is more likely to mark the commerciality of sport than media coverage. The appearance of a sporting event on television screens is a palpable indication of money

[331] B Dabscheck, 'Righting a wrong: Dennis Tutty and his struggle against the New South Wales Rugby League', 2009 4(1) *ANZSLJ* 145 at 152.
[332] See *Grieg v Insole* [1978] 3 All ER 449.
[333] Caldwell G, 'Sport and the Australian Identity' *Hemisphere* Vol 16, No.6 June 1972 at 9. Reprinted in Jacques T and Pavia G, *Sport in Australia*, 1976, McGraw-Hill Sydney at 141.

changing hands between the sporting organisation and the media outlet. Advertisements shown during the telecast attempt to transmit to the minds of the audience a positive association between product and athlete to enhance sales. Today, with sport broadcast through dozens of media on dedicated platforms, the connection between business and sport is blatantly obvious. As Rowe observed, 'In a television system that, following the arrival of multi-channel TV, is increasingly content hungry, sport provides much cheap and globally mobile program fodder. Even more importantly, as the age of free-to-air broadcast hegemony passes, sport is perceived by media entrepreneurs as, in Rupert Murdoch's words, 'a battering ram' which can open up the private domestic sphere to the full range of possibilities going beyond subscription and pay-per-view television to telephonic and information-based services.'[334]

However, at the time of *Elford*, 1969, sport was not central to the survival of television in Australia. In fact sport was just one part of diverse content. Sport was broadcast in Australia on free to air, black and white television often in a truncated format because 'most sports organisations were concerned that TV coverage would reduce their revenues from gate receipts.' To illustrate consider the sport programming of Sunday March 30, 1969: only the second half of the 'Match of the Day' was shown on television, the broadcast beginning at 3:45. The League, as with the Victorian Football League, was fearful that live broadcasts would keep spectators from attending the ground.[335]

Other sporting programs revealed by a television guide of the day include: *Channel 2*: 3pm 'Australian Men's Athletic Championships'; 10.45 'Australian Track And Field Championships Highlights'. *Channel 7*: 12pm 'Sports Action'; 1pm 'World Championship Cricket.' *Channel 9*: 12pm 'World Championship Wrestling'; 1pm 'World of Sport'; 2pm 'Star Soccer'; 3pm 'The Wide World of Sports'; 3.45 'Rugby League match of the day'.[336]

That the public were interested in sport is evident from the content offered to television audiences. The refusal of the NSW Rugby League to supply for broadcast more than half a game indicates that either television stations were not prepared to pay an amount necessary to persuade the League to release entire games or that the League, for commercial or other reasons, believed spectator attendance in large numbers was more in the interests of the game than larger television audiences.

The view of sport as less than a fully commercial enterprise is found most starkly in the attempts of media owner Kerry Packer to gain television rights to broadcast Australian Test Match Cricket – matches that had only ever been broadcast by the non-commercial Australian Broadcasting Commission (ABC). According to Gerald Stone, Packer, 'as a keen cricket fan ... was convinced he could turn it into a ratings goldmine, especially after the introduction of colour television in 1975.'[337] Packer's bid of $1.5m for a three year contract

[334] Rowe D, 'Sport: the genre that runs and runs', *The Australian TV Book*, 2000, Allen and Unwin, Sydney, at 140.
[335] <http://www.televisionau.com/tv300369.htm>
[336] <http://www.televisionau.com/tv300369.htm>
[337] Stone G, *Compulsive Viewing – the Inside Story of Packer's Nine Network*, Viking Penguin Australia, 2000 at 134.

was ‘as still startling for its time and place’. Stone placed the reluctance to fully embrace commercialism at the feet of cricket administrators who, ‘since the advent of television ... had always made sure that their old school chums at the BBC and ABC were guaranteed coverage by being granted a special category of non-commercial rights. That made it impossible for any commercial channel to buy a monopoly position.’[338]

What was the justification for not taking a commercial attitude towards Test Cricket? ‘It was just another “tradition” to be added to the list. ... The fact that Packer was prepared to pay $500,000 a season compared with the ABC’s going price of $70,000 couldn’t make them change their minds. ... Over a three year period they had undersold TV rights by a seventh of their true value on the open market.’[339]

Stoddard has observed that, ‘at first, curiously enough, television had little impact upon media coverage of Australian sport. ... For twenty years after the arrival of television with the 1956 Olympics, sport played a surprisingly modest role in Australian television and its consumption patterns.’[340] Rowe commented similarly: ‘The arrival of television in 1956 ushered in the era of the moving sports image, enhancing the illusion of physically attending sports events in real time and space. Yet, although the technological capability of covering sport in the media developed reasonably swiftly over the twentieth century, the willingness of the parties to cooperate and combine their efforts was slower in coming.’[341] Australia adopted the British tradition of regarding television coverage of major sports events as ‘an important aspect of nation building, helping to forge and foster a common national culture.’[342]

By the mid-1970’s the motive of forging a national culture had given way to increasing commerciality as ‘colour television made the TV sports spectacular more vibrant and life-like’.[343] According to Salter the marketability of sport was a ‘serendipitous coincidence’ between technology and politics: ‘Sport was not always the most prized form of television content in Australia. ... The advent of colour transmissions in early 1975 came almost exactly at the same time as the Whitlam governments’ total ban on TV tobacco advertising.’ As a result the commercial networks competed ‘fiercely to show off their flashy new colour equipment. Sport was the obvious choice.’[344]

But at the time of *Elford* the commerciality of sport evidenced through the fact of media purchases of sporting content, was limited to the technology of black-and-white, free to air broadcasts on a single television station. At this point it is perhaps interesting to note in contrast that twenty years after Kerry Packer attempted to acquire Test Match Cricket for the Nine Network at $500,000 a season, Rupert Murdoch’s Fox Television, prompted by the

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[338] Stone G, *Compulsive Viewing – the Inside Story of Packer’s Nine Network*, Viking Penguin, Australia, 2000 at 135.
[339] Stone G, *Compulsive Viewing – the Inside Story of Packer’s Nine Network*, Viking Penguin, Australia, 2000 at 135.
[340] Stoddard B, *Saturday Afternoon Fever: Sport in the Australian Culture*, Angus & Robertson, Sydney, 1986 at 99.
[341] Rowe D, ‘Sport: the genre that runs and runs’*, The Australian TV Book*, Allen & Unwin, Sydney, 2000 at 31.
[342] Rowe D, ‘Sport: the genre that runs and runs’*, The Australian TV Book*, Allen & Unwin, Sydney, 2000at 131.
[343] Rowe D, ‘Sport: the genre that runs and runs’, *The Australian TV Book*, Allen & Unwin, Sydney, 2000at 131.
[344] Salter D, *The Media We Deserve*, 2009, Melbourne University Press, at 219.

revenue attached to sports content on pay television, paid $555,000,000 to acquire the rights to provincial and international rugby matches between Australia, New Zealand and South Africa for ten years. The financial necessity to attain sport content was also responsible for the 'Super league war' as Fox attempted to acquire rugby league players from the Australian Rugby League by offering far more income than many players could command in less heated times: 'Players who had been on $150,000 a year were signing for $500,000. Players on $250,000 were going for $800,000 a year ...'[345]

Returning to1969, Hardie J saw sport controlled by a sporting organisation where players were 'members' and commercial returns were focused on gate receipts. Sport as a trade for the purposes of the restraint of trade doctrine could not be grasped. His Honour's finding in *Elford* are supportable on the basis that most sport in Australia was non-professional or semi-professional designed historically to meet a number of community functions. If one considers the restraint of trade doctrine to be adaptable to changing times, the worst that can be said of Justice Hardie's decision in *Elford* is that it was old-fashioned.

The restraint of trade doctrine, a doctrine that from the early cases of the thirteenth century has ever changed with changing social norms spurred by developments in technology, had moved on. Hardie J was merely applying the norms of the era to his immediate past in the case before him.

## 7. The watershed of *Buckley v Tutty*

The case of *Buckley v Tutty*, in overruling *Elford*, mandated that professional sport, and semi-professional sport for that matter, was to be adjudged as a trade for the purposes of the restraint of trade doctrine.

The factual differences that persuaded the High Court of Australia to decide the player, Tutty, was unreasonably restrained are likely to be subtle alongside those that prompted the decision of Hardie J in *Elford*. It may be nothing more than the Court becoming cognisant that the sport of rugby league had reached a threshold where the restraint of trade doctrine was applicable to the restraints imposed on Mr Tutty. The fact that Tutty, in contrast to Elford, offered to play for free if promised a release from the Balmain and, when this was not accepted, sat out the 1969 season in the hope that this act alone would release him from the retain/transfer system,[346] may have impressed upon the Court the essential unfairness of the restraint.

A number of background events well known at the time may have been taken as judicial notice. Rugby Union player John Brass along with Alan Cardy contracted with league team Eastern Suburbs for a $30,000 signing-on fee plus match payments in 1969, as did Phil Hawthorn with the St George club in 1968, for the same 'record' amount. This fee stands in contrast to Tutty's total earnings in 1969 of 'approximately $2,400'.[347] Tutty also claimed

[345] Fitzsimons P, *John Eales: The Biography*, ABC Books, Sydney, 2001 at 184.
[346] *Buckley v Tutty* (1971) 125 CLR 353 at [8].
[347] B Dabscheck, 'Righting a wrong: Dennis Tutty and his struggle against the New South Wales Rugby League', 2009 4(1) *ANZSLJ* 145 at 154.

that 'I can make three times more than I have been offered by Balmain by playing elsewhere. Balmain tell you they just can't pay you any more money then turn around and buy several players from the country and Queensland.' Whether such facts were entered into evidence cannot be known – there was not though, in *Elford*, any mention of monetary amounts.

A particular feature of *Tutty* was the High Court's finding in respect of the 'transfer fee' - the amount a new club paid to secure the transfer of a player from his old club. This fee was payable even though the term of the player's contract had expired and he was 'off contract'. The court saw these fees as unreasonable restraints of trade:

> 'If a man has proved himself to be a valuable player his club can fix a substantial fee which may adversely affect his chance of obtaining a new engagement. And may also affect the amount he is likely to be offered by another club as a joining fee. The transfer fee may not only prevent a player from reaping the financial rewards of his own skill but it may impede him in obtaining new employment.'[348]

This finding alone was likely to cause substantial monies to be redistributed from clubs to the players. The player's skills were now his to own and to bargain with. What then of income generated through media outlets? As mentioned above, television, which began in Australia in 1956, broadcast half a game of rugby league on a Sunday afternoon in 1969. The broadcast became an additional stream of earnings for the clubs which had, until that time, relied almost entirely upon gate receipts and ground advertising as a source of revenue.

It was above all the reclassification of rugby league to a 'trade' and the recognition that the income earned by players was more than a supplement to their 'real job' that is most pertinent to the emergence of sport as a category of industry amenable to the restraint of trade doctrine.

The restraint imposed on Dennis Tutty was the same retain or transfer system faced by league player John Elford. Rule 30 of the contract provisions expressly warned of the right of a club to retain the services of players at its discretion:

> c) 'A player who signs as a professional player should note carefully that he is in effect tied to his Club and cannot subsequently sign for any other club unless he is released – either by transfer or by the club agreeing to strike his name from their list or registered players.'
>
> f) Unless the Club agrees in writing that the player's name shall be removed from their list ... the Club is entitled to retain the player's name on its register indefinitely.'

One could assume that in drawing up the Player Contract, the League was legally advised. If so, the above provisions are curious in their complete disregard to the precepts of the restraint of trade doctrine. Although the player is classified as 'professional' he is made well aware that the restraint can prevent him from pursuing his career at the whim of his club. The terms are an egregious if not arrogant breach of the *Nordenfelt* principle suggesting a confidence founded on the previous decision in *Elford*: that the restraint was beyond challenge.

[348] *Buckley v Tutty* (1971) 125 CLR 353 at [8].

As the judgment of *Elford* does not refer directly to the provisions above, it is not possible to know whether these two 'warnings' were incorporated in the period before or after the decision in *Elford*. If incorporation occurred after *Elford* it is likely the decision of Hardie J would inspire in the League confidence of its chances of success. In either case, Rule 30 reflects the view that sport was not, in that era, trade for the purposes of the restraint of trade doctrine.

The High Court found, as in *Eastham*, that the League had a legitimate interest in fielding teams as well matched as possible. Legitimacy also sounded in the League's object to 'provide a system that will ensure sufficient stability of membership to permit those who play for a club to be trained as a team and to develop a team spirit.'[349] This interest, it may be suggested in passing, is perhaps less imperative today as players regularly change teams under the salary cap regimen operating in NRL competition and appear to accept such movement as a norm of the profession. However, the legitimacy of 'competitive balance' is of an entirely different character to the protection of a monopoly on the provision of endorsement services.

## 8. Conclusion

The value of *Tutty* as a 'sport case' is the comprehensive treatment of the League's argument that sport was not a trade. In the four decades following *Tutty* a large number of restraint of trade cases came before Australian courts across a range of sports.[350] Except for *Elford*, there were none prior. To merely say, however, that the decision in *Tutty* was the right decision is to miss the point in respect to the influence of the communications technologies on the application of the restraint of trade doctrine to sport. *Tutty* is recognition that the milieu of the Australian amateur had passed and a different paradigm had emerged; that of the full professional. For the High Court to have decided otherwise would have been an anachronism given the emerging fact of professional sport.

To date there are no cases either directly or indirectly dealing with restraints imposed on athlete endorsement of goods and services. The acceptance of the sport as amenable to the restraint of trade doctrine runs parallel to developments in the communications technologies. Sport today is shown through multiple media platforms from mobile phones and I-Pads to in-home three dimensional televisions across the globe and from the globe.[351] Markets once distant are now a nanosecond away. The application of the restraint of trade doctrine in these circumstances has not been tested. Will courts consider the new mediums the domain of the sporting organisation and exclude athlete participation?[352] How will courts consider the obligations of individual athletes contractually required to act as endorsement vehicles for the products of the organisation's sponsors when the employment description is that of

[349] *Buckley v Tutty* (1971) 125 CLR 353 at [17].
[350] For example, *Adamson v New South Wales Rugby League* (1991)103 ALR 319; *Hall v Victorian Football League and Clarke* [1982] VR 64; *Foshchini v Victorian Football League and South Melbourne* (unreported, VSC, 15 April 1983; *Hughes v Western Australia Cricket Association* (1986) 69 ALR 660; *Forbes v NSW Trotting Club Ltd* (1979) 143 CLR 242; *Barnard v Australian Soccer Federation* (1988) ALR 55; *Avellino v All Australia Netball Association Ltd* [2004] SASC 56.
[351] See Chapter 3 'The Rise and Rise of Liberalised Trade'.
[352] See Chapter 3 'The Rise and Rise of Liberalised Trade'.

professional athlete?[353] How will courts react to the inclusion of a player's reputation transferred under contract from the athlete to the organisation?[354] The digital technologies are a paradigm shift with no less potential impact upon the restraint of trade doctrine as it applies to sport than that which occurred between 1969 and 1971.

In order to further explore the background to possible unfairness to athletes in the structure and operation of current restraint of trade rules, it is necessary to examine the nature of the employment relationship between organisation and athlete.

[353] See Chapter 6 'Athlete Persona as Subjective Knowledge'.
[354] See Chapter 6 'Athlete Persona as Subjective Knowledge'.

# Chapter 5: The Athlete and the Organisation

## 1. Introduction

Three interconnected issues related to employment are at least theoretically relevant to the application of the restraint of trade doctrine to limitations on athlete endorsement. These issues represent real, though as argued here, not insurmountable, obstacles to the employee athlete's claim to be unreasonably restrained in endorsement.

The creation of the new market of endorsement servicing and the extension of this market into cyberspace is so radically different to that which existed previously as to raise doubt that the employer sporting organisation possesses a legitimate claim, as a matter of course, to the sole exploitation of the endorsement markets. The question of 'reasonableness', for example, had been discussed from the early 19th century before it was finally resolved in *Nordenfelt* in 1894.

The point is similar to one made by Professor Riley in respect to claims of employers to employee-created property: 'The ownership of property ought not to be determined by some ancient bias, predicated on an assumption that the servant owes everything to the master.'[355] It does not necessarily follow that the endorsement market specifically, and the cyberspace market generally, should, as a matter of pre-ordained right, belong solely to the covenantee employer.

Although Riley is referring to the entitlement to 'own' something newly created, the underlying concept finds support in the willingness of judges, from at least the 18th century, to adapt the application of the restraint of trade doctrine to changing philosophical and economic needs. As discussed, in *Mitchell v Reynolds* in 1711, for example, Parker CJ introduced the 'partial restraint rule' in response to developments in the transport industries.[356]

Returning to the issues related to employment. The first issue concerns the question: 'what is the athlete employed to do'? It is proposed that a restraint imposed on a 'trade' that is not in fact that which the employee is hired to perform is impermissible under the restraint of trade doctrine. Specifically it is argued that a where an athlete is employed to play sport a ban on engaging in endorsement is unreasonable and lies beyond the scope of the sporting organisation's protectable interests.

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[355] Riley J, 'Who Owns Human Capital? A Critical Appraisal of Legal Techniques for Capturing the Value of Work', (2005) 18 *Australian Journal of Labour Law* 1 at 4.

[356] *Mitchell v Reynolds* (1711) 24 ER 347. Prior to *Mitchell v Reynolds*, because covenantor apprentices tended to remain within the village of their birth and therefore that of their master, restraints of trade were void absolutely for to enforce a restraint would have the effect of forcing an able-bodied worker onto parish relief. As transport improved and individuals became accustomed to travel, it became possible to enforce a restraint within the Master's village leaving the covenantor to relocate to a neighbouring village or town.

The second issue considers the validity of a covenantor seeking relief under the restraint of trade doctrine during the currency of his or her employment. Although reservations have been expressed in earlier cases, the restraint of trade doctrine has been available to aggrieved covenantors during the currency of their employment, where the circumstances dictate, since at least *Esso Petroleum v Harper's Garage* [357] in 1968.

A third issue concerns the somewhat 'vague'[358] obligation of employee fidelity; a common law rule that prevents employees from competing against their employers. On the basis that the duty is one owed mutually between employer and employee, it is argued that where a sporting organisation itself fails to adhere to the principles of 'fidelity' the obligation is of an entirely different character to that common to most spheres of employment and, as such, cannot be enforced by the employer.

Overall, the argument is put that where the marketable traits of an athlete differ from those of the organisation, it is unreasonable to prevent the athlete from engaging in endorsement marketing. Any restriction in such circumstances is a bare restraint of trade designed to prevent competition for the purpose of maintaining a monopoly within the endorsement market. Where the marketable traits differ between athlete and organisation, it is axiomatic that issues one and two above must be resolved in favour of the athlete.

## 2. What is the Athlete employed to do?

### 2.1 Introduction

This section proposes that a demarcation exists between those tasks properly classified as the 'job' of the employee, in essence playing the game, and that of endorsement marketing. To illustrate, although players are usually required to wear club clothing displaying sponsors insignia when in a work setting, this duty very different, it is argued, from being employed to endorse products specifically. In effect the player is prevented from acquiring an income by offering a service that is not the object of his or her employment.

Consider for purposes of context a statement of Younger and Atkin LJJ in *Attwood v Lamont*:

> '... the permissible extent of any covenant imposed upon a servant must be tested in every case with reference to the character of the work done for the employer by the servant.'[359]

[357] *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269. The object of the judges was to formulate a test by which the restraint of trade doctrine could be deemed inapplicable. In so doing there was a considerable attempt to discover authority from which to support such a test. The task was apparently not easy, for little guidance was found in precedent: 'Any attempt to trace historically the development of the common law attitude towards "restraints" of different kinds would be out of place here, and generalisations as to it are haphazard. ...' (at 333) [357] *Nordenfelt* did not, however, offer exclusions by type of restriction from the restraint of trade doctrine. There is, as Heydon indicated, no exclusion based on the currency of employment. For a full appraisal of the issue see Thorpe D, (2012) 29 *Journal of Contract Law* 1.
[358] *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 173.
[359] *Attwood v Lamont* [1920] 3 KB 571 at 590.

Whilst a restraint functioning to prevent work in occupations that are not those the employee has contracted to perform is pertinent to the question of reasonableness, it is arguably more correct to classify such a restraint as one failing to attach to a legitimate interest of the employer.

### 2.2 Exemplars of employment restraints: the NRL and ARU

The player contracts of the National Rugby League (NRL) and the Australian Rugby (ARU) are examined below as exemplars of athlete employment contracts. The NRL is an Australian domestic competition (including a New Zealand club side) with occasional international matches and an annual interstate competition between NSW and Queensland known as the 'State of Origin'. The ARU and its associated State Unions are concerned with the 'Super Rugby' tournament, a regional competition between teams from Australia, New Zealand and South Africa and a comparatively heavy international program of 'Rugby Tests'. Both sports possess a high profile within Australia and, in the case of Australian Rugby a substantial international profile. Media coverage in newspapers and specialist magazines is wide and both sports enjoy prime-time television screenings on free to air and on pay television with multiple replays of major games. Both sports are digitally distributed through a multitude of official and unofficial websites.

### 2.3 Employment and restraints on endorsement

The recital to the NRL Playing Contract (2012) states that the signatory parties are the Player and his Club:[360]

> A. 'The NRL conducts the elite competitions for the Game throughout Australasia, known as the NRL Competition ...
>
> B. The Club is the holder of a licence to field a team in the NRL Competition.
>
> C. The Player who plays in the NRL Competition is a professional player of the Game.
>
> D. The Club and the Player wish to contract with each other on the terms and conditions set out in this agreement'.

The NRL Player Contract creates an 'employer/employee' relationship between the Club and the Rugby League player:

> 'The relationship between the Player and the Club, as evidenced by this Agreement, is one of employee and employer, for the purposes of participating in the NRL Competition, the National Youth Competition (if eligible), Representative Competitions (if so selected) and any Related Competitions.'[361]

[360] NRL Playing Contract (2012) Recitals.
[361] NRL Playing Contract (2012) section 1.1.

The player is also required to sign a NRL 'Player Registration Application' under which he agrees to abide by the terms of the Playing contract:

> 'In signing this registration form, and in return for the NRL agreeing to consider my application for registration as a player in the NRL Competition I agree:
>
> > 'to comply with and be bound by the NRL Rules including ... Schedule Six - NRL Playing Contract and Remuneration Rules the NRL Playing Contract'.[362]

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

> 'The Player grants to the Club for the duration of the Employment Term a licence to use, and to license the use of, his Player Property (together known as the "Rights") and to sub-license the Rights to the NRL on terms that authorise the NRL to further sub-licence the Rights to the NRL Partnership.'[363]

Through this clause the Club acquires the rights to a player's image and an entitlement to sub-licence the player's image for the use of the NRL. It is this clause that operates as a restraint of trade by ensuring that the player cannot freely use his image for his own purposes of endorsement.

Under Section 1 (f) of the Player Registration agreement the player agrees:

> 'To grant to the NRL the right, and I hereby authorise the NRL, to use my name and image in connection with the promotion or marketing of the NRL Competition and Representative Matches where I am a member of a Representative Team.'

This clause, as well as being the means by which the organisation acquires the rights to the player's image, operates in tandem with the restraint of trade to ensure that the image rights acquired are not reduced in value by a would-be athlete entering the endorsement market.

Nevertheless, the player is permitted some use of his Player Property. As will be seen, this entitlement is heavily qualified. Section 3.4 (a) states:

> '... the Player is entitled to use his Player Property for commercial purposes including, but not limited to endorsements, promotions, events and marketing provided that the NRL Playing Contract and remuneration Rules are not contravened.'[364]

The ARU contract functions similarly. 'Employment' is described as 'full time' with the 'State Union' (NSW or Queensland for example). That is, the player is the employee of the State Union, not the ARU. Similar to the NRL arrangements, the ARU restraints on endorsements do not arise through an employer/employee relationship.

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[362] NRL Playing Contract (2012) 'Player Registration Application' clause 1.
[363] NRL Playing Contract (2012) Section 3, clause 3.3. 'Player Property' 'means the name, photograph, likeness, reputation and identity of the Player': Section 29 'Definitions and Interpretation'.
[364] NRL Playing Contract (2012) Section 3.4. Registered trademarks, logos and designs are the property of the club.

The Australian Rugby Union (ARU) collective bargaining agreement is a tripartite arrangement (though a bilateral contract) between the players, represented by the Rugby Union Players Association' and the various state rugby boards and the ARU. The preamble states:

> 'The Collective Bargaining Agreement (CBA) is an agreement entered into between RUPA, ACTRU, NSWRU, QRU, WARU and the ARU. It sets out the terms and conditions of employment for professional rugby players in Australia. It provides the regulatory framework for labour relations between Australia's rugby administrators and the players.'[365] Schedule C to the Standard Player Contract states: 'employment with the State Union is full time and Players must not have any other form of employment unless first agreed to in writing by the Chief Executive Officer of the State Union to which they are employed.'[366]

This agreement restricts player endorsement in that:

> 'Players may not enter into an endorsement arrangement with any organisation that uses a player's image to promote goods and services that competes with the business undertakings of ... protected sponsors.'

A category of ARU 'Special Rights Sponsors' are entitled to use players' images on the basis that they 'make the most significant contribution to the game of rugby in Australia ... and in exchange for their investment, they receive protection in relation to their sponsorship ... for example, the use of players' images in certain conditions.'[367] In addition, Special Rights sponsors may use player images 'in any form including television, radio, digital services, billboards and transport advertising.' As a concession to players the use of an image will 'require a talent fee being paid to the player'. The term 'talent fee' is not defined within the CBA.

A lesser category of 'protected sponsors' are those 'who make a significant contribution to the game of rugby in Australia'. These sponsors do not have the same privileges of Special Rights Sponsors but in exchange for their investment they receive protection from athlete competition and are entitled to specific privileges, for example, use of players' images in certain conditions.[368]

Contracted players consent to allow the ARU and State Unions (and ARU and State Union sponsors) to use their image 'individually' for the term of the contract and for one year after the contract terminates.

What is a grievous restraint is imposed on non-Wallaby players by the ARU. Although not playing for the ARU, that is, as an Australian representative, state players are also banned from individually endorsing the products of sponsors who compete in the same product lines

[365] Collective Bargaining Agreement 2005-2012, Rugby Union Players Association (RUPA) section 1.
[366] Standard Player Contract (Rugby Union) Schedule C section 2.
[367] Standard Player Contract; (Rugby Union) Schedule A Players' Images and Signatures, RUPA, CBA.
[368] Standard Player Contract, (Rugby Union) Schedule A Players' Images and Signatures, RUPA, CBA.

as ARU sponsors. To be clear, the player is not engaged in employment or under a contract of exclusive service to the ARU but is, nonetheless, restrained by the ARU. There is every reason to believe such a restraint is a restraint on bare competition unenforceable under the restraint of trade doctrine.[369]

The ARU agreement also contains what might be termed a 'recognition clause':

> 'It is recognised that these sponsors make a valuable contribution to the revenues of the game and that their business undertakings are worthy of protection from competition by players using their images with rival competitors.'

Such clauses, which are increasingly evident in sports contracts, are unlikely to have any impact upon the enforceability of a restraint of trade. Where the legality of a restraint is challenged, resort to the above 'recognition clause' will not impact upon the enforceability of the restraint any more than the restraint of trade clause itself – as stated previously, the covenantor's agreement is irrelevant to considerations of reasonableness.[370] Such self-serving statements are little more than proclamations that the organisation will benefit from the restraint of trade in question.

### 2.4 The Collective Bargaining Agreement

The players, as contracting parties within the NRL and the ARU are not, despite an apparently widely held assumption, employees of those organisations. As such, the classification of a player as a non-employee of the organisation negates any claim that the player owes an implied obligation of loyalty not to compete against the parent organisation. In further consequence, the player is not restrained in trade as an employee of the NRL but through contractual agreement.

Nevertheless, although a parent sporting organisation may not be a signatory to the athletes' employment contract with a club, the terms of that player contract along with additional terms, are generally incorporated into the Collective Bargaining Agreement (CBA) between the organisation and the relevant players' association to bind the athlete. The contractual relationship (common to most major sporting contracts) between parties of the NRL was summarised by Goldberg, Bennett and Edmonds JJ in *Commissioner of Taxation v Spriggs*:

> 'Each NRL club is required by the NRL Playing Rules to engage players under the standard NRL Playing Contact. The relationship between the NRL, each NRL club and the NRL players is also governed by the Collective Bargaining Agreement negotiated by the Rugby League professionals Association with the NRL. The provisions of the Rugby League CBA are expressly incorporated into the standard NRL Playing Contract.'[371]

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[369] *Petrofina (Gt Britain) v Martin and Another* [1966] Ch 146 at 182.
[370] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 56.
[371] *Commissioner of Taxation v Spriggs* [2008] FCAFC 150 at [16].

Dabscheck has in fact stated that the CBA is 'central to every major sport' in Australia as the means by which 'players, collectively and individually' are committed to their respective employment rules.[372]

The player contracts of the major sports incorporate a number of terms into the CBA, a bundle of rights as it were, beneficial to players. How should these terms be considered against the burden of restraints on athlete endorsement?

Under the arrangements of the NRL, for example, a Club is to pay the legislated level of superannuation;[373] pay the hospital and medical insurance of a player but which amounts are deducted from a Player's income. Where a Player is injured, the Club will pay the 'gap' between medical fees and the amount covered by insurance.[374] Players are granted tickets to games and car parking where this are available.[375] All Clubs are to create $30,000 pool which is to be made available to meet the educational needs of a Player who qualifies under the NRL Education and Welfare Committee guidelines – an amount that can be reduced should a Club face financial hardship.[376]

The ARU Collective Bargaining Agreement[377] contains similar terms but also incorporates, in Schedule A, the restraints that prevent players using their 'image and signatures' and the recognition of 'protected Sponsors.'

In what exemplifies the authority of the Sporting Organisation to 'give and receive' as it sees fit, is a Section headed, 'Apparel/Boots', which states 'Players *may now* wear the football boot of their choice both at State and Wallaby level in Matches and training.'[378] In previous contracts the ARU required players to wear the boots of its sponsors. Should it enter into an arrangement with a boot manufacturer there is no necessary reason why it could not again claim a contractual right to decide the brand of boots players should wear.

The benefits expressed in the CBA, often no more than is legislatively required of an employer, offer little compensation for giving up the entitlement of players to engage in private endorsement. Indeed, the CBA of the NRL mandates that 'the RLPA will not pursue any extra claims, award or over award, for improvement in wages or other terms and conditions of employment ...'[379] a term that contractually seeks to negate legal challenges. Moreover, the CBA incorporates a Salary Cap, a restraint of trade in itself, into the agreement between the Players Association and the NRL, argued in Chapter 7 to be one of a multitude of restraints that accumulate to unreasonably affect the interests of the players.

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[372] Dabscheck B, *The Linkage between player payments and benefits to revenue sharing in Australian sport*, Australian Athletes Alliance, 3 August 2010.
[373] Rugby League Players (NRL) Collective Bargaining Agreement (2004-12) Section 12.
[374] Rugby League Players (NRL) Collective Bargaining Agreement (2004-12) Section 13.2.
[375] Rugby League Players (NRL) Collective Bargaining Agreement (2004-12) Section 14.
[376] Rugby League Players (NRL) Collective Bargaining Agreement (2004-12) Section 16.
[377] ARU Collective Bargaining Agreement (2005-2012).
[378] ARU Collective Bargaining Agreement (2005-2012) Section 15 (emphasis added).
[379] Rugby League Players (NRL) Collective Bargaining Agreement (2004-12) Section 24.

In justifying a restraint on endorsement, a parent organisation may well argue that monies it acquires through endorsement are, at least in part, returned to the various clubs to help meet salary obligations to players. While this may be true, the fact remains that endorsing athletes subsidise through foregone endorsement earnings those players neglected by private sponsors. Moreover, endorsing players forego income in favour of the organisation through a restraint that, as argued, has the effect of sterilising competition in the endorsement market.[380]

Dabscheck cites the CBA as a reason why Sporting Organisations have been able to prevent market competition from players in a broader sense stating that, 'Leagues insisted on these agreements to shield their rules from common law unreasonable restraint of trade suits.'[381] In effect, despite any benefits afforded players of major sport, a CBA may in fact work to stifle complaint and reinforce the imposition of trade restraints on athletes.

**2.5 Is endorsement mandated work?**

Returning to the description of the contractual relationship between club and an NRL player:

> 'The relationship between the Player and the Club, as evidenced by this Agreement, is one of employee and employer, for the purposes of participating in the NRL Competition, the National Youth Competition (if eligible), Representative Competitions (if so selected) and any Related Competitions.'[382]

The employee athlete is hired for the 'purpose' of playing rugby league for the club in the NRL competition. The player is not expressly employed to provide endorsement services to the club's sponsors. Only through the most oblique of constructions, it is argued, can be seen to create an obligation to endorse as opposed to playing the game for reward.

The closest the NRL contract comes to 'employing' the player for endorsement is through Section 3.1(j) of the Playing Contract which states that the player is to:

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

Indeed, the player is 'entitled to use his Player Property for commercial purposes including, but not limited to, endorsements, advertising, promotions, events and marketing[383] provided the use of his property does 'not conflict with the name, reputation, image, products or services of any of the Club's sponsors',[384] That fact that these terms permit a player to engage in endorse marketing, suggests that the task of endorsement is not one of employment.

In similar vein, the ARU Collective Bargaining agreement requires that Players 'attend any pre and post match functions including official presentations and dinners, sponsors' functions

[380] See *Fitch v Dewes* [1920] 2 KB 146 re restraints in gross.
[381] Dabscheck B, *The Linkage between player payments and benefits to revenue sharing in Australian sport*, Australian Athletes Alliance, 3 August 2010.
[382] NRL Playing Contract (2012) Section 1, clause 1.1.
[383] NRL Playing Contract (2012) Section 3.4(a).
[384] NRL Playing Contract (2012) Section 3.4(c).

and corporate hospitality functions.'[385] Section 15 of the same Agreement states that 'Players cannot remove, alter or obscure any brands or other identification from any other clothing, equipment of accessories that the State Union or ARU requires you to wear or use.' Again, the clause recognises the value of a player displaying a sponsor's trademark and indeed the value to a sponsor of having players attend a specified function, but does not mandate endorsement advertising.

The requirement to wear team apparel is at best ambiguous in respect to endorsement obligations and, as a matter of construction, does not mandate endorsement as an occupational duty. It is highly speculative to assume that the purpose of the clause is to display a sponsor's trade mark on apparel rather than, say, appearing as a united team when attending the ground.

Indeed, in acquiring a 'player's property' but not requiring him to work as an endorser, is suggestive of a restraint designed to sterilise competition. Such restraints lack reference to a legitimate interest and are unenforceable, a point made by Lord Diplock in *Petrofina (Gt Britain) v Martin*:

> 'It has frequently been said that a private party has no right to protection against competition *per se*. This is because elimination of competition with nothing more is regarded as prejudicial to the expansion of the general volume of trade and thus contrary to public interest.'[386]

On the basis that 'an employee is expected to adapt himself to new methods and techniques introduced in the course of employment'[387] can it be said that working at endorsement is a required part of the athlete's job?

The duties of athletes in the modern era are extensive; from after match speeches to avoiding activities that are likely to cause injury to undergoing mandatory drug testing – all terms expressed within the athlete contract.

