



The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine

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A salary cap system is presently used by both the AFL and NRL with the stated objective of creating a more even competition. Although the salary cap can be viewed as creating a situation where players are being deliberately underpaid, the author argues that there is overall benefit, even to the players, in having a salary cap in operation. Such benefit includes a more even competition, which then provides for a more stable financial situation for the league and the players, and a more interesting competition for the spectators. The author therefore argues that, after applying the Nordenfelt test, salary caps in professional team sports do represent a reasonable restraint of trade. It is also suggested that the principles of contract law play an important role in protecting the rights of the players.

Introduction

The salary caps implemented by both the Australian Football League (AFL) and the National Rugby League (NRL) were the subject of much publicity during the later half of 2002 when systematic breaches of the system were uncovered in both codes. Large fines and the loss of either draft selections or competition points were the harsh penalties that were subsequently handed out by the respective governing bodies.

What has also made headlines in the AFL has been the number of clubs who have been forced to trade big name players in the last few years, including players still under contract, in order to remain under the salary cap.¹ Other players meanwhile agreed to take pay cuts from their existing contracts to help ensure their club remained within the salary cap.² A question then arises as to whether this forced trading of players and the taking of pay cuts means that a salary cap system represents an unreasonable restraint of trade.

This paper, therefore, will explore the salary cap system in the context of the restraint of trade doctrine. This will be achieved by examining the use and suggested benefits obtained by the operation of a salary cap under the concept of protectable interests. However, a major component of the paper involves an examination of what the rules of a salary cap allow, in practice, within sporting organisations. It is therefore very much a practical paper which looks at a number of specific case examples to see how the implementation of a salary cap has affected the payment particular players have received, or affected their ability to select the employer of their choice. Finally, the paper

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1 C Le Grand, 'Blumfield deal caps trade deals' *The Australian*, 29 October 2002 at 14.

2 B McDonald, 'Voss gives up more than \$20 000 for greater glory', *The Age*, 4 October 2002 at Sport 3. G Denham, 'Saints to Stick Together in Quest for Greatness', *The Australian*, 11 March 2005 at 27.

can also be viewed as a response to Buti's 1999 *Journal of Contract Law* article³ which concluded that the salary cap system represents an unreasonable restraint of trade.

The Restraint of Trade Doctrine: The Nordenfelt Test

The test for a restraint of trade was developed by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company*⁴ (*Nordenfelt*) where his Lordship stated that:⁵

It is a sufficient justification, and indeed it is the only justification, if the restraint is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

Thus, the restraint must afford no more than adequate protection to the party in whose favour it is imposed, while in *Adamson v New South Wales Rugby League Ltd*⁶ (*Adamson*) it was also held that the restraint is to be tested 'by reference to what the restraint entitles the parties to do rather than what they intend to do or have actually done'.⁷

Another relevant factor is the concept of protectable interests, for as Carter and Harland⁸ point out this concept lies at the heart of the justification of restraint of trade, as a covenantee is entitled to protect certain interests. However, if there are no protectable interests then the covenant in question will be regarded as being unreasonable.

Protectable Interests

When looking at this concept, the protectable interests must first be identified. For instance in *GKR Karate Australia v P & M Thomas*⁹, GKR operated a business that conducted karate classes throughout Australia. A clause was incorporated into the employment contract that restrained a manager from working, for a period of three years, with similar companies within 20 kilometres of any training or administrative centre run by GKR.¹⁰ It was stated by Martin J that the protectable interests of GKR had to be identified, in this case it being the extensive information the manager, Paul Thomas, had of clients, instructors, distributors and venues.¹¹ The assessment of whether the restraint exceeded what was necessary to guard GKR's protectable interests required taking into consideration the geographical area in which GKR

3 A Buti, 'Salary Caps in Professional Team Sports: an Unreasonable Restraint of Trade' (1999) 14 *JCL* 130.

4 [1894] AC 535.

5 [1894] AC 535 at 565.

6 (1991) 31 FCR 242.

7 (1991) 31 FCR 242 at 285. See also *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337 at 344; *Woolworths Limited v Olson* [2004] NSWSC 849 at [305].