The capacity of an employer to require an employee to engage in a different form of work to that under which he is contracted to perform is limited. *Commissioner for Government Transport v Royall* offers some insight:

> '... the general rule is that a contract by which a person is employed in a specific character is to be construed as obliging him to render, not indeed all service that may be thought reasonable, but such service as properly appertains to that character.'[388]

The case concerned a bus mechanic, Royall, who injured his left hand at the Kingsgrove bus depot, that prevented him from performing his usual work for a period of one week. During this period of incapacity the mechanic was directed to report to the 'printing room' where he was to 'trim plans'. As the injury was to his left hand, and he was to trim plans with his right

[385] ARU Collective Bargaining Agreement (2005-2008 and ongoing) Schedule C, Section 3.
[386] *Petrofina (Gt Britain) v Martin and Another* [1966] Ch 146 at 182.
[387] *Creswell v IRC* (1984) 81 LSG 1843.
[388] *Commissioner for Government Transport v Royall* (1966) 116 CLR 314 at 322.

hand, the employer believed he could perform the required task. Royall, however, did not respond to the direction, did not attend work and claimed an entitlement to wages for the week of incapacity. Kitto J, with whom McTiernan J agreed, indicated that the question of whether an employee mechanic was bound in law to work at plan-cutting depends on whether that type of work 'properly appertains to a motor bus mechanic'. His Honour stated:

> '… a man who accepts employment as a motor bus mechanic does not engage to cut plans, and cannot lawfully be required by his employer to do so.'[389]

Barwick CJ and Menzies J stated similarly:

> 'Nor are we satisfied that any officer is under a duty, upon pain of loss of salary, to do such work within his capacity but outside the classification to which he has been appointed as he may be instructed to do.'[390]

These cases draw a demarcation between work of a particular nature and other work, or specific tasks within work of a given occupation. In the absence of an express term it can be suggested that an athlete employed to play a sport is not obliged to perform any duty that does not relate directly to playing the sport in question; in the context of this thesis, the doing of 'endorsement work'.

The NRL Player Contract requires the athlete to be on duty for 'the purposes of participating in the NRL Competition'. The player's job is not designated as that of product endorser, suggesting that endorsement on behalf of the organisation is not a required duty of an employee.

### 2.6 Identifying the specific occupation

An enforceable restraint of trade as a concession to the *Nordenfelt* principle of prima facie unenforceability must not exceed the minimum necessary to protect a legitimate interest of the covenantee. A covenantee is not afforded license to impose a restraint covering occupations or occupational tasks that are not those of the covenantor's employment. For example, it would not usually be reasonable to restrain a journalist from working as a novelist.

Consider as background a statement of Younger and Atkin LJJ in *Attwood v Lamont*:

> '... the permissible extent of any covenant imposed upon a servant must be tested in every case with reference to the character of the work done for the employer by the servant.'[391]

A number of cases illustrate the point. In *Routh v Jones*[392] two medical doctors engaged a third medico to work as a general practitioner. The terms of his contract restrained him from working within a 10 mile radius in any 'department of medicine, surgery or midwifery' for a

[389] *Commissioner for Government Transport v Royall* (1966) 116 CLR 314 at 323-324.
[390] *Commissioner for Government Transport v Royall* (1966) 116 CLR 314 at 317.
[391] *Attwood v Lamont* [1920] 3 KB 571 at 590.
[392] *Routh v Jones* [1947] 1 All ER 758.

period of 5 years following the termination of his employment. The covenantor left the practice and took employment as a general medical practitioner in breach of the restraining term. Lord Greene MR stated, 'The language of the covenant is wide enough to shut out the defendant from any practice of any branch of the medical art. He could not use his medical knowledge in any way whatsoever.'[393] His Lordship found the restraint unreasonable indicating that had the restraint been limited to 'general practice' it would have been enforced. As expressed, however, the term included practice as a 'specialist' or a 'consultant', areas of employment the covenantee could not reasonably restrain the medico from adopting.

The validity of a restraint may turn on whether the covenantor employee had influence over the covenantee's customer list in the specific task in which he or she was employed. For example, in *WR Carpenter Aust v Kleisterlee*[394] the covenantor was restrained from working in both the retail and wholesale arms of the business. The plaintiff's business was, however, only that of wholesaling and such did not protect a proprietary interest. In *Bromley v Smith*,[395] the covenantor sold bread in a bakery and could not be restrained from restaurant work. In *Rogers v Maddocks*,[396] because the covenantor was engaged in both the retail and wholesale tasks the restraint was upheld.

In *British Reinforced Concrete v Schelff* ,[397] a non-employment case, the defendant Schelff, along with his partners, sold their business to British Reinforced Concrete (BRT) an England wide concern, covenanting that they would not act as servant of, 'any person concerned or [with] interests in the ... manufacture or sale' of road reinforcements in any part of the United Kingdom. In time Schelff took work with the engineers, Brown and Tawse, as manager of the reinforced material department. The firm was not then engaged in road building. Sometime later Brown and Tawse moved into the business of road reinforcements. This placed Schelff in possible breach of his covenant. When he informed Brown and Tawse of this he was put in charge of a stall at a 'Building Exhibition' centre explaining the merits of road reinforcement but not actually involved in the sale of road reinforcements. BRC sought to enforce the restraint against Schelff.

Younger LJ stated that the question to be asked in respect to reasonableness was 'whether in an agreement for sale of a business the reasonableness of a vendor's restrictive covenant is to be judged by the extent and circumstances of the business sold or by the extent and range of any business of the purchaser of which after transfer to him it is to form a part.'[398] In other words, does the restraint cover all businesses of the purchaser or only those in which the covenantor was concerned? The answer: 'It is the business sold which is the legitimate object of protection.'[399] Younger LJ commented further that a covenant exacted only for the

[393] *Routh v Jones* [1947] 1 All ER 758 at 761.
[394] *WR Carpenter Aust Ltd v Kleisterlee* [1988] ATPR 40-913.
[395] *Bromley v Smith* [1909] 2 KB 235.
[396] *Rogers v Maddocks* [1892] 3 Ch 346.
[397] *British Reinforced Concrete v Schelff* [1921] 2 Ch 563.
[398] *British Reinforced Concrete v Schelff* [1921] 2 Ch 563 at 574.
[399] *British Reinforced Concrete v Schelff* [1921] 2 Ch 563 at 574.

protection of a business with which the covenantor has never had a connection, 'is for this purpose no better than a covenant in gross.'[400]

An analogy can be drawn from the attempted imposition of a restraint across several companies within a group. In *Henry Leetham v Johnstone-White*[401] the covenantee 'Master', as agent of a company and a number of subsidiary flour mill companies, required the covenantor to contractually agree that he would not work for any other wheat or corn miller within the United Kingdom and Ireland or sell or deal in flour or any other article or goods dealt with by the principal company and any of its subsidiaries for five years following his employment. Farwell LJ found the covenantor was, in fact, the servant of but one company, the Cleveland Company. Farwell LJ recognised the right to protect a business 'so as to enhance its value' but recognised that 'a contract restraining trade is only good if and so far as it is for the protection of that business.'[402] In full his Honour stated:

> 'a man whose business is a corn miller's business and who requires to protect that, cannot, if he has also a furniture business, require the covenantee who enters into his service as an employee in the corn business to enter into covenants restricting him from entering into competition with him in the furniture business also, because it is not required from the protection of the corn business in which the man is employed, however much it may be beneficial to the individual person, the owner both of the corn business and of the furniture business.'[403]

Where an employer sequesters an employee's services that are not in fact the subject of his or her employment, the claim can rightly be made that rather than enforcing a positive duty on the part of the employee, the motive of the covenantee employer is to 'sterilise' the employee from the market. Lord Pearce in *Esso Petroleum v Harper's Garage* commented aptly that, 'The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties services and not their sterilisation.'[404]

It might also be noted that the apparent entitlement of an employer not to provide work to an employee[405] is conceptually different to the sterilisation of a worker for purposes of preventing competition or, if looked at another way, as the subject matter of the work, in context endorsing goods and services, does not fall within the employee's duties it is not within the power of the employer organisation to withhold or demand.

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[400] *British Reinforced Concrete v Schelff* [1921] 2 Ch 563 at 576. It is worth noting that Younger LJ stated that although the precedents such as *Henry Leetham* dealt with employee restraints 'the principle remains applicable to all covenants.'; at 576.
[401] *Henry Leetham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322.
[402] *Henry Leetham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322 at 326.
[403] *Henry Leetham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322 at 327.
[404] *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 328.
[405] *Ramsey Butchering Services Pty Ltd v Blackadder* (2003) 127 FCR 381.

The restraint of trade doctrine has, across a range of occupations and trades, refused to recognise as enforceable restraints which did not touch upon the specific tasks the covenantor was hired to perform.

## 3. A restraint during the currency of employment

Most often restraints of trade in respect to endorsement apply during the currency of an athlete's employment rather than, as is more usual, after the term of employment. Whilst challenging a restraint is less than common, there is no principle denying relief to those properly aggrieved. As High Court judge JD Heydon writes extra-judicially:

> 'Since *Warner Bros Pictures Inc v Nelson*, there have been several instances of the restraint of trade doctrine being applied to contracts during their continuance, for example, contracts of employment,[406] contracts for the exclusive provision of services[407] and contracts controlling the activities of players of professional sport whether or not they are parties to the contracts.[408] These developments are sound. ... it would unnecessarily hamstring the doctrine of restraint of trade to apply a test based on when a "contract" came to an end.'[409]

To emphasise the words of Heydon, that a challenge to a trade restraint can be made during the currency of employment is a sound development. Heydon went on to note that *Esso Petroleum v Harper's Garage*[410], heard before the House of Lords, 'had the effect of reversing earlier authorities holding that the restraint of trade doctrine could not apply during the continuance of a contract, so that it now applies to contracts of personal service.'[411]

The case of *Beetson v Humphries* illustrates the point well. Professional rugby league player Arthur Beetson contracted with The Sun newspaper to write a column on his sport. Beetson was threatened with expulsion from the game by the New South Wales Rugby League should he breach a by-law banning criticism of officials and players. He claimed the by-law was an unreasonable restraint of trade. The League claimed that 'published criticisms of players and coaches ... will undermine or destroy the very existence of the game itself by affecting the intake of the young players and by drying up the sources of referees and voluntary administrators.'[412]Although the court recognised the League possessed a legitimate interest

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[406] *Heine Bros (Aust) Pty Ltd v Forrest* [1963] VR 383.
[407] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308.
[408] *Buckley v Tutty* (1971) 125 CLR 353; *Adamson v New South Wales Rugby Football League Ltd* (1991) 31 FCR 242.
[409] Heydon JD, *The Restraint of Trade Doctrine*, 3rd ed. LexisNexis Butterworths, Australia, 2008 at 69-70.
[410] *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269. The object of the judges was to formulate a test by which the restraint of trade doctrine could be deemed inapplicable. In so doing there was a considerable attempt to discover authority from which to support such a test. The task was apparently not easy, for little guidance was found in precedent: 'Any attempt to trace historically the development of the common law attitude towards "restraints" of different kinds would be out of place here, and generalisations as to it are haphazard. ...' (at 333). In respect to this point, *Nordenfelt* did not, however, offer exclusions by type of restriction from the restraint of trade doctrine. There was, as Heydon indicated, no exclusion based on the currency of employment. For a full appraisal of the issue see Thorpe D, (2012) 29 *Journal of Contract Law*.
[411] Heydon JD, *The Restraint of Trade Doctrine*, 3rd ed. LexisNexis Butterworths, Australia, 2008 at 241-242.
[412] *Beetson v Humphries* (unreported, NSWSC, Hunt J, 10950 of 1980, 30 April 1980). Lexisnexis, BC8000054 at 19.

worthy of protection, at no time was the argument put that professional footballer Beetson should be excluded from his profession of journalism because he concurrently played rugby league for salary. Rather the case was determined as to reasonableness.

In a number of 'sport cases' where a restraint was imposed during the currency of employment relief has been granted, including *Adamson v NSW Rugby League*[413] and, at least to the extent that the restraint applied to rugby league players in general, *Buckley v Tutty*.[414]

Why is secondary employment an issue? There was a time under the restraint of trade doctrine when a covenantor would be hard pressed to challenge a restraint during the currency of employment. We see, for example, in the 1936 case of *Gaumont-British Picture Corporation v Alexander*, Porter J comment that, '... I do not myself know of any case, although it is possible that there may be a case, where circumstances might arise in which it would be held that a restraint during the progress of the contract itself was an undue restraint.'[415]

What was viewed as a 'possibility' in 1936 is now reality. Clearly, there is no per se rule preventing a restraint of trade being challenged during the currency of employment.

Nevertheless, should one wish to take a conservative position on this point, the comments of Crocket J in *Buckenara v Hawthorn Football Club*[416] are pertinent. The covenantee club, based in Melbourne, sought to enforce an option to acquire the playing services of Buckenara in the upcoming season. Buckenara, wishing to return with his wife and child to Perth, the city of their upbringing, claimed the operative contact was void as being in restraint of trade. Crockett J stated: 'A court will be very slow to find a provision to be a restraint during the period of service required by the contract to be rendered ... the circumstances must, therefore, be very *unusual* before any restraint imposed by the agreement could be said to be beyond that which was necessary to protect the defendant's legitimate business interests.'[417]

Several comments can be made in respect to his Honour's statement. To the extent that it is necessary to demonstrate the 'unusual', and noting that the word 'unusual' is not defined, it is more than arguable that the circumstances appending athlete restraints are, in fact, 'unusual'. Contracts restraining athlete endorsements are imposed on a take it or leave it basis on young athletes who possess little if any bargaining power. Indeed, mature athletes are also unlikely to possess sufficient bargaining authority to challenge the terms of their engagement. As Lord Diplock said in *A Schroeder Music Publishing v Macaulay*,[418] a case concerning the singer/songwriter Gilbert O'Sullivan who had been wrongfully exploited by his covenantee manager: '... what your Lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the songwriter at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the

[413] *Adamson v New South Wales Rugby Football League Ltd* (1991) 103 ALR 319.
[414] *Buckley v Tutty* (1971) 125 CLR 353.
[415] *Gaumont-British Picture Corporation v Alexander* [1936] 2 All ER 1686 at 1692.
[416] *Buckenara v Hawthorn Football Club* [1988] VR 39 (*Buckenara*).
[417] *Buckenara v Hawthorn Football Club* [1988] VR 39 at 44 (emphasis added).
[418] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 (*Macaulay*).

songwriter promises that were unfairly onerous to him.'[419] When most employee athletes in major Australian sport come 'off-contract' they seamlessly engage in a new contract on essentially the same terms as the old; terms that apply across the entirety of the code. There is, in these circumstances, no pause between the formation of one contract and the next in which to contemplate alternatives or to negotiate different terms to those established over time.

Secondly, in most sporting contracts no direct remuneration flows to athletes who have relinquished their reputation and persona in favour of their club. In claiming the athlete's subjective knowledge the sporting organisation becomes at some level a free-rider offending the notion of fair remuneration for income foregone, a practice condemned in *Nordenfelt* by Lord Macnaghten: '... of course the quantum of consideration may enter into the question of reasonableness of the contracts.'[420] The notion of proper remuneration in foregoing a prima facie right to trade was also referred to in *A Schroeder Music Publishing Co Ltd v Macaulay*: 'The test of fairness is ... whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor.'[421] Gibbs J stated similarly in *Amoco v Rocca Bros* that, 'as part of the circumstances of the case against which the question of reasonableness is to be decided, the quantum of consideration received by the covenantor and the effect of the agreement on the position of the covenantor' may be referred to.[422] Or as similarly stated by Lord Lyndhurst CB in an old case concerning a contract of exclusive employment: 'Where one party agrees with another to employ him, and the latter agrees not to work for any third person, such agreement is a partial restraint of trade and must be supported by adequate consideration.'[423]

The limited career span of athletes, exposure to career ending injury and the possibility of few post-sport employment opportunities are 'unusual' factors, a point made by Crockett J in respect to the Australian Footballer Gary Buckenara: 'He is now 29 years of age. It is over the next couple of years that he must seek to gain optimum income ... his past work history is not very satisfactory. He has had a number of jobs. They have been largely unskilled. His only genuine talent is for playing football.'[424] Unlike most employees in non-sport industries, the athlete's capacity to earn an income is limited to a few good years. Rather than being financially rewarded for experience and longevity of employment, the athlete will often face diminishing physical form and therefore decreasing financial returns before the age of thirty.

As stated earlier, the restraint of trade doctrine is on the cusp of change as it comes inevitably to deal with the digital communications paradigm, a change that may necessitate reconsidering the legal precepts that have so far guided the law of the restraint of trade doctrine specifically and employment law generally. Owens and Riley argue that the skills of

[419] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 at 1315.
[420] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 565.
[421] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 623-4.
[422] *Amoco Australia v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 316.
[423] *Young v Timmons* (1831) 1 Cr & J 331 (Quoted in Heydon JD, *The Restraint of Trade Doctrine,* 3rd ed, LexisNexis Butterworths, Australia, 2008 at 69).
[424] *Buckenara v Hawthorn Football Club* [1988] VR 39 at 46.

employees in 'recent times' may be classified as a form of 'human capital'. The authors state in respect to capturing 'the produce of work in proprietary form' as it relates to the 'knowledge economy', that there has been a presumption under 'traditional employment law ... that the employer owns it.' This presumption, it is argued, is without a basis in policy. Referring to academic Katherine Stone, the authors state: ' the "new psychological contract", whereby workers trade their labour not for job security but for career employability, must be accompanied by legal developments recognising the worker's entitlement to ownership of their own intellectual capital.'[425] There is, demonstrably, little or no 'job security' in sports employment and, given the nature of competitive sport, little concern that employers routinely breach the obligation of fidelity when they discard the services of an employee athlete in his or her late twenties.

It is clear that engaging in secondary employment does not preclude a covenantor from resort to the restraint of trade doctrine. To the extent that argument will focus on what is 'unusual' is sport employment, a court will also consider the specific issues going to reasonableness discussed below in Chapter 6, in particular whether the athletes reputation is his or her inalienable 'subjective property'.

## 4. The obligation of fidelity

Brief mention should be made of the employee's implied obligation of fidelity to the employer, specifically the obligation not to compete against the employer. (The subject matter of employee fidelity, it might be added, is a study in itself.) Suffice to say that the nature of sport employment requires the obligation of fidelity to be considered against the unique circumstances of the sport in question. For example, players of most football codes are subject to being 'traded' by the employer club – often against their wishes – a fact bearing upon the degree of fidelity that can concomitantly be expected of the player.

The question of present concern is at what point or through what circumstances can the implied duty of fidelity prevent the athlete/employee from engaging in secondary income-earning activities during his or her free-time.[426] Consideration of the matter is hampered by an incoherency in the doctrine of implied fidelity and the consequential absence of a clear principle: 'It has been said on many occasions that an employee has a duty of fidelity to his employer. ... The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends.'[427]

The concept of employee fidelity as it relates to secondary employment is of relatively recent origin, being heard for the first time in 1946 in *Hivac Ltd v Park Royal Scientific Instruments Ltd*.[428] The case, described as 'the leading authority'[429] by Heydon, concerned five

[425] Owens R and Riley J, *The Law of Work*, Oxford University Press, Melbourne, 2007 at 214-215.
[426] In the case of athletes, in endorsing goods and services for money
[427] *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 173 (*Hivac*)
[428] *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169. An earlier Australian case discussed below, *Blyth Chemical v Bushnell*, concerned an express term.
[429] Heydon JD, *The Restraint of Trade Doctrine,* 3rd ed, LexisNexis Butterworths, Australia, 2008 at 104.

employees who worked on Sundays making valves for hearing aids for a potential competitor of their employer, Hivac Ltd. Lord Greene stated relevantly, 'we are in an area of law which has not ... been sufficiently explored.'[430] The paucity of case law, up to and including the present time, has been problematic to a principled development of the law and, as suggested below, and caused the scope to the duty to remain largely amorphous. The Court in *Hivac* suggested the dearth of cases was due to the abandonment of the employer's usual response to employee competition, dismissal, caused by the post World War II labour shortage. Alternatively, it is suggested here that prior the introduction of shorter working hours and the labour-saving devices of the twentieth century, employees did not possess the capacity, if only in time and energy, to undertake extensive secondary employment. Certainly in the post-World War II era those working in manual labour, and indeed for those in skilled trades and professions, have been assisted by the electrification and mechanisation of tools with obvious personal benefits.

The employee's obligation not to compete with the employer was considered in Australia before the High Court in *Blyth Chemicals v Bushnell*.[431] The employee, Bushnell, an industrial chemist, established the firm called Electrolytic Lead Products, a company manufacturing white lead for use in paints, and appointed himself chairman of directors for life. Bushnell's primary employer, Blyth Chemicals, manufactured chemicals, many of which were lead based, for use on fruit trees. Blyth believed that with little effort Bushnell could convert his equipment to produce chemicals similar to its own and capture Blyth's customers. Anticipating this possible event Blyth Chemicals sacked Bushnell.

The High Court found the employee Bushnell had been wrongfully dismissed. Dixon and McTiernan JJ stated:

> '... the conduct of the employee must of itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to future conduct arises.'[432]

The descriptors 'incompatibility', 'impediment', 'destructive of confidence' and 'conflict' are so broad in meaning as to make elusive the discernment a threshold demarking the acceptable from the unacceptable. Nonetheless, it would seem in reference to Bushnell's behaviour that the Court set a somewhat high threshold for determining whether employee conduct is destructive of the obligation not to compete. Suspiciously, Bushnell, although informing Blyth that he would not compete against it, in fact refused to permit his company to enter into a deed to secure the protective promise. Bushnell, in addition, was also known to have independently approached Blyth's customers. Blyth informed the Court that Bushnell had recently visited long standing customers in Tasmania and suspected Bushnell was luring away workers. The board of Blyth Chemicals indicated that they, perhaps not unreasonably,

[430] *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 173.
[431] *Blyth Chemicals v Bushnell* (1933) 49 CLR 61 (*Blyth*); Bushnell's contract of employment incorporated a 'non-competition clause'; nonetheless, the analysis of the issue is applicable to a determination of an implied obligation not to compete.
[432] *Blyth Chemicals v Bushnell* (1933) 49 CLR 61 at 81-82

had lost confidence in Bushnell given this behaviour. It would seem that such conduct would, by ordinary standards, cause many employers to lose confidence in the employee. Nevertheless, according to the High Court Blyth's conduct was not in breach of the obligation not to compete against the employer, begging the question as to what level of misconduct is required to meet the threshold.

As stated, the obligation of employee fidelity is undefined and as such its scope, according the Lord Greene, 'must be a question on the facts of each particular case'.[433] This factual basis was also referred to by Denning MR in *Woods v WM Car Services (Peterborough)*: 'The circumstances are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not.' [434]

The employee's obligation of fidelity is concomitant with the employer's duty of fidelity to the employee, described in *Auckland Shop Employees Union v Woolworths*, 'a corollary to the employee's duty of fidelity.'[435] The rationale of the mutual duty was expressed in *Malik v Bank of Credit and Commerce International* as a means of securing 'a balance ... between the employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.'[436]

In *Capital Aircraft Services v Brolin*[437] Connolly J reflected on the mutuality of the obligation of fidelity as between employer and employee stating:

> 'It seems to me that all of the arguments in favour of exclusive dealing are based on the employee's duty of fidelity during the life of the employment. But this is of course a two way street, and the employee, in return for this fidelity, enjoys all the consequences of the employment relationship.'

His Honour went on to list factors inimical to the contractor who was once a full time employee but now provided services on a casual basis to covenantee:

> 'The present agreement is expressly a contract for services, and excludes the defendant from workers compensation and insurance. There is no obligation to supply any work or any defined quantum of work.'

Whilst certainly an athlete need not be supplied with endorsement work by his employer, the facts applicable to fidelity in sport employment are so unique as to justify a 'sport specific' approach. Where, for example, the employer, perhaps on a whim, 'trades' an employee athlete for another of perceived greater talent, one may question the depth of obligation the player can concomitantly be thought to owe to the employer. The limited length of most sports careers and the possibility injury, events which regularly result an athlete's services being abruptly discarded, are also germane to the scope of fidelity that can be expected of athletes.

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[433] *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 174.
[434] *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 at 670.
[435] *Auckland Shop Employees Union v Woolworths* [1985 2 NZLR 372 at 376
[436] *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1998] AC 20 at 46
[437] *Capital Aircraft Services Pty Ltd v Brolin* SCACT 516 of 2003 [2006] ACTSC 80 at [22[.

Sport employees are also subject to summary dismissal for 'bringing the sport into disrepute', a term not defined in sporting contracts made worse by the fact that it may well be differentially applied according the an athlete's status within the sport in question. For example, rugby league rookie player Dane Tilse had his contract with the Newcastle Knights Rugby League team terminated 'after an alcohol-fuelled incident involving a woman at Bathurst.'[438] Around the same time 'star' player Craig Gower 'was fined $30,000 and sacked as Penrith captain after groping Wayne Pearce's daughter at a charity golf day, but his career can continue unabated.'[439] Such a double-standard operates well beyond what can reasonably be referred to as employer fidelity. Rather it depends not on the offence but on matters extraneous to the offence.

Within the employment setting emphasis is often placed on the type of duty the employee is called upon to perform. In *Nova Plastics Ltd v Froggatt* the Employment Appeal Tribunal upheld a finding that an 'odd job' man who had taken secondary employment did not come under a 'duty in law to his employer because he happens to be working in his spare time for somebody who is in competition with his employer.'[440] Lord Greene MR in *Hivac* took the view that it would be undesirable to tie the hands of a manual worker 'and prevent him adding to his weekly money' but conceded that in certain classes of activity such as that of a solicitors clerk who found himself 'embarrassed' to perform for the same client on opposite sides of the case, it 'may well be a very good answer.'[441] In both examples, it can be noted, the worker performed tasks for the secondary employer of a similar type as for the primary employer, in contrast to the endorsing athlete, who, once again it must be said, is employed to work at playing the sport in question. In both the cited cases mention was made of the need to ensure the worker was available for overtime should it arise and, in the example of the solicitors clerk, that he must be able to provide 'undivided attention'[442] to the business of the primary employer. Neither circumstance is applicable to the endorsing athlete. Nor can it be said, as was the gravamen in *Wessex Dairies Ltd v Smith*, that the athlete is breaching the obligation fidelity by using 'the time for which he is paid by the employers in furthering his own interests.'[443]

As a matter of policy it is arguable that the old restraint of trade paradigms associated with banning secondary work during the currency of employment have become outmoded as part-time and flexible work conditions becomes more acceptable. Again, this is point made more broadly by Riley who suggests that the changing nature of the work relationship has given rise to a different dynamic in respect to the legal rights of employees – one, it can be noted, that is peculiarly relevant to the sporting organisations' uncertain employment practices:

> 'Claims to enforce post-employment restraint covenants or duties of confidence are really assertions of rights to sterilize, or at least handicap, the employee's exploitation of his or her own human capital. In the new boundary-less workplace, the law ought

[438] Stanton W, 'Tilse Refusing to Cry Foul at Gower's Star treatment', *The Sun-Herald*, 8 January 2006.
[439] Stanton W, 'Tilse Refusing to Cry Foul at Gower's Star treatment', *The Sun-Herald*, 8 January 2006.
[440] *Nova Plastics Ltd v Froggatt* [1982] IRLR 146 at 147.
[441] *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 175.
[442] *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 175.
[443] *Wessex Dairies Ltd v Smith* [1935] 2 KB 80 at 84.

> not to support such claims. The same economic justifications which support flexible work practices and a weakening of the employers commitment to long term engagement of particular workers, also support the liberty of the worker to carry a full range of talents, skills, knowledge and connections into new jobs and new careers.' [444]

Riley's comment refers specifically to post-employment restraints. What is important, however, is recognition that the erosion of what might be termed 'employer loyalty' must call for a singular appraisal of how far the employee athlete's obligation of fidelity can be expected to extend.

While much could be said of this 'vague'[445] notion as it applies to sport, there is no doubt that fidelity is an obligation mutually owed. In this sense the standard of fidelity expected of the athlete can be no higher than that of the employer. It can also be noted that athletes of individual notoriety who trade their reputation, perhaps digitally, in far-off nations where their organisation has little to offer the advertiser, can hardly be accused of affecting the interests of their employer.

## 5. Conclusion

The relationship between athletes and the major sporting organisations is commonly that of employment. Three interconnected issues related to employment have been suggested as least theoretically relevant to the application of the restraint of trade doctrine to limitations on athlete endorsement. One: whether an athlete is employed for the purposes of endorsement. Two: whether the restraint of trade doctrine is available to an aggrieved athlete during the currency of employment. Three: whether an athlete breaches his or her obligation of fidelity in offering endorsement services to a market in which the employer also has an interest.

This Chapter argued that when considering the employment obligations of the athlete to the organisation, it is necessary to draw a demarcation between what the employee athlete is employed to do, play sport, and the trade of endorsement. It is clear that the contractual terms place limits on athletes accepting private endorsement, it is also clear that there is no contractual term mandating that an athlete, as part of his or her employment, is to endorse goods and services. This fact was argued to suggest the purpose of the restraint was to sterilise the competition of the athlete from the endorsement market. Enforceable restraints of trade are required to protect a 'legitimate' or 'proprietary' interest of the covenantee. There must in this sense be a connection between the specific task the covenantor performs and the restraint.

It was proposed that the duty of fidelity owed by the employee athlete to the sporting organisation must be considered against the peculiarities of the sports industry. In particular, that as the duty is one mutually owed as between employer and employee, account must be taken of the uncertainty of on-going employment and the willingness of the employer sporting organisation to trade even the most loyal of athletes for another of believed greater

[444] Riley J, "Who Owns Human Capital? A Critical Appraisal of Legal Techniques for Capturing the Value of Work", (2005) 18 *Australian Journal of Labour Law* 1 at 2.
[445] *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169 at 173.

talent. In short, the obligation of the athlete is to be measured against the demonstrable 'infidelity' of the sporting organisation.

It was also proposed that as endorsement marketing through sport is a relatively modern development, there is, to paraphrase the words of Riley, no reason why 'the employer should own it.'

Sporting organisations are recognised as possessing a legitimate interest in conducting a well organised competition, in preserving a strong competition and maintaining public interest. Such interests relate directly to the playing of sport. Imposing a salary cap, for example, on a player furthers the legitimate interest of a stronger competition. By contrast, an endorsement restraint fails to further any interests of the sport as these relate to the contracted task of playing the game. To this extent, it represents a strikingly unreasonable extension of employer power over athletes. This point will be elaborated in detail in the next Chapter.

# Chapter 6: Enforcement and Reasonableness I

**Preface**: *In considering the question of enforcement, it is helpful to distinguish between specific matters bearing upon the reasonableness of endorsement restraints and the milieu in which these restraints occur. Chapter 6 will focus on the former whilst Chapter 7 will consider endorsement restraints against the backdrop of the multiple restraints of trade that are commonly imposed on athletes.*

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# Single Factors bearing upon Endorsement Restraints of Trade

## Section 1: Product grouping as a restraint of trade

### 1. Introduction

A sporting organisation if challenged that its restraint on athlete endorsement is unreasonable can rightly point to the partial nature of the restraint. Under most contracts in major sport the athlete is entitled to endorse all products and services that do not conflict with products the organisation endorses.[446] In these circumstances a restraint is partial in subject matter, leaving room for the athlete to trade his or her servicers of endorsement to the wider market, that which does not threaten the organisation's sponsors. However, it is argued below that such terms are in fact a device to create the impression of partialness and which in reality offer little to release athletes from the burden of the restraint on endorsement.

Sporting organisations do not endorse merely one product or service but many, leaving relatively few product categories free for athlete endorsement. Should an athlete endorse a product or service that competes with a product or service the sporting organisation endorses, he or she would be in breach of contract. Once the organisation contracts with a sponsor an entire product or service line is removed from the athlete's potential endorsement market. To illustrate, should the National Basketball Association (NBA) contract to endorse Holden cars, all NBA athletes are excluded from endorsing a car of any other manufacturer. This section asks, as a matter of contract construction, whether a restraint on endorsing cars other than, say, Holden, extends other forms of motorised transport like trucks or motor bikes.

A sporting organisation markets its services of endorsement by categorising products into groups, for example, alcoholic beverages, electronics and insurance. The commercial rationale of product grouping is to create the appearance that a large number of businesses are

[446] The word 'product' is at times used in reference to both 'product' and 'service'.

each a main sponsor of the sport in question. Although revenue per sponsor is somewhat less than under full exclusivity, total revenue, given a larger number of sponsors, expands.

## 2. Partial Restraints of Trade

A partial restraint of trade is one that does not remove the covenantor from the market entirely but excludes him or her from merely a segment of the market. A 'general restraint' on the other hand may cover an entire nation or perhaps in some cases the world.[447]

The concept of a partial restraint was introduced in the 1711 case of *Mitchell v Reynolds* when Parker CJ commented in respect to the advantages of partialness that:

> '... without doubt some place or other may be found where the party entering into such a bond may use his trade, without any prejudice to the obligee.'[448]

The case occurred in the early years of the Industrial Revolution in England when, for the first time, technological developments in transportation made travel between towns more available, safer and quicker, permitting covenantors to find 'some place', as his Honour described it, in which to work beyond the locality of previous occupation and in doing so not affect the trading interests of the covenantee. Prior to this transport revolution a restraint preventing a covenantor from trading in his or her village or town was not enforced because to do so would place an unacceptable burden on the charitable resources of the local parish, at the time legally charged with sustaining the unemployed. The 'partial restraint rule' was replaced in *Nordenfelt* in 1894 but nonetheless remains as a test of reasonableness under the modern doctrine.

Where a restraint is 'partial' it is less likely to exceed the parameters of 'adequate protection' or the frontiers of reasonableness. As Kitto J commented in *Lindner v Murdock's Garage*:[449]

> 'In order to be valid (the restraint) should, I think, have been so limited in respect of each area as not to operate therein unless the appellant should be employed by the respondents in their business in that area within some specified reasonable period preceding the termination of his service. Not being so limited, the clause, even if free from objection in any other respect, appears to me to exceed what was reasonably required in order to obviate the danger from which the respondents were entitled to obtain protection.'[450]

*Murdock's Garage* concerned a restraint on an employee who took work with a competitor of the Garage. The restraint was found unreasonable on the basis that the geographic scope of the restraint exceeded that necessary to protect the covenantee's legitimate interests.

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[447] For example, the restraint in *Nordenfelt* was world-wide and of twenty-five year s duration.
[448] *Mitchell v Reynolds* 24 ER 347 at [136] .
[449] *Lindner v Murdock's Garage* (1950) 83 CLR 628.
[450] *Lindner v Murdock's Garage* (1950) 83 CLR 628 at 659.

## 3. Partial restraint as to product line

The object of a partial restraint of trade is to ameliorate the effect of a restraint on the covenantor by leaving some portion of the market available for his or her private exploitation. In most industries this portion is the time beyond the expiry date of the restraint or the area beyond the geographic reach of the restraint. Restraints of trade imposed on athlete endorsement are different; the object of the restraint is not the maintenance of customer lists or the preservation of business goodwill - here the athlete presents no threat to the organisation - rather, the restraint is directed at the subject matter of a commercial activity: endorsement.

There is no reason in principle why the ameliorating effect of a partial restraint should not extend to interests beyond the dimensions of area and duration to include the subject matter of a restraint; in the context of this thesis, endorsement of products and services. The partialness of an endorsement restraint is, then, that segment or the market (those products and services) not endorsed by the athlete's sporting organisation. In general, where a covenantor athlete is permitted to endorse alternate products to his or her sporting organisation the restraint is more likely to be reasonable. Where this is not so, the restraint bears the character of a general restraint and, without more, tends towards the unreasonable.

## 4. Product categorisation as a 'partial' restraint of trade

As the dominant party, the sporting organisation is able to incorporate terms into its athlete contract to ensure that sponsors must, in almost all cases, approach the organisation in preference to the athlete. In effect the organisation has first claim in offering endorsement services to the market and the athlete is left to contract with those sponsors who did not want, or were unable, to contract with the parent body. Whilst this 'residue' may appear extensive, in practice the line of products or services appropriated by the sporting organisation is so vast that few, if any, alternate lines are available for athlete exploitation. For example, the National Rugby League (NRL) endorses Toyota, Harvey Norman, Telstra and Coca-Cola amongst many others, effectively closing-off to NRL players' endorsement in motor cars, retail, telecommunications and soft drinks. In such cases, and bearing in mind that the application of the restraint of trade doctrine focuses upon the practicality of the restraint rather than its form, [451] the restriction must then be categorised as non-partial.

For a sporting organisation, profits are maximised by categorising products into different groups such that each sponsor is granted an exclusive 'product line' association with the sport. Netball Australia, for example, is able to offer their 'sponsor partners', Holden cars and Elastoplast bandages, an exclusive association with the Australian Netball team in these two product lines. No player with Netball Australian is permitted, under contact, to endorse any product falling within the product lines of cars and bandages.

[451] 'As the whole doctrine of restraint of trade is based on public policy, its application ought to depend less on legal niceties or theoretical possibilities than on the practical effect of a restrain in hampering that freedom which it is the policy of the law to protect.'[451] *Esso Petroleum v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 298, per Lord Reid.

Each sponsor benefits in appearance, if not in effect, from a monopoly association with the sport in that product line. Categorised sponsorship, in short, is a marketing tool designed to permit more than one sponsor to appear as a 'major sponsor' or 'partner' of the sport without threatening the commercial interests of other sponsors. For the athlete, however, profits are maximised where he or she is free to offer unrestrained services of endorsement to all-comers.

It is proposed here that the difference between a sporting organisation that endorses a single product line leaving all other products and services to its athletes, and an organisation that endorses a multitude of products (shutting out the athlete when doing so) marks the difference between a reasonable and an unreasonable restraint. In the idealised world of 'perfect competition'[452] sporting organisations and athletes would offer their endorsement services unrestrained, allowing the market forces of supply and demand to set the price. That is, where a single product is claimed by the organisation, the market for all other endorsements is openly competitive and the endorsement market clears at the perfect competition price. The present practice of product categorisation, however, creates several 'product line monopolies' within a given sport. Supply relative to demand in each product category is restricted and the price of endorsement, according to economic theory, rises. The organisation's profits are maximised, athletes incomes are minimised, sponsors pay more for their endorsement services and, with some inevitability the additional costs are passed on to consumers.

As the dominant party the sporting organisation is able to impose a number of contractual 'protections' to make it the 'endorser of choice' for sponsors. These protections include banning athletes from wearing apparel or insignia not associated with the sport in question, or a ban on endorsing certain product types, for example, rightly or wrongly, the National Hockey League contract states that, 'No Player shall be involved in any endorsement or sponsorship of alcoholic beverages and or tobacco products.'[453] Restrictions are sometimes placed on the use of an athlete's autograph or on the use of 'mascot words' like 'kangaroo'. The contract may require that any private endorsement exceed a set amount of money or that 'nominated clothing' be worn to games, training or public appearances, and when doing so that all brands and insignia be prominently displayed. Whilst perhaps understandable on their face, these restrictions nonetheless limit the endorsement opportunities available to individual athletes. The overall effect is to engineer the organisation as the first port of call for sport sponsors.

A further and prominent difficulty faced by endorsing athletes is the limited market for sport related endorsement. The purpose of sponsorship is to allow 'the sponsored brand to live in the reflection of the sponsored activity.'[454] There are only so many product lines advantaged through an association with a particular sport at a given time. Once committed to a particular

[452] 'Perfect competition': a term of economics where a market is characterised by a large number of buyers, a large number of sellers, with perfect freedom to enter and exit the market at will where price is set by the free interaction of supply and demand.
[453] For example, National Hockey League Player Contract (2010) section 25.1.
[454] Meenaghan T and Shipley D, 'Media effect in commercial sponsorship' (1999) 33 (3/4) *European Journal of Marketing* 328 at 335.

sport a sponsor will, in all likelihood, be disinterested in an additional endorsement association with a player as an independent contractor of that sport. [455]

## 5. An exemplar: the ARU sponsors and product categorisation

The Australian Rugby Union (ARU) contracts with its players through a bargaining process with the Rugby Union Players Association (RUPA).

RUPA provides to the players it represents a document entitled 'Key Features' of the Collective Bargaining Agreement which is apparently a simplified version of the Player Contract. The Player Contract is a curious mixture of terms proclaiming a number of restraints on endorsements, concessions to those restraints and qualifications to these concessions. Within a simplified 'Key Features' document is a revealing clause found directly after the contractual term restraining a player from entering into private endorsement with a sponsor:

> 'It is recognised that these sponsors make a valuable contribution to the revenues of the game and that their business undertakings are worthy of protection from competition by players using their images with rival competitors.'

The purpose of incorporation into the player contract of the above term is uncertain but one might speculate that it serves to testify that the player agrees to the reasonableness of the endorsement restraint – a forlorn hope on the part of the organisation as agreement is of little consequence where the overriding issue is that of reasonableness in the interests of the parties and of the public.[456]

Under the terms of the Player Contract, sponsors are divided into two groups: 'Special Rights Sponsors' and 'Protected Sponsors'. The higher category group, Special Rights Sponsors, receives benefits not available to the other sponsors, essentially in the form of greater access to individual player images. The ARU is limited to four Special Rights Sponsors and each State Union to two. The ARU is entitled to ten Protected Sponsors and each State Union to four. There are, in addition, a number of suppliers and licensees. It is these various interests that the restraints on player endorsement aim to protect.

'Special Rights Sponsors' of the ARU and a State Union such as New South Wales or Western Australia, are granted:

> 'the unlimited right and authority to use your name, image, likeness, talents and reputation in newspapers, match programs, advertising brochures, magazines, websites or any other printed medium (excluding a billboard) for the purposes of promoting a Special Rights Sponsor's business undertakings.'[457]

[455] See discussion of this limitation in Chapter 2 'The Factual Context'.
[456] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 565.
[457] ARU Standard Player Contract (2008-2012) section 13.2.

Clause 13.4 grants the same rights to the four ARU Special Rights Sponsors and the two State Union Special Rights Sponsors where the player's image appears alongside at least four other players' images.

Non-Special Rights Sponsors are granted the same 'unlimited right to the use of name, image, likeness, talents and reputation in any form of medium to publicise and promote their business undertakings' provided the use is in the context of a group of at least four players.[458]

The use of individual images and the like is confined to 'the context of playing the game, training, travelling to or from a Match, engaging in pre or post match activities or wearing team uniform'.[459]

Protected Sponsors of a State Union or the ARU 'do not have the same privileges of Special Rights Sponsors but in exchange for their investment, they receive protection in relation to their sponsorship and are entitled to specific privileges'. The idea behind offering slightly different privileges between the categories of sponsors is apparently that of product differentiation – one category of sponsor paying more than another.

The right to use player images, it might be noted, extends for the term of the player's contract and two years following the retirement of the last player in the group.

**5.1 Player entitlements and limitations on the use of image**

A player is entitled to benefit from the use of his image. However, the capacity to do so is restrained by the following term of the CBA:

> 'Players may not enter into an endorsement arrangement with any organisation that uses a player's image to promote goods or services that compete with the business undertakings of the ... protected sponsors. ...
>
> Players may however use their own image to promote goods and services for personal financial reward provided that such use does not conflict with the business undertakings of the protected sponsors ... is not prejudicial to Australian Rugby, does not use any of the State Unions intellectual property, ie logos, playing uniforms etc ...'[460]

The wording of the Player Contract is more direct:

> 'During the term or your employment you must not:
>
> (a) Engage in any other promotional, marketing or advertising activities of any kind whatsoever; or

[458] ARU Standard Player Contract (2008-2012) section 13.5.
[459] Rugby Union Players Association (RUPA) Collective Bargaining Agreement 2005-2012, Schedule A – Players' Images and Signatures. All relevant quotes are from this source. The 2005-2008 CBA has been rolled over and remains applicable in 2012 (personal discussion of author with RUPA official).
[460] Collective Bargaining Agreement (2005-2012) Schedule A: Players' images and signatures'.

(b) Make any contract, arrangement or agreement (whether or not legally binding) that requires or permits the use or exploitation of your name, image, likeness, talents or reputation for any other promotional, marketing or advertising activities (without the prior written consent of the ARU or the players relevant State Union).'[461]

The Player Contract informs the players that consent to endorse '*may* be withheld where those (promotional) activities':[462]

(i) 'relate to products or services competitive with those of Protected Sponsors, official suppliers or licensees (existing or under negotiation) of the ARU or the relevant (State) Union which have been nominated to RUPA from time to time;

(v) Involve the use of any names, logos or other intellectual property of the ARU or the Relevant (State) Union.'

The use of the indefinite word 'may', in some sense signalling that consent may not be withheld, is of no benefit to a covenantee. A restraint is tested 'not be reference to what the parties have actually done or intend to do, but what the restraint entitles or requires the parties to do'.[463] In other words, the fact that the ARU may, or may not, refuse consent is of no import and the term will be treated as a full restraint of trade.

Non -Special Rights Sponsors are permitted to use a player's image provided it is within a 'series or collection'. In such cases 30% of the net revenues received by the Rugby Body are shared equally amongst the players whose images were used in that series of shots. Players are also permitted to use team association words like 'Wallaby' or 'Waratah' in promotions provided the revenue received by the player exceeds $25,000 or, in the case of State Unions, $15,000. In consequence, small sponsorship interests are excluded by the ARU minimum $25,000 expenditure threshold which effectively prevents players with low sponsor value from accepting minor endorsement contracts, for example with local or regional businesses. The minimum expenditure is clearly a restraint on trade but is arguably reasonable in the interests of the majority of players in that it maintains a floor below which the price of endorsement will not fall. Whether it is in the interests of an individual player of lesser talent, in particular State players, is a different question.

The Player Contract permits a player to: '... seek and receive a fee or some other form of consideration if your image is to be used in a Sponsor's promotional activity'[464] if no other player is included and the activity is a 'non-staged action shot ie playing, training...' The contract does not reveal what quantum of fee will constitute the entitlement and, it is submitted, does not grant the athlete free access to private endorsement.

[461] ARU Standard Player Contract (2008-2012) section13.16.
[462] ARU Standard Player Contract (2008-2012) section13.16 (b) (i). Emphasis added.
[463] *Adamson and Others v New South Wales Rugby League and Others* (1991) 103 ALR 360 per Gummow J.
[464] ARU Standard Player Contract (2008-2012) section 13.2 and 13.3.

The use of player signatures for promotional purposes is also restricted. A player is permitted to sign (autograph) an object, say a ball or jumper, only where to do so does not conflict with 'the business undertakings of protected sponsors'. Where signatures are used in licensing agreements on memorabilia such as jerseys, sporting calendars, footballs, photographs and mugs, the 'players will receive a total of 45% of the revenues receivable by the ARU or State Unions'.[465] According to the CBA, 'players' consent is deemed to have been given for the range of products referred to.'

As a concession to the signature restrictions, 'players are now entitled to use their individual signature for promotional activities provided that such use does not conflict with the business undertakings of the protected sponsors ...'[466]

There are few things more personal than an individual's autograph, once given freely at the gate to the ground but now part of a revenue stream controlled by the organisation. Such schemes impact negatively on the decades old private marketing practice of the 'signature football' or the 'signature bat', and of course sharing in 45% of the generated endorsement revenue is, for those players with 'star-quality', far less than 100%.

The above terms grant the sponsor access to a player's personal image. Having contracted with sponsors to furnish these images, the ARU and similar sporting organisations must protect the sponsor's investment from endorsement competition from players who, in addition to the organisation, are the only entities able to form an association between products and the game of rugby union.

The effect of the above terms is to grant to Australian representatives and State players the right to endorse any sponsor's product provided it does not 'conflict with' or, as expressed in the Player Contract, 'relate to products competitive with' those of a Protected Sponsor. The proviso is, of course, the relevant restraint of trade.

## 6. Multiple organisations with multiple sponsors

Bearing in mind that an athlete is usually confined to endorsing for those sponsors who did not contract with the sporting organisation (the 'residue') the usefulness of a contractual entitlement to privately engage with sponsors depends on how many sponsors the sporting organisation supports with and how many product lines are claimed. The greater the number of sponsors, the more product lines removed from athletes and the more difficult it is for an athlete to secure a private endorsement contract.

Consider the extent of sponsor coverage an individual athlete playing rugby union faces. The ARU's 2012 'Partner' sponsors number twenty-two.[467] Qantas is the 'Naming Rights Sponsor'; Castrol the 'Official Oil and Lubricants Partner'. KooGa is the 'Official Sports Apparel Sponsor' as compared to Sportscraft, the 'Official Formal Wear supplier' and Le Coq Sportif which has not received specific designation but is presumably the 'official casual

[465] Collective Bargaining Agreement (2005-2012) Schedule A: Use of Players' Signatures.
[466] Collective Bargaining Agreement (2005-2012) Schedule A: Use of Players' Signatures.
[467] <http://www.rugby.com.au/wallabies/OurPartners.aspx>

wear' sponsor. Blackberry is the 'Official Mobile Partner' and Panasonic the 'exclusive partner in Audio Visual products and Consumer Electronics category'.

Hahn Super Dry is the Official Beer; Lexus the Official Motor Vehicle Partner and Vero the Official Commercial Insurance Partner. Other sponsors include Nine Wide World of Sports; Skins compression garments; Intercontinental Hotels and Resorts; Swisse the Official Supplements Supplier; Gatorade, Victor, Julius Marlow; Fox Sports, Channel 9; WA Events Group; State Government of Victoria; The City of Melbourne and VisitBrisbane.[468]

A rugby player wishing to privately endorse must not only find product and service categories that are not taken by the ARU's sponsors but must also avoid competing with sponsors of his regional rugby team. For example, a Wallabies player who also plays for the Western Australia team, the 'Western Force', must not, in entering into a private endorsement contract, support sponsors in commercial conflict with his regional team's sponsors. The 'Force's' sponsors are divided into three groups: 'Major Partners', 'Partners' and 'Preferred Suppliers'.[469] There are eight major sponsors including Emirates Airlines, Bankwest, McDonalds, Volvo, and Bupa. There are eleven 'Partner' sponsors such as Rebel Sports, Lion, Lavan Legal and Karma Resorts. There are around twenty Preferred Suppliers ranging from Schweppes soft drinks to Elastoplast to Globetrotter commercial travel.[470]

So, the Western Force player who is also an Australian player is confronted with twenty-two Wallabies 'Partners', and, looking only at the Force's 'Major Partners' and 'Partners', a further twenty-seven sponsors for a total of more than forty-five sponsors, the product and service lines of which he is not permitted to endorse.[471] The restraints on player use of image in rugby, the means by which players usually endorse products and services, are clearly extensive. The concern though is with a restraint that gives the appearance of being partial but in fact covers a wide range of product and service lines progressively limiting the endorsement market available to athletes.

## 7. Sub-categorisation

Sub-categorisation, as proposed here, occurs where products are placed into subsets of their genus, for example different alcohol products, different forms of wearing apparel or different types of insurance. The commercial rationale of the sporting organisation is to engage with

[468] To illustrate changes in sponsors and additions to numbers, the 2012 list can be compared to that of 2008: 'Special Rights Sponsors' and 'Protected Sponsors': Qantas (Airlines); Bundaberg Rum (Alcohol – Spirits); Canterbury Clothing (Sports and Fashion wear); Tooheys (Alcohol – beer).The additional 'Protected Sponsors' (which also includes the Special Rights Sponsors) were: Qantas (Airlines); Bundaberg Rum (Alcohol – Spirits); Canterbury Clothing (Sports and Fashion wear); Tooheys (Alcohol) – beer); Suncorp (Financial Services/Credit Card); Panasonic (Consumer Electronics); TBC (Telecommunications); Ford (Motor Vehicles); Coca-Cola (Non-alcoholic beverages).

[469] <http://www.westernforce.com.au/HQ/Partners/MajorPartners.aspx> In April 2012 Toohey's was the official beer, replaced, by August 2012, by Hahn Super Dry.

[470] It is not clear whether preferred suppliers are a category protected from endorsement competition.

[471] Some sponsors, such as KooGa, are aligned with both the Wallabies and the Force, marginally limiting the adverse affect of the restraint.

additional ‘major’ sponsors by creating from a single product line, a number of further product lines.

Consider the example of ‘sub-categorisation’ extracted from the list of 2012 ARU sponsors.[472]

KooGa is the Official Sports Apparel & Leisure Wear Sponsor of the Wallabies and a Platinum partner of Australian Rugby

SPORTSCRAFT

Sportscraft are proud to be the Official Formal Wear supplier of the Qantas Wallabies.

The sponsor ‘le coq sportif’ is yet to be sub-categorised by product but is known for ‘on-field’ sports apparel.

Each product line is that of clothing. The organisation is able to break that product line into sub-categories to form, as it were, sub-category monopolies.

The 2008 ARU ‘alcohol’ sponsors demonstrate more starkly the process of sub-categorisation in respect to this archetypal sports sponsor. The trademarks and descriptions of the ARU sponsors for alcoholic beverages are divided into rum, beer and wine. [473]

**BUNDABERG RUM**

**Bundaberg Rum is once again a proud sponsor of the coming Bundaberg Red Rugby Series a Bundaberg Red Tri Nations, and is as excited as ever to be behind the Qantas Wallabies for what is sure to be a great year of Test match rugby.**

**TOOHEYS NEW**

**Tooheys New has supported rugby across the country at all levels and in 2010 continue their passionate support of the Qantas Wallabies.**

[472] As at April 2012.
[473] Taken from the ARU website: <http://www.rugby.com.au/qantas_wallabies/partners/partners,186.html> Possible issues of contract constructions in respect of sub-classification are discussed in the section below.


**ROBERT OATLEY VINEYARDS**

**Robert Oatley wines reflect both a proud winemaking heritage and contemporary, innovative Australian wine styles - crafted and bottled at the family estate in Mudgee, Australia.**

By August 2012 the Official Beer Partner became Hahn Super Dry and the Official Wine Partner, St Hallet. There is no reason why most categories of sponsorship cannot be divided into number of subcategories and expanded or contracted at will. For example, wine could be further sub-categorised into red wine or sparkling wine and beer into low alcohol beer or foreign produced beer.

Similar endorsement lists are found in the NRL competition. The NRL has an association with 18 sponsors.[474] The club the Sydney Roosters has 12 sponsors.[475] The NRL subcategorises alcohol into 'Bundaberg Rum' and 'VB' beer. In contrast the Parramatta Eels has a mammoth 52 sponsors, with alcohol, for example, again sub-categorised into 'Tooheys' beer, 'Tyrrell's Wines' and 'Jim Beam' bourbon.[476] If Parramatta so desired its sponsor categories could be further divided into sub-categories for entertainment, restaurants or sports gear.

## 8. Legal Issues of Sub-categorisation

There are two legal questions relating to the restraint of trade doctrine that are of concern:

One: Does the use of sub-categorisation suggest, as a matter of contract construction, that athletes can endorse in sub-categories not claimed by the organisation, or indeed by the same reasoning, suggest that athletes are permitted to unilaterally divide the organisation's sponsors into product sub-categories for their personal exploitation?

Two: Does the practice of claiming increasing numbers of protected sponsors indicate a general restraint tending to unreasonableness?

### 8.1 A narrow or broad construction to sub-categorisation

The ARU contracts to supply an exclusive association between a sponsor's product and the sport of Australian representative rugby by limiting athletes to those products or services not endorsed by the ARU:

> 'Players may however use their own image to promote goods and services for personal financial reward provided that such use does not conflict with the business undertakings of the protected sponsors ...'

[474] <http://www.nrl.com/Sponsors/tabid/10630/Default.aspx>
[475] <http://www.sydneyroosters.com.au/default.aspx?s=current-partners>
[476] <http://www.parraeels.com.au/default.aspx?s=sponsor-directory>

Or, as it is expressed through the Standard Player Contract, the entitlement to endorse may be withheld if the promotional activities:

> 'relate to products or services competitive with those of Protected Sponsors, official suppliers or licensees (existing or under negotiation) of the ARU or the relevant (State) Union which have been nominated to RUPA from time to time.'

The question a rational player will ask is: 'when will *my* sponsor's product conflict with the business undertakings of the organisation's sponsor'? This answer cannot be found in the express words of the contract and so must be discerned through the process of contract construction. That is, by construing the meaning of the words: 'not conflict with business undertakings of the organisation's sponsors'?

At first blush the relevant wording could be thought to apply to any enterprise that is broadly in conflict with a sponsor's area of business, such as all alcohol manufacturers or all clothing suppliers. However, the use of sub-category endorsement by the organisation suggests that 'relevant' conflict occurs only where a product is identical to that of the organisation's sub-categorised sponsor, for example 'beer' rather than 'wine' or 'alcohol'. In essence the question is whether the term 'conflict with' is to be given a wide meaning to apply to any product that falls into the broad genus of a sponsor's product, or whether 'conflict with' has a narrow application applying to a specific subset of that genus. A narrow application will only bar athletes from endorsing those product and service lines in direct competition with their organisation's sub-categorised sponsors.

Contract construction has been described as:

> 'The determination of the meaning of words used to express the terms of the contract. It is also the means by which particular legal effects are ascribed to those terms.'[477]

The overriding aim of construing words in a contact is to give effect to the presumed intention of the parties. As stated by Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*:

> '... the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied.'[478]

The context, or surrounding circumstances, within which a contract is formed is essential in revealing the meaning of its terms. According to the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*:

> 'The meaning of terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires

[477] Carter JW, Carter on Contract, [12-001] LexisNexis: <http://www.lexisnexis.com.ezproxy>
[478] *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99.

consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.'[479]

In *Club Hotels Operations v CHG Australia,* Einstein J placed emphasis on common knowledge referenced to 'a reasonable person having all the background knowledge which would reasonably have been available to a reasonable person in the position of the parties ...'[480]

It is permissible to refer to surrounding circumstances, that is to go outside the 'four-corners' of the contract, only where there is an ambiguity in the meaning or legal effect of the term in question.[481] Given that the words are susceptible to more than one meaning, there is in respect to the words 'conflict with' just such an ambiguity.

The apparent acceptance by all parties of sub-categorisation as a marketing technique suggests the object of the restraint is not to protect the sporting organisation from competition in the broad sense but in the narrow or specific sense. That is, for example, to protect a beer manufacturer's sponsorship of the sport against other beer manufacturers but not against wine purveyors.

Under a narrow construction of the words 'conflict with the sponsor's business', the sporting organisation is on slippery ground: whole sub-categorised product lines not specifically in conflict with a sponsor's product are, as a matter of construction, available for the athlete to exploit. A similar argument could apply to restraints under the NRL contract. To illustrate, VB is the 'official beer' and Bundaberg is the 'official dark rum' of the NRL. A natural response is to ask whether rum could be further sub-categorised into 'light rum' to form an additional endorsement category. Would sponsorship by 'Toyota' the car manufacturer exclude a player endorsing trucks made by 'Ford'? Would a sponsor that is geographically isolated, such as the University of Canberra, a sponsor of the ACT Brumbies rugby team, exclude player endorsement of a university located in Western Australia? Would sponsorship by Qantas exclude endorsement of an airline that flies on routes not occupied by Qantas? In all cases, at least in respect of the cited construction, the answer is arguably no.

For players a narrow interpretation of the words 'conflict with' is a potential boon permitting greater access to endorsement contracting. As a threat to its monopoly position, the sporting organisation is likely to resist the narrow construction on grounds that it was not, in fact, the intention of the parties at the time of contracting. As noted above, giving effect to the presumed intention of the parties discerned from the words used is the prime requirement of construction.[482] Revealing the parties presumed intention is 'an objective question for the court, and the subjective beliefs of the parties are generally irrelevant....'[483]

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[479] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52 at [41].
[480] *Club Hotels Operations Pty Ltd v CHG Australia Pty Ltd* [2005] NSWSC 998 at [120].
[481] *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45.
[482] *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99.
[483] *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153.

The difficulty the sporting organisation faces is arguing that the broader construction is the presumed intention when the organisation itself applies a narrow construction when it contracts with sub-category sponsors. Whilst it may be argued that evidence of subsequent (post contract) conduct is not admissible to aid in discerning the meaning of contractual clauses,[484] it is not clear that sub-categorisation is in fact post-contractual as opposed to performance as intended. In any case, post-contractual conduct can be utilised to give meaning to a term where there is doubt as to that meaning: 'evidence may be given of use ... to show the sense in which the parties to it used the language they have employed, and their intention in executing the instrument as revealed by their language interpreted in this sense.'[485] The principle was affirmed in *Farmer v Honan* by Rich and Isaacs JJ of the High Court of Australia, who stated that subsequent conduct may be used 'to elucidate the contract, where its terms are doubtful.'[486]

The ongoing use of sub-categorisation suggests the incorporation of a term by consistent course of dealing. In particular as characterised by the organisation's annual contractual engagement with various sub-category sponsors.[487] In this respect one should bear in mind that newly contracted players observing the use of sub-categorisation will rightly assume the term 'conflict with' is applied in the narrow sense; this on the basis that such a use is part of the 'objective background facts which were known to both parties and the subject matter of the contract.'[488]

The pyrrhic advantage to the organisation of a narrow construction based on the sub-categorisation of product lines is to tilt the restraint towards reasonableness. Under such conditions the restraint is truly partial, leaving large numbers of product lines available for athlete endorsement. But of course, as stated, this construction is likely to be resisted by sporting organisation for purposes of control and financial benefit.

### 8.2 The growth in sponsor categories and unreasonableness

As the party possessing relatively greater bargaining power, the sporting organisation is able to determine the number of sponsors it will classify as 'its sponsors' and, further, create sub-categories of sponsors to effectively widen the scope of the restraint of trade over successive years. The restraint is thereby open-ended tending towards the unreasonable.

More perniciously major sporting organisations appear able to add sponsors to the list of protected sponsors at will, suggesting that should an athlete be fortunate enough to secure an endorsement a 'non-competitive' product line, the contract (or at least any chance of renewing the contract) may be snuffed out by the organisation merely adding that particular sub-category of product to its catalogue of protected sponsors.

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[484] *Maynard v Goode* (1926) 37 CLR 529 at 535.
[485] *Watchum v Attorney-General of the East Africa Protectorate* [1919] AC 533 at 540.
[486] *Farmer v Honan* (1919) 26 CLR 183 at 197.
[487] *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.
[488] *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

The ARU contract is again a useful exemplar to examine the power of a sporting organisation to create additional categories of protected sponsors.

As noted above, in 2008 the ARU had four Special Rights Sponsors and a further five Protected Sponsors; a total of nine. In 2010 the ARU sponsors, then transposed from 'sponsors' to 'Corporate Partners' on the ARU website, numbered twenty three; an increase of fourteen. The ARU acquired in 2010 an 'Official Oil and Lubricants Partner' in Castrol, an 'Official Motor Vehicle Partner' in Lexus, an 'Official Supplements Supplier' in Integria Healthcare, an 'Official Water Supplier' through Love One Water. Other sponsor products range from Julius Marlow shoes to the Eventscorp of Western Australia to Avis rent a car. By 2011 going into 2012 the ARU's sponsors numbered 25 with 'partners' stretching from sporting equipment to airlines. [489]

The athlete, who in 2008, could not endorse across nine product categories was confronted in 2010 with twenty-three limitations and, in 2012, with twenty-five category limitations across a range of products and services. For some players these product categories were not in place at the time of contracting with the ARU. It will be noted in this respect that the Player Contract permits the ARU and the State Unions to increase the number of 'Protected Sponsors, official suppliers or licensees ... from time to time'.[490]

Sponsors of a State Union playing in the 'Super Rugby' competition also take precedence in claiming a right to endorse products or services over the player. The 'HSBC Waratahs' of New South Wales have a contractual relationship with 35 sponsors. The ACT Brumbies contracted with 36 sponsors[491] and the Queensland Reds around 35 sponsors.[492] The New South Wales Waratahs and the Australian team have a combined total of some 60 sponsorship contracts. Admittedly some businesses, for example 'Gilbert', sponsor the Australian team and a regional side lessening to some extent the number of sponsor categories a player is prevented from engaging with. Nevertheless a NSW player faces around 60 product category limitations on his capacity to endorse.

Of some interest is the fact that State Unions are apparently able to endorse products that are in commercial conflict with those of the ARU. This occurrence is not as ironic or as commercially unfair as may be thought. Both rugby bodies are separate business entities and compete in different markets. New South Wales does not play rugby at the same time Australia plays rugby.[493] The player, though, is in a different commercial situation for he or she represents an alternative to the organisation in supplying to the market a psychological connection between sport and product.

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[489] <http://www.rugby.com.au/wallabies/OurPartners.aspx>
[490] ARU Standard Player Contract (2008-2012) section13.16.
[491] 2011 numbers, the 2012 sponsors not available at time of writing.
[492] <http://www.redsrugby.com.au/Partners/Sponsors/PrincipalandEliteSponsors.aspx> (some sponsors not discernible on site.)
[493] In addition there is little scope – legal or practical - for the Australian Rugby Union to dictate to an autonomous entity such as NSW Rugby who it should contract with.

## 9. Structural limitations of sport endorsement

In addition to the product lines covered by the 'non-compete' clauses in contracts of major sports, there are additional structural factors which limit the number and type of sponsors likely to seek an endorsement arrangement with an athlete of a specific sport.

First, the market for sports endorsements is limited – not all products and services benefit from an association with a sport.[494] For a sponsor to benefit from sport related endorsement there needs to be a 'fit' between sport and product. Where, in the perception of the public, a product does not accord with the recognised profile of a particular sport, the effect on sales is negative. Speed and Thompson note that 'both sponsorship and event managers need to have a good understanding of the attitude held by their audience to maximise the value of the sponsorship. In the sponsorship selection decision, managers must choose between alternative events as vehicles for sponsorship. ... Promotion that communicates sponsor-event fit ... is likely to increase the response to sponsorship.'[495] Shilbury uses the example of car manufacturer who must decide whether to sponsor a tennis match or a car race: 'the association between a car manufacturer and a car racing event evokes a stronger cognitive effect that the association between a car manufacturer and a tennis event. The car manufacturer-car race link is logical and requires little explanation.'[496]

Aligned to the notion of the 'sport/product' fit is the 'psychological effect' of a marketing campaign on consumers. Some sports are more likely than others to create a level of consumer 'identification' sufficient to alter buying patterns. In other words, not all sports offer the same level of identification to consumers.

There are a number of externalities that may also deter sponsor interest in an athlete. A major concern is the incapacity to control various elements necessary for successful marketing, for example, whether the sponsored team wins or loses – too many losses risks a negative image of the product may form in the minds of consumers. Media coverage of a team's event and the time-slot for viewing cannot be guaranteed causing a level of uncertainty not found in other areas of marketing. A sponsor's competitors may utilise the techniques of 'ambush-marketing' to gain a no cost windfall in advertising. Gaining a naming rights sponsorship, that is the expensive purchase of a sponsor's brand alongside that of the team, does not commentators or the media will refer to the team as officially designated, for example, 'Wallabies' as opposed to Qantas Wallabies'.

Although of growing importance, sport sponsorship is merely one means of marketing goods and services. The athlete endorser must compete with other forms of marketing such as 'store atmospherics, brand extension and brand alliances, where the consumer's ability to see an association between marketing assets enhances the effectiveness of these assets.' The athlete also competes against athletes in his or her sport, athletes from different sports and celebrity endorsers unconnected with sport, such as actors, writers or experts in a given field.

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[494] For detailed discussion see Chapter 2 'The Factual Context – Marketing and Endorsement'.
[495] Speed R and Thompson P, Determinants of Sports Sponsorship Response, (2000) 28 (2) *Journal of Academy of Marketing Science* 226 at 236.
[496] Shilbury D, Quick S, Westerbeck H, *Strategic Sports Marketing*, Allen & Unwin, Sydney, 1998 at 208-9.

Research by Speed and Thompson reveals the development of a damaging form of consumer cynicism directed at sponsors who market through too many sports:

> 'The positive association found between perceived sincerity and response for sponsorship suggests that consumers do not perceive sponsorship to be just another form of commercial activity but are sensitive to the potential philanthropic dimension that a sponsor may have. ... We add to sponsorship research by identifying the negative relationship between perceived ubiquity and response. Taken together the findings suggest that a sponsor who is perceived to be sincere and is well liked by the sponsorship audience can extract superior benefits from sponsorship. However, if sponsors add to their sponsorship portfolio to exploit this advantage, they run the risk of reducing response for all sponsorships in the portfolio if the addition leads to an increase in the perceived level of ubiquity.'[497]

It is quite clear from the research of Speed and Thompson that sponsors who support a number of sports may face declining sales.[498] For an individual athlete who wishes to acquire an endorsement contract there remains the possibility of rejection from sponsors fearful of a potential consumer backlash due to their over subscription to endorsement marketing.

## 10. Conclusion

The purpose of a partial restraint of trade is to permit the covenantor to find, in the words of Parker CJ, 'some place' where he or she can practice a trade 'without any prejudice to the obligee.'[499] The major sports permit athletes to endorse products and services provided they do not compete with the organisation's sponsors. While this restriction seems to leave a portion of the market to the athlete, it is a partial restraint in name only. Under the restraint of trade doctrine, the reasonableness of a restraint depends on the practical effect on trade rather than the form in which it appears.[500] By categorising products and services into their genus, the sporting organisation provides an apparent monopoly to sponsors over a large number of product lines. Residual product and service lines, should any exist in a practical sense, are left to the athlete. The appearance is of a partial restraint. The effect is of a general restraint.

Sporting organisations have adopted the practice of dividing products into 'sub-categories' such as alcohol into sub-categories of wine or beer. Each sub-category sponsor is offered a form of monopoly relationship with the sporting organisation with respect to that product or service. The privilege to engage in sub-categorisation' does not appear to be available to athletes. As a matter going to the consistency of construction, it is argued that sub-categorisation applies equally to athletes as a means to divide broad product lines into specific subsets for purposes of private endorsement.

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[497] Speed R and Thompson P, 'Determinants of Sports Sponsorship Response' (2000) 28 (2) *Journal of Academy of Marketing Science*, 226-238.
[498] See Chapter 2 'The Factual Context – Marketing and Endorsement'.
[499] *Mitchell v Reynolds* 24 ER 347 at [347].
[500] *Adamson and Others v New South Wales Rugby League and Others* (1991) 103 ALR 360 per Gummow J.

The notion of a useable and practical ‘partial restraint’ is further diminished when it is realised that the market for sports endorsement is limited by structural factors like the suitability of sport to the marketing of certain products and the competition between athletes and other celebrities for sponsor interest.

# Section 2: Athlete Persona as Subjective Knowledge

## 1. Introduction

Although an athlete's most marketable quality is usually sporting acumen, some athletes transcend mere sporting prowess to display the more abstract but nonetheless commercially valuable traits of personality, reputation and charisma. Who 'owns' these qualities? Are they the property of the athlete to market as he or she wishes or do they, as a matter of contractual arrangement, belong to the club, sport or the parent organisation? On the answer hinges the right of athletes to profit from that which is unique to their person; their persona and reputation.

For more than a century the law governing restraints of trade has recognised two forms of property, one belonging to the employer known as 'objective knowledge' and another known as 'subjective knowledge' which is personal to the employee.

Athletes are sought by sponsors as a focal point for product and service marketing. When a fan 'connects' or 'identifies' on a psychological level with an athletic star, the fan's self schema and the schema of the athlete meld to enhance sales.[501] In essence, the sporting organisation attempts to acquire by contractual terms the athlete's persona and reputation, his or her 'subjective knowledge' as it is argued here, for purposes of commercial gain.