8 J W Carter and D J Harland, *Contract Law in Australia*, 4th ed, Butterworths, Sydney, 2002, p 588.

9 [2000] SASC 160.

10 [2000] SASC 160 at [6]–[7].

11 [2000] SASC 160 at [16].

operated its business, and the position of the defendant within the organisation.¹² It was then held that the clause in question encompassed an area that was far wider than what was necessary to protect GKR's legitimate interests, with the three-year period also being held to be excessive.¹³ By contrast it was held in *Woolworths Limited v Olsen*¹⁴ that Woolworths had a properly protectable interest in securing the right to impose a post-employment restraint of six months, given the fact that the defendant had access to valuable confidential information,¹⁵ and the fact that the restraint did not prevent Olson from earning a living as Woolworths was subject to a restraint payment.¹⁶

In regard to the situation relevant to this paper, namely the implementation of a labour market control by a sporting organisation, the concern of a governing body wanting to ensure that the teams compete on an equal footing has been held to be a justification for a restraint on members of the teams.¹⁷ In *Adamson* for instance, a case involving a challenge to the New South Wales Rugby League's (NSWRL) draft system, it was held by the primary judge, Justice Hill, that there were three legitimate interests of the league. These were the desirability of a strong and competitive competition with teams as evenly matched as possible; all the clubs competing to be as financially viable as possible; the clubs being in a position to retain players engaged by them and, in particular, rich clubs not being able to plunder the weaker clubs of their players.¹⁸ On appeal, Gummow J likewise stated that these were the legitimate interests of the league.¹⁹

The High Court in *Buckley v Tutty*,²⁰ although declaring the NSWRL's retain and transfer system to be an unreasonable restraint of trade, also acknowledged that it was a legitimate objective of the league to ensure that the teams in the competition be as strong and as well matched as possible.²¹ Henry J in *Kemp v New Zealand Rugby Football League Inc*²² meanwhile accepted that the league had a legitimate and relevant interest in maintaining the strength of the game in New Zealand.

This objective of obtaining an even competition is based on the peculiar economics of the sports industry,²³ which is why professional team sports have a tendency to be highly regulated and cooperative organisations with rules and restrictive product and labour market controls that both the clubs and the players have to obey. This is because the attractiveness of competition, it is argued, depends on a high degree of uncertainty about the result of any competition, and so the measures are seen as reducing the chances of a few

12 [2000] SASC 160 at [14].

13 [2000] SASC 160 at [19].

14 [2004] NSWCA 372.

15 [2004] NSWCA 372 at [61]–[62].

16 [2004] NSWCA 372 at [68].

17 Carter and Harland, above, n 8, p 588.

18 (1990) 27 FCR 535 at 560.

19 (1991) 31 FCR 242 at 294.

20 (1971) 125 CLR 353.

21 (1971) 125 CLR 353 at 377.

22 [1989] 3 NZLR 463 at 468–9..

23 Buti, above, n 3 at 142.

teams dominating the competition through their economic power.²⁴

The protectable interests of a league will therefore be considered when examining the implementation and use of salary caps. However, the paper will first of all take a look at the other methods that can be adopted in regard to controlling payments to players, namely the maximum wage restraint.

Maximum Wages

While salary caps are relatively new in Australia, it should be noted that prior to their inception a maximum wage restraint was utilised to try and maintain a limit on player salaries. A maximum wage restraint sets an upper limit on how much each and every player can be paid. It was first introduced into the English Football League in 1901 by the Football Association (FA), with the maximum being set at four pounds. Such a wage restriction was unique in the history of industrial employment and was retained for 60 years, by which time the maximum wage was £20 a week, the minimum eight.²⁵ These figures, it is suggested, also indicate that the maximum wage was used in English soccer, and elsewhere, to keep a control on what a star player could earn.