When footballer Harry Kewell offered to play in the A-League in 2011-12 for a 30-70 split of additional gate receipts,[502] the basis of his negotiation was not merely playing talent but Kewell's persona – what he had become to Australian football fans. When golfer Tiger Woods agreed to play in the Australian Masters Golf Tournament in November 2009, public interest was so great that tickets were sold to the practice rounds. Of the 100,000 tickets available for the tournament 35% were reportedly sold overseas and interstate.[503] It was also reported that Woods' appearance cost 'the Victorian Government $3 million ... but it is expected to generate about $19 million in economic benefits.[504] Woods was invited back to play in 2011 Australian Masters to a similar commercial response: 'He's still worth every cent of investment,' said Bob Tuohy, a former professional player who set up an Adelaide-based golf management company. 'You take him out and the event just wouldn't have the same appeal.'[505]

The commanding profiles of athletes like Kewell and Woods allows them to largely control the use of their subjective knowledge. But what of the majority of Australian athletes who are

[501] Carlson BD and Donavan T, Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions', (2008) 17 (3) *Sports Marketing Quarterly* 154 at 154-155.
[502] <http://www.smh.com.au/sport/football/deal-off-kewell-wont-play-in-aleague-20110704-1gxv6.html#ixzz1R6zKY2h6>
[503] Reed R, *The Herald Sun* (Melbourne) 11 May 2009, p30-3.
[504] Reed R, *The Herald Sun* (Melbourne) 11 May 2009, p30-30.
[505] <http://msn.foxsports.com/golf/story/Tiger-Woods-promises-to-return-for-2011-Australian-Masters-15026540>

locked into contracts where their reputation and persona are ceded to their club or sporting organisation? For these athletes endorsement marketing offers opportunities incapable of acceptance short of breaching their contract. From time to time individual athletes express their dissatisfaction at the loss of perhaps hundreds of thousands of dollars in endorsement earnings – and yet the issue has never been litigated.

## 2. The theory and rationale of subjective knowledge

As far back as 1909 in *Sir W C Leng & Co v Andrews*,[506] an employee's right to use the skill and knowledge of his trade 'learnt in the course of his employment' was recognised as personal property. Farwell LJ indicated that whilst the source of an employee's knowledge may well have been the 'admirable instructions' of the employer, policy required that the entitlement to benefit from the acquired skill and knowledge was that of the worker and the public at large.[507]

The employee's right to subjective property was affirmed in 1913 by the House of Lords in *Mason v Provident Clothing and Supply Co.*[508] From the perspective of employee covenantors, the importance of *Mason* is the recognition of an employee's entitlement to retain and market, as his or her own, the personal skills and knowledge gained in the process of working for an employer.

Mr Mason, a canvasser of the Provident Clothing and Supply Co (Provident), was restrained for three years after termination of employment from engaging in a similar business within twenty-five miles of London or any other place where had been employed. Provident provided credit to purchasers who agreed to buy from specified retail outlets in enterprises as varied as drapery, boot-making and jewelling. Provident had a presence in 'most of the large towns in England, Wales and also in Scotland and Ireland.'

When Mason left its employ after three years service, Provident sought to restrain him from working for a rival business. It argued that the right to utilise Mason's skills and knowledge rightly belonged to itself – after all, these abilities were gained on the job. Mason retorted that his skills of 'persuasion' were inherent to him and not the property of the employer.

Lord Shaw catalogued two forms of entitlement: 'subjective knowledge,' (attained during employment and belonging to the employee) and 'objective knowledge' (such as trade secrets and customer lists which are the property of the employer):

> '… the equipment of the workman becomes part of himself, and its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden. But in the other case the knowledge of trade secrets may be as real and objective as the possession of material goods ...'[509]

[506] *Sir W C Leng & Co v Andrews* [1909] 1 Ch 763.
[507] *Sir W C Leng & Co v Andrews* [1909] 1 Ch 763 at 773 per Farwell LJ.
[508] *Mason v Provident Clothing and Supply Co* [1913] AC 724 (*Mason).*
[509] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 741.

Two rationales underpin the concept of 'subjective knowledge'. The first is practical: the 'equipment' of subjective knowledge resides within the worker as 'part of himself' and is, of course, inalienable; one cannot simply forget what one knows. The deeper rationale, however, is that of policy, looking to the foundational right to own and trade that which is the individual's:

> '… (the restraint on subjective knowledge) is a thing under the guise of a contract which is not protection for the employer, but a means of coercing and punishing the workman and putting him under a tyrannous and, therefore, a legally indefensible restraint. No workman could have the freedom to dispose of his own labour, or risk a movement towards his own advancement, under what might turn out to be the cruel operation of such a clause.'[510]

The statement, 'risk a movement towards his own advancement', indirectly addresses the economic imperative of workforce mobility; the need for employees to offer their skills in the interest of the community at large.

'Subjective knowledge' reflects an inherent entitlement the employee retains to profit personally from trading the skills and knowledge gained in his or her employment. A benefit the employee is entitled to keep and to market as his or her own.

In *Herbert Morris Ltd v Saxelb*y,[511] the employer firm was a 'very successful manufacturer' of lifting machinery. It feared that Saxelby would use his subjective knowledge, his 'superior skill' acquired whilst in its employ 'in the service of some other employer.'[512] Lord Shaw revisited the notion of subjective knowledge' and in so doing placed emphasis on the public interest leg of *Nordenfelt*:

> '… a man's aptitudes, his skill, his dexterity his manual or mental ability - all those things which in sound philosophical language are not objective, but subjective – they may and they ought not be relinquished by a servant; they are not his master's property; they are his own property; they are himself.[513]

In *George Weston Ltd v Baird* [514] Lennox J framed his comments in words similar to the more modern treatise of 'sterilisation of capacity'[515] again considering the public interest in the free exchange of goods and services and limiting the right to use the property of another only where it is acquired by payment or effort:

> 'The covenant can only protect that which is his, the product of expenditure of some kind or what he has acquired by foresight, industry, energy, enterprise or skill; something paid for in some way by himself or those whose title he has; he will not be

[510] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 741.
[511] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.
[512] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 698.
[513] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 714.
[514] *George Weston Ltd v Baird* (1916) 31 DLR 730.
[515] See *Esso Petroleum v Harper's Garage (Stourport) Ltd* [1968] AC 269.

> allowed to appropriate or destroy the rights of the State to the benefit which should accrue from the industry, education, skill, capacity, or aptitude of its people.'[516]

The judgment of Lennox J clearly differentiates between the property of the employer and that of the employee as designated by 'something paid for' by the covenantee. To emphasise the point, the covenantee can have no claim unless the property has been acquired by him or her.

In Australia, *Lindner v Murdock's Garage*[517] in 1950 was the first High Court case since the 1912 judgment of *Hamilton v Lethbridge*, to deal with employee restraints. The Courts reasoning was essentially that of *Mason* – a case that correctly applied both the law and ethos of *Nordenfelt*.

Murdock's Garage sought to prevent Lindner from using at a rival's garage, 'any information … which may have been acquired by him through his employment for his own benefit …'[518] McTiernan J concluded that the aim of the restraint was to 'sterilise competition':

> 'This restriction extends to … the defendants mental powers on what he heard and said in the employment. ... The inclusion of this restriction on the use of the defendants subjective knowledge tends to show that the plaintiff firm desired not to protect its business connection and trade secrets but to sterilise the defendants technical skill and knowledge ...'[519]

Although accepting that the employee acquired his skill and knowledge in the employer's workshop, McTiernan J nonetheless stated that 'an employer must be prepared to face the competition of a former employee if it comes along.'[520] Given that an employee's subjective knowledge is not the employer's to own, the attempt to prevent its use indicated a 'desire' to sterilise competition. Leaving the motivation of the covenantee aside, the policy is directed at ensuring the 'workman could have the freedom to dispose of his own labour … (and see to) his own advancement.'[521]

Following naturally from the decision, had Linder decided to advertise his 'subjective knowledge' or to utilise it in, say, endorsing the mechanical expertise of a friend, Murdock's could not be heard to complain.

## 3. Extending 'subjective knowledge'

From the earlier cases it is clear that the concept of subjective knowledge arose out of the impossibility of an employee disgorging knowledge and skills from his or her mind. It is suggested below that subjective knowledge is now a broader concept to include the amorphous traits of reputation and charisma.

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[516] *George Weston Ltd v Baird* (1916) 31 DLR 730 at 738.
[517] *Lindner v Murdock's Garage* (1912) 14 CLR 628.
[518] *Lindner v Murdock's Garage* (1912) 14 CLR 628 at 629.
[519] *Lindner v Murdock's Garage* (1912) 14 CLR 628 at 641.
[520] *Lindner v Murdock's Garage* (1912) 14 CLR 628 at 646.
[521] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 409 per Lord Shaw.

Underpinning this proposition is the ever present influence of policy, the malleability of which has kept the restraint of trade doctrine relevant in times of changing technology and philosophy for more than 600 years.

There are few better descriptions of the capacity of the doctrine to adapt to societal change that than expressed by Younger LJ in *Attwood v Lamont*:

> '... we are now dealing with a branch of the law which has at all times been peculiarly susceptible to influence from current views of public policy. Its modern developments have grown under the shadow of the "laissez-faire" school of economics. ... But current opinion on the relations between employers and employed has moved rapidly in recent years, and thus it is that the House of Lords ... when the validity of a restrictive covenant entered into be an employee came into question before it, to examine the whole problem afresh ... [and] has now placed upon permissibility of such covenants a limit ...'[522]

And so, when called upon the consider extending the principle of subjective knowledge to new and different areas of employment relations, superior courts of the present are not confined by the precepts of the past. It is suggested that at a time in our cultural history when image and persona are tradeable items in their own right, courts should respond by finding that these private traits do not flow to the dominant contracting party as a matter of course but rather, reside with the athlete for his or her exploitation.

When a sponsor contracts with an athlete it is the athlete's subjective knowledge in the form of image, reputation and persona that is sought. Image is a valuable tool at times so grand that it changes the perception of the public regarding an entire sport. According to Schaaf, golfer Tiger Woods 'star power is so big that the PGA negotiated a 46 percent increase in rights fees for the PGA events in 2003-2006.'[523] Without the athlete's personal appeal the sponsor is merely putting a rugby jersey, a cricket cap or a netball shirt on a human body in the hope that the apparel alone will sell the product.

It is argued below that an employer has no right to an employee's subjective property in the form of image, reputation, persona, or for that matter charisma, unless it is integral to the job the employee is specifically hired to perform and compensatory consideration is received.

### 3.1. Is 'reputation' or 'image' a protectable interest?

The rationale of an enforceable restraint on trade requires that 'the employer has some proprietary right.'[524] Where there is no legitimate interest the restraint of trade doctrine cannot apply. The basis of subjective knowledge as a form of property is the inalienable entitlement the employee possesses to retain that property as his or her own; it is 'not his master's property.'[525] In the set of cases below, two forms of private interest were deemed to

[522] *Attwood v Lamont* [1920] 3 KB 571 at 581-582.
[523] Schaaf P, *Sports Inc.100 Years of Sports Business*, Prometheus Books, New York, 2004 at 159.
[524] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 710.
[525] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 714.

be the property of the restrained party. In the first category of cases, *Paredes* and *Ryott*, the property found to belong to the covenantor was 'reputation'. In the second case, *Curro*, the court recognised that in certain professions, usually in the entertainment field, the employer does not acquire control over the employee's right to be put before the public. In other words, there is a section of an entertainer's work that is immune to the employer's desire to control.

In *Lido-Savoy Pty Ltd v Paredes*, the defendant and exotic dancer Paredes, using the stage-name 'Alexandra the Great 48', was the subject of an extensive advertising campaign conducted by Lido-Savoy. After completing her 12 week engagement with Lido-Savoy she returned to the United States. When she again visited Australia some three months later Lido-Savoy sought to restrain her from performing for another company stating that the performer agreed not to work for eighteen months in Australia once her contract with Lido-Savoy had concluded. Lido-Savoy argued that it had enhanced Paredes reputation though its publicity campaign and should, consequently, share in the benefits accruing there from. Lush J took the view based on analysis in cases such as *Morris v Saxelby* that Paredes' reputation was her property:

> '… I think that what the plaintiff is attempting to do here is to restrain the use of something, that is, the enhancement of the defendant's reputation by the campaign, which has become part of the defendant herself. She cannot divest herself of it or, while she is performing in Australia, be unaffected by it. What is being attempted, I think, is a simple restraint upon competition.'[526]

In *Curro v Beyond Productions*, current affairs presenter Tracy Curro wished to remove herself from an existing contractual obligation with 'Beyond'. She argued, in part, that the contract was unfair because 'Beyond' could 'simply elect to pay … remuneration, give her no work, and keep Miss Curro talents "sterilised" for up to three years.'[527] The Court found that should 'Beyond' attempt to do so it would breach an implied contractual term requiring an employer to provide work for employees in the entertainment industry: '… in the case of actors and others in a similar position who are vitally interested in opportunities to perform or exercise a skill or talent in public. … An employer in the entertainment industry who engages an employee such as Miss Curro for work of that kind contemplates that he employee wants not only the agreed remuneration but also the opportunity to keep her name and talents before the viewing public.'[528] Curro possessed a right independent of the terms of her employment – in contrast to most other professions where an employer is entitled to keep the employee idle merely because a salary is paid.[529]

In *Hepworth Manufacturing Co v Ryott*, a film actor was assigned the pseudonym, Stewart Rome, by his producers, for whom he went on to make thirty films. Rome was conscripted in 1917. Upon his demobilisation he continued to use the pseudonym in work for a different studio. Hepworth claimed the name as a proprietary interest in that, should he appear in

[526] *Lido-Savoy Pty Ltd v Paredes* [1971] VR 297.
[527] *Curro v Beyond Productions Pty Ltd* 1993 SCNSW CA 40125/93 lexisnexis BC9304252.
[528] *Curro v Beyond Productions Pty Ltd* 1993 SCNSW CA 40125/93 lexisnexis BC9304252 at 7- 8.
[529] Compare to occupations where the employer is entitled to leave an employee idle: *Bearingpoint Australia Pty Ltd v Robert Hillard* [2008] VSC 115.

inferior films it would affect the value of their existing film stock. Moreover, Hepworth claimed there was no restraint of trade as Ryott was free to act where he liked, provided he did not use the 'Stewart Rome' name. Atkin LJ spoke scathingly of the restraint:

> 'This man has built up and acquired a public reputation. Ordinarily speaking I suppose, it is one of the most legitimate and certainly one of the strongest incentives to good work in this world that a man tries to improve his reputation; he honestly seeks to increase his reputation and tries to make his work worthy of his reputation, and so to climb from height to height.'[530]

Atkin LJ, referring to actors in general, commented that such agreements give 'the employer the power to filch from them their identity if they should turn out to be artists of any value.'[531]

Actors' reputations and by extension their persona, fame and charisma are not the property of the employer. We see in *Paredes* an example of reputation classified as subjective knowledge. In *Curro* the court distinguished between different facets of the performer's professional life: that which was the employer's to direct and that which concerned the preservation of her image, a facet the employer could not claim or control.

In a case briefly discussed earlier, *Beetson v Humphries*, [532] professional rugby league player Arthur Beetson contracted with The Sun newspaper to write a column on his sport. Beetson was threatened with expulsion from the game by the New South Wales Rugby League should he breach a by-law banning public criticism of officials and players. He claimed the by-law was an unreasonable restraint of trade. The League argued that 'published criticisms of players and coaches ... undermine or destroy the very existence of the game itself by affecting the intake of the young players and by drying up the sources of referees and voluntary administrators.'[533] Although the court recognised the League possessed a legitimate interest worthy of protection, at no time was the argument put that professional footballer Beetson should be excluded from his second profession of journalism because he concurrently played rugby league for salary. Rather the case was determined as to reasonableness.[534]

It can be suggested that in like fashion to the cases listed above, the athlete's job as on-field performer does not extend to the acquisition of his or her reputation and persona. This form of subjective knowledge is, in the words of Lord Shaw, 'his own property'[535] and should, given this fact, be the athlete's to commercially dispose of as he or she thinks fit rather than claimed as sport progressed from a semi-professional pastime to a fully fledged marketing entity.

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[530] *Hepworth Manufacturing Co v Ryott* [1920] 1 Ch 1 at 29.
[531] *Hepworth Manufacturing Co v Ryott* [1920] 1 Ch 1 at 32.
[532] *Beetson v Humphries* (unreported, NSWSC, Hunt J, 10950 of 1980, 30 April 1980).
[533] *Beetson v Humphries* (unreported, NSWSC, Hunt J, 10950 of 1980, 30 April 1980) Lexisnexis: BC8000054 at 19.
[534] A number of 'sport cases' have seen relief granted where a restraint has been imposed during the currency of employment, including *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319 and, at least to the extent that the restraint applied to rugby league players in general, *Buckley v Tutty* (1971) 125 CLR 353.
[535] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 714.

## 4. The employee: an athlete or an endorser?

A question for consideration is the extent to which, if at all, a covenantee's 'objective knowledge' can include traits of the employee that are not part of the employee's precise job description. To illustrate, documentary television is today replete with academics who have acquired a persona transcending their employment. These include such notables as Simon Schama, Niall Ferguson and Geoffrey Blainey. These university employees (at one time at least) were not engaged in teaching or research but in a commercial pursuit stemming from, but different to, their usual occupation and largely dependent on their persona and reputation. For the employer to claim a share of their media earnings would seem preposterous. This situation contrasts with that of professional athletes, the persona and reputation of whom is claimed by their sporting organisation and marketed as its own property.

The relevant question in respect to the use of this subjective knowledge in the form of reputation and persona is whether the sporting organisation has purchased these traits when they purchased the individual's athletic ability?

Consider again the relevant terms of 2012 NRL Playing Contract which creates an employer/employee relationship:

> 'The relationship between the Player and the Club, as evidenced by this Agreement, is one of employee and employer, for the purposes of participating in the NRL Competition, the National Youth Competition (if eligible), Representative Competitions (if so selected) and any Related Competitions.'[536]

The player facilitates the production of revenue by playing the game of rugby league and bringing spectators to the ground. How, though, should the personal qualities that make up the player's marketability be viewed in respect of subjective knowledge. Whilst there is no mention of the player being employed as a marketer of goods or services, the player is, nonetheless, contractually required to make available to the Club his 'Player Property', for such purposes as 'endorsements, advertising, promotions, events and marketing':

> 'The Player grants to the Club for the duration of the Employment Term a licence to use, and to license the use of, his Player Property (together known as the "Rights") and to sub-license the Rights to the NRL on terms that authorise the NRL to further sub-licence the Rights to the NRL Partnership.'[537]

Player Property means: 'the name, photograph, likeness, *reputation and identity* of the Player.'[538] Therefore, by contract a player in the National Rugby League signs away his reputation and identity in the form of Player Property, as it is called.[539]

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[536] NRL Playing Contract (2012) section 1. 1.1

[537] NRL Playing Contract (2012) section 3.3. Player property is defined as 'the name, photograph, likeness, reputation and identity of the Player'.

[538] NRL Playing Contract (2004) section 29.1 Definitions. (Emphasis added).

[539] The privilege of self-marketing is permissible but so heavily restricted as to arguably fade to zero. See discussion in Chapter 6, Section 1: product grouping as a partial restraint of trade.

The incorporation of the words 'reputation' and 'identity' is unusual in an employment contract. Such words are better suited to contracts engaging an entertainer, where 'reputation' and 'charisma' are in fact part of the package the covenantee acquires. On one level it could be described as an attempt to see athletic services cast as a form of 'special service' whereby an obligation of 'exclusive service' to the employee can be recognised.[540] The difficulty is again, however, that the sports star is employed to play sport rather than as a performance endorser and whether intentional or not, the contract works to sterilise from the market the athlete's services.

As part of the 'general obligations' under the NRL contract, a player is required to 'attend appointments arranged by the club or the NRL to make appearances in public or on radio or television' and when doing so 'wear such Apparel as the Club or the NRL requires.' [541] Such is a perfectly acceptable requirement of a professional athlete in assisting the sport to raise its profile and give value to its sponsors. The 'obligation' does not, however, transpose into a general obligation the effect of which is to obliterate any right to engage in private endorsement.

The restraints imposed on athletes engaging in endorsement is an attempt by sporting organisations to capture the subjective knowledge of the athlete, or more specifically the athlete's reputation, persona and charisma. Indeed, the definition of subjective knowledge is that 'the equipment of the workman becomes part of himself.'[542] This very point was made in the United States case of *Love v Miami Laundry* by Buford J who stated:

> 'If the driver of a laundry truck gains such friendship and confidence amongst customers that the customers will change laundries when the driver changes employment, it is not because of the use of any property or property rights of the laundry owner, but because of the driver's God-given, or self-cultivated, ingratiating personality, and to this the employer acquires no property interest.'[543]

If the subject matter 'follows the employee' rather than remaining with the employer, then, it may be suggested, the attribute should be deemed 'subjective knowledge'. In this sense the acquired trait is purely personal to the employee and at the very least necessitates that adequate compensation flow to the covenantor restrained from using as he or she wishes personal property of such value.[544]

## 5. Conclusion

In closing this section, it is worth reflecting on the fact that an employer is entitled to claim objective knowledge in the form of trade secrets and customer lists. So palpable are these forms of objective property that Lord Shaw in *Mason* classified them as being 'as real and objective as the possession of material goods.' But so too is the subjective knowledge of the

[540] *Hallam v Harvey* (1901) 1 SR (NSW) Eq 155.
[541] NRL Playing Contract (2004) section 3.1 (k).
[542] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 740.
[543] *Love v Miami Laundry Co* 160 S 32 at 36.
[544] *Amoco Australia v Rocca Bros Motor engineering Co Pty Ltd* (1973) 133 CLR 288 at 316.

employee: 'For … the equipment of the workman becomes part of himself.' [545] How, it may be asked can 'reputation' be classified as tantamount to the possession of material goods?

At the time of contracting, the employee's 'subjective knowledge' is yet to come into existence. The potentiality of subjective knowledge was described by Lord Shaw in *Herbert Morris Ltd v Saxelby* in the following terms:

> 'In this latter case [dealing subjective knowledge] there is not a something already realised, made over to and for the use of another, but there is something to be created, developed, and rendered to the individual advantage of the worker and to the use of the community at large.'[546]

While improved skill set may be exercised in the interests of the employer, what flows from those skills such as reputation are the employee's private property. The employer is quite entitled to expect that the increasing capacities of, say, a netball player will be used in the interests of the team. The employer is entitled to additional revenue from seat sales and television rights as these related directly to the athletic performance the employer has purchased. The subjective qualities of reputation or charisma or identity, those traits prized by marketers, are argued to remain the property of the employee athlete. The traits of personality are not those of sporting acumen but, as argued here, are more aptly classified as the athlete's subjective knowledge.

The subjective knowledge of the athlete in the form of reputation and persona are rightly his or hers to exploit. At present the contractual dominance of the sporting organisation has claimed these marketable traits as property it sells to sponsors. Whilst athletes may receive an indirect reward for the use of the persona, the fact remains that athletes are unable to claim a place in the market to offer their full endorsement to sponsors for personal reward.

Enforceability requires any restraint to be reasonable in the interests of the parties and the public. It is suggested here that under the *Nordenfelt* principle it is unreasonable without direct recompense to exclude a covenantor from a market that is by definition his or hers to control 'for [personal] maintenance and advancement'. Moreover, on the basis that the organisation has no prima facie right to the subjective property of an athlete it is doubtful that the covenantee can point to a legitimate interest worthy of protection under the restraint of trade doctrine.

[545] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 408-409 per Lord Shaw.
[546] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 714.

# Section 3: Claiming the Digital Markets

## 1. Introduction

The transport technologies of the industrial age expanded the geographic radius of a covenantee's protectable interests beyond anything previously imagined. Markets which were physically inaccessible were brought near to put a covenantor within reach of the covenantee's protected clientele. Nonetheless, there remained a 'corner of the world', to paraphrase Parker CJ in *Mitchell v Reynolds*, where the covenantor was free to engage in his or her trade without affecting the interests of the covenantee.[547] Today physical distance may present no barrier to trade – a market in New Delhi or Copenhagen can be as accessible through digital channels as if physically next door and the unclaimed 'corner of the world' has vanished.

Prior to the age of television sports endorsement was confined to the local ground or regional newspapers. Today a sports consumer moves through cyberspace, not only viewing matches on pay television but playing virtual games on fantasy sports websites as children concoct matches on computerised toys. Even the humble match program has been digitalised into an 'entertainment event'. English soccer club Chelsea report that a digital program is available for paid subscription with player interviews, pre-game comments by coaches and static print-style ads supported with video. The publisher of the programs says that the 'interactivity inherent in the digital medium provides advertisers with a far more direct route to deliver effective buy messages.'[548] Each game, real, replay and virtual, each issue of a digital journal, is a marketing opportunity where the name of a sponsor, the team or the image of an athlete, work to inspire the sports consumer to purchase the endorsed brands.

These are new forms of market, the control of which represents arguably the greatest threat to the right of individuals to freely trade since *Dyer's case* in 1414. As it stands, a covenantee sporting organisation is able to claim by dint of contract the entirety of the cyberspace markets – markets formed in unique circumstances by 'a commercial technology like (none) in the history of the world.'[549] The sporting organisations' claim represents two challenges for modern jurists.

First, whether to permit the dominant contracting party to claim an entire market of increasing commercial significance or, in line with ancient tradition, adopt a policy means of promoting competition in the public interest and the access of covenantors to these 'cyber-markets'.

Second, whether the 'cyber-markets' are rightfully the sporting organisations' to claim as their own. An assumption seems to have been made that the digital markets fall automatically

[547] *Mitchell v Reynolds* 24 ER 347 at [347]: 'a place ... where the party entering into such a bond may use his trade, without any prejudice to the obligee.'
[548] Roberts K, 'Adding a digital dimension' *Sport Business International*, No. 138, 09 08, at 28.
[549] Cairncross F, *The Death of Distance*, Texere LLC, New York, 2001, at 95.

under the contractual term restricting athlete endorsement. The ARU and the NRL contracts, for example, make no specific reference to the internet markets and yet the players of these codes by default are as restricted as if expressly denied access to cyber-marketing. Although it is arguable that a legitimate interest exists, there is also room to suggest that the respective rights to these new and unique markets should not be made available on an automatic basis to sporting organisations but rather tested by judicial examination.

Drawing largely upon the notion of the 'partial restraint rule', this section considers the question of reasonableness as it applies to the cyberspace markets. Also briefly discussed is the effect of 'club conglomeration' as a factor diminishing the specialised markets athletes would normally claim as their own.

## 2. The fact of the digital market: reach and pervasion

The ubiquitous nature of the internet markets is argued below to be a factor going to the question of reasonableness. Is it reasonable that this nascent market configured on a global scale should fall to the covenantee to the exclusion of all others on the mere basis of contractual power? To answer this question it is necessary to briefly consider the penetration of the digital media.

1. Micro-engineering

The micro-processor, the 'computer on a chip', was invented in 1970 and through continual miniaturisation, falling costs and increased power and speed of processing, allowed 'information-processing power to be installed everywhere' making it possible to integrate computer technology 'in every machine of our everyday life, from microwave ovens to automobiles'.[550]

2. The personal computer and adapted software

The first Apple personal computer was launched in 1976 and the first IBM personal computer (PC) in 1981. In the mid-1970 Microsoft began provision of software for personal computer use. By the 1990's lap-top technology and increasing computing power 'shifted the computer age in the 1990's from centralised data storage and processing to networked, interactive computer power-sharing' and saw 'the average cost of processing information fall from around $75 per million operations in 1960 to less than one-hundredth of a cent in 1990.'[551]

3. Telecommunications

In 1956 the first transatlantic telephone cable 'carried 50 compressed voice circuits, in 1995, optical fibres could carry 85,000 such circuits.'[552] The electronic switch, broad-band fibre optics, laser transmission and digital packaging were developed from the 1970's, continue to improve, and form the basis of the internet. On-going use of terrestrial broadcasting, satellite

[550] Castells M. *The Rise of the Network Society*, 2nd ed. Blackwell Publishing, Maldon, MA, 2000 at 40-41.
[551] Castells M. *The Rise of the Network Society*, 2nd ed. Blackwell Publishing, Maldon, MA, 2000, at 43-44.
[552] Castells M. *The Rise of the Network Society*, 2nd ed. Blackwell Publishing, Maldon, MA, 2000 at 44.

broadcasting and coaxial cable integrated with digital telephony 'offer a diversity of versatility of transmission technologies and make possible ubiquitous communication.'[553]

4. The internet

The internet went on-line in 1969 a communications network where 'message units would find their own routes along the network, being reassembled in coherent meaning at any point along the network' to be 'invulnerable to nuclear attack'. Developments in digital technologies allowed the packaging of diverse messages, including, sound, images, and data to create 'technological conditions for horizontal, global communications.'[554]

Since the time of Castells' writing, technology has evolved, expanding digital communications by platform, capacity and innovative software. There can be no serious doubt that as the digital revolution gathers speed the communications technologies will increasingly pervade every geographic corner of world society to create a global market from that which was once local.

## 3. The loss of partial markets

In common with athletes of today, athletes in the pre-digital era also faced restraints being imposed on their provision of endorsement services. Such restrictions were, though, tempered by the requirement of reasonableness in respect to the geographic reach of the restraint. That is, if the restraint exceeded that necessary for the legitimate protection of the sporting organisation's interests an aggrieved athlete could challenge the reasonableness of the restraint. In the digital era, however, the communications mediums have swallowed-up the reserved 'some place' Parker CJ spoke of in *Mitchell v Reynolds* that now forms part of the calculus of reasonableness. When Queensland rugby league player Arthur Beetson moved to the Sydney club, East's, in the 1970's, the club could legitimately argue that that any endorsement by Beetson in Sydney newspapers was a threat its own interests. It would be more difficult to sustain such a claim should Beetson have taken advantage of his home town popularity and endorsed products in Brisbane. In contrast, if Beetson had played in the digital age, his Sydney club may well expect that when the name 'Arthur Beetson' was typed into a search engine all that came up on the screen was its website.

The geographic demarcation between the unreasonable and the reasonable has blurred where digitalised communications methods penetrate the globe and with it the athlete's potential 'share' of the endorsement market. In fact it might be said that in the circumstances of digital marketing a test based on the geographic scope of a restraint is verging on the irrelevant.

The threats posed by the digital mediums to covenantors arise from:

- The variety of new digital communications platforms
- The ubiquity and availability of these platforms

[553] Castells M, *The Rise of the Network Society*, 2nd ed. Blackwell Publishing, Maldon, MA 2000 at 44.
[554] Castells M, *The Rise of the Network Society*, 2nd ed. Blackwell Publishing, Maldon, MA 2000 at 45.

- The mobility of these platforms, such as video phone
- The number of media outlets, including amateur outlets
- The speed of communications between platforms
- The compatibility of communication between different platforms
- The ease of storage and retrieval of communicated images

The changing factual circumstance engendered through recent technological advances was summarised by National Rugby League Chief Executive, David Gallop, in respect to the possible effect on sport:

> 'Advances in new media technology have focused on the opportunities that technology provides in gaining greater access to content – access that was beyond the imagination of the public a decade ago. ... The lines between the traditional media streams are shifting rapidly with print organisations now providing video and audio, television stations providing print based websites and radio involved in print, audio and visual content.'[555]

The media technologies through wider geographic coverage, greater levels of content and extensive penetration on a multitude of platforms provide an unprecedented opportunity for sponsors to market products through an association with sport. For example, during the 1980's it became possible, with the right equipment, to tap into satellite broadcasts originating from anywhere in the world. Satellite transmission permitted niche markets to develop in which advertisers could cater to the tastes of specific audiences. For example, in Britain telecasts of Indian and Pakistan cricket matches were 'watched almost exclusively among Asian communities in Britain.'[556]

## 4. Media platforms and image repetition

Again, it should be emphasised that athlete endorsement need not take the form of verbal statements. Most product endorsement is relayed to the public through image association – in essence the athlete is juxtaposed with the product or service he or she is, thereby, impliedly endorsing.[557] The more often an athlete is seen or heard alongside a sponsor's product, the greater the value of the endorsement to the sponsor. *Ceteris paribus*, a successful athlete commands higher endorsement fees because he or she is seen through the camera more often (match of the day, news highlights, interviews) than their less successful compatriots.

The public exposure of an endorsement advertisement is a function of the number of media platforms displaying the athlete's image, how often that image is shown and the accessibility of the platform. In combination these factors can be referred to as the 'reach' of the

[555] Gallop D, Coalition of Major Professional Sports; Submission to the Senate Inquiry into the reporting of sports news and emergence of digital media. 9 April 2009.
[556] Williams J, *Cricket and Broadcasting*, Manchester University Press, Manchester, 2011at 17.
[557] See discussion in Chapter 2, 'The Factual Context – Marketing and Endorsement'.

endorsement image. The 'reach' created through the development of digital mediums has broadened the commercial value of endorsement services and arguably displaced the viability of the partial restraint convention. Consider the following table:

| **Platform** | **Coverage and availability** | **Accessibility** |
|---|---|---|
| Digital television | Multiple channel – direct coverage, highlight package, news, specialist shows. | No direct download and storage. Internet access. Multiple provider replays. Highly pervasive. |
| Pay television | Multiple channel – direct coverage, highlight package, news, specialist shows. | Direct download and storage available. Highly pervasive. Multiple provider replays. |
| Digital set-top box | Multiple channel – direct coverage, highlight package news, specialist shows. | Some direct download and storage, retrieval and repetition at will for limited time. Multiple provider replays. Highly pervasive. |
| Hard-drive video recorder | Multiple channel – direct coverage, highlight package news, specialist shows. | High download and storage, retrieval and repetition at will, create own highlight package. Highly pervasive. |
| Computer Internet | Private down load, official website, club website, unofficial third-party website, gambling houses, chat rooms, interest groups, YouTube and related sites, news-media sites. | Almost unlimited download and storage, high ease of retrieval, repetition at will, unlimited upload. Highly pervasive. |
| Mobile computer, Wireless internet | Private down load, official website, club website, unofficial third-party website, gambling houses, chat rooms, interest groups, YouTube, Twitter, Facebook and similar sites, news-media sites. | High download and storage, high ease of retrieval, repetition at will. Highly portable, unlimited upload. Highly pervasive. |
| Mobile television | Multiple channel – direct coverage, highlight package, news, specialist shows. | Highly portable. Highly pervasive. |

| | | |
|---|---|---|
| Mobile video phone | Highlight package, direct screening. | Extremely portable. Highly pervasive. |

These digital devices are the platforms on which modern endorsement marketing is largely based - the more available viewable content the more value for a sponsor.

For purposes of contextualising the impact of technological reach, and while bearing in mind that the commercial advantage of endorsement increases in proportion to the number of media platforms and the number of repetitions, consider an event from the 2005 US Golf Masters involving Tiger Woods.[558] In the final round golfer Woods chipped his ball to within a millimetre of the cup, where, after a few seconds and with cameras focused on its Nike trademark, the ball toppled in securing Woods a playoff and ultimately the championship.

The image of Woods' Nike ball was digitalised, sent around the world, rebroadcast and viewed repeatedly on a variety of platforms. As one commentator pointed out, 'it is fair to say it will amount to hundreds of millions of dollars, perhaps more. The Nike "swoosh" label was there for all to see'.[559] To emphasise the point 'YouTube' replays of the Woods chip-in posted by a contributing individual one year after the event had received 590,795 viewings; the same image posted by a different individual two years later received 266,545 viewings. By July 2012 the original upload had been viewed 672,272 times. Many compilation packages of the same shot have been viewed well over 1,000,000 times. The Nike organisation calculated that the coverage 'was worth $A162,000 in 'free' advertising the *first* time it was beamed into homes around the world.'[560] More importantly though, considering the capacity of the media to replay events, the shots future worth, was 'so significant it cannot be calculated.' Nike Golf's marketing manager, said, 'it was the best product endorsement you could ever wish for.'[561] Although the event of a stationary ball, trade-mark displayed, overbalancing into the hole could be seen as luck, from Nike's position such serendipity is a known benefit of hiring elite athletes who receive greater screen-coverage than journeymen.

The media reach of the Woods' Nike ball can be compared to that of earlier 'famous' sporting moments, such as Don Bradman's duck in his final test in England in 1948 that deprived the batsman of the four runs he needed for a century average, and the 1960 'tied test' between Australia and the West Indies the publicity of which prompted Bradman himself to describe it as 'the best thing which could possibly have happened for cricket'.[562] It was not until news-reels were played in local cinemas some weeks later that Bradman's duck was seen by the Australian public. In 'the tied test', as it became known, the last batsman was dismissed in a run-out which was seen once during the game, on nightly news broadcasts and

[558] <http://www.youtube.com/watch?v=1nJfhUGM4Yc>. First viewed August 2009, last viewed July 2012.
[559] Swanton W, *The Sun-Herald*, April 17, 2005.
[560] Swanton W, *The Sun-Herald*, April 17, 2005.
[561] Swanton W, *The Sun-Herald*, April 17, 2005.
[562] Benaud R, *Anything but an Autobiography*, Hodder & Stoughton, London, 1998 at 186.

newsreels, to be rarely viewed again during the analogue age.[563] Sponsors products were not seen in these examples of the 'best' of Australian sporting folk-lore; a reflection of the contemporary state of technology.

Had Bradman's duck or the tied test occurred in the digital era, each, with little doubt, would be a marketing opportunity of great potential – multiple replays with sponsors signs on shirts, bats and boots. In fact, just one U-tube recording of Bradman's dismissal has been viewed 38,831 times[564] and the first 'tied-test' viewed more than 5,500 times. At the time of these events broadcasting platforms were limited in number and repetition verged on the non-existent.[565] And yet ironically it was the absence of technology that prevented commercial conflict between athletes and their overseeing organisations in respect to endorsement marketing. Today, a paradigm shift in communications technologies – a shift which has removed geographic boundaries - necessitates a re-evaluation of how the restraint of trade doctrine is to apply in respect to the competing interests of the sporting organisation and the endorsing athlete.

It was suggested above that the judgments in *Nordenfelt* which affirmed the test of reasonableness were the unavoidable policy responses to the industrial and societal changes pressed upon England by three-hundred years of technological change. How, as a matter of policy, the restraint of trade doctrine will adjust to the digital revolution is a question yet to be answered. Nonetheless, given that the 'standard of policy is the standard of the day',[566] there can be little doubt that the judiciary will be required to determine how the markets of cyberspace are to be delineated and what rights are to be afforded the respective parties.

## 5. The rise of the sports conglomerate

With the rise of the digital era, major sporting clubs have broadened their product line to form conglomerates, a type of globalised monopoly encompassing the club name and the persona of its athletes. This conglomeration threatens an individual's most foundational entitlement to trade one's self for reward and, as proposed here, will increasingly come to bear upon the question of reasonableness as athletes seek to trade their services of endorsement in markets that are progressively diminishing.

A 'sporting conglomerate' is described here as a sports entity that transcends sport to become a marketable entity in its own right. Just as a banking corporation may own a mining company and a cannery, the sporting organisation, through a process of horizontal integration, comes to own, or be in partnership with, a phone company, a credit card company or a multitude of other niche businesses. The difference between the bank and the sporting organisation, however, is that the sporting organisation markets its diverse business

[563] Having said this, the author at a rained-out junior cricket camp viewed a 16mm film of the tied test run out that had been shown so often that the film was mangled causing the image to jump about on the screen.
[564] <http://www.youtube.com/watch?v=hvrOHYp8nRY> viewed August 2012. A speech given by Rahul Dravid, ex-Indian captain, on Bradman had received over 205,000 views.
[565] 'The first televised cricket in Australia was in 1958-59, when the final session of play in the test could be shown'. Benaud R, *Anything but an Autobiography*, Hodder & Stoughton, London, 1998 at 185.
[566] *Attwood v Lamont* (1920) 3 KB 571 at 581.

interests in its own name. Under a conglomerate structure the athlete becomes an entity in a collection of business interest's unrelated to his or her sport. In such a circumstance, legal arguments going to the fact that the athlete is employed to play, not to endorse, becomes more difficult to sustain.[567] The athlete who argues to the organisation, 'your business is sport, so I'm going to endorse a credit card', may face the retort, 'But our business is credit cards.'

The judiciary has been concerned to prevent market domination from at least the fourteenth century for 'the common law abhors all monopolies.'[568] Club conglomeration is a scheme of monopoly not dissimilar to the thirteenth century ploy of 'engrossing' where, to increase the price of produce, merchants would buy up and hoard large quantities of supplies – a form of marketing declared criminal by Henry VIII.[569] In like vein the club conglomerate forms partnerships with various commercial entities and then, to secure its trading position, restrains athletes from engaging in endorsement in opposition to its compatriots.

### 5.1 Monopoly and sports conglomeration

A theme of this Chapter has been the crowding-out of athletes from the endorsement markets through digitalised methods of advertising.[570] 'Crowding out' is an economic term describing the process by which increases in government borrowing limit the availability of loans and resources to private individuals'. The analogy is apt; as clubs conglomerate to dominate the digital media, the individual athlete is crowded out from sectors of commerce in which he or she would ordinarily seek to offer endorsement services.

Several major Australian sports, Cricket, NRL, AFL, and the ARU possess characteristics of sports conglomerates but are, on a world scale, relatively minor or perhaps in a stage of transition to full conglomeration. None of these Australian organisations has branched into differentiated businesses, preferring to supply their endorsement services to large corporate 'partners'. At this stage the Australian examples are incomparable to the sporting giants of 'Manchester United', 'Dallas Cowboys', or 'New York Yankees' but, with little doubt, are likely to follow their model in the longer term.

For purposes of illustration consider the commercial conglomerate that is Manchester United Football Club (Man U).[571] The football team sells, as would be expected, in its own colours with its logo, a home kit, an away kit, a goal-keeper's kit and a training kit – these can be personalised with the fans own name. Predictably there are shower jackets, t-shirts and a personalised 'dressing room mug'. The club has branched into 'fashion wear' for men, women, boys and girls. Children's wear items from age 2 to 10 include shoes, baby milk bottles, jackets, lunch bag, training mug and a children's bear. 'Essential items for the home'

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[567] See Chapter 5: 'The Athlete and the Organisation'.
[568] *Darcy v Allen* (1602) Moore 671 at1219.
[569] Lord Wilberforce, Campbell, Elles, *The Law of Restrictive Trade Practices and Monopolies*, Sweet & Maxwell, London, 1966 at 24.
[570] There are few true monopolies as there are substitutes for most things. The word is used in this thesis is the sense of a sole provider of endorsement services with respect to a given sport.
[571] All references to the Manchester United website and associated links can be found at: <http://www.manutd.com>

include, a mini gnome, window curtains, inflatable lounge room chairs, a bathroom range (rubber duck and towel), dishes, spoons and cups for the kitchen table. There are wallets, golf club covers and luggage, baby wear, dressing gowns and towels as well as prints or paintings of past stars. Manchester United publishes its own weekly magazine ('£3.85 – 33% off the high street price').

More revealing of conglomeration is the 'partnership' between Manchester United and 'Britannia', the trading name of 'The Co-operative Bank PLC' (registered office in Balloon St. Manchester). The relationship is described on the Man U's website as: 'Manchester United has teamed up with Britannia to offer you an exclusive range of financial products for both adult and junior Reds fans'. The customer is enticed by the words: 'By holding Manchester United Finance products, supporters earn entry to the RedRewards monthly prize.' The website advertises 'Manchester United Savings', 'Manchester United Mortgages', the 'Manchester United Credit Card' and 'Manchester United Insurance'. In addition, 'Manchester United Finance products are available internationally.'

'Manchester United Mobile Membership' permits a member to access unlimited videos on their mobile phone or similar device and view the goals scored from 11pm the night of a match. SMS is available 'all season home and away' with free ringtones while player 'animations' appear on the mobile screen. Alerts (for 25pence) give 'match information such as goal alerts give a full description of the action from a fan's point of view not simply the score'. Ring tones may be bought for £3. On offer is the 'Mobile video membership' where 'highlights and alerts, weekly classic matches, player specials and free monthly downloads' are provided.

Manchester United also has a partnership arrangement with 'Betfair' to grant on-line gamblers a free £25 bet as part of the 'Man-Utd slot game £200 welcome package.'

Conglomeration leaves little or no room for athletes to acquire personal endorsement contracts where product categories – many marketed in cyberspace - are claimed by the parent sporting organisation in a host of areas unrelated to sport.

### 5.2 Relationship marketing and the sports conglomerate

Related to club conglomeration is the sales tool of 'relationship marketing'. Relationship marketing emerged in academic literature in the 1990's to gather momentum from around 2000 on. The motivation behind this form of marketing is to build a relationship between a product name (in context, a sporting organisation) and the customer in an attempt to enhance loyalty to the brand. When the 'relationship' is strong the customer is more likely to stay with the brand and also more likely to adopt additional products marketed by the brand. Sports endorsement, it may be suggested, is ideally suited to this form of marketing.

Relationship marketing has been described as 'an integrated effort to identify, maintain, and build up a network with individual consumers and to continuously strengthen the network for

the mutual benefit of both sides, through interactive individualised and value-added contract of a long period of time.'[572]

Shani and Chalasani believe that 'niche' identification is the means of creating a foundation for relationship marketing. To do so the 'marketer starts with the mass market and divides it into micro-markets. ... The marketer starts from the needs of few customers and gradually builds up a larger customer base.'[573] When one considers the brand 'Manchester United', whether intended or otherwise, the methodology is that of relationship marketing. Each product functioning independently of the game itself is a niche market identified solely by the interest fans have in Manchester United.

There are three recognised elements to relationship marketing: 1) identifying, building and continuously updating a database to store relevant information about current and potential customers covering a wide range of demographics, lifestyles and purchase history; 2) using innovative media to target the consumer and communicate with him or her on a one-to-one basis; 3) tracking and monitoring the relationship with each customer and calculating the lifetime value for the organisation.[574]

When Manchester United markets a product on-line, consumer responses are placed into a data base for future reference. Most importantly, offers of gifts and 'special' treatment illicit a sense of loyalty and motivate the consumer/fan to progressively accumulate 'Man-U' products. The implementation of the three elements mentioned above is meant to lead customers to think positively about future offers made by that provider. In essence relationship marketing attempts to transcend the product itself and, extraordinarily, have the individual subjugate his or her interests to the brand:

> 'Through the flexibility to accommodate individual customers in the form of incentives, service options, and interactive communication, the provider demonstrates that the relationship with the individual customer is more important than any particular transaction. The customer becomes an important attribute of an offer rather than a by-product of a particular transaction. Relationship marketing leads to brand loyalty ... even when such brand loyalty seems to be contrary to the customer's self-interest.'[575]

Again, this form of marketing is enhanced by developments in the digital technologies: 'The advances in technology make it possible to carve out niches and target individual members with a precision that was inconceivable earlier.'[576] It would seem reasonable to propose that

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[572] Shani D and Chalasani S, Exploiting niches using relationship marketing (1992) 6 (4) *The Journal of Services Marketing* 43 at 44.
[573] Shani D and Chalasani S, Exploiting niches using relationship marketing (1992) 6 (4) *The Journal of Services Marketing* 43 at 45.
[574] Taken from Shani D and Chalasani S, Exploiting niches using relationship marketing (1992) 6 (4) *The Journal of Services Marketing* 43 at 45.
[575] Shani D and Chalasani S, Exploiting niches using relationship marketing (1992) 6 (4) *The Journal of Services Marketing* 43 at 45.
[576] Shani D and Chalasani S, Exploiting niches using relationship marketing (1992) 6 (4) *The Journal of Services Marketing* 43 at 45.

at each stage of a Manchester United fan's life, he or she is part of a niche market for age specific Man-U products ranging from baby bottles to training kits to car loans and home insurance. In these situations the athlete is not only restrained from endorsing against the interests of the Club's sponsors but against the niche businesses that the Club has entered.

Given the commercial advantages of relationship marketing and conglomeration, there is no reason to believe that the major Australian sporting organisations will not proceed into individual businesses or in partnership with established businesses to further access the advantages market niches created by fan loyalty. The rise of the sporting conglomerate with interests in a multitude of products and services displayed and sold digitally serves only to further limit athletes from accessing the endorsement market, to again suggest the need for policy intervention.

# 6. Policy and the Markets of Cyberspace

## 6.1 Introduction: Policy and a new paradigm of thinking

What is clear from the foregoing discussion is the impact of technology upon the restraint of trade doctrine generally and the communication of sport specifically. As demonstrated earlier, where technological change causes alterations in patterns of trade, the restraint of trade doctrine also adjusts. Lord Watson in *Nordenfelt* accommodated what he referred to as 'exceptional' technological circumstances by adjusting policy. In this respect the function of England's tribunals was, 'not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time.'[577] In later times, in the words of Lord Denning: 'as methods of trading change, so do the areas of restraint expand. The law, if it is to fulfil its purpose, must keep pace with them.'[578] If these statements mean anything at all, courts are duty bound to consider the reasonableness of the increasing monopolisation of cyber-markets by sporting organisations in respect to the public interest and that of individual covenantor athletes.

At the present time the law of the restraint of trade doctrine stands at a cross-roads in respect to the markets of cyberspace not unlike the nineteenth century debate of 'freedom of contract against freedom of trade', a debate, it might be added, that resolved in favour of freedom of trade.[579] Should a court take a policy position to protect the entirety of the covenantee's interests it would, in effect, remove all covenantors from the cyberspace markets. With economic development historically founded in a freedom of trade approach, the first policy alternative must be seen as progressive, whilst the second, stifling of individual commercial enterprise, as regressive.

In fact, the cyberspace markets are so radically different from markets the world has experienced over the past several thousand years that good policy requires that a specific

[577] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 554 per Lord Watson.
[578] *Petrofina (Gt Britain) v Martin and Another* [1966] Ch. 146 at 169.
[579] See Chapter 3, 'The Rise and Rise of Liberalised Trade'.

restraint of trade approach be developed to enunciate how the competing interests seeking to access this market are to be accommodated.

### 6.2 What is cyberspace?

'Cyberspace is not a place. It is many places', says Lawrence Lessig a leading commentator on the 'law of cyberspace.'[580] Shapiro describes it as 'the place where online interactions are said to occur.'[581] Other definitions are more technical: 'Cyberspace is an embodied switched network for moving information traffic, further characterised by varying degrees of access, navigation, information activity (and ) augmentation' and the internet is 'the tool that creates a gateway to cyberspace.'[582] To Ku, cyberspace is not confined to email and the World Wide Web or 'the world between wires; it encompasses the ever present mingling of technology in our everyday lives ... an ever growing real world mediated by microprocessors – a cyberworld.'[583] At its most simple cyberspace is a computer linked to other computers over the internet.

### 6.3 The 'direction' of policy under the restraint of trade doctrine

Earlier sections of this thesis revealed a connection between developments in technology and the approach of courts to the enforceability of restraints of trade. In the fifteenth century restraints of trade were void absolutely as courts recognised the social and financial costs of able hands left idle.[584] By the early 1700s, as the nascent Industrial Revolution improved communication technologies, restraints began to be enforced on the basis of their geographic partiality. Continual improvements in technology saw a test of reasonableness adopted in *Nordenfelt* in 1894. In each case, courts were prepared to respond to technological change by adjusting the policy approach to the restraint of trade doctrine. Although the fact of a restraint had not changed, the circumstances in which the restraint occurred required a different policy approach. As Macmillan LJ stated in *Vancouver Malt and Sake Brewing Co v Vancouver Breweries Ltd*:

> 'It is no doubt true that the scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not a constant.'[585]

Although a full treatise on policy as it relates to the restraint of trade doctrine is confined by the word limit of this thesis, two points can be raised. First, that the adjustment of policy in general occurs in response to changed circumstances; a view reflected in the writings of Holdsworth who stated:

> '... a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily requires some fixed principles, and if it is to maintain these

[580] Lessig L, *Code and Other Laws of Cyberspace*, Basic Books, New York, 1999, at 63
[581] Shapiro AL, 'The disappearance of cyberspace and the rise of code' 8 *Seton Hall Const LJ*, 703 at 703.
[582] Folsom TC, 'Defining Cyberspace (finding real virtue in a place of virtual reality)' (2007) 9 *Tul J Tech & Intell. Prop* at 80.
[583] Ku R, A Brave New Cyberworld, (2000) *T.Jefferson L Rev* 125 at 126-7.
[584] See Chapter 3 'The Rise and Rise of Liberalised Trade'.
[585] *Vancouver Malt and Sake Brewing Co v Vancouver Breweries Ltd* [1934] AC 181 at 189.

principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.'[586]

Second, how courts in previous eras dealt with technological impacts on trade offers broad policy guidance to present day courts. Historically, restraints were enforced only where the covenantor would not be deprived entirely of his or her capacity to earn an income in a chosen field (unless, as in *Nordenfelt*, the covenantor's release from a particular enterprise had been bought to protect an acquired business). This was the approach of Parker CJ in *Mitchell v Reynolds* in 1711 and, with an eye to greater flexibility, the House of Lords in *Nordenfelt* in 1894. In these cases, the restraint of trade doctrine underwent policy adjustment forced upon the judiciary by technological and circumstantial change. In succession the absolute rule against restraints of trade was replaced by the partial restraint rule and then the rule of reasonableness. At all times the predominant focus of policy was on securing trade – including, it might be added, during the laissez-faire period.[587]

The rationale permitting a court to interfere in the private arrangements between parties is one of policy. On a broad philosophical level it was argued above that the 'tilt of policy'[588] has leant towards the freedom of the individual to trade without restraint. There is little point in revisiting the role of policy other than to point out several relevant features that will guide its approach in respect to the restraint of trade doctrine:

1. Policy has generally favoured freedom of trade over restrictions on trade.

2. The policy position is that pertinent to the time or era of contracting.

3. The policy position alters according to the technological state.

4. Policy, although recognising the legitimate interests of covenantee's, has been concerned to avoid the personal and societal losses associated with unemployment.

5. Courts have disfavoured restraints imposed in employment contracts.[589]

These approaches to the question of policy are reflected in a brief statement of Diplock LJ in *Petrofina (Gt Britain) v Martin and Another*:

> 'The public interest, which the common law doctrine against restraint of trade is designed to promote, are social and economic – liberty and prosperity; the liberty of the individual to trade with whom he pleases in such manner as he thinks is desirable, and the prosperity of the nation by expansion of the total volume of trade. The accepted economic theories as to how best to promote the expansion of the total

[586] Holdsworth WS, *A History of English Law*, *Vol. III*, Methuen & Co, London, at 55.
[587] See for example: *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 741 – onus of proof shifted to covenantee; *Esso Petroleum v Harper's Garage (Stourport) Ltd* [1968] AC 269 – solus agreements amenable; *Buckley v Tutty* (1971) 125 CLR 353 – acceptance of sport as a trade; *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995 – staff connections become a legitimate area of protection.
[588] This is particularly the case since the adoption of the *Nordenfelt* test. Note the words of Lord Sterndale MR in *Attwood v Lamont* [1920] 3 KB 571 at 578: 'the tendency of later decisions ... is towards a stricter application of [the freedom to work].
[589] *Attwood v Lamont* [1920] 3 KB 571.

> volume of trade vary from time to time. They are reflected not only in legislation.... but also in the attitude of the courts towards contracts in restraint of trade; but their reflection in the attitude of the courts takes the form of a change in approach to the question of what is reasonable in the interests of the parties.'[590]

Although, in general, policy applications may possess a wide locus of operation there is, in restraint of trade law, two dominant objectives informing the judiciary: that of promoting trade and competition and that of securing the freedom of the individual to trade.[591] The recognition of the pre-eminence of trade interests has arguably shown the 'unruly horse'[592] of policy under the restraint of trade doctrine to be more predictable and purpose driven than policy applied in other areas of law.

### 6.4 Cyberspace: a new paradigm?

In respect to policy positioning, it would be remise to not include brief reference of the push by some commentators to have cyberspace declared a zone free of strict legal control. Should cyberspace not be amenable to law, a covenantor would be entitled to argue that the endorsement restraint cannot be breached and is unenforceable within that sphere. The notion of a 'free cyberspace' invokes two concepts inherent in the restraint of trade doctrine. First, the applicable policy standard is that conforming to the practices of the day.[593] Second, that policy adjusts according to changes in the fabric of society and commerce.

The theoretical basis of the 'free cyberspace' argument is a belief that the markets of cyberspace vary so markedly from traditional markets that an entirely new form of approach should be adopted by legislators to make of cyber-markets a zone of free trade and expression. The argument is, though, largely political: a subjective hope that the 'cyberworld' should not fall within the jurisdiction of governments, courts or the control of 'big-business' but remain as a form of communal asset.

A number of postulations have been made as to how cyberspace should be owned or controlled. The question of 'ownership', at least as theory proclaims it, bears upon whether the restraint of trade doctrine will be deemed to apply to cyber-marketing. Lessig claims that cyberspace should be controlled by a 'cyberspace code', in the form of the British constitution as an 'architecture ... that structures and constrains social and legal power'.[594] Others believe a 'constitution' of cyberspace already exists in established laws: 'just because a phenomena is global does not mean that the Constitution cedes jurisdiction ... Physical

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[590] *Petrofina (Gt Britain) v Martin and Another* [1966] Ch. 146 at 181. See also: *Lindner v Murdock's Garage* (1950) 83 CLR 628 at 641; *Mason v Provident Clothing* at 733 per Lord Haldane; *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 621 Lord Reid; *Ipswich Tailors case* (1614) 77 ER 1218 at 1219.

[591] In Chapter 3,'The Rise and Rise of Liberalised Trade', it was argued on the basis of a philosophical appreciation of freedom of the individual and the economic loss associated with provisioning parishioners denied work, that the 'tilt of policy' has favoured freedom of trade over considerations of contractual intent.

[592] *Richardson v Mellish* (1824) 2 Bing 229 at 252 per Burrough J. In full: 'It is a very unruly horse, and when once you get astride it you never know where it will carry you.'

[593] *Petrofina (Gt Britain) v Martin and Another* [1966] Ch. 146 at 181.

[594] Lessig L, *Code and Other Laws of Cyberspace*, Basic Books, New York, 1999 at 5.

borders still matter'.[595] Some champion the idea of an autonomous 'global commons'[596] in the sense of international waters and airspace, 'where freedom can flourish.'[597] Others think that each State should assert its own sovereignty 'as a separate domain' over cyberspace.[598]

The idea of 'communal cyberspace' proposes in essence that ownership of the 'new' market should not necessarily follow the patterns of the past.

It must be stated, however, that whatever the merits of a free cyberspace, the notion is essentially a romantic ideal and, given the reality of commercial opportunism, unsustainable. Franzese points out a number of reasons why cyberspace is unlikely to become a law free zone. These include the fact that the internet has a physical structure falling within the purview of one state or another and which inevitably invites monitoring for reasons of national security, criminal deterrence and the passing of information.[599] More pertinent, however, is the economic maxim of individual self-interest that seeks to exploit commercial opportunities wherever these arise.[600] Whilst the internet promotes the flow of information, it is also the medium by which self interest is expressed in the digital world; a new technology promoting the consumption of goods and services. As Trachtman commented, 'cyberspace is best viewed as a bulge in the technical production frontier'[601] rather than as a separate entity existing beyond the usual commercial controls. As such, it makes better sense to view the digital markets as a commercial medium to which the usual laws of commerce will apply.

Further, the financial relationships of sporting organisations and athletes, whether in the real world or cyberspace, must be governed by a set of laws enforceable through courts of competent jurisdiction. In context, the sporting entities of athlete and organisation trade their names to be used as marketing tools. The name of the endorser, sport or individual athlete, has value, is capable of ownership and may be sold for financial reward. Indeed, such commercial rights are protected under the common law of passing off,[602] at times under copyright or trademark[603] and through consumer protection legislation.[604] It is not in the interests of either athletes or organisations that cyberspace should be deemed free from legal control.

Related to concerns of a free or unregulated cyberspace is the capacity of some individuals to anomalously market products through websites located in poorly policed jurisdictions. This is of little import, however, where the parties contract in an accessible jurisdiction and require certainty in their commercial arrangements. Most athletes are nationals of, or reside in, the country in which they play, such that any dispute is resolvable through the domestic

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[595] Hetcher S, 'Climbing the walls of your electronic cage', [May 2000] 98 *Michigan Law Review* 1916 at 1917.
[596] Buck SJ, *The Global Commons: An Introduction*, Island Press, 1998.
[597] Lessig L, *Code and Other Laws of Cyberspace*, Basic Books, New York, 1999, at 5.
[598] Franzese PW, 'Sovereignty in cyberspace: can it exist?' (2010) 64 *Air Force Law Review* 1 at 33.
[599] Franzese PW, 'Sovereignty in cyberspace: can it exist?' (2010) 64 *Air Force Law Review* 1 at 33.
[600] 'Competition is by its very nature deliberate and ruthless.' *Queensland Wire Industries Pty Ltd v BHP Co Ltd* (1989) 167 CLR 177 at 191 per Mason CJ.
[601] Trachtman JP, 'Cyberspace, Sovereignty, Jurisdiction, and Modernism' Vol 5, *Global Legal Studies Journal*, 561 at 565.
[602] *Lennox v Megray pty Ltd* (1986) ATPR 40-640.
[603] Copyright Act 1968 (Cth); Trade Marks Act 1995 (Cth).
[604] For example, Australian Consumer Law, Section 18.

jurisdiction or by a forum specified under the pertinent contract.[605] Unlike faceless cybercriminals, athletes are known and courts of competent jurisdiction, national and foreign, are available to hear matters of dispute. In this sense, the law to be applied is not the theoretical construct proposed by commentators like Lessig; it is the law of contract defined by the objective intention of the parties concerned.[606] Within the sphere of contract law, cases will be considered and policy adjustments made.

Whilst some may argue that the paradigm of cyberspace should be resolved differently to restraints imposed in the traditional markets, say as a market totally free of legal control, it is doubtful such a response can be of more than academic interest. It is possible and in fact desirable for purposes of doctrinal clarity that complaints of trade restraints in cyberspace be resolved by established law, albeit with 'policy adjustment' appropriate to the new communications mediums.

## 7. 'Sharing' cyberspace: the micro-markets for sport endorsement

### 7.1 A new partial restraint 'policy' for a new paradigm

The very abundance and diversity of internet sites makes possible what might be called the 'sharing' of the cyberspace markets for athlete endorsement; in essence the reintroduction of a partial restraint rule. What is proposed by analogy is a form of partial restraint of trade that recognises, drawing upon the descriptor of Parker CJ in *Mitchell v Reynolds*, that 'some place' in the cyber-markets is to be available for covenantor exploitation.

Although clearly the word 'rule' as attached to 'partial restraint' has passed with the decision in *Nordenfelt*, the partiality of a restraint remains highly pertinent to the modern application of reasonableness. As said by Dixon CJ in *Butt v Long*: 'The covenant ... is reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser.'[607]

Whilst this Chapter proposes a methodology for achieving an acceptable partial restraint, the restraint of trade doctrine has not historically been applied to 'balance' the competing interests of the parties.[608] Markets are not 'shared' between the parties as a matter of comity – each entity has an interest it is permitted to preserve. A market is not split between the covenantor and covenantee as a compromise as if dividing a cake between squabbling siblings. As Gummow J remarked in *Adamson v NSW Rugby League* (a case concerning the internal draft then operating in Rugby League) in respect to the competing interests of players and organisation: 'but that is not to undertake a "balancing" exercise with a comparative evaluation of the weight of the interests of organisers and players.'[609] What is required is an 'assessment and determination of the justification attempted' by the covenantee.[610] It is for

[605] For example, NRL Player Contract, section 28.1: 'This agreement shall be governed by the laws of the State of New South Wales and the parties submit to the exclusive jurisdiction of its courts.'
[606] *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429.
[607] *Butt v Long* (1953) 88 CLR 476 at 486.
[608] *Adamson and Others v NSW Rugby League and Others* (1991) 103 ALR 319 at 364.
[609] *Adamson and Others v NSW Rugby League and Others* (1991) 103 ALR 319 at 364.
[610] *Adamson and Others v NSW Rugby League and Others* (1991) 103 ALR 319 at 364.

this reason that any notion of 'sharing' cyberspace, even where configured as a form of partial restraint, must be based on specific policy considerations. Whilst not strictly necessary when introducing adjustments in policy, what is proposed finds support through an analogous reasoning in respect to the restraint of trade doctrine. These analogies are discussed below.

As stated earlier, should a court determine that the 'ownership' of the cyberspace markets is to fall to the dominant contracting party, all other parties would be excluded from a market of increasing influence on national and international commerce. In such circumstances a Superior Court will be called upon to consider the policy ramifications of denying covenantors access to the internet generated markets. The practical effect of sequestering these markets to the covenantee is not unlike that flowing from the decision of Elizabeth I in 1600 to grant of royal monopoly 'The Company of Merchants of London' the sole right to trade into the East Indies. The initial advantage of encouraging 'trade adventures' gave way by the middle of the seventeenth century to cost inefficiencies associated with monopoly market structuring and which, it might be added, prompted the courts of the period to progressively curtail the royal prerogative.[611] As in the past, monopoly today is associated with diminished supply and higher prices, neither of which is in the public interest.

Policy adjustments will need to consider two broad questions:

1. Is it in the public interest that an entire market is allocated to the dominant contracting party?

2. Is it reasonable that a covenantor is locked-out of a market with growing national and international commercial value?

### 7.2 The tension between 'Nth degree' protection and reasonableness

A policy approach is necessitated by a tension, if not a conflict, in how the restraint of trade doctrine deals with restraints that they protect the outermost reaches of covenantee's total market but where this outlying section of the market is minor, or trivial, in respect to the covenantee's overall market interests.

The question by analogy is whether the restraint of trade doctrine should afford a covenantee total protection in circumstances where *almost* total protection, (in fact a high degree of partial protection) is reasonable. Would it be correct, for example, to permit a restraint to extend an additional 5 kilometres to ensure the continuing custom of a one client of the covenantee out of 100 clients, where a restraint 5 kilometres narrower would secure the ongoing custom of the remaining 99?

How this tension is resolved is particularly relevant to endorsement restraints where a ban on, say, internet advertising yields only a small return to the sporting organisation but a great loss to the athlete. A claim to total protection is tantamount to stating that even the most tenuous of connections to a cyber-market or the most minimal of returns is sufficient to exclude the athlete from website endorsement.

[611] See generally Chapter 3: 'The Rise and Rise of Liberalised Trade'.

In restraint of trade law there is a level of uncertainty as to how the relative interests of the parties are to be considered – one seemingly given little attention in commentary. A possible but by no means certain source of this doubt can be traced to the foundational case of *Herbert Morris v Saxelby* heard before the House of Lords.[612]

Two semantically different formulations of reasonableness can be identified in *Saxelby*. Lord Parker stated that, '... to be reasonable in the interests of the parties the restraint must afford *adequate* protection to the party in whose favour it is imposed.'[613] Lord Atkinson worded the requirement with a slight but nonetheless significant difference: '... nothing more than *reasonable* protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests.'[614] On one hand the test is designated by 'adequate protection' and on the other by 'reasonable protection'. For present purposes it is enough to note that 'adequate protection' refers to a restraint of sufficient scope to fully protect the interests of the covenantee. That is, a restraint of any scope is enforceable where necessary to protect the entire interest of the covenantee. On the other hand 'reasonable protection' would permit a court to strike down a restraint where its scope, whilst necessary to protect the totality of the covenantee's interests, is unreasonable when weighed against other factors, say, where the 'damage' to the covenantee's interests is minor as against the cost to the covenantor of enforcing the restraint.

Lord Reid in *Esso Petroleum v Harper's Garage* [615] also quantified protection in terms of adequacy of protection: 'I think it better to ascertain what were the legitimate interests of the appellants which they were entitled to protect and then see whether these restraints were more than adequate for that purpose.' Adequate protection is the level of protection necessary to secure the covenantee's interests entirely.

In *Connors Brothers Ltd v Connors*[616] the covenantor agreed not to engage in sardine processing throughout the entirety of Canada but later sought to have the restraint overturned on the basis that the covenantee's business had not been conducted in all parts of Canada. Viscount Maugham found that it was not necessary to prove that all areas included within the covenant were subject to an immediate trade interest, stating, 'In a country of vast spaces ... it will always be possible, until the population of the country reaches a point now scarcely contemplated, to point to areas where there are only a few settlers or inhabitants, and where, accordingly, few if any, of the goods sold by the manufacturer have penetrated.'[617] The court found acceptable to protect even a small market, perhaps consisting of a handful of customers,[618] a point reflected in the words of HM Blake in the Harvard Law Review: 'a

[612] *Herbert Morris v Saxelby* [1916] 1 AC 688.
[613] *Herbert Morris v Saxelby* [1916] 1 AC 688 at 707(emphasis added).
[614] *Herbert Morris v Saxelby* [1916] 1 AC 688 at 700 (emphasis added).
[615] *Esso Petroleum v Harper's Garage* [1968] AC 269 at3 01.
[616] *Connors Brothers Ltd v Connors* [1940] 4 All ER 179.
[617] *Connors Brothers Ltd v Connors* [1940] 4 All ER 179 at 194.
[618] The reasoning to an extent recognises that some leeway is given to new businesses with plans or potential for expansion: *Cook v Shaw* (1894) 25 OR 124. Nevertheless Heydon has commented that 'on the facts ... sufficient

restraint is usually held to be reasonable ... only if its scope is necessary in its full extent to protect a legitimate interest.'[619]

There is, then, an arguable right for a covenantee to protect its legitimate interests completely.

Despite the apparent immutability of the above prescriptions, there is nonetheless authority indicating that reasonableness will not always be a matter of providing 'nth degree' or total protection.

In *Cream v Bushcolt Pty Ltd* [620] the covenantor sold a business operating over several regions of Western Australia but 'mainly' within a 200 km radius of the town of Geraldton and the lower west of the state. Cream agreed not to engage in the transportation of livestock in Western Australia for a period of 10 years. Some months later he sought to have the restraint overturned on the basis of excessive geographic reach. Scott J in the Supreme Court found that although the covenantee's operations were 'insignificant in some regions of the State' the restraint was nonetheless reasonable because 'the business did operate throughout all those [restrained] regions of the state.'[621] The Court of Appeal disagreed finding that although some business was conducted in diverse areas of the state, 'on a proper analysis of the facts, the nature and extent of the operations of the business in the rest of the State outside its main areas of operations ... was insufficient to warrant a state-wide restraint.'[622]

In *Herbert Morris Ltd v Saxelby* Lord Parker denied enforcement where a legitimate interest in the form of a sole trade secret because 'it would be a point of some difficulty whether the possession by an employee of a single trade secret would justify a restraint as wide as that in the present case ...'[623]

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dealings by the business sold were proved to justify a Canada-wide restraint.' Heydon JD, *The Restraint of Trade Doctrine*, 3rd ed. LexisNexis Butterworths, Australia, 2008 at 206.

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

[620] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82.

[621] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82 at [59].

[622] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82 at [70].

[623] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 712.