The problem with a maximum wage therefore, especially when the difference between the maximum and the minimum was relatively small, was how to construct a club wage structure which could adequately reward the star players on the team. Given such problems it is not surprising that many clubs offered under-the-table payments to players. Five Sunderland players, for instance, were suspended during the 1956–57 season for their involvement in this illegal activity that had, by this time, become fairly widespread.²⁶

The threat of strike action by the Professional Players Association forced the league to abolish the maximum wage in 1961.²⁷ It continued, however, in the Northern Irish Football League until it was challenged in the courts. In *Johnston v Cliftonville Football and Athletic Club Ltd*²⁸ (*Cliftonville*) the plaintiff was a part-time soccer player who, when he signed with Cliftonville, received a signing-on fee higher than that allowed under the league's regulations. The plaintiff then commenced legal action to have these regulations declared an unreasonable restraint of trade. Murray J noted that, based on the *Nordernfelt* test, two questions needed to be addressed:²⁹

- (1) Did the maximum wage regulation constitute a restraint of trade in regard to the liberty of the plaintiff to obtain employment as a professional player?
- (2) If yes, is that restraint reasonable and therefore enforceable?

Murray J noted that the maximum wage regulation did not restrict the plaintiff from signing with any of the 14 teams in the competition; it only restricted his freedom to negotiate the financial terms on which he was to play.

²⁴ Buti, above, n 3 at 143.

²⁵ B Dabscheck, 'Defensive Manchester: A History of the Professional Footballer's Association' in R Cashman and M McKernan, *Sport in History: The Making of Modern Sporting History*, University of Queensland Press, Brisbane, 1979, pp 251–2.

²⁶ Dabscheck, above, n 25 at 249.

²⁷ Dabscheck, above, n 25 at 249.

²⁸ [1984] NI 9.

²⁹ [1984] NI 9 at 18.

However, his Honour further noted that a contract in restraint of trade includes restricting the arrangements he (or she) may make with others, which if unreasonable, will be invalid.³⁰ In his Honour's opinion a maximum wage undoubtedly interfered with the plaintiff's liberty of action in trading, and his liberty to negotiate the basic matter of payment he was to receive for his service to his employer, and so the regulation was therefore a restraint of trade.³¹ Since the defendant's argument that the regulation prevented the stronger clubs from capturing all the best players was a 'bad point'³² his Honour held that the regulation was not reasonable and was therefore void.³³

In Australia similar maximum wages were implemented in competitions like the Victorian Football League (VFL), the forerunner of the present-day AFL, at a time when players had full-time jobs and did little more than a couple of nights' training in preparation for a Saturday afternoon match. The system was scrapped without the matter being challenged in the courts,³⁴ just as it had been in English soccer. The NSWRL, the forerunner of the present-day NRL, also introduced a maximum signing on fee and match payments in the quest of promoting or encouraging an even competition. However, as Wilcox J noted in *Adamson*, the regulation failed because of the inability of the league to effectively enforce it since associates of the club, rather than the clubs themselves, made extra payments to the players.³⁵

The maximum wage restraint has therefore been abandoned by a number of leagues and, in the instance when it was challenged in court, was held to be an unreasonable restraint of trade. This then raised the question as to whether the maximum wage, in the age of full-time professionalism and good television revenue, could still represent a reasonable restraint of trade. One league that presently implements a maximum wage restraint is the Women's National Basketball Association (WNBA) which has a maximum wage of \$120,000 for any one player.³⁶ It should be noted, however, that this is, relatively speaking, a small league with more limited financial resources than other sporting leagues in the United States (US), or elsewhere in the world.

Cricket Australia, meanwhile, while not having a maximum wage as such, does rank its 25 contracted players from 1 to 25, then pays them on a decreasing scale based on those rankings. Australian captain, Ricky Ponting, for instance, is currently the number one ranked player and is accordingly paid the highest retainer of around \$600,000, in addition to his match payments.³⁷ The lowest ranked of the contracted players receives a base retainer of \$125,000 while 100 or so state players are contracted to receive a base retainer of \$32,500.³⁸ It is suggested therefore that there is an element of a maximum wage restraint in the wage structure implemented by Cricket Australia.

30 [1984] NI 9 at 19.

31 [1984] NI 9 at 20-1.

32 [1984] NI 9 at 21.

33 [1984] NI 9 at 23.

34 B Dabscheck, 'Industrial Relations and Professional Team Sports in Australia' (1976) 18 *Journal of Industrial Relations* 28 at 32.

35 (1991) 31 FCR 242 at 255.