According to Heydon, at least in respect to geographic scope, the division depends on 'whether the business *substantially* extends over the area in issue' suggesting that protection cannot extend beyond that which is reasonable in the circumstances.[624]

A more definitive statement is found in *Blakely and Anderson v de Lambert*: 'a covenant will not necessarily be allowed to go to the full extent of preventing all possible injury. It is always a question of what is reasonable by way of protection in all the circumstances of the case, and the area of possible injury may not be coterminous ... with the right to protection.'[625]

The better view, one supported by the thrust of policy since the first restraint of trade cases of the fifteenth century, is that a restraint cannot extend to give 'Nth degree' cover to covenantors where it is 'rational' or 'correct'[626] that protection should only extend to that which is reasonable. In the context of this thesis, it cannot be expected that a restraint of trade will necessary deliver complete protection to a sporting organisation against the accumulated effects of multiple restraints bearing upon the covenantor athlete's interests.

When considering the policy question of 'shared cyberspace zones' a court will be concerned with practicalities rather than 'legal niceties' – that which works to achieve the desired policy outcome. In the words of Lord Reid:

> 'As the whole doctrine of restraint of trade is based on public policy, its application ought to depend less on legal niceties or theoretical possibilities than on the practical effect of a restraint in hampering that freedom which it is the policy of the law to protect.'[627]

Bearing Lord Reid's direction of 'practicality' in mind, the 'sharing' of internet markets is agued here to provide a workable means of accommodating the competing interests of sporting organisations and athletes. The proposal is based on the very abundance and diversity of internet sites and the capacity of modern search engines to delineate sites according to subject matter, thereby permitting the market for sports endorsement to be divided into commercial segments. Under this proposal the cyber-markets are segmented into areas that fall most naturally to each party. For example, a personal website or a site akin to 'Facebook' is deemed to belong to the athlete whilst certain digital offshoots of the sport itself, such as the official website are the organisation's to exploit. The task, in essence, is to fashion a practical means of dividing the cyberspace markets amongst the parties whilst at the same time ensuring a rational base for the development of principle.

### 7.3 A 'non-compromise' claim to cyberspace

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[624] Heydon JD, *The Restraint of Trade Doctrine,* 3rd ed, LexisNexis Butterworths, Australia, 2008 at 155 (emphasis added).
[625] *Blakely and Anderson v de Lambert* [1959] NZLR 356 at 378.
[626] These words are used because there is no single descriptor to encapsulate 'absolute', 'partial' or 'reasonable' the broad designations used in reference to the policy applications relevant to the restraint of trade doctrine.
[627] *Esso Petroleum v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 298. See also Gibbs J in *Amoco Australia Pty Ltd v Rocca Bros* (1973) 1 ALR 385 at 406: 'The application of the doctrine of restraint of trade ... is to be determined "by reference to the practical working of the restraint, irrespective of its legal form.'

The 'partial restraint rule' of *Mitchell v Reynolds*, was presented as an analogy to suggest a means by which athletes and sporting organisations may, in compromise, 'share' different parts of the cyberspace markets according to the character of the websites concerned.

Leaving aside the suggested approach of 'compromise', the cases listed in the previous sub-section are also applicable to an athlete's claim under the *Nordenfelt* principle, that is that excessive or 'nth degree' protection is not reasonable. Although these cases concern post-contractual restraints, each applies to restraints during the currency of employment; the degree of protection to be afforded a covenantee is not specific to whether a restraint is post-contractual or inter-contractual.[628]

In this sense the athlete claims a section of the cyber-markets on the basis that the scope of the restraint exceeds that necessary to protect the sporting organisation's interests. This is an entirely different approach to a claim, based largely on policy, that part of the cyber-market should be reserved for athletes as a compromise.

### 7.4 Legal analogies relevant to 'shared' cyber-markets

Three possible legal analogies applicable to sharing cyberspace are suggested:

One: An analogy can be drawn to policy developments in the early twentieth century that recognised as a matter of law an employee's subjective knowledge; that personal skill that cannot be claimed by the employer.[629] Present technology allows the digital market-place to be divided into specific areas for purposes of commercial exploitation according to geographic location, by consumer interest, or by a personally designated website. Each website as an independent entity can be exploited as a market-place for the sale of goods and services. For example, a sporting star from a country town may be able to endorse products on websites confined to that country town.

Two: A theoretical base to the suggested market division is also supplied by what in the United States is known as 'the right to publicity'. Again, as word limitations preclude any detailed analysis of this right, a brief summary will hopefully prove sufficient. The right to publicity, a phrase coined in by Frank J in *Haelen Laboratories Inc v Topps Chewing Gum Inc*,[630] recognises the property right of a celebrity in protecting their persona from use that will cause commercial harm.[631] The entitlement transcends, in certain circumstances, the more general right under the First Amendment to the United States Constitution to free expression. According to McCarthy the right to publicity permits each individual to profit from their name, image, likeness or any fact related to identity.[632] There is a stark distinction between the right of a celebrity to profit from his or her reputation or persona and others referring to the celebrity in respect to news or results. By and large use of a celebrity's image

[628] See discussion in Chapter 5: 'A restraint during the currency of employment'.
[629] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 407.
[630] *Haelen Laboratories Inc v Topps Chewing Gum Inc* (1953) 202 F.2d 866 (2nd Cir) 346 US 816.
[631] Note that although the right applies to all US citizens, in reality only celebrities are able to profit from their persona.
[632] McCarthy JT, *The Rights of Publicity and Privacy* reported in Fernandez C, 'The right of publicity on the internet' (1992) 2 *Marquette Sports Law Journal* 289 at 306.

which is not concerned with intellectual or commercial property is permissible. Clearly, news and political opinion cannot be curtailed,[633] nor do fictionalised accounts of a celebrity or satire and the dissemination of ideas[634] infringe the right to publicity.

*Haelan Laboratories v Topps Chewing Gum* concerned a baseball player who had granted Haelan the exclusive right to use his picture in selling its products. 'Topps', without permission, produced a baseball card of the player. When sued it claimed in its defence that there were no enforceable rights in a reproduction of a likeness. The court rejected the argument stating that the player possessed 'right in the publicity value of his photograph.'[635]

This 'new common law right of publicity' in the United States was justified according to Fernandez by a fundamental rationale: 'The right to publicity is characterised as an intellectual property right. The defendant may not take, without authorisation, a plaintiff's image in order to use it as a vehicle to attract attention to the defendant's protected image.'[636] A similar approach could reasonably apply to rationally delineate the cyberspace markets as between organisation and athlete. It might be noted that although the right of publicity is assignable, usually in return for payment, the major sporting organisations in Australia are not engaged in the purchase of the athlete's right to publicity but rather acquire this valuable property by contractual dominance.

Three: It is also possible to suggest a theoretical underpinning aligned to more traditional approaches. Gaik has proposed the law of trademark as a possible means by which 'celebrity athletes can control the use of their 'personality' and image'.[637] Under the Trade Marks Act 1995 (Cth) a 'sign' may be used to distinguish goods and services. A sign includes any 'letter, word, name, or signature'.[638] Gaik frames her argument around the fact that 'the name, image, signature or other distinctive qualities of a celebrity personality are potentially capable of being registered as trade-marks.'[639] It might be noted that swimmer Ian Thorpe registered his nickname 'Thorpedo' as a trade mark that later withstood legal challenges from 'Torpedoes Sportswear Pty Ltd'[640] – a small amendment to designation which entirely altered the legal rights of the swimmer.

Again it must be stressed that the foregoing discussion is not aimed at illuminating a means by which athletes can enforce some 'right of publicity' but rather to give some basis by which a rationale can be fashioned for purposes of policy adjustment under the restraint of trade doctrine in respect to the use of the cyber-markets. As a concept, the task is no different to that which has confronted courts obliged to adjust policy to changes in technology over the 600 year history of the restraint of trade doctrine.

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[633] *Dun & Bradstreet Inc v Greenmoss Builders In,* (1985) 105 S.Ct. 2939, 2945.
[634] *Harper & Row publishers Inc v Nation Enterprises* (1985) 105 S.Ct. 2218, 2232.
[635] *Haelen Laboratories Inc v Topps Chewing Gum Inc* (1953) 202 F.2d 866 (2nd Cir), 346 US 816.
[636] Fernandez C, 'The right of publicity on the internet' (1997-1998) 8 *Marq Sports LJ* 289 at 323.
[637] Gaik JNS, 'Protecting a sports celebrity's goodwill in personality in Australia' [2008] Art6 *Bond U Sports Law eJournal* at 1.
[638] Trade Marks Act 1995 (Cth) section 6,.
[639] Gaik JNS, 'Protecting a sports celebrity's goodwill in personality in Australia' [2008] Art6 *Bond U Sports Law eJournal* at 2.
[640] *Torpedoes Sportswear Pty Ltd v Thorpedo Enterprises Pty Ltd* (2003) 204 ALR 90.

Should it be thought that categorising markets in the manner suggested above is somewhat artificial, one may consider that the restraint of trade doctrine has, in the words of Lord Wilberforce, 'been expressed with considerable generality, if not ambiguity. There is no need to regret these tendencies: indeed, to do so ... would indicate a failure to understand its nature.'

## 8. Compromise and the divided market

Slade J in *Office Angels v Rainer-Thomas* [641] found that it was acceptable for a court to take into account whether a restraint in a 'different form' would cause less disruption to the covenantor when coming to its decision in respect to reasonableness. His Honour stated in full:

> 'The Court cannot say that a covenant in one form affords no more than adequate protection to a covenantee's relevant legitimate interests if the evidence shows that a covenant in another form, much less far reaching and less potentially prejudicial to the covenantor, would have afforded adequate protection.'[642]

Slade J provides no adequate authority supporting this view other than apparently extrapolating (probably incorrectly) from *Mason v Provident Clothing and Supply Co*, to state of that case that, 'all these observations (of the judges), in my judgment, illustrate that in considering the reasonableness or otherwise of a covenant ... the Court is entitled to consider whether or not a covenant of a narrower nature would have sufficed for the covenantee's protection'.[643] There are difficulties in accepting Justice Slade's 'judgment' on 'another form' of narrower restraint. The narrower restraint in *Mason* was not a narrower substantive restraint but a restraint narrower in the geographic sense. As such, there is doubt that *Mason* can be taken to support a determination of unenforceability where a less intrusive substantive restraint is available. The use of this methodology to determine reasonableness has particular conceptual difficulties, in particular throwing the court into the role of factual expert attempting to discern across a multitude of business alternatives what is, and what is not, a narrower form of restraint. Nevertheless, the case has been referred to by a number of commentators,[644] and although direct support for this 'lesser restraints' proposition was not made, neither is there demurral.

The statement of Slade J in *Office Angels* allows for a compromise argument to be fashioned along the lines of a shared market. Where a restraint excludes an athlete from the entirety of the digital markets it will, under the formulation of Slade J in *Office Angels*, be unreasonable should a lesser restraint can achieve adequate protection of the covenantee. This authority gives at least a form of base from which to consider a policy adjustment aimed at compromising access to the digital markets.

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[641] *Office Angels Ltd v Rainer-Thomas and O'Connor* (1991) IRLR 214; Mann and Butler-Sloss LJJ agreeing.
[642] *Office Angels Ltd v Rainer-Thomas and O'Connor* (1991) IRLR 214 at [49].
[643] *Office Angels Ltd v Rainer-Thomas and O'Connor* (1991) IRLR 214 at [50].
[644] Heydon JD, *The Restraint of Trade Doctrine,* 3rd ed, LexisNexis Butterworths, Australia, 2008; *Chitty on Contracts*, 2004; Treitel, *The Law of Contract*, 2003.

### 8.1 The organisation's market

Progressively the digital communications platforms are providing individuals with choices as to what they watch, how they watch and when they watch, in effect expanding the customer base of the sponsor market. Each viewing platform, say television or I-pod, is a vehicle carrying the sport's sponsors. These forms of cyberspace market are directly referable to the sport itself and rightly the organisation's to exploit.

Broadly speaking the 'natural' internet market of a sporting organisation are those sites associated with the sport itself. A supporter 'googling' a sport's website will usually be presented with a number of tabs leading to the marketing material of the sport's sponsors. For example, the Netball Australia website displays the advertising of sponsors such as ASICS the sports shoe manufacturer and the magazine 'New Idea'. The tab 'Australian Teams and Squads' presents graphics of players in uniform displaying sponsors trade-marks with alternating links taking fans to sponsors websites. The tab 'online shop' allows viewers to see a range of merchandise, including the 'Gilbert ball' or a 'kids hoodie' displaying the trade mark of the sponsor 'Kukri'. The '2011 Diamonds Training Camp' tab takes the netball fan to multiple photos of players and coaches adorned in uniforms with sponsors symbols.[645] A junior inquiring into playing netball is taken to the 'San Remo' 'net-set-go' page.[646]

For those sports with a large public or international profile but relatively minor sponsorship arrangements, the digital viewing platforms are a marketing division that rightly belongs to the sport itself. Small national markets where an audience is too small to justify a major marketing campaign are made large by accumulating a national or international audience around a single sports broadcast. Consider again Netball, a sport played in only a handful of countries. The Australian team is sponsored by British sports-wear manufacturer Kukri; Japanese sports shoe manufacturer ASICS; international pasta maker San Remo; international beauty producer Olay and international sporting goods producer 2XU. The 2011 Netball Test series against New Zealand was shown on the Ten Network in Australia and streamed online locally and internationally. Netball spectators not living in Australia, whilst perhaps small in number in their own countries are, on a global scale, collectively large. Digitalisation is able to foster the marketing of products on a global scale, the expense of which could not be justified if confined to only local viewers.

### 8.2 The athlete's market

Given that the policy purpose of the restraint of trade doctrine is to find a practical solution to trading disputation, it is proposed that websites personal to an athlete should be deemed a form of 'subjective property' where the player is permitted to display the advertising of any sponsor, including those competing with the organisation's sponsors. It is also proposed that certain markets, perhaps geographically limited or confined to products within a narrow market, should also be accepted as the athlete's to exploit as he or she wishes. For example, although the Western Force rugby team is sponsored by Emirates Airlines, an individual

[645] <http://www.netball.asn.au/PhotoGal.asp?PgId=2558>. Last viewed January 2012.
[646] <http://www.netsetgo.netball.asn.au/home.asp>. Last viewed January 2012.

player endorsing via cyberspace the services of a regional airline, say Rex in New South Wales, would have little if any impact on the international carrier.

The proposition is best examined through example. Consider the marketing of James O'Connor, a 21 year old Australian rugby representative and 'Super 15' player. In 2012 O'Connor contracted to the Melbourne Rebels. When the name 'James O'Connor rugby' is 'Googled', '2,060,000 results appear, any one of which can be downloaded in a fraction of a second. There is also O'Connor on 'Facebook', 'Twitter', 'RSS' and 'YouTube'.

Under 'Google images' there are thousands of photographs of O'Connor (in fact there are 376,000 results for images). In approximately 95% of these images, O'Connor is wearing his Australian Rugby jersey emblazoned with 'Qantas' or his 'Super 15' team jersey bearing the regional sponsor's logo.[647] O'Connor also has a Wikipedia entry, again wearing the Qantas Wallabies jersey. There can be little doubt that ARU and the ARU's sponsors are advantaged through the display of cyberspace images of O'Connor.

But what of the 'James O'Connor official website'?[648] Here the player wears his Wallabies jumper with the ARU's sponsors displayed. However, all commercial logos not associated with the national team's sponsors are blurred out; the player's contract preventing him from engaging in personal endorsement where it conflicts with the interests of the organisation's sponsors. The product 'One Water' is not blurred as One Water has a commercial association with the Wallabies.[649]

In testimony to the new medium of cyber-marketing, O'Connor advertises the football boots of Puma on his website, a permissible endorsement as Australian rugby is without a 'boot' sponsor. Several short advertisements show O'Connor wearing Puma boots in comical situations, for example, in the bath, surfing or with formal wear. Such ads do not appear on television and appear to be made for small screen, website marketing.

It is the personal nature of such websites that affixes the commercial interest more closely to the athlete than to the covenantee. O'Connor's website abounds with photos of him, newspaper headlines and charities he supports. His 'Facebook' page shows communications with fans, including those describing him as 'lovly ...awsum ... cute', many from as far away as Malaysia, Fiji and New Zealand. This is the stuff of the dedicated personal fan. An athlete's website containing information of a personal nature should not, it is argued, be controlled by the contractual reach of the sporting organisation.

The example of O'Connor's website demonstrates several things. One, that cyber-marketing is well established which, as argued here, will necessitate at some point in time courts considering the implications of a general restraint of trade limiting the use of these mediums by covenantors. Two, that some digital portals are uniquely private suggesting a ready delineation between marketing that is organisational as opposed to personal. Three, that

[647] <http://www.google.com.au/search?q='james+o'connor+rugby'&hl=en&biw=1251&bih=875&prmd=imvnsuo&tbm=isch&tbo=u&source=univ&sa=X&ei=pii6Tq3CLseNmQWm4NmHCA&sqi=2&ved=0CCoQsAQ>
[648] <http://www.james-oconnor.com.au/_blog/Latest_from_James>
[649] <http://www.james-oconnor.com.au/>

although a player like O'Connor is permitted to endorse a brand of rugby boot, there is no guarantee that this 'contractual privilege' will necessarily remain. To illustrate, in the 2004 Collective Bargaining Agreement between the Rugby Union Players Association (RUPA) and the ARU, an arrangement between Mizuno boots and the ARU was acknowledged with the words, 'RUPA agrees not to encourage Players to wear boots other than Mizuno and agrees not to bring ... an action on behalf of any of its members disputing the requirement that the Player must wear Mizuno boots.'[650] It appears that the ARU entered into a contract with Mizuno part way through the term of an existing player contract and managed to persuade the Players Association to acquiesce in limiting the entitlement of players to impliedly endorse their own sponsor in their act of wearing the sponsor's boot.

At this point it is worth reiterating the words of Parker CJ in the 1711 case of *Mitchell v Reynolds* upon the introduction of the 'partial restraint rule':

> '... without doubt some place or other may be found where the party entering into such a bond may use his trade, without any prejudice to the obligee ...'[651]

To be clear, the adjustment in policy by Parker CJ was available because advances in transport technology made it was possible to both enforce the restraint and permit the covenantor to trade in his or her profession. This did not guarantee that some clients of the covenantee would not travel a greater distance to access the services of a known covenantor, merely that the covenantee's interests would not be unreasonably disrupted. In such circumstances there can be no guarantee of total protection short of the total exclusion of the covenantor from the market.

The acceptance of a 'partial restraint rule' applicable to the targeted 'sharing' of cyberspace may cause some harm to the interests of sporting organisations such as the Australian Rugby Union, an employer of O'Connor. However, as a policy alternative the suggested methodology permits the sporting organisation to retain the bulk of the cyberspace market without excluding the athlete in totality. To emphasise the rationale of the court in *Cream v Bushcolt Pty Ltd*,[652] 'on a proper analysis of the facts, the nature and extent of the operations of the business in the rest of the State outside its main areas of operations ... was insufficient to warrant a state-wide restraint.'[653]

## 9. The targeted cyberspace market

Digital media tools have the capacity to target individual websites and email addresses by category, such as hobbies, profession, education, reading interests and a multitude of other classifications. Allocating websites by a covenantor's personal interest is a suggested here as a possible means of assigning rights of endorsement between the competing entities of organisation and athlete.

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[650] RUPA Collective Bargaining Agreement 2004, section 20, 'Boot Sponsorship'.
[651] *Mitchell v Reynolds* 24 ER 347 at [136].
[652] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82.
[653] *Cream v Bushcolt Pty Ltd* [2004] WASCA 82 at [70].

To illustrate, some athletes are known to have interests extending beyond their sport. The ex-rugby league player Andrew Ettingshausen has a long term interest in fishing and presently compares a fishing program on Fox television. Ex-Australian rugby player Tim Gavin was brought up on the family farm and maintained a professional interest in its ongoing development. Many athletes are involved in the arts or music, for example, tennis player Pat Cash played electric guitar and New South Wales cricketers Gavin Robertson, Brett Lee and Richard Chee Quee played semi-professionally with the rock band 'Six and Out'. Endorsing the products and services associated with a personal interest is a means by which athletes can use their notoriety to endorse, via cyberspace, specialised markets on a more limited scale to that generally favoured by major sporting organisations.

In terms of marketing psychology the athlete's persona transcends the sport to become associated with a product of his or her personal interest. Following on from the examples above, although many sporting organisations endorse the audio products of suppliers like Panasonic, an athlete with a personal interest in professional sound systems may appeal to a niche market advertising that product on the internet and do so without overly affected the interests of the sporting organisation. Here, not only is the market limited to internet endorsement but also by particularity of product. Similarly, specialised communication equipment such a satellite phones used on large farm holdings, if endorsed by a 'farmer sportsman' are unlikely to disrupt the commercial interests of companies like Vodafone, sponsor of the Australian Wallabies. If a more geographically narrow scope is needed, the athlete's image can be targeted to specific nations, regions or suburbs where the athlete has an association, such as cricketer Brett Lee who, as discussed below, is popular with Indian cricket fans.

To emphasise the point: 'Athletes are effective as endorsers because they often represent an association with a symbolic reference group.'[654] The athlete as farmer or singer or musician has an appeal to specific reference groups the needs of which cannot be supplied by a sporting organisation. These reference groups, as suggested, represent the basis of a cyber-market falling naturally to the athlete.[655] As Shani and Chalasani comment, 'Niche marketing ... is the process of carving out a small part of the market whose needs are not fulfilled.'[656] A sporting organisation that endorses for, say, Panasonic, is not meeting the informational needs of the musician – a musician who may be open to the endorsement message of an admired athlete who shares an interest in music.

## 10. The cyberspace market and geographic reasonableness

The terms by which the major sporting organisations restrain the capacity of their athletes to trade in the endorsement market are expressed without any geographic limitation. For example, the wording, 'the Player will not do anything which may reasonably be considered

[654] Carlson BD and Donavan T, 'Concerning the Effect of Athlete Endorsement on Brand and Team-Related Intentions' (2008) 17 (3) *Sports Marketing Quarterly* 154 at 155.
[655] See Chapter 2: 'The Factual Context – Marketing and Endorsement'.
[656] Shani and Chalasani, 'Exploiting Niches using relationship marketing' (1992) 6(4) *The Journal of Services Marketing'* 43 at 44.

as promoting or endorsing any product or service'[657] is a general restraint.[658] Such restraining provisions are expressed in the same language as pre-digital contracts - 'grand-fathered in' as the expression goes – but take no account of developments in cyber-marketing.

This type of restraint is known as general geographic restraint because it leaves no part of the world for the athlete to freely endorse the products and services of sponsors. Noting again that the reasonableness of a restraint is adjudged according the contractual entitlement to enforce, a sporting organisation's apparent disinterest in foreign endorsement or in a particular website is not to the point.[659]

As sporting contracts are presently expressed, there is no a geographic boundary to cyberspace, meaning that the athlete is restrained from entering all cyber-markets for the purpose of endorsement.[660] Given that restraints on endorsement are general, and include all digital sites globally, are such restraints reasonable? The next sub-section argues that such restraints are in fact unreasonable.

### 10.1 Cyberspace endorsement as a general restraint

A restraint that exceeds that necessary to reasonably protect the legitimate interests of the covenantee is unenforceable, as illustrated in the classic case of *Mason v Provident Clothing*.[661] The court found the covenant imposed on a salesman of 25 miles to be excessive for, 'such an area is very far greater than could be reasonably required for the protection of his former employers.'[662]

Uniquely to the sports (and entertainment) industries, the persona of an athlete may extend into geographic areas where there is no sponsor interest in covenantee sporting organisation as a product endorser. In fact, the sporting organisation could be viewed with distain by the populous of some regions, for example, Indian cricket fans may like Australian cricketers but be unable to identify in the psychological sense that underpins endorsement marketing, with Australian cricket or the Australian Cricket Board.

The point is this: sporting organisations by and large lack the qualities that permit individual athletes to successfully market their persona on a global or regional scale. Where the organisation restricts its athletes from endorsing in markets where the populous in unable to 'identify' with the sport as offered by the organisation the restraint is prima facie unreasonable: 'a restriction imposed to protect a business which was not in fact being worked and might never be set up at all' is unreasonable.[663]

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[657] WNBL Player Agreement, 2008, section 17.3.
[658] Whilst the restraint can be classified as partial in respect to product categories, these forms of restraints were argued in section 1 of this Chapter to be a false partial restraint.
[659] *Adamson and Others v New South Wales Rugby League and Others* (1991) 103 ALR 319 at 360.
[660] As stated earlier in this Section, there is a policy question as to the ownership of these markets. Is there any reason why a geographically acceptable restraint should extend to the digital markets, to cyberspace?
[661] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 728.
[662] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 744.
[663] *Mulligan v Corr* [1925] 1 IR 172 at 177.

To illustrate the unique nature of athlete appeal regionally and internationally, two examples are posited:

One: to return to the example of rugby player James O'Connor. Until the end of season 2011 O'Connor played for the 'Western Force' of Western Australian. This club featured sponsors 'Saltire Engineering' and 'JB O'Reilly's dining emporium'.[664] O'Connor faced a global ban on endorsing products that conflicted with the interests of these sponsors. However, the names Saltire Engineering and JB O'Reilly's may mean little or nothing to rugby fans in locations beyond Western Australia. It is not reasonable under the *Nordenfelt* principle to protect Saltire and JB O'Reilly's from O'Connor's endorsement in locations where the output of these businesses is not available or where their name is unknown. When O'Connor transferred to the Melbourne Rebels in 2012 a different set of sponsors had an interest in the player. The major sponsor of the Rebels is 'RaboDirect' – an online bank that has an interest in advertising nationally as do several other sponsors such as Carlton United Brewers and 'Elastoplast'. Amongst Melbourne based sponsors are 'City of Melbourne', 'University of Melbourne' and radio station SEN 1116. As a Melbourne radio station is not likely to face competition from radio stations across the country, it can be proposed that it is reasonable for an athlete with an inter-regional reputation such as O'Connor to endorse, say, a Sydney radio station. It can further be suggested that a player who transfers from a regional club should be permitted to take up endorsement in competition with his old club. To not permit endorsement in these circumstances is tantamount to imposing a post-contractual restraint in that the object of protection, the player's previous club, no longer employs the player. In moving to a new region in which he had previously endorsed products, a player may reasonably be required to drop those sponsors who clash with his new club's sponsors.

Two: In some cases a multi-national product may promote sales by engaging an athlete who is not a citizen of the country where an advertisement is presented. Athletes falling within this category include David Beckham, Michael Jordan, Tiger Woods and Roger Federer. These players regularly endorse products in media beyond their own countries, for example in Australia Woods advertises Rolex watches and Beckham aftershave.

Consider in this respect the possible Australian endorsement market of England rugby player Jonny Wilkinson. When 'Googled', Wilkinson has 3,130,000 entries recorded against his name with hundreds of thousands of images. U-tube, his official personal website and dozens of other links take the viewer to photos of Wilkinson. Wilkinson's sponsors are Adidas and Gillette – both global companies. 'Invicta' sponsors Wilkinson's club, Toulon. Australian supporters of Wilkinson may not have access to, or knowledge of, Invicta, a French producer of stoves and BBQs. Should an athlete like Wilkinson wish to endorse Australian stoves within Australian, he could do so without threatening the legitimate interests of the French Bar-B-Que maker or his Toulon club. It would arguably not be reasonable in the interests of his club, given the international interests of Adidas and Gillette, for Wilkinson to endorse other brands of athletic shoe and razor blade in Australia. The England rugby team is sponsored by mobile phone company 'O2'. Should O2 not have an Australian subsidiary by

[664] <http://twf.com.au/showthread.php?t=29828>

name (although there is an apparent association with Virgin mobile), it is reasonable to argue, at least in respect to internet marketing within Australia, that Wilkinson is free to endorse Australian mobile phone companies.

Certain Australian athletes, including some in team sports, also have an international profile that transcends their sport. Ian Thorpe, for example, has been mobbed by fans in Japan, reporting, 'It's a bit crazy. Once everyone knows that I am in Japan, everything changes. I am probably going to have to change hotels tonight.'[665] His notoriety has enabled the swimmer to sell products internationally. As one website stated:

> 'Ian Thorpe, Australia's most prolific Olympic gold medalist visited Maebashi city in Tokyo on the 28th June to promote the launch of his new low GI beverage and encouraging the youth of Japan to follow their dreams.
>
> With over a 1000 people attending the venue to see Ian, an excited Mr. Fukahori, a 12 year old boy proclaimed to the audience, "He is so big. I want to be an Olympic athlete too" to cheers of the crowd.'[666]

In similar vein, Australian cricketer Brett Lee appears on a range of Indian media platforms endorsing products such a Kit Kat and Timex watches.[667] Lee has been interviewed on Indian radio station Big 92.7[668] and recorded a song with Indian singer Ashe Bhosla[669] prompting Indian fan comments such as: 'Lee is the best!!! Luv you Lee ... according to me his bowling action is most beautiful. gud wishes for his career and his life.'[670] The reaction to Lee in India is a clear example of the process of psychological identification so favoured by sponsors.[671] Other Lee endorsements in India include international shoe manufacturer New Balance and Indian motor company TVS.

When under contract with Cricket Australia, Lee is restricted by a world-wide restraint on his entitlement to endorse products in competition with the sponsors of Cricket Australia. A difficulty arises for the player should Cricket Australia accept sponsorship from a confectioner in competition with Kit Kat or a watch-maker competing with Timex. In such circumstances Lee would be required to relinquish his arrangements with his personal sponsors irrespective of the isolation of the Indian market.

In terms of the restraint of trade doctrine, it can be suggested that Cricket Australia would be hard pressed to establish that the global scope of the restraint is reasonable. It is rightly stated that the interest of Indian cricket fans is found in the persona of Lee; little if any

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[665] <http://www.dailytelegraph.com.au/sport/more-sports/ian-thorpe-prepared-to-be-mobbed-by-enthusiastic-japanese-fans-in-tokyo/story-e6frey6i-1226193163653>
[666]< http://www.corp8trading.com/archives/246>
[667] <http://www.youtube.com/watch?v=imZGf4XT2cU>
[668] <http://www.youtube.com/watch?v=68N1GanwNPw>
[669] <http://www.youtube.com/watch?v=48eHkZfnGug>
[670] <http://www.youtube.com/watch?v=68N1GanwNPw>
[671] Meenaghan T and Shipley D, 'Media effect in commercial sponsorship' (1999) 33(3/4) *European Journal of Marketing* 328.

psychological identification in these fans can be expected from an association with Cricket Australia.[672]

At least some impact upon the sporting organisation as a vehicle of endorsement trading can nonetheless be expected – an expectation that is likely to prompt objection from the covenantee organisation. A similar concern was expressed regarding the 'employers market' when courts first began to consider the right of employees to retain, as their own, their subject knowledge acquired on the job. In *Mason v Provident Clothing* for example, counsel for Provident, Danckwerts KC, proposed that 'the employer is entitled to say, "I will not have the skill and knowledge acquired in my employment imparted to my trade rivals."'[673] Haldane LC, furthering a policy initiative, looked to the personal attributes of the covenantor, an approach which would be affirmed in the later case of *Herbert Morris Ltd v Saxelb*y,[674] stating, 'The capacity of the servant must obviously, from the character of the business as I have described it, be due mainly to the natural gifts of the canvasser.'[675] As stated previously, the digital markets are a new medium of commerce and, in line with other economic and technological developments, it cannot be expected that the restraint of trade doctrine will necessary grant to the covenantee all entitlements associated with it.

### 10.2 The status of global restraints

A question of some relevance in respect to the increasing use of digitalised devices associated with sports endorsement is the extent to which a world-wide restraint is enforceable where it results in the total exclusion of a covenantor from all markets.[676] While there is no doubt that global restraints can, under certain conditions, be deemed reasonable, enforcement, from the covenantee's position, may for several reasons prove elusive.

First, such restraints are difficult to justify if the covenantor does not possess 'substantially' a global business interest.[677]

Second, such restraints are so consummate that the 'interests of the covenantor', which must be preserved under the *Nordenfelt* test, may be obliterated.

Third, there is authority that such restraints are enforceable only where the covenantee can prove necessity to a high order: 'The fact that a restriction is potentially world-wide in its operation is a remarkable feature prima facie needing justification, even when there is the limitation to competitors',[678] or as stated by Lord Evershed MR, '... it must be rare, and,

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[672] See Chapter 2: The Factual Context - Marketing and Endorsement.
[673] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 728.
[674] *Herbert Morris* v *Saxelby* [1913] AC 724.
[675] *Mason v Provident Clothing and Supply Co* [1913] AC 724 at 731.
[676] Word limits preclude lengthy discussion.
[677] *Dowden and Pook Ltd v Pook* [1904] 1 KB 45; re 'substantially' see *Ropeways Ltd v Hoyle* (1919) 120 LT 538 at 542; reported in Heydon JD, *The Restraint of Trade Doctrine,* 3rd ed, LexisNexis Butterworths, Australia, 2008 at 155.
[678] *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623 at 644.

speaking from experience as I have had, is indeed very rare, to find an ex-servant restrained from exercising his trade in a competing business anywhere in the world ...'[679]

Fourth, a global restraint, particularly if imposed on employees, may require 'adequate' compensatory consideration to justify forcing the covenantor to entirely surrender his or her capacity to work in a nominated profession.[680]

Consider for example *Vancouver Malt & Sake v Vancouver Breweries,* a case where the covenantee, Vancouver Malt & Sake, attempted to introduce a world-wide restraint on a potential competitor. Although noting that global restraints had 'passed muster' in a number of courts, enforcement in such cases was only granted, said the Privy Council, where 'the restrictions to be reasonably effectual had to be world-wide.' [681] In light of the above maxims, there are very few industries, it may be submitted, where a global restraint is necessary to protect the legitimate interests of a covenantee.

In respect to endorsement, Australian sporting organisations imposing global restraints as a matter of course on athletes face the difficulty of proving a protectable interest of sufficient international import to justify the world-wide restraint on the athlete's trade.

## 11. Conclusion

For over 600 years the restraint of trade doctrine has responded to changed technological conditions with an eye to securing the entitlement of individuals to trade. Restraints were enforced only where a covenantor could find some place to work without threatening the interests of the covenantee. Today the courts face a challenge from digitalised marketing, a method so pervasive that few places in the world cannot be accessed for purposes of marketing.

This section has argued that enforcing a restraint to deprive athlete access to the digital markets is to award covenantee sporting organisations an entire global market. This was argued to be neither in the interests of the public nor in the interests of individual athletes.

A new form of marketing monopoly was argued to exist in what was called a 'sports conglomerate', a club or sport that integrates vertically to acquire a number of partnerships across a range of activities to exacerbate the problems of athlete access to the endorsement markets. Although sports conglomeration is in nascent form in Australia, it was suggested that the modelling of American and European sports will see its adoption by major Australian sports in the near future.

To overcome the domination of the digital endorsement markets it was proposed as a 'practical' policy measure that the cyberspace markets be shared by the sporting organisation and the athletes along lines of natural fit; personal sites to be the property of the athlete and all sporting sites that of the organisation. Such an approach could only occur, it was argued,

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[679] *Vandervell Products Ltd v McLeod* [1957] RPC 185 at 191.
[680] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 623.
[681] *Vancouver Malt & Sake Brewing Co v Vancouver Breweries Ltd* [1934] AC 181at 191.

by a policy adjustment. A number of related legal forms were suggested as a loose model for adjusting restraint of trade policy in respect to the digital markets.

It was proposed that restraints which include cyberspace or internet marketing are in fact global restraints. As sporting organisations lack ‘psychological identification’ in most international markets it was proposed that preventing an athlete with whom international fans identify from trading in the cyber-markets is unreasonable under the restraint of trade doctrine and, as such, unenforceable.

It is now appropriate to turn to another critical dimension of reasonableness: the phenomenon of multiple restraints imposed on athletes.

# Chapter 7: Enforcement and Reasonableness II: Multiple Restraints of Trade in Sport

## 1. Introduction

Athletes, particularly those competing in team sports, are not uncommonly restricted by more than one substantive restraint of trade. The literature on restraints of trade in sport deals by and large with restraints as single impositions.[682] The concern of this Chapter is with the effect of restraints additional to those imposed on athlete endorsement and how these, in combination, bear upon the reasonableness of the endorsement limitations. As Wilcox J stated in *Adamson v New South Wales Rugby League*,[683] 'The more onerous the restraint, the more difficulty it is ... to satisfy a court that it was ... no more than reasonably necessary ...' The 'difficulty' is Honour refers to is transposed from considering the reasonableness of several restraints singularly to the collective impact of multiple restraints.

The use of multiple forms of trade restraints is somewhat unique to the industry of sport to include over the years, player draft systems[684], salary caps[685], zoning restrictions[686], retain or transfer systems[687] and wage ceilings.[688] Endorsement restraints are considered against the cumulative backdrop of these restraints.[689] In testimony to the contractual power of the sporting organisation, it is the athlete who bears the burden when the effects of these various restraints are aggregated.

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[682] See for example: Buti A, 'Salary caps in professional team sports: an unreasonable restraint of trade' (1999) 14 *JCL* 130; Ross SF, 'Player restraints and competition law throughout the world', (2004-2005) 15.1 *Marquette Sports Law Rev*; Davies C, 'The use of salary caps in professional team sports and the restraint of trade doctrine' (2006) 22 *JCL* No. 3, 246. 'Draft systems in professional teams sports and the restraint of trade doctrine', (2006) 1 ANZSLJ 80; Owen-Conway S and L, 'Sport and restraint of Trade', (1989) 5 Aust Bar Rev No 3 208; Davies C, 'The AFL's Holy Grail: The Quest for an even Competition [2005] *JCULaw Rw* 4; Buti A, 'AOC Athletes' Agreement for Sydney 2000: The Implications for the athletes', (1999) 22(3) *UNSWLJ* 746; Johnson J, 'Restraint of Trade in Sport', *Bond University Sports Law eJournal*, Art 10 [2009].

[683] *Adamson and Others v New South Wales Rugby League and Others* (1991) 103 ALR 365 at 341.

[684] Presently operating in the Australian Football League (AFL). See also *Adamson and Others v New South Wales Rugby League Ltd* (1991)103 ALR 319.

[685] Operating in the National Rugby League, the Australian Football League, the National Basketball League.

[686] See *Hawick v Flegg* (1958) 75 WN (NSW) 255; *Foschini v Victorian Football League and South Melbourne Football Club* unreported, Victorian Supreme Court, 15 April, 1983.

[687] See *Buckley v Tutty* (1971) 125 CLR 353.

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

[689] There is no intention in this Chapter, for reasons of specificity and word length, to discuss benefits that may be thought to compensate athletes for the imposition of the various restraints of trade imposed in the context of major Australian sport. For example, Section 23 of the AFL Collective Bargaining Agreement permits a player to wear as a 'tool of his trade' any footwear of his choice. Trademarks displayed on modern sporting tools are a means of product endorsement from which a player may expect some remuneration from a manufacturer and could, as such, be used to promote the argument that endorsement restraints are 'partial' in scope, a factor often going to reasonableness. Such clauses generally fall short, however, of permitting the overt endorsement advertising of manufacturers.

As there is no *per se* ban on incorporating multiple restraints of trade into a contract, the question of reasonableness is perhaps best examined as a group of restraints likely, in combination, to provide more than reasonable protection in securing the legitimate interests of the covenantee. In considering reasonableness as it relates to multiple restraints, one must differentiate between those restraints which combine to damage a single aspect of an athlete's trade, such as his or her earning capacity, and multiple restraints that impact on several trading interests of the athlete, for example, one restraint dictating the club he or she must play for and another bearing upon earning capacity. Suggested below are several approaches to considering the effects of multiple restraints upon a covenantor's interests under the restraint of trade doctrine.[690]

In several celebrated sports cases including *Eastham v Newcastle United Football Club*[691] and *Beetson v Humphries*,[692] so entrenched was the focus on the single restraint in question, that additional restraints patently impacting on the interests of the covenantor were ignored as factors going to reasonableness. In *Eastham*, in addition to the transfer and retention systems players were restricted to a maximum wage ceiling of £20 a week during the season and £17 in the off-season. Although Wilberforce J was prepared to recognise that the transfer and the retention restraints operated as a system, no mention, not even as historical background, was made of this 'wage ceiling' that was voluntarily removed by the club 'after the issue of the writ' as an additional restraint that undoubtedly impacted on the player's earning capacity.[693]

In *Beetson v Humphries*, professional rugby league player Arthur Beetson, restrained under a by-law of the League from writing newspaper columns critical of referees, officials, the General Committee or which raised allegations of rule breaches by players appeared oblivious to possible arguments as to the effects of multiple restraints on the question of reasonableness. Beetson had written for the press since 1970 being paid by 'The Sun' in 1980 $571 for 35 weeks totalling $20,000. The second plaintiff, Western Suburbs coach Roy Masters, also wrote a column for 'The Sun' to be deprived of his 'meagre' earnings' under the same by-law. Hunt J recognised that the 'practical effect of By-Law 34 on the plaintiff's

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[690] The question of multiple restraints and reasonableness is all the more topical for recent calls to reintroduce a draft system in the National Rugby League (NRL) in addition to the existing salary cap: 'NRL chief executive David Gallop has warned that players could be driven into the arms of rugby union if the push within the code to adopt a draft system continues.': Honeysett S, 'Draft will drive talent to our rivals warns David Gallop' *The Australian*, March 14, 2012.; And again, the proposed use of a salary cap in rugby union in addition to existing trade restraints: 'The Australian Rugby Union is set to introduce an NRL-like salary cap to curb player expenditure of more than $30 million, cracking down on third-party payments, and reducing individual player payments by as much as 25 per cent ...': Rakic J, 'Big pay cuts on cards as ARU seeks salary cap', *The Sydney Morning Herald*, March 13, 2011.; Is the imposition of such restraints to be viewed as singular occurrences isolated from other restraints of trade in respect to the question of reasonableness? A draft or a salary cap introduced where other restraints of trade are extant, must, it is proposed, be considered against the backdrop of the cumulative effects of all restraints upon a player's interests in general. In fact, as the AFL moves towards a so-called 'free agency' system, trade limitations nonetheless remain: 'A player has served seven seasons or fewer of AFL football at one club, and is now out of contract. The player is not eligible for free agency if his club wishes to retain him. He may only move clubs via a trade or the draft.': 'Free Agency rules AFL statement 16 March, 2012. <http://www .afl.com.au/tabid/208/default.aspx?newsid=130820>

[691] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 (*Eastham*).

[692] *Beetson v Humphries* 10950 of 1980, 30 April 1980, Lexisnexis, BC8000054.

[693] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 417 – 418. Although the ceiling had been removed it was nonetheless described by Wilberforce J as existing at 'the material time.'

occupation as sporting journalists will be a financial one.'[694] No mention, though, was made of other financial restraints which had been applied in the years leading up to the case including a 13 man import rule, a maximum signing on fee and a wage ceiling.

For purposes of clarity, where multiple restraints impact on an athlete's freedom to trade, a covenantee may be tempted to argue that the interests of each party should be 'balanced out', such that each will give up a little in return for a gain. For example, finding that one restraint is unreasonable would require, in balancing the competing interests of the parties, that the other restraint be declared reasonable. This approach is incorrect. Determining the reasonableness of a restraint of trade 'is not to undertake a "balancing" exercise with a comparative evaluation of the weight of the interests of organisers and players. It is to test the justification attempted by those in adverse interest, in the litigation, to the players. ... (The trial judge) had proceeded on the footing that (it) was a question of "balancing" the competing interests. In my view, that was impermissibly to lighten the burden on the respondents (the League).'[695] Having said this, it is suggested below that 'balancing' the interests of the parties in a manner similar to the accepted practice of setting-off the extensive duration of a restraint against a small geographic scope may offer a means of resolution.

## 2. The fact of multiple restraints in sport

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

### 2.1 The example of the National Rugby League (NRL)

The National Rugby League Playing Contract incorporates multiple restraints of trade typical of those found in many Australian professional sports leagues. The relationship between the National Rugby League and premier rugby league players is that of Employer and Employee.[696]

The major restraint of trade on NRL players is a salary cap set at $4.4 million per club in 2012 'for the 25 highest paid players at each club' plus up to an additional '$350,000 on those players outside the top 25 who play in the NRL competition.'[697]

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[694] *Beetson v Humphries* (unreported, NSWSC, Hunt J, 10950 of 1980, 30 April 1980). Lexisnexis, BC8000054 at 15.
[695] *Adamson and Others v New South Wales Rugby League and Others* (1991) 103 ALR 365 per Gummow J. Note also *Herbert Morris v Saxelby* [1916] AC 688 where Lord Parker states at 707: 'It was at one time thought that ... the court ought to weigh the advantages accruing to the covenantor ... against the disadvantages ... but any such process has long been rejected as impracticable.'
[696] NRL Playing Contract (2012) Section 1.1. All NRL Playing Contract references refer to the 2012 contract.
[697] http://www.nrl.com/nrlhq/referencecentre/salarycap/tabid/10434/default.aspx

The Collective Bargaining Agreement (CBA) states that 'The NRL Clubs and Players recognise the importance of a Salary Cap and acknowledge that the Salary Cap limits, in a reasonable way, the remuneration that may be paid by, or on behalf of, any one NRL Club to its Players.'[698]

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

In addition to the salary cap there are further trade restraints:

Under Section 3.1(s) a league player must: 'not play the Game with any person, team of organisation save for the Club or in matches in any representative Competitions ... except with the prior written consent of the Club.'

Plus, under Section 3.1(t) the player must: 'not without the prior written consent of the Club, which the Player acknowledges will only be given with the consent of the NRL, participate in any football match of any code ...'

Plus, under Section 3.1 (u) he must '... not participate in any sporting or leisure activities other than matches approved by the Club and the NRL ... except where:

(i) the chances of injury are unlikely ...
(ii) there is no pre-arranged media coverage
(iii) the Player is not (directly or indirectly) paid.'

Plus:

> 'not to enter into any Non-Playing Agreement or Third Party Agreement without the prior written consent of the Club ... [Section 3.1 (v)]

Plus:

> '... the Player may make public appearances and contribute to the press, television and radio provide that:
>
> (i) The consent of the Club has been obtained, which consent must not be unreasonably withheld and
> (ii) Such appearances and contributions do not conflict with the interests of, or bring into disrepute, the NRL, the Club or the Game' [Section 3.2 (a)]

Although largely aimed at preserving employee fidelity, the above restraints nonetheless impinge upon a player's capacity to fully engage with outside agencies to play sport for reward or to be involved in any sport where injury could possibly result. The effect of many

[698] NRL Collective Bargaining Agreement (2006-2012) section 9.1.

of these restraints, at least singularly, is relatively minor and should be seen as merely a fringe influence on the question of reasonableness. There is, though, potential for substantial loss of income when the contractual terms prevent an athlete from engaging in other sports or appearing publically for reward. An illustration of the possible impact of this type of restriction is found in the 'ultimatum' delivered to dual international Ellyse Perry in May, 2012, by her 'W-League' soccer club Canberra United, demanding that she quit cricket 'or find another club' – a prima facie restraint of trade jeopardising potential salary and endorsement earnings.[699] In this respect one could also consider whether a restraint preventing Australian cricketers from competing in the Indian Professional League could be validly introduced. What of a single mid-week tournament or rugby players devoting part of their season to foreign competition in perhaps Europe or Japan before joining their provincial or national team? What of so called 'rebel tours' such as that made by cricketer Kim Hughes to apartheid South Africa in 1985?[700] Could a professional rugby player like Sonny-Bill Williams be restrained from boxing for reward?

Although in many instances clubs may give permission to players to engage in other sports or activities, the existence of a restraint of trade is determined by the contractual right to impose a restraint, not in acquiescing to the momentary wishes of the athlete.[701]

### 2.2 The 'big-ticket' restraints

The impact of endorsement restraints must be considered against the backdrop of the other 'big-ticket' restraint on income; a salary cap. Where such a restraint is applied alongside other 'serious' restraints such as a player draft, a transfer system or residency requirement, the burden on players takes on what might be called an exponential quality. Not only are earnings diminished but the entitlement to choose an employer and the place of work is placed beyond the athlete's control.

Again the NRL contract is illustrative and typical. An NRL player is granted the right to use his 'Player Property', in essence his image or reputation. As discussed previously, an athlete will find that the contractual entitlement so restricted as to be potentially worthless.[702]

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

> 'The Player grants to the Club for the duration of the Employment Term a licence to use, and to license the use of, his Player Property (together known as the "Rights") and to sub-license the Rights to the NRL on terms that authorise the NRL to further sub-licence the Rights to the NRL Partnership.'[703]

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

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[699] Hassett S, 'Spectacular own goal as star forced to choose codes', *Sydney Morning Herald*, May 30, 2012.
[700] See *Hughes v Western Australian Cricket Association* (1986) 69 ALR 660.
[701] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 360.
[702] The relevant contractual terms are again recorded in this Chapter to avoid the need to turn back the pages.
[703] 'Player Property' 'means the name, photograph, likeness, reputation and identity of the Player': 2004 Playing Contract Section 29: Definitions and Interpretation.

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

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

> '... The Player must not, without the prior written approval of the Club and the Salary cap Auditor, exercise his rights ... where use of the Player Property would or might:
>
> (i) Conflict with the name, reputation, image, products or services of the Club, the NRL, any of the Club's sponsors or a Game Sponsor.
> (ii) Conflict with, or be prejudicial to, the interests of the Club or the NRL ...'

In effect the player is entitled to engage in endorsement that does not conflict with (compete against) any sponsor of his club, the NRL or the sponsor of a particular game. Once a club, the NRL or any other relevant entity agrees to endorse a particular product or service, all other products falling within that category, say cars, airlines or alcoholic beverages, are excluded from the player's capacity to endorse. As discussed previously, while this arrangement may seem to leave a number of product categories available for exploitation by the player, in reality the clubs and the NRL's sponsors are many and cover most product lines advantaged through a marketing association with sport.[704]

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

> 'Wear only Team Apparel at training, NRL Competition matches, Representative Matches, matches in the Related Competitions and in all public appearances as a player.'[705]

There can be little doubt that the Club is entitled to insist on players wearing designated team apparel to work related events. Extending the restriction to 'all public appearances as a player' would seem, however, to include appearances as a 'private' player. Modern players appear regularly on television discussion panels, at fund raising and charitable events, visit hospitals and conduct interviews on the way into and out of the ground. Public appearances

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[704] Chapter 6, section 1, 'Product Grouping as a partial restraint of trade.' As stated, only certain products and services are advantaged through an association with sport. 'The task facing the sponsor is ostensibly to ensure his presence is clearly associated with the activity and where necessary to drain the activity values onto the brand. ... Essentially sponsorship allows the sponsored brand to live in the reflection of the sponsored activity.' Meenaghan T and Shipley D, 'Media effect in commercial sponsorship' (1999) 33 (3/4) *European Journal of Marketing* 328 at 335. To reiterate the difficulty a player faces in finding 'sponsor-free products and services', consider that the NRL and all clubs endorse the products and services of sponsors. The NRL has some 18 sponsors, <http://www.nrl.com/Sponsors/tabid/10630/Default.aspx>; the Sydney Roosters has 12 sponsors <http://www.sydneyroosters.com.au/default.aspx?s=current-partners>; and the Parramatta Eels a mammoth 52 sponsors. http://www.parraeels.com.au/default.aspx?s=sponsor-directory>.
For discussion see Thorpe D, 'Sports marketing as a factor in the punishment of athletes for misconduct.' (2012) 85 *ANZSLA The Commentator*.

[705] NRL Playing Contract (2012), Section 3.1 (j).

are also opportunities for endorsement – the player is seen, for example, on the evening news to place his or her sponsor's name on a cap or a jacket before the national public. Noting that Lord Denning MR defined a restraint of trade as any 'contract which interferes with the free exercise of his trade ... by restricting him in the work he may do for others, or the arrangements which he may make with others ...',[706] the limitation of wearing apparel for the purpose of securing endorsement income is a prima facie restraint of trade.

Similar restraints are also found in the AFL Collective Bargaining Agreement.[707] Section 7 bans a player from participating in any competition but those approved by the AFL. Section 10 establishes a 'First Year Draft.' Section 11 places limits on 'Total Player Payments.' Section 21 bans a player from the use of his image for endorsement that conflicts with the AFL or a 'Protected Sponsor' of an AFL Club.[708]

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

## 3. Reasonableness and adequate protection

A sporting organisation is justified in arguing that each restraint should be examined as a distinct legitimate interest, so that provided a single restraint is no more than is necessary to protect a specific interest, the restraint it is reasonable. This is a strong argument but, as proposed in this Chapter, unreasonably weights the enforceability of a restraint in favour of the covenantee where several restraints of trade bear upon the interests of covenantor athletes.

In exploring the organisation's entitlement to trade protection, two related concepts are pertinent. One concerns a previously considered question of whether a covenantee is to be awarded total protection as opposed to reasonable protection of its interests. And the other; the extent to which a covenantor's interests are to be considered in the assessment of reasonableness as against the interests of the covenantee.

### 3.1 The degree of protection

To be clear, an athlete will argue that the effect of two or more substantive restraints on his or her interests should be accumulated with respect to the question of reasonableness. In contrast, a sporting organisation claims that each substantive restraint does no more that protect a singular legitimate interest and should, as such, be enforced. These arguments again raise the policy question of whether a covenantee is entitled to 'total' protection or to 'reasonable' protection of its interests. 'Total' protection will see every restraint enforced whilst 'reasonable' protection will assist an athlete in retaining some of the market – a particularly cogent argument where endorsement advertising utilises the digital

[706] *Petrofina (Gt Britain) Ltd v Martin* (19966) Ch 146 at 169.
[707] AFL Collective Bargaining Agreement (2007).
[708] As stated previously, it is not the intention of this paper to consider benefits that may be thought to compensate for the imposition of the various trade restraints in sport.

communications mediums argued previously to offer novels means of 'dividing' the cyber-markets.

Viewed in isolation it is quite possible to see a single substantive restraint as having a relatively minor impact on the covenantor to indicate reasonableness. Where accumulated, however, the financial cost to the covenantor or an endorsement restraint, a salary cap, appearance and apparel restraints, and player drafts (as a draft prevents clubs from acquiring a player's services at market prices) the impost on the athlete's income accumulates to represent a significant reduction in total income. In this situation it is the covenantor athlete who bears the burden of each restraint whilst, somewhat ironically, affording to the covenantee organisation the collective benefit. Where the income of the covenantor is restricted across all possible bargains, the policy approach should, as argued here, by guided by Lord Reid's dictum that the application of the doctrine of restraint of trade 'ought to depend less of legal niceties ... than on the practical effect of a restraint in hampering that freedom which it is the policy of the law to protect'.[709]

Without reiterating the detail, section 3 of Chapter 6, 'Claiming the Digital Markets', discussed at some length the tension between 'total' and 'reasonable' protection, and argued that there is sufficient legal authority to propose that the protection of a covenantee's interests should, as a matter of policy, be limited to that which is 'reasonable' taking into account the relative costs borne by each party should the restraint not be enforced.

### 3.2 The interests of the athlete covenantor

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

According to Lord Macnaghten in *Nordenfelt* the interests of the covenantor must be considered when calculating the reasonableness of a restraint.[710] However, as discussed above, the covenantor's interests may well be subsumed where a restraint does no more than protect the legitimate interests of the covenantee. In this sense a restraint is reasonable irrespective of the effect on the covenantor provided 'its scope is necessary in its full extent to protect a legitimate interest.'[711]

Nevertheless, the interests of the covenantor cannot be entirely ignored. In *Attwood v Lamont* before the English Court of Appeal, Younger LJ commented that, 'the restraint must not only be reasonable in the interests of the covenantee but in the interests of both the contracting parties.' His honour went on to comment that this approach '... disposes of the almost passionate protest of Neville J in *Leetham v Johnstone-White* that no agreement was invalid, provided the restriction was reasonably necessary for the protection of the employer, however

[709] *Esso Petroleum Co Ltd v Harper's Garage* (Stourport) Ltd [1968] AC 269 at 298.
[710] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition* [1894] AC 535 at 565.
[711] Blake HM, 'Employee Covenants not to Compete' (1960) 73 *Harv LR* 625 at 675.

oppressive to the employee and fatal to his chance of obtaining his own living in this country might be.'[712]

In *Amoco Australia v Rocca Bros Motor Engineering*,[713] heard before the High Court of Australia, Gibbs J referred to the test of Lord Parker in *Herbert Morris v Saxelby*, '... to be reasonable in the interests of the parties the restraint must afford *adequate* protection to the party in whose favour it is imposed',[714] and then commented: 'The test stated suggests that it is not material to consider the effect of the contract on the covenantor.' His Honour, however, did not find the ramifications of this 'test' appealing and so drew on the foundation proposition of Lord Macnaghten in *Nordenfelt* to state:'... the fundamental rule remains that the restraint must be reasonable in the interests of the contracting parties ... In my opinion it is permissible, in asking whether a restraint is reasonable in the interests of the parties, to consider, as part of the circumstances of the case against which the question of reasonableness is to be decided ... the effect of the agreement on the position of the covenantor.'[715]

In the Australian sporting cases up until *Buckley v Tutty* in 1971[716] there had been a tendency to enforce restraints with little regard to burden placed on the covenantor athlete.[717] As discussed in detail earlier, to Hardie J in *Elford v Buckley*, professional rugby league was not a full time job but rather a 'supplement to income.'[718] By the time of *Adamson v NSW Rugby League*[719] twenty years later the interests of the athletes concerned were given particular attention.[720]

In *Adamson* Sheppard J framed the debate in these terms: 'A point of possible unevenness between the other judgments ... concerns the question whether it is relevant to take into account the interests of, or matters affecting, the players.'[721] The question itself reveals a negative mindset, at least to that point in time, in respect to player interests. His Honour commented that:

> 'I have not understood why the likely or potential effect on those most affected by it – in this case professional football players – is not a matter relevant to be taken into account. ... If one does not make a judgment about how it is likely to affect the players

[712] *Attwod v Lamont* [1920] 3 KB 571 at 589.
[713] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 1 ALR 385.
[714] *Herbert Morris v Saxelby* [1916] 1 AC 688 at 707(emphasis added).
[715] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 1 ALR 385 at 407-408.
[716] *Buckley v Tutty* (1971) 125 CLR 353.
[717] See discussion in Chapter 4: 'Restraints of Trade in Sport'.
[718] *Elford v Buckley* [1969] 2 NSWLR at 175.
[719] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319. In *Adamson*, although a salary cap operated alongside the draft system its legitimacy was not challenged so as to make redundant the Leagues argument that the draft was necessary to prevent 'cheque book warfare' between the clubs (at ALR 324). Nonetheless the salary cap continued to form part of the factual matrix under which the draft was considered, specifically the draft as a 'supplement' to the salary cap (at 346).
[720] In *Adamson* the parties to the restraint were the NSW Rugby League and the Clubs playing in its premier competition. Whilst the players were not covenantors under the contract they nonetheless carried the burden of the restraint. The comments of the judges in respect to the effects of the restraint would, with little doubt, be no different had the players in fact been signatories.
[721] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 322.

> whose ability it is to earn their living is or may be restricted by it, one will not have the complete picture. ... Unless one examines the consequences or potential consequences upon the players, one will not be able to make an adequate or satisfactory judgment on the question whether the persons who have imposed the restraint have established that it goes no further than is reasonably necessary to protect their legitimate interests. An important part of the mosaic will be lost.[722]

Sheppard J went on to state that in cases where a restraint is reasonably required to protect the interests of the covenantee it will still be necessary 'to consider the impact of the restraint upon those whom it is intended to affect',[723] before concluding definitively that, 'In other cases ... the effect will be drastic and will lead plainly to the conclusion that the restraint is unreasonable.'[724]

The division between the respective entitlements of covenantor and covenantee was also addressed by Wilcox J in *Adamson*: '... although the primary question will always be the extent to which the covenantee's need for protection, it is impossible to leave out of account the effect of the restraint upon the covenantor.'[725] His Honour then considered the specific burden placed on the players to state: 'In order to determine the matters of justification which are found to be established are sufficient to support the rules, it is necessary also to consider the effect of those rules upon the players.'[726]

As such, there is strong support for the proposition that even where restraints are singularly reasonable the burden on the covenantor athlete, in context the collective burden, must also be appraised when considering enforcement.[727]

### 3.3 Policy considerations

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

As discussed previously, there is nothing unusual about the restraint of trade doctrine adjusting policy in response to new circumstances or developments in economic thought or social philosophy. As Diplock LJ said in *Petrofina (Gt Britain) v Martin and Another*: The

[722] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319.
[723] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 323.
[724] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 323.
[725] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 341.
[726] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 351.
[727] Neither can one ignore the possibility of non-enforcement where a restraint damages the public interest: As Ungoed-Thomas J said in *Texaco v Mulberry Filling Station*, the interest of the public 'is part of the doctrine of restraint of trade which is based on and directed to securing the liberty of the subject and not the utmost economic advantage.' *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 WLR 814 at 827.

accepted economic theories as to how best to promote the expansion of the total volume of trade vary from time to time.'[728]

Nor has the restraint of trade doctrine been backward in altering micro policy within the broad economic or philosophic paradigm existing at the time of contracting. Examples over the last century include a willingness of courts to review the level of consideration supporting a restraint,[729] differentiating between restraints on employees and those supporting goodwill,[730] looking to the equality of bargaining power between parties[731] or distinguishing between an employee's 'subjective knowledge' and the employer's 'objective' knowledge'[732] and recognising a 'newer' form of protectable interest in staff connections.[733]

As stated by French, Kiefel and Nicholson JJ in *Peters (WA) v Petersville Ltd*: 'The cases show that Courts will look at aspects of the bargain in order to determine whether it is reasonable.'[734] The unique nature of the sports industry raises a number of 'aspects of the bargain' pertinent to the discussion of the reasonableness. These include: an arguable inequality of bargaining power between athlete and organisation; an absence of consideration supporting certain restraints; a limited career span in which to earn a substantial 'sporting' income; exposure to career ending injury; the subjection of players to interclub trades whilst still contracted; the argument that an athlete's reputation forms part of his or her 'subjective knowledge';[735] the fact that some restraints, are general rather than partial in scope - a factor going specifically to the question of reasonableness.[736]

In *Adamson* Wilcox J remarked:

> 'If that restraint is enforceable, it can only be because it does no more than reasonably protect the interests of the respondents, having regard to its effect upon the players.'[737]

Policy adjustment in respect to multiple restraints of trade, it is proposed, should be made with 'regard to (the) effect upon the players'. Reasonableness cannot be seen to involve merely the enhancement of the organisation's goals to the inordinate cost of athletes. As Ross correctly comments: 'Whatever the supposed advantage in enhancing competition between clubs, the effect of such restraints represents a significant transfer of wealth from players to clubs'.[738] The transfer of wealth is all the more significant for the manifold trade restraints imposed on athletes.

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[728] *Petrofina (Gt Britain) v Martin and Another* [1966] 1 All ER 126 at 139.
[729] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 126.
[730] *Herbert Morris v Saxelby* [1916] 1 AC 688.
[731] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308.
[732] *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724.
[733] *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995.
[734] *Peters (WA) v Petersville Ltd* (1999) ATPR 41-714 at [26].
[735] *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724.
[736] *Fitch v Dewes* [1921] 2 AC 158.
[737] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 356.
[738] Ross SF, 'Player restraints and Competition Law throughout the World' (2004-2005) 15 *Marq. Sports L Review* at 50.

A further policy consideration, as discussed previously, concerns the impact of digitalised communications on the definition of a 'protectable' interest and how the cyber-markets should be 'divided' in recognising the covenantor's trading interests. More importantly from the perspective of this Chapter, the income foregone from website endorsement must be aggregated with the income lost through salary caps, draft systems or apparel restraints to determine the true reasonableness of the restraints in question.

### 3.4 Revisiting 'a balancing exercise' as a matter of policy

In *Adamson* Gummow J emphasised that determining the reasonableness of a restraint of trade did not involve the court in balancing the interests of the parties one against the other but was rather to ensure that the covenantee met the burden of reasonableness.[739] Again, this rule developed from, and is most applicable to, singular restraints of trade. In respect to multiple substantive restraints of trade however, it is at least arguable that reasonableness could well be determined by balancing the benefits of all restraints against the cost of all restraints in a manner akin to the recognised practice of 'balancing' the scope of 'duration' against the scope of 'geographic reach'. This approach represents a radical departure from the conventional, and could, as such, only be sustained where multiple restraints permit legitimate trade-offs as a compromise between the parties.

In *Fitch v Dewes* the respondent Dewes, an articled clerk and managing clerk of the solicitor Fitch, entered into an agreement not to 'directly or indirectly be engaged or manage or concerned in the office profession of a solicitor within a radius of seven miles of the town hall of Tamworth.'[740] The question of contention was the unrestricted duration of the restraint – that is, it was a restraint for 'all time'. Lord Birkenhead LC, unperturbed, enforced the restraint on the basis that although the duration was unlimited, the covenantor was advantaged by the limited geographic scope of the restraint which permitted him to develop 'his business acquaintance with the clients of the firm so long as he does not practise within a range of seven miles.' His Lordship commented that '... if the restriction in respect of space is extremely limited, it is evident that a very considerable restriction in respect of time may be more acceptable than would otherwise have been the case.'[741]

By emphasising the collective burden of a restraint, an athlete, for reasons of consistency, would need to yield to arguments that the collective benefits should also be considered. A policy approach reflected in the further words of Lord Birkenhead: 'I have no doubt that it is for this reason that the Courts long since determined that they would lay down no hard and fast rule either in relation to time or in relation to space, but that they would treat the question alike of time and of space as one of the elements by the light of which they would measure the reasonableness of the restriction taken as a whole.'[742] The role of policy will be to

[739] *Adamson and Others v New South Wales Rugby League and Others* (1991) 103 ALR 319 at 365.
[740] *Fitch v Dewes* [1921] 2 AC 158 at 162.
[741] *Fitch v Dewes* [1921] 2 AC 158 at 163.
[742] *Fitch v Dewes* [1921] 2 AC 158 at 166-167.

'balance' the entirety of the benefits against the entirety of the costs in circumstances where trade restraints are imposed in multiples.[743]

## 4. Multiple restraints: calculating 'reasonableness'

To be legally reasonable a restraint on trade must be 'so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed ...'[744] Where the restraint, or multiple restraints, exceeds that necessary to protect the legitimate interests of the covenantee the restraint is unenforceable. This Chapter highlights the question of reasonableness in circumstances where restraints in multiple forms are imposed upon athletes' freedom to trade.

How is one to adjudge where several distinct restraints, each of which may not exceed 'adequacy' as a single restraint but which as a combination bears heavily upon the trading interests of the covenantor?

Few cases give any detailed consideration to the combined effects of multiple restraints of trade as a distinct matter going to reasonableness. Two sporting cases touch on but cannot be seen to offer any principled guidance as to how multiple restraints should be dealt with under the restraint of trade doctrine. *Eastham v Newcastle United Football Club*[745] is one and *Adamson v New South Wales Rugby League*[746] another. Nor do these cases differentiate between damage to specific interests as opposed to the overall interest of the covenantor. At best there is recognition that several restraints may combine to affect the covenantor's interests but without affirming a principle.[747]

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

1. Where different substantive restraints combine to adversely affect a single trading freedom of the covenantor.
2. Where different substantive restraints combine to affect the totality of covenantor's freedom to trade.

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[743] See also *Procter v Sargent* (1840) 2 Man & G 20 at 33 per Tindale CJ:'...where the question is, whether the restraint is unreasonable or not, in point of space, that which would be unreasonable were to continue for any length of time may not be so when it is to last only for a day or two.'
[744] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition* [1894] AC 535 at 565 per Lord Macnaghten.
[745] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413.
[746] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319.
[747] The case of *Cream v Bushcolt Pty Ltd* [2004] WASCA 82, although not relevant to the topic of athlete endorsement, represents a further means of combining disparate restraints of trade as these impact on the covenantor. In this case the substantive restraint, the dimension of time and the geographic scope were expressed as separate restraints in themselves permitting recourse, should the court have found it necessary, to the combined impact of all restraints in respect to reasonableness. Although it was unnecessary for the Court to consider the cumulative effects of the multifarious restraints Malcolm CJ nonetheless commented at [98] that, 'if I am wrong in that respect and each of those restraints considered individually could be regarded as reasonable *their combined effect* constituted an unreasonable restraint of trade with the result that the covenant was void.'

3. A third category arises in circumstances where 'economic' and 'non-economic' restraints combine to impact on a specific interest.

### 4.1 Restraints bearing upon a specific interest

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

The case of *Eastham v Newcastle United Football Club*[748] ostensibly concerned a 'retain or transfer' system which, through its constituent parts, affected a specific interest of the covenantor: the player's capacity to freely offer his professional services to the football market. The player George Eastham claimed the Football Association's system was an unreasonable restraint of trade.

At the end of the season each club was required to send to the Football Association a list of players it wished to retain and a list of players it wished to transfer, along with a 'transfer fee'. A player on the retain list could not play for any other club. Only a player on the transfer list could be acquired by another club. Where no club was interested in the services of a player he became a free agent. Players could be placed on both lists, the purpose of which was to add power to the clubs' bargaining position: '... the retention provisions are used to reinforce the club's desire to secure a transfer fee for a player they do not wish to retain. ... if a player is merely on the transfer list, he may escape, either by persuading the management committee to give him a free transfer, or by going outside the league; he cannot escape if he is on the retain list.'[749]

Wilberforce J found the 'retain and transfer term' operated as a system. Nevertheless, in believing the 'two sets of provisions are severable'[750] his Honour thought it necessary to consider the retention restraint and the transfer restraint separately. From this severance it is possible to propose a form of judicial approval for combining the effects of multiple restraints as these bear upon a specific interest of covenantors.

The transfer system was described by Wilberforce J, rather ambiguously, as possessing 'an element of restraint' but one 'not so serious as the restraint produced by the retention system.'[751] In greater detail:

> 'Now I must consider the transfer system. Taking this alone – that is on the assumption that the retention system is not used to reinforce it – it does not appear to me to be so very objectionable ... placing a player on a transfer list and asking a fee for him, though it prevents a player from going to another league club unless the fee is

[748] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413.
[749] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 430.
[750] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 428.
[751] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 431.

> paid, leaves the player with the right to have the fee reduced or eliminated and leaves him free to seek employment outside the league. There is a restraint here but it would not take much to justify it.[752]

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

> 'What makes the transfer system objectionable, in my judgment, is its combination with the retain system. When it is combined – that is, when a man is retained and it is made known that his club is open to offer, or when a man is put on both the transfer and retain list – he cannot escape outside the League, all he can do is (in the latter case) to apply to have the transfer fee reduced. But even if it is reduced, no club may pay it, and yet he cannot go outside. It seems to me that the arguments put forward in favour of the retention system alone equally fail to support this combined system.
>
> 'I conclude that the *combined* retention transfer system as existing at the date of the writ is in unjustifiable restraint of trade. ... whether the transfer system could be justified if supported by a modified retention system ... or if it were divorced entirely from the retention system, is another matter which is not the subject of dispute in the present matter ...'[753]

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

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

### 4.2 Restraints affecting the 'total position' of the covenantor

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

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[752] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 437.
[753] *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 438 (emphasis added).