36 P Kogey, 'Jackson deal puts her top of the hoop', *The Australian*, 24 January 2005 at 23.

37 Note that Cricket Australia also limits the overall payments to the players to 25 per cent of player-generated income which in effect acts like a salary cap.

38 M Conn, 'Players, CA clash over who pays piper', *The Australian*, 22 December 2003.

Despite the decision in *Cliftonville*, there would appear to be an argument that, in some situations, a maximum wage set at a reasonably high level could be considered to be a reasonable restraint of trade. It is suggested it would more likely be in a relatively small league, like the WNBA, without too many star players. In competitions with numerous star players, however, for a maximum wage to be reasonable it would need to be able to cater for the stars, by providing, as in the Cricket Australia model, an opportunity for these star players to earn considerably more than the average player. At the time that the maximum wage was abandoned in English soccer, for instance, the best players could only legally earn two and half times that of the average players. By comparison the top players in both the AFL and NRL earn around 20 times more than what the average players earn. This, it is suggested, is one reason why the AFL and the NRL, like most sports that presently seek to control player payments, do so by means of a salary cap rather than a maximum wage restraint. This then raises the question as to whether a salary cap represents a reasonable restraint of trade.

Salary Caps

Salary caps involve restricting player payments, not by limiting the amounts that can be paid to an individual player, but by limiting the overall amount that each club can spend on player payments, with the clubs then being left to decide how much to pay each individual player. Its aims can be summarised by a NSWRL discussion paper on salary caps, namely that:

- (1) To ensure individual clubs remain solvent there must be a limit on the payment to the players.
- (2) To ensure a successful and financially viable league, there needs to be an even competition to enhance spectator appeal.³⁹

A salary cap can come in one of two forms: an even salary where the same limit applies to each club, and an uneven salary cap where a different amount exists for each club, depending on the governing body's view of the club's specific financial situation.⁴⁰ It is suggested that an uneven salary cap is less likely to represent a reasonable restraint of trade as it is less likely an even competition will be created if some clubs are permitted to spend considerably more on player salaries than other clubs, an opinion also expressed by Buti.⁴¹

Buti also points out that salary caps, unlike other labour controls, have remained free from legal challenge,⁴² though it should be noted that NRL player, Brett Kimmorley, did threaten legal action over the NRL salary cap when such restrictions prevented him from signing with the St George-Illawarra club.⁴³ However, at present, the only judicial reference to salary caps in Australia are some obiter statements in *Adamson*.⁴⁴

In the original trial Hill J acknowledged that while the salary cap introduced

39 Buti, above, n 3 at 142.

40 Buti, above, n 3 at 146.

41 Buti, above, n 3 at 146.

42 Buti, above, n 3 at 132.

43 S Honeysett, 'Sharks to seize Kimmorley', *The Australian*, 6 November 2001 at 17.

44 For a greater discussion on the two *Adamson* cases in regard to the salary cap see Buti, above, n 3 at 136–140.

by the NSWRL in 1990 was not the subject of a challenge by the players, it still formed an important part of the competition rules.⁴⁵ His Honour also stated that the internal draft may be justified by the objective of financial stability in the situation that then prevailed in the NSWRL where an uneven salary cap was in use because some clubs were less viable than others. However, his Honour also stated that 'with greater financial equality of clubs and an equal salary cap (both objectives of the League) the result may well be different'.⁴⁶

Buti has suggested that these comments may indicate an acceptance of salary caps,⁴⁷ but points to other comments by Hill J about clubs not being sufficiently viable financially to spend up to their salary caps, as indicating that sports administrators may have some difficulty in justifying a salary cap system.⁴⁸ Buti also expresses the view that Wilcox J's judgment in the Full Court of the Federal Court could give encouragement to any potential complainant against a salary cap system. He points to references that without a salary cap clubs would have greater freedom to purchase necessary players and this therefore ought to improve, rather than detract from, the overall competitiveness of the competition.⁴⁹ However, as Sheppard J pointed out, the validity of the salary cap was not an issue in the case,⁵⁰ and so therefore the question as to whether salary caps in Australia are valid remains an open one.