*Adamson v New South Wales Rugby League* [754] gives some recognition to an approach that combines the effects of more than one restraint on the diverse interests of the covenantor. The case concerned the introduction by the League of an internal draft system, a non-economic restraint, to operate simultaneously with the then existing salary cap, an economic restraint. The draft allowed clubs in reverse order to how they finished in the previous year's competition to acquire the services of players coming-off contract. The purpose of the draft was to enable the worst performing clubs to employ the best players and 'prevent the stronger clubs from obtaining the services of an unfair proportion of the better players at the expense of the weaker clubs.'[755] The logic was that 'public support and the opportunities for players to develop and employ their skills both depend upon the League continuing to conduct the competition between evenly matched and financially viable clubs.'[756] The League also argued that both restraints were necessary because the salary cap alone was 'inadequate to restrain "cheque book warfare"' – a colloquial term used to describe clubs that compete for player services by offering more money than they can afford to pay.

The internal draft was found by Hill J at trial to be an unreasonable restraint of trade because the player 'was prevented from playing for the club of his choice. ... There could seldom be a greater restraint upon trade than restricting an employee's freedom of choosing an employer.'[757] Wilcox J on appeal agreed, though in stronger language, stating the right to choose an employer 'separates the free person from the serf.'[758]

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

> 'There is nothing in any of the cases, so far as I am aware, to suggest that consideration of onerousness must be confined to economic effects. On the contrary, Isaacs J's reference to the covenantor's "fullest liberty of action" suggests that his Honour held the view that *the covenantor's total position is relevant*. Whether or not this is so, it seems to me that, in principle, non-economic effects ought not to be disregarded. They may not be as easy to evaluate as economic effects; but they may be just as significant ...'[759]

The words of Isaacs J 'fullest liberty of action' were utilised by Wilcox J as a means by which to bring non-economic restraints under the restraint of trade doctrine. There had not apparently been any case to that point in time supporting a restraint on non-economic interests: 'Counsel for the League argued that the principles regarding restraint of trade were protective only of economic interests, as opposed to social interests ... But they were not able

[754] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319.
[755] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 325.
[756] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 325.
[757] *Adamson v NSWLR trial* (1991) 100 ALR 479 at 498 per Hill J.
[758] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 342.
[759] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 341 per Wilcox J; quoting Isaacs J in *Brightman v Lamson Paragon Ltd* (1914) 18 CLR 331 at 337 (emphasis added).

to cite any authority to the effect.'[760] It will also be noticed that 'fullest liberty of action' as it relates to 'total position' is expressed with diffidence reflected in the words ''whether or not this is so'.

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

On a simpler level but nonetheless revealing was the preparedness of the Court to address the League's arguments as to the cumulative necessity of the restraints:

> 'The most that can be said is ... that the internal draft rules operate to some degree to assist the cause of evenness of competition...'[761]

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

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

*Adamson* suggests a liberal approach in applying the restraint of trade doctrine to multiple restraints on trade. In essence there is no necessity for a disgruntled athlete to point to a specific area of his or her trade interests where restraints operate in combination.

### 4.3 Economic and non-economic restraints on a specific interest

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

Non-economic restraints prevent the forces of supply and demand functioning to clear the market at the true competitive price. This is seen most clearly where draft systems are used to spread player talent across a sporting competition. At its most simple, when a player is

[760] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 340.
[761] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 351. A further supporting argument of the League was the need to promote club stability by preventing players from signing with opponent clubs midway through a season.

removed from the market, interested clubs are prevented from engaging in a 'bidding war' to acquire his or her services at the correct and 'bargained' wage/price.

Economic restraints may also render a non-economic burden. As Buti explains:

> '... one could reasonably argue that a salary cap system, indirectly at least, interferes with a player's right to freely determine their employer, coach and team-mates and affects remuneration that is able to be earned. For example, a club may need to "cut-off" a player from their list because salary cap restrictions, forcing that player to move to a club that they prefer not to play for.'[762]

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

## 5. The outcomes of multiple restraints

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

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

The outcome therefore depends on how egregious is each restraint singularly and in combination with other restraints. For instance, the more a player draft tends towards the unreasonable, the more likely the restraints collectively will be unreasonable. To reiterate the statement of Wilcox J in *Adamson*: 'The more onerous the restraint, the more difficult it is for the person seeking to enforce the restraint to satisfy the court that it was, in all of the circumstances, no more than reasonably necessary for the protection of his or her interests'[763] – a comment made in respect to a single restraint which is equally applicable to an analysis of the effects of multiple restraints. Similarly, given the variety of circumstances attending restraints of trade in sport, no definitive answer can be given as to whether the removal of one restraint will make reasonable the remaining restraints given that these may, singularly or as a remaining collective, also be unreasonable.

Much of the analysis has so far considered substantive restraints like salary caps or player drafts as these in combination bear upon the interests of the athlete. But reasonableness also concerns matters internal to each particular restraint such as duration, geographic scope and

[762] Buti A, 'Salary Caps in Professional Team Sports: an Unreasonable Restraint of Trade' (1999) 14 *Journal of Contract Law* 130 at 135.
[763] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 341.

the less common but nonetheless relevant factors of the amount of consideration paid to support the restraint[764] or whether there is an egregious imbalance of bargaining power.[765]

### 5.1 The 'other' restraints: a salary cap as an exemplar

There is little point in traversing the variety of facts and circumstances that go to determining the reasonableness of each substantive sport restraint, (the various aspects of which have been well discussed in commentary and law reports) rather, a salary cap is used as an exemplar to examine the reasonableness of a single restraint as a factor going to the collective reasonableness of combined multiple restraints.

Given that the NRL, the AFL, and Football Australia all employ a salary cap and the ARU is to introduce a form of salary cap in 2013, the selection of a salary cap to demonstrate the effects a single restraint may have to collective reasonableness is apt.

A salary cap aims to limit the amount of money a club can devote to athletes as salary for the provision of playing services. The purpose is create a 'competitive balance' between teams: 'It is a legitimate object of the League and of the district clubs to ensure that the teams fielded in the competitions are as strong and well matched as possible.'.[766]

Commonly a salary cap also includes less obvious means of player payment designed by clubs to avoid the salary limit, for example, where players are 'employed' as barmen or cellarmen for the licensed club.[767] There are no cases in Australia dealing directly with salary caps as a restraint of trade.[768] Self-evidently a salary cap has a direct affect on player income.

As one of a set of multiple restraints, the more a salary cap tends towards the unreasonable, the more likely the contract as a whole will be declared unenforceable. Where this is the case the sporting organisation will come under pressure to abandon at least one of its multiple restraints.

The salary cap of the Australian NRL is typical of this form of trade protection.[769] Upon signing an NRL contract the player is bound by the salary cap operating 'from time to time'

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[764] *Amoco Australia v Rocca Bros Motor engineering Co Pty Ltd* (1973) 133 CLR 288 at 316.
[765] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308 at 1315.
[766] *Buckley v Tutt y* (1971) 125 CLR 353 at 377.
[767] For example, the NRL states: 'The basic guide is that if a player is receiving money from any person as a way of inducing him to play for the Club, then that money will be included in the Salary Cap.' <http://www.nrl.com/nrlhq/referencecentre /salarycap/tabid/10434/default.aspx>
[768] *Adamson v NSW Rugby League* considered the draft systems obliquely the issue was not argued nor determined
[769] The NRL's reasons for instituting a salary cap are: 'The first is to assist in 'spreading the playing talent' so that a few rich clubs cannot simply out-bid poorer teams for all of the best players. The NRL believes that if a few clubs were able to spend unlimited funds in such a way, that it would reduce the attraction of games to fans, sponsors and media partners due to an uneven competition. Allowing clubs to spend an unlimited amount on players would drive some clubs out of the competition as they would struggle to match the price wealthy clubs could afford to pay. Another reason for having the cap is to ensure that clubs are not put into a position where they are forced to spend more money than they can afford in terms of player payments, just to be competitive.' NRL website: <http://www.nrl.com/nrlhq/referencecentre/salarycap/tabid/10434/default.aspx.>

within that sport and agrees to 'submit to the jurisdiction of ... the Salary Cap Review Committee.'[770]

As stated previously, the NRL in 2012 introduced a salary cap of $4.4 million 'for the 25 highest paid players at each club' at an average $176,000 per player per year plus up to '$350,000 on those players outside the top 25 who play in the NRL competition.'[771] Better players attract larger fees meaning a club, which must also pay many lesser players, will quickly exceed the salary cap if it attempts to buy more than a few 'stars' of the game.

**5.2 What is the cost of salary cap protection to individual players?**

Financially the salary cap lowers the income of those players who would, but for its imposition, command higher salaries in a freely operating market. Rather than income being established by the forces of supply and demand, a salary cap permits premium players to be supplied to the market at a discounted price producing an artificial windfall to the covenantee club. This loss accumulates with income lost through endorsement and other restraints, amounting to perhaps several hundred thousand dollars a year in a career that rarely exceeds thirty years of age.

In considering the reasonableness of a restraint it is necessary to calculate the effect of a restraint on the covenantor. As Gummow J commented in *Adamson*: 'The High Court (in *Buckley v Tutty*) did not state the ultimate question as being whether, in some broader sense, the restraint was unreasonable. The restraint in such cases strikes at the essential interest of each player ...'[772]

Although the financial impact of a salary cap is predictable in a general sense, there is difficulty in gauging the true market value of an athlete in any sport where such external influences prevent a true market price from being established. As such, the precise dollar cost of a salary cap cannot be accurately calculated.

Nevertheless, breaches of the NRL salary cap by rugby league club the Melbourne Storm in 2010 give some insight into the dollar cost to star players of a salary cap regimen: The breach by the Storm was originally '... estimated to be in excess of $1.7million over five years, around $400,000 in 2009 and with a projected breach of $700,000 in 2010'.[773] In fact a report by accountants Delloit established a breach in the amount of '$3.17 million dollars over five years.'[774] Media speculation suggested the excess was spent on 'Melbourne's "big four" – Billy Slater, Cooper Cronk, Cameron Smith and Greg Inglis.'[775] If the amount by which the salary cap was exceeded, say $700,000 a season, were paid to these four players each would receive, above their formal salary, $175,000. When combined with their capped earnings, this

[770] NRL Playing Contract (2012) Section 3.1 (l).
[771] http://www.nrl.com/nrlhq/referencecentre/salarycap/tabid/10434/default.aspx
[772] *Adamson and Others v New South Wales Rugby League Ltd* (1991) 103 ALR 319 at 364.
[773] NRL Website: <http://www.nrl.com/news/news/newsarticle/tabid/10874/newsid/58359/melbourne-storm-breach-nrl-salary-cap/default.aspx >April 10, 2010
[774] NRL Website: <http://www.nrl.com/nrlhq/nrlhqnews/nrlhqnewsarticle/tabid/10871/newsid/59433/official-release-nrl-responds-to-deloitte-report/default.aspx> 15 July 2010.
[775] Proszenko A, *The Sun-Herald* July 11, 2010 at 70.

amount serves as a rough estimate of what some players could receive in the absence of salary cap price controls in the NRL. Of course the Storm club was not forced to compete against other suitors in the market place, a factor which would ordinarily advance the wage to a figure in excess of $175,000.

In respect to high profile players in the NRL competition, a loss in wages of $100,000 to $175,000 must be considered onerous. Where further restraints also limit the same players' capacity to market their profile as product endorsers the impost over a career is likely to total well into the millions of dollars. For stars of the game, the salary cap interferes with the forces of supply and demand artificially lowering their income.

The cost of a salary cap to players of renown is easily imaginable, but there is also a cost borne by the 'journeyman' player who is paid a lower wage and is expendable because his talent is common to a large number of players willing to take his place – a simple matter of supply and demand. In a 'zero-sum game' the money needed to secure the services of talented players necessarily reduces the amount available to journeymen. According to Davies, 'it was estimated that North Melbourne star, Wayne Carey, was paid around one sixth of the club's salary cap during its highly successful period in the 1990's'.[776] While the salary cap may be effective in distributing player talent throughout the various clubs, the financial effects are felt by journeymen many of whom receive the minimum wage payable within the sport in question (in the NRL for example, the minimum wage is $55,000). Buti makes the point that in the Australian Basketball League (NBL), 'a player with the Perth Wildcats was delisted and forced to move interstate to remain in the NBL competition because the Perth Wildcats could not retain him after signing another player.'[777]

The structure of most salary caps inevitably results in journeymen subsidising the wages of better players – a situation unlikely to accord with the interests of the majority of journeymen under a salary cap regime to tilt the restraint towards the unreasonable in respect to this category of player. Reasonableness is to be determined not by the general effect but according to how the salary cap impacts on the individual: As Wilcox J commented in *Adamson*: '... not many players have the playing ability to substantially affect the evenness of the competition or the money earning-capacity to threaten a club's financial viability.'[778] As Gummow J commented in *Adamson*: 'The restraint in such cases strikes at the essential interest of each player ...'[779]

While it is difficult to be precise given the private nature of individual tax returns and the absence of a freely operating market for playing services, it is certainly arguable given the revelations flowing from the 'Storm' controversy that the elite athletes of Australia's major sports suffer income reductions of tens of thousands and in some cases several hundred thousand dollars a year due to the imposition of multiple restraints of trade.

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[776] Davies C, Is the NRL Salary Cap an unreasonable restraint of trade? (2010) 79 ANZSLA *The Commentator* 1.
[777] Buti A, 'Salary Caps in Professional Team Sports: an Unreasonable restraint of Trade' (1999) 14 *Journal of Contract Law* 130 at 135.
[778] *Adamson and Others v New South Wales Rugby League and Others* (1991) 103 ALR 319 at 356.
[779] *Adamson and Others v New South Wales Rugby League and Others* (1991) 103 ALR 319 at 364.

### 5.3 Avoidance, detection and reasonableness

Loses in income to particular players are only one side of the argument; the other being whether the salary cap can be justified in protecting the legitimate interests of the sport. The concern in respect to reasonableness is whether the purpose of a salary cap (competitive balance) is defeated by the possibility, or perhaps likelihood, that some teams will pay players discretely to effectively cheat the system. Where cheating occurs, a salary cap, unable to deliver a benefit, is purposeless and must be declared unreasonable. There are a number of examples in the AFL and NRL competitions of clubs exceeding their salary cap to jeopardise the object of its incorporation. In 2002 NRL club, the Canterbury Bulldogs, was fined $500,000 for payments in excess of the permissible level. The Warriors were fined $430,000 in 2005. Numerous other breaches, large and small, have occurred since the early years of the NRL competition. The teams Carlton, Essendon, Melbourne and Fremantle have each breached the salary cap regulations of the AFL.

A necessary precondition to effectively cheating a salary cap is avoiding detection. Where one or two talented players make the difference between winning or losing, a salary cap ineffectively policed is unlikely to secure the legitimate interests of the organisation thereby lessening the case for reasonable implementation under the restraint of trade doctrine. Under such circumstances clubs which do not abide by the cap, all things being equal, will win more often, attract more gate receipts, sponsors and media revenue; clearly to the cost of compliant teams. Where cheating is rife or perhaps where it is merely influential in the outcome of matches, the salary cap is arguably ineffective in meeting its object and may thereby be struck down.

Where a breach of the salary cap is readily discoverable, teams rationally fearful of fines and the loss of competition points will be more willing to comply. That is, where detection is perfect there should be perfect compliance. However, in practice such a level of detection is almost impossible. Player income may be 'off-the-books' through both internal and external sources. A club supporter, a corporate sponsor or any interested party can pay players to stay with a particular club unbeknown to the organisation or the club. Internally, through a board member or a collective of board members, the player may receive additional funds unbeknown to the organising body. Major sport has long been rife with rumours of 'boot money' placed in the shoes of a star or a brown paper bag left on the table after the board retires from meeting a sought-after recruit – speculations damaging to the legitimacy of a salary cap if ever shown to be accurate.

Davies makes the point that neither individual breaches nor the difficulty of enforcement should determine the reasonableness of a salary cap regime because 'penalties imposed by the governing bodies have, and will continue to act, as a deterrent against future breaches.'[780] The basis of the suggestion appears to be that of deterrence by unavoidable detection. The anecdotal reasoning of Davies must be questioned however, not only because teams on recent evidence have and do cheat the system but because, demonstrably, they may do so without

[780] Davies C, 'The use of salary caps in professional teams sports and the restraint of trade doctrine', (2006) 22 *Journal of Contract Law* 246 at lexisnexis 7.

detection over a considerable length of time - in the case of the Melbourne Storm for a suggested period of five years.[781] If, and for how long, the deterrent effect lasts in the NRL following the Melbourne Storm's loss of premiership titles and competition points, is a matter of conjecture, though certainly detection and penalisation will give pause to clubs considering similar breaches of the system.

Although a salary cap may enhance the competitive balance between teams, it does so by punishing wealthier clubs that can afford the market price of top line players. Less wealthy clubs, often without adequate backing from a licensed club and faced with an insufficient population to support adequate gate receipts or sponsor interest, set the norm for player payment. These structural matters, related as they are to population numbers, are unlikely to improve into the future leaving the club perpetually unable to pay its way in the market without external assistance. Rather than the system persisting in underpaying players it is in fact possible, and perhaps preferable, to rationalise the competition and remove teams unable to compete financially and replace them with clubs, perhaps representing regional centres more able to take advantage of growing populations. Where a less intrusive alternative is available to an existing restraint, the case can be put that the existing restraint is unreasonable. According to Slade J in *Office Angels v Rainer-Thomas* where an available restraint which is 'much less far reaching and less potentially prejudicial to the covenantor, would have afforded adequate protection'[782] the court may take this lesser alternative into account when determining the reasonableness of the existing restraint.

Endorsement restraints are part of the mix of a large number of other restraints of trade. The closer a salary cap, or any substantive restraint of that matter, approaches the threshold of unreasonableness the greater will be likelihood that all restraints in aggregate will also be unreasonable.

## 6. Conclusion

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

There is justification in a sporting organisation arguing that as each restraint protects a discrete interest focus should not move beyond the reasonableness of the singular restraint in question. It was suggested, however, that this approach places too little emphasis on the cost borne by the covenantor athlete. For notable athletes the combination of a salary cap and an endorsement restraint may well diminish income by several hundred thousands of dollars a year. When additional restraints such as draft or appearance restraints are included the collective impact is all the more punitive.

[781] *Sydney Morning Herald*, 24 July 2010.
[782] *Office Angels Ltd v Rainer-Thomas and O'Connor* (1991) IRLR 214 at [49].

This Chapter suggests that where multiple restraints of trade are employed, a judgment as to reasonableness should include the impact on an athlete's 'specific interests' such as income earning capacity, as well as on the 'total' interests of athletes including the freedom to choose an employer alongside limitations affecting revenue. It is proposed that the more a singular restraint tends towards the unreasonable the more likely the restraints collectively will be found unreasonable. In such circumstances the sporting organisation, to preserve the benefits of those restraints important to its objectives, would need to consider removing or modifying one or several restraints within the collective.

Underpinning the debate as to the reasonableness of multiple restraints is the constant need of courts to adjust the restraint of trade doctrine to the policy imperatives of the time. Just as time and invention caused a paradigm shift in the restraint of trade doctrine in *Nordenfelt*, the courts of today must be cognisant of the need to adapt reasonableness to the changing technological and social conditions. 'I have only to observe', said Lord Watson of the facts in *Nordenfelt*, 'that they are, from a legal standpoint of view, exceptional' such that the judges of the past 'never imagined that any business should attain such a wide dimension that it could not be reasonably protected from the invasion of the seller, except by subjecting him to a restraint unlimited in space.'[783] In a departure from the norms of 'single restraint decision-making', it was suggested that the costs and benefits accruing to both athlete and organisation under a multiple restraints regimen may in fact be 'balanced out' in a manner similar to the accepted practice of weighing the excessive geographic scope of a restraint against the short duration of the restraint.

Today the question is whether it is reasonable to see every source of an athlete's income limited by the mandates of the contractually dominant party, the sporting organisation, and to do so where additional trade restraints take from the hands of employee athletes the entitlement to decide who will be the employer and what will be the place of employment.

It has been suggested that where restraints in their cumulative effects on the athlete are unreasonable, the covenantee must abandon at least one of the restraints to permit the other to remain as a contractual obligation of the covenantor athlete. Or, looked at in another way, where a restraint such as an endorsement restriction is added to an existing restraint such as a salary cap, the additional restraint must, where evidence is sufficient, be considered an unreasonable impost.

[783] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 553 per Lord Watson.

# Chapter 8: Conclusion

When, in 1934, Donald Bradman exploited his national fame to secure three endorsement contracts[784] the Australian Cricket Board was not seen to thrust its hand out demanding a cut from statistically the world's greatest ever sportsman.[785] Less so did the Board reflect on sponsorship earnings lost when Bradman's bat sponsor, 'Sykes', distributed a promotional photograph through the print media showing the batsman kitted-up with bat prominently displayed. When Bradman endorsed the 'Don Bradman special cricket boot' for shoe manufacturer J McKeown of Erskineville NSW, and later, in the 1940's, advertised 'Minties' for lolly maker Sweet Acres,[786] there was no rush by the parent organisation to incorporate a trade restraint into Bradman's next contract. The few athlete endorsements that existed at the time were seen to be the business of the athlete, his or her 'subjective property' as it were.[787]

All this occurred in an era prior to the advent of mass-media; before the commercial reality of 'mass-viewers' drove the introduction of athlete endorsement. As technology from radio to television to digital broadcasts progressively inspired audiences to consume the sport product, the interest of marketers was pricked and, soon after, those with contractual power, the sporting organisations, made the commercially astute decision to restrain athletes from entering the endorsement market.

The restraint of trade doctrine has always been concerned with adjusting policy to the arrival of new technologies. Technological change, it is argued, is a consistent thread running through the restraint of trade doctrine from its inception in the 15th century to the present day, proclaiming the necessity of adjusting policy to technology for the purpose of the doctrine's continuing relevance. The digital age is argued to be a fourth phase of adjustment visited on the restraint of trade doctrine due to technological change. An historical appreciation of the technological influences is essential background to any analysis that seeks to understand the functioning of the restraint of trade doctrine in the present era; an era marked by the impact of the digital paradigm increasingly taking hold of world marketing.

At its core, the state of technology primarily concerns market access. When villagers of the middle-ages were unable or unwilling to relocate to distant towns it made no sense for courts to enforce a restraint and drive covenantors into destitution and place the burden of their upkeep on the local parish. With the first gleams of the Industrial Revolution, Elizabeth I, to preserve the realm from the rapacity of continental Europe, began a centralised plan to expand production and self-sufficiency. To encourage entrepreneurialism Elizabeth granted

[784] Pollard J, *The Bradman Years*, The Book Company Publishing, Sydney, 2001 at 272.
[785] Bradman's test average of 99.94 is more than 50% better than any other batsman, an unheard of statistic in any major sport.
[786] Page M, *Bradman: the Illustrated Biography*, MacMillan Australia, 1983 at 132 and 295.
[787] Bradman was in fact fined and faced removal from the Australian Cricket team for his commercialism. The threat was not on the basis, though, of the Board's desire to acquire his endorsement portfolio. In a letter to the Board, Bradman stated in a fashion presaging modern concerns regarding endorsement: 'To my mind the Board was never meant to have powers directing business interests of players.' Rosenwater I, *Sir Donald Bradman: A Biography*, Batsford, London, 1978 at 172.

Royal Monopolies, a form of trade restraint, across a range of industries. In response, explorers made their way to India and the further reaches of the Mediterranean initiating a world trade that would last for more than three-hundred years. To foster exports Elizabeth's laws preserved the entitlement of the trade guilds to set standards in all trades and to indenture apprentices to a seven year term with their master – a period of time generally considered far more than necessary to learn the 'mysteries' of most crafts. The scheme nonetheless fostered a level of trade expertise that remains to this day. But centralised regulation, monopoly and trade restraints, particularly those emanating from the guilds, began to stifle enterprise.

By the time of *Mitchell v Reynolds* in 1711, the restraints of the Elizabethan period had become increasingly impractical. The science and technology of the early Industrial Revolution mobilised the populace to make possible the enforcement of trade restraints limited to the geographic location of the covenantee's interests; but not beyond. The 'partial restraint rule', as it became known, served the needs of commerce well into the 19th century when again the progress of technology forced it into obsolescence.

As the technologies of rail and shipping progressed, the market for some goods, like modern weaponry, became the entire world. The policy of the partial restraint rule ceased to be practical in a world were technology has caused the 'annihilation of time and space'[788]. At the end of the 19th century the test became that of '*Nordenfelt* reasonableness'. Under *Nordenfelt* all restraints were prima facie unenforceable unless shown to be reasonable in the interest of the parties and the public. A rule of such flexibility was no doubt thought capable of covering all possible contingencies. The test of partiality nonetheless remained, not as a rule but as an indicator of unreasonableness, where only in the most extreme of cases could a global restraint be enforceable - and then largely confined to the 'goodwill cases'. How rare that an employer could maintain an interest in preventing an employee from working on the other side of the world. As argued, so influential was the comparative impact of technology that the otherwise pervasive philosophy of laissez-faire was ignored by judges of the 19th century trade restraint cases, where, the practical consequence of inducing unemployment held sway over the dictates of a philosophical movement.

The *Nordenfelt* rule remained a reliable means to set the workable parameters of a restraint of trade until the arrival of the digital revolution at the turn into the 21st century where, in some industries, world markets were a nanosecond away. The very concept of reasonableness attuned to the geographic scope of a trade restraint is now under challenge. It is within this context that restraints of trade on athlete endorsement now fall.

Today major sporting organisations make contractual claim to the entirety of the pertinent 'cyber-markets'. This claim exists irrespective of whether the sport and the customer are on opposite sides of the world and without concern that the visitor is more interested in the athlete than the sport. The very notion of a claimable market without limits is a concept largely foreign to the practical history of the restraint of trade doctrine and moreover opposed

[788] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition* [1894] AC 535 at 575 per Lord Morris.

to its very philosophy. As argued, the historical tilt of the restraint of trade doctrine has favoured freedom of trade over curtailment of trade – it was after all freedom of trade and the push to entrepreneurialism that drove Britain into the economic advances of the Industrial Revolution. Indeed, the fact that courts have overturned restraining terms in contacts for over 600 years speaks of the ancient concerns of trade promotion gainsaying the express agreement of the parties. A policy of trade promotion is argued to be as applicable to the cyber-markets of the 21st century as at any time in history of the restraint of trade doctrine.

The question was asked, why do sporting organisations impose restraints of trade on athlete endorsement? Answering this question suggests a second question: why did this form of restraint emerge long after the seminal sport restraint of trade case of *Buckley v Tutty*?

The rationale lies in the similarity of endorsement service offered by athletes and sporting organisations. Each is able to form in the mind of a consumer a link between the positive image of sport and the product to be sold by a sponsor. To quote from Chapter 2, there is 'a transference of inherent values from the activity to the sponsor' whereby the consumer/fan, on a psychological level, comes to identify with the athlete or the sport. The phenomena of 'identification', although recognised in psychological circles for many years, lacked, until the arrival of television in Australia and the gradual acceptance of sports broadcasting as a medium for advertising, a means to exploit athlete image as an immediate and extensive sales tool. By tapping into the public's fascination with an individual athlete, a sponsor is able to turn a prodigious physical talent into a method of marketing goods and services.

Under normal commercial conditions (that is in the absence of a trade restraint) a sponsor is free to choose between the athlete and the organisation as a vehicle to convey the marketing message to consumers. But for sporting organisations the market for endorsement services was too lucrative to leave to the forces of supply and demand alone. Far better, the argument went, to close the market to athletes through a contractual restraint of trade imposed on a 'take it or leave it basis'. The sporting organisations were assisted in this by a residual belief typified in the sport cases of the 1960's, that sport was somehow different to other forms of commercial endeavour and to which, therefore, greater leeway should be given. Although egregious restraints of trade exemplified by the 'retain or transfer' system of *Elford v Buckley* have long passed, the sense that the endorsement markets are rightly those of the organisation largely remains. Certainly restraints on endorsement servicing are incorporated into athlete contracts as a matter of course and, despite the clear financial costs to athletes, there has never been a challenge to the control of the endorsement markets by sporting organisations.

Athletes with 'star-power' have the potential to add substantially to their income by endorsing goods and services on behalf of sponsors. Moreover, the new digital paradigm, it was argued, permits athletes with merely a modest reputation to embrace 'website endorsement' without interfering unduly with the interests of their sporting organisation. The potential income accruing to athletes from endorsement is not insubstantial; in some cases exceeding the amount an athlete is paid in salary by the parent organisation.

Limitations imposed on athlete endorsement are argued to be an unreasonable restraint of trade. Amongst many possible propositions relevant to this argument several were selected for deeper consideration (selection being necessary due to the word restrictions of a Masters thesis). The restraint of trade doctrine, at least in respect to endorsement limitations, is argued to be on the cusp of policy adjustment as the paradigm of the digital communications increasingly impacts adversely on the interests of the parties and the public.

In the context of this thesis, the geographic generality with which most endorsement restraints are expressed denies athletes access to markets across the globe. As a matter going to reasonableness it was suggested that despite the scope of the restraint, the major sporting organisations often possess the barest commercial interest in many of the markets they contractually claim. Moreover, it was suggested that digital endorsement is sufficiently unique to require a complete reappraisal of the *Nordenfelt* principle in respect to the cyber-markets.

Sporting organisations have developed techniques referred to in this thesis as 'product categorisation' and 'product sub-categorisation' to multiply the number of products and services it supports through endorsement. It is suggested that a sporting organisation if challenged as to its use of endorsement restraints could, with ostensible accuracy, proclaim that the athlete is free to endorse in any category of product or service not claimed by the organisation itself. That is, the restraint is merely a partial restraint of trade. It was argued, however, that any partialness is largely illusory. The organisation is able to use its contractual dominance to expand the product categories in which it endorses to 'crowd out' the athlete from successive markets.

The organisation has shown a remarkable capacity to utilise the restraining terms of its athlete contract to create 'sub-categories' by dividing generic products into sub-sets of products, for example, alcohol as wine, beer and spirits. It was argued that as a matter of construction a typical restraining term like 'does not conflict with sponsors of the sport', permits the athlete, if the term is to be applied with consistency, to also endorse in sub-categorised product lines - a contractual approach likely to be vigorously opposed by sporting organisations bent on ensuring the continuance of a near monopoly in endorsement servicing.

Drawing upon marketing research, it was revealed that only a limited number of goods and services benefit from an association with a specific sport. Rather than functioning as a partial restraint, the practical effect of most limitations is to subject the covenantor athlete to a general restraint of trade excluding him or her in a practical sense from endorsement marketing altogether.

This thesis argues that the concept of 'subjective knowledge' – traits and skills inherent in the employee - extends to an athlete's reputation and persona; the qualities routinely acquired by sponsors for purposes of endorsement marketing. Even when appearing in 'mufti' – not in their players' uniform - players are banned from utilising their reputation in public for purposes of endorsement. In fact some contracts, such as that of the NRL, go so far as to claim a right to the 'reputation and identity' of the player. In *Mason v Provident Clothing*, an

employee's subjective knowledge was described as that which 'becomes part of himself'. Although referring to skills upon the mind of the worker, it is argued that if the term 'subjective knowledge' is to remain relevant over time, it must also apply to an individual's reputation and charisma. In circumstances where the player's personality is acquired without payment, it is argued as a matter going to the question of reasonableness that the sporting organisation is a 'free-rider' – an economic term denoting someone who utilises a benefit free of charge.

Potentially the greatest threat to an individual's right of free trade occurs in what this thesis calls the 'cyber-markets'. These are markets that have sprung up with the advent and dissemination of the internet. It is argued that each website and every digital device is a potential outlet for the sale of goods and services, and as such, an opportunity for endorsement advertising. As contractually expressed endorsement restraints are without geographic limit, restraining the athlete from endorsing on any website the world over. In consequence, at least within the 'cyber-sphere', that 'some place' described by Parker CJ in *Mitchell v Reynolds*, where a person is free to trade, ceases to exist and with it the rationale of an approach that has rationally applied for over 300 years.

That the covenantee organisation has little or no 'drawing-power' in many of the digital markets it claims, the argument was advanced that restraints on athletes engaging in cyber-marketing were unreasonable as athletes with international reputations could, unlike their organisation, trade their fame for reward across the globe. It was also argued that the number and diversity of internet sites is such that it is quite possible, as a matter of policy design, for the cyber-markets to be divided between the sporting organisation and the athlete along the lines of a rational 'best fit' with some conceptual similitude to the subjective knowledge/objective knowledge 'divide' of *Herbert Morris v Saxelby*. For example, where the sport itself is 'googled', the organisation is entitled to endorse its sponsor's products to the exclusion of athletes. In contrast, websites devoted to the athlete as a private person, such as a personal webpage or 'Facebook' account, may be utilises as the athlete desires. It was also argued that as form of compromise an athlete famous in a particular district or suburb, say, where he or she was born, should be free to endorse products or services located within that area. Or similarly, where an athlete possesses a specialised hobby or skill he or she is permitted to endorse through appropriate specialised websites. It was argued in respect to these proposals that as a matter of practice and of policy it is unreasonable for a covenantee sporting organisation to claim 'nth degree' protection of its endorsement interests in respect to the digital markets.

The restraints on athlete endorsement are exacerbated by the fact that athletes in major sport frequently endure not one but a several restraints of trade contractually imposed their sporting organisation. Whilst the primary concern of this thesis is with endorsement restraints, any consideration of reasonableness must concern the circumstantial backdrop of multiple restraints of trade impinging on every possible avenue of athlete earnings and, in addition, restricting the fundamental freedom the athlete would have, but for the imposition of a player draft or residential requirement, to choose his or her employer. An athlete in major sport may face, as in the Australian Football League for example, financially debilitating restraints in

the form of a salary cap, a draft and an endorsement restraint. Each restraint alters the 'price mechanism', the means by which supply and demand adjust in a competitive market, to decrease effective demand and reduce the athlete's income. It is argued in this thesis that the reasonableness of endorsement restraints can only be accurately appraised by accumulating the effects of all restraints imposed the athletes of a given sport.

In the first study of the restraint of trade doctrine as it applies to limitations on athlete endorsement a number of avenues of discovery could be taken. Most simply research could look to the important but comparatively vapid concerns of athlete inequality of bargaining power and inadequacy of consideration. Amongst other sub-topics a portion could be devoted to the economic costs of a market monopoly in the provision of endorsement services. As the first treatment on the topic of restraints of trade on athlete endorsement it was thought best to deal with the sweep of the subject; to set the scene as it were. The areas of substantive investigation have not, to the extent that a thorough document search can reveal, been considered before. It is hoped that much of the singular subject matter of this thesis will sustain continued in-depth exploration and research.

In the space of less than forty years the business of sports marketing, once conducted by handouts of merchandise to gifted athletes, has been propelled by developments in the communications technologies into one of the world's most significant industries fostering a relentless movement of revenue away from gate receipts to sponsorship.

If the brief history of sports marketing reveals anything, when there is more money in sponsorship and endorsement than there is in gates receipts and match payments, it is only a matter of time before athletes claim their exclusion from endorsement marketing by their parent sporting organisation is an unenforceable restraint of trade.

This thesis argues that the restraint of trade doctrine has remained relevant to contemporary needs by adjusting policy to changes in technology. The arrival of 'cyber-marketing' will present a unique challenge to courts confronted with the attempted closure of an entire marketing system by the contractual dominance of covenantee sporting organisations. It was suggested that the variety and pervasiveness of the internet, and the ability of digital search engines to discern discrete market websites will enable a 'compromise' to be fashioned where the interests of athletes and their sporting organisations can be jointly satisfied. To do otherwise is to cede to the dominant contracting party, the sporting organisation, the entirety of these new and expanding markets and to entrench a monopoly with all its inefficiencies and unfairnesses.

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