Salary Caps and the Restraint of Trade Doctrine

While salary caps have not yet been the subject of litigation, as Buti suggests,⁵¹ if the salary cap fails to satisfy the Lord Macnaghten test in *Nordenfelt*, the salary cap would appear to be subject to legal challenge. It is also suggested that what needs to be addressed when looking at the validity of the salary cap and the potential legal problems associated with its use are the following:

- (1) whether it is an even or uneven salary cap because, as mentioned, the latter is less likely to be considered a reasonable restraint of trade;
- (2) whether it interferes with a player's choice of employer;
- (3) whether it involves players being deliberately underpaid;
- (4) the problems enforcing the salary cap;⁵²
- (5) whether there is empirical evidence to support that salary caps produce sporting equality, and that, in turn, this creates a financially more viable competition.⁵³

These points will be discussed in relation to the salary caps implemented by both the NRL and AFL. The salary cap system will then be analysed in relation to the *Nordenfelt* test, that is, is it reasonably necessary in order to

45 (1990) 27 FCR 535 at 543.

46 (1990) 27 FCR 535 at 565-6.

47 Buti, above, n 3 at 137.

48 Buti, above, n 3 at 138.

49 Buti, above, n 3 at 139.

50 (1991) 31 FCR 242 at 249.

51 Buti, above, n 3 at 141.

52 Buti, above, n 3 at 149.

53 Buti, above, n 3 at 144-5.

protect the interests of the leagues and the clubs, is it not unreasonable in regard to the players, and not injurious to the public.

Issues Relating to the Use of a Salary Cap System

Even or Uneven Salary Cap

The NSWRL implemented a salary cap for its 1990 season. It was an uneven salary cap in that different clubs had differing amounts, the highest amount being \$1,500,000, the lowest \$800,000, with the amount being determined by the league's analysis of each club's financial situation. A similar inequality operated for the 1991 season, though the ultimate intention was to set a uniform ceiling for each club.⁵⁴ While the salary cap was dropped during the Super League war of the mid 1990s, it was re-introduced into the NRL competition for the 2000 season, this time with an even system with each of the 15 clubs having a limit of \$3.39m for the 2007 season, rising to \$4.1m by the 2010 season.

The AFL's salary cap will be \$6.94m for each club for the 2007 season, significantly higher than the NRL salary cap, and will also increase by at least 3 per cent per annum over the next four years.⁵⁵ Unlike the NRL, each club is required to spend at least 92.5 per cent of that amount.⁵⁶ The National Football League (NFL), it should be noted, also employs a similar minimum level, in its case A\$111m, as well as a maximum of A\$131m.⁵⁷ In the AFL players over the age of 30 who have played for 10 seasons with that club can also be placed on a 'veterans list' with only part of their salaries being counted in the salary cap. If there are two such players, then half of their salary counts. If there are three, then a third of each player's salary will not count towards the salary cap.

Until recently Brisbane and Sydney had an extra 10 per cent and 15 per cent respectively to compensate for the fact that they both have more out of state players than the other teams and, in the case of Sydney, a higher cost of living. These extra allowances to Brisbane and Sydney were the subject of strong criticism from some of the Melbourne clubs, particularly after Brisbane won three successive Premierships from 2001 to 2003, the claim being that the inequality it created placed the Victorian clubs at a disadvantage.⁵⁸ This resulted in the AFL significantly reducing these concessions. Brisbane had its extra amount cut to 9 per cent in 2004 and then to 7.5 per cent in 2005. Sydney's was reduced by 1 per cent per year for two years, and in 2006 both clubs will revert to a formula which will give every club an extra \$30,000 for up to 12 interstate players, though it will only apply to clubs where less than 40 per cent of their playing list are homegrown.⁵⁹ Under the new scheme

54 (1991) 31 FCR 242 at 256.

55 G Denham, 'Players gain \$9m pay hike', *The Australian*, Friday, 13 June 2003 at 27.

56 'Strength in new pay deal', *AFL Record*, 4 August 2006 at 16. For the 2008 season the salary cap will be \$7.43m, then \$7.70m in 2009, \$7.96m in 2010, and \$8.22m in 2011.

57 'Tough on dirty dogs in US', *The Sunday Mail*, 25 August 2002 at 148.

58 C Le Grand, 'Collingwood declare salary cap war', *The Australian*, 30 September 2002 at 18, C Saltau, 'Malthouse proposes mid season trade', *The Age*, 31 October 2002 at Sport 3.

59 G Denham, C Le Grand, 'Brisbane pay the price of success', *The Australian*, 1 July 2003 at 16.

Sydney will, however, retain a housing allowance of 7 per cent.⁶⁰

Thus, within the question of a salary cap being an even or uneven one, the AFL salary cap has a number of factors presently not found in the NRL's salary cap. These are a minimum level of 92.5 per cent, potential extra concessions for any club with less than 40 per cent of homegrown talent, a 7 per cent housing allowance for Sydney, and the presence of a 'veterans list' where only part of those players' salary will be included in the club's salary cap. In the author's opinion this veterans list works well as a system that helps to reward players who have shown loyalty to a particular club and, as it applies equally to all clubs, does not really have an impact on the evenness or unevenness of the salary cap. The lower level of the AFL's salary cap, together with the extra allowances that are available, however, raises the question of whether the AFL salary cap is in fact an uneven one.

The author would argue that the standard 7.5 per cent difference between the maximum and minimum levels in the AFL represents a reasonable difference, particularly when compared to the much greater difference that existed in the previous NSWRL salary cap. The author would also express the opinion that this system of maximum and a minimum levels of the salary cap works well, the former providing good protection for the clubs, the latter giving protection to the players. It is further suggested that there is justification for the extra allowances that are allowed as it can be harder for clubs to retain interstate players whenever their contracts expire, as all things being equal, there is a strong possibility these players may choose to return home. However, the author does agree with the new way of calculating these figures, as it is now done in a non-discriminatory way, where all other clubs are eligible should they meet the criteria.

There is also little doubt that Sydney is the most expensive city in Australia in which to live, and this, it is suggested, is also justification for the extra 7 per cent housing allowance that Sydney is still allowed. However, this again could be calculated in a non-discriminatory way by relating it to a percentage above the average cost of living in Australia, thus making every club potentially eligible should the cost of living rise significantly in the city in which they are based.

In summary, it is the author's opinion that the salary cap utilised by the AFL can be considered an even, and therefore more likely to be a reasonable, one with the in-built discrepancies justified by either the need to balance other inequalities within a national competition, or as a logical way to allow less wealthy clubs to remain reasonably competitive.

Players Forced to Take Pay Cuts

While Sydney could, until recently, have its players' salaries reaching 115 per cent of the salary cap, it should be noted that in recent years it has only been using 103 per cent.⁶¹ This is due to financial problems which have forced the club to cut costs, including payments to players in 2003. Despite such measures it looked likely that the club would require financial assistance from

60 G Denham, C Le Grand, above, n 59.

61 C Le Grand, 'Pay cuts continue as clubs enter red', *The Australian*, 14 November 2002 at 16.

the AFL in order to help compensate for the loss from, amongst other things, the impact of the 2003 Rugby Union World Cup.⁶² However, better than expected on-field performances in 2003 and subsequent years, including the 2005 Premiership, provided sufficient revenue for the club to operate without a grant from the AFL.⁶³

The Western Bulldogs on the other hand had to apply to the AFL for a \$1 million assistance package in order to keep trading. Part of the AFL's requirement for the granting of such assistance was an undertaking by the Western Bulldogs that it limit future player payments to around 92.5 per cent of the salary cap. Following a meeting between Western Bulldogs and AFL officials the players agreed to take pay-cuts that would lower the club's total player payments to about 94 per cent of this year's cap in order to guarantee the AFL line of credit. Captain Chris Grant described it as a salary sacrifice, with the alternative being the loss of several uncontracted players from the club's playing list.⁶⁴

While players from the Western Bulldogs and Sydney have had to take pay cuts to help the clubs avoid financial problems, salary cap pressures have forced players to take pay cuts even at financially stable clubs, such as Essendon.

At the end of the 1999 season Essendon was unable to reach a contractual arrangement with Justin Blumfield because of salary cap restrictions. Blumfield was all but ready to sign with Sydney as it was both willing and able to pay what he was asking for. Only a discussion with coach Kevin Sheedy just before the 1999 National Draft persuaded Blumfield to sign for less money. Another Essendon player, Joe Misiti, likewise was offered less money than he was seeking during negotiations to renew his contract at the end of the 2001 season. Despite strong interest from Collingwood, he too decided to stay at Essendon, reportedly for \$300,000, rather than the \$325,000 he was asking for. At the same time a number of Richmond players also accepted less money in order to stay at the club, with Wayne Campbell and Duncan Kellaway reportedly accepting a combined reduction of \$350,000, while Joel Bowden, Andrew Kellaway, Greg Tivendale, Matthew Rogers, Mark Chaffey and Craig Biddiscombe all reportedly accepted cuts of \$25,000.⁶⁵ The end of the 2002 season saw a number of Brisbane players take voluntary pay cuts in order to help the club retain its premiership winning playing list, with 12 senior players taking a collective cut of \$380,000.⁶⁶ A number of Melbourne and Essendon players, including captain James Hird, also reportedly took pay cuts that year,⁶⁷ while in 2005 a number of St Kilda players reportedly re-signed for much less than they were being offered by other clubs.⁶⁸

62 G Denham, 'Dire Swans need \$2m handout', *The Australian*, 3 June 2003 at 18.

63 G Denham, J McAsey and P Lalor, 'Swans' success boosts finances', *The Australian*, 10 September 2003 at 18.

64 C Le Grand, above, n 61.

65 C Wilson, 'Top Tigers' pay slash', *The Age*, 12 October 2001 at Sport 1.

66 M Davis, 'Matthews accuses clubs of dishonesty in trading period', *The Australian*, 1 November 2002 at 35.

67 J Niall, 'Complications of switching sides in draft bidding war', *The Age*, 29 October 2002.

68 G Denham, 'Saints to stick together in quest for greatness', *The Australian*, 11 March 2005.

Thus salary caps can clearly create situations whereby players are forced to take cuts in their pay, and Buti suggests that one argument against the validity of a salary cap system is that it requires players to accept less money and therefore involves employers deliberately underpaying its employees.⁶⁹

Players Being Unable to Choose Their Employer

When Brett Kimmorley left NRL club, the Northern Eagles, after it was unable to fulfil its contractual commitments, he indicated he wished to join St George-Illawarra. The club indicated it was willing to sign Kimmorley for the same amount he had been contracted for at the Northern Eagles, but was unable to do so because of its salary cap restrictions. Kimmorley then threatened legal action, though that was eventually dropped after he signed with Cronulla, reportedly on much less money than he had been earning at the Northern Eagles and what he could have earned at St George-Illawarra.⁷⁰

The situation, therefore, involved not only a player having to reduce his income, but also having to choose another employer, two potential legal arguments against the salary cap representing a reasonable restraint of trade. The fact that Kimmorley was the victim of being contracted with a club that was unable to fulfil its financial commitments suggests that, given the circumstances, the NRL perhaps should have been willing to grant another club dispensation from the salary cap so that the player was not disadvantaged financially. While the author's opinion is that you either have a rigidly enforced salary cap, or none at all, the one exemption may be the Kimmorley situation where one club is unable to meet its financial commitments to the player. A case-by-case dispensation to cover such situations may therefore be a fair solution.

What can complicate salary cap questions in the AFL is that it also employs a draft system, meaning that players can only change clubs by being traded or delisted. The salary cap can force clubs to trade players in order to reduce the salary cap pressures, and this was never so apparent than at the end of the 2002 season and, as Niall points out,⁷¹ the names of those traded was staggering, with many of the trades being caused by salary cap pressures. Essendon was the hardest hit, losing three premierships players in Blake Caracella, Justin Blumfield and Chris Heffernan to Brisbane, Richmond and Melbourne respectively. As head coach, Kevin Sheedy, pointed out the club did not want to lose the players and none of the three players wanted to go but were required to go because of what assistant coach, Robert Shaw, described as a prohibitive salary cap.⁷² Comments such as these clearly illustrate that the salary cap can certainly prevent players from choosing their employer.

Salary cap pressure was also a big factor behind the Kangaroos trading Byron Pickett to Port Adelaide, while perhaps the highest profile

69 Buti, above, n 3 at 153.

70 Honeysett, above, n 21.

71 J Niall, 'Complications of switching sides in draft bidding war', *The Age*, 29 October 2002 at Sport 3.

72 K Lyon and N Ahmed, 'Bombers on defensive over departures', *The Age*, 4 October 2002 at Sports 3. Note that Heffernan later returned to Essendon by means of the 2005 pre-season draft: P Krupka, 'Camporeale dons the red and black' *The Australian*, 14 December 2005 at 18.

salary-related trade was that of Melbourne's 2001 Brownlow Medallist, Shane Woewodin to Collingwood, with Woewodin only hearing of the deal while on holiday in Mauritius.⁷³ While the trade may have been a shock, it was essentially a result of Woewodin's relatively poor season in 2002 where he went from being voted the best player in the competition in 2001 to being considered no better than twelfth best at his club the following year. On a salary of \$500 000 a year, Woewodin had simply not performed to a level that his large salary required. As Niall points out, the deal, from Melbourne's perspective, was far from catastrophic as it enabled the club to fit under the salary cap, sign other players and have room to manoeuvre for the 2003 season.⁷⁴ From Woewodin's perspective it was also hardly disastrous as he was traded to the 2002 Grand Finalists which, unlike Melbourne, went on to play in the 2003 finals.

However, from the collective players' perspective, one of the problems with the abovementioned cases was the way in which it was done, with the Australian Football League Players' Association (AFLPA) Chief Executive, Rob Kerr, stating that a lot of the tactics employed in the 2002 trading period left the players feeling bitter. The AFLPA sought to limit this trading to players who were out of contract when it was re-negotiating the collective bargaining agreement, but had to accept a compromise where players on contracts of greater than three years will not be traded in the first year.⁷⁵

Enforcing the Salary Cap

News broke in August 2002 that NRL club, the Canterbury Bulldogs, were involved in large-scale abuse of the salary cap system. Extra payments had been made by the Canterbury Leagues Club which then took many of the players' salaries to a level that meant the salary cap had been well and truly breached.⁷⁶

The situation graphically illustrates the point that salary caps can be hard to enforce, and also concurs with Wilcox J's comments in *Adamsonin regard to maximum wages, that extra payments can come from associates of the club, rather than the club itself*.⁷⁷ It is also worth noting that the breach was detected from a source other than the NRL, namely newspaper journalists. While this can be used to support the argument that breaches can be hard to detect by the controlling body, the author suggests the case indicates that there a number of sources that can detect the breaches, and that it does not really matter who actually detects the breach, as long as it is detected.

What was more important was the response of the NRL to immediately penalise Canterbury by removing all the competition points it had earned

73 C Saltau, 'Woewodin shows off his new colours', *The Age*, 31 October 2002 at Sport 3. Note that Woewodin was delisted by Collingwood after the 2005 season and after not securing a contract with any other club, is no longer playing in the AFL. See P Krupka, above, n 77, at 18.

74 J Niall, 'Complications of switching sides in a draft bidding war', *The Age*, 29 October 2002 at Sport 3.

75 G Denham, above, n 34. For further discussion see *Salary Cap and the Interests of the Players* in this paper.

76 S Honeysett and I Payten, 'Capital Punishment', *The Australian*, 26 August 2002 at 17.

77 (1991) 31 FCR 242 at 255.

while operating in breach of the salary cap restrictions, as well as imposing a \$500,000 fine.⁷⁸ This, it is suggested, not only provided the appropriate penalty, but will also act as a severe deterrent to any other club that may have similar ideas of deliberately and systematically breaching the salary cap.

Like the NRL, the AFL has also encountered breaches of the salary cap. Prior to 2002 Carlton, Melbourne, Essendon and Fremantle were all found to have breached the salary cap after independent audits were carried out on the clubs. Fines were imposed on the clubs, with Melbourne, Essendon and Fremantle also losing draft choices for these breaches.

A more extensive breach of the salary cap was brought to light at the end of the 2002 season when news broke of the investigation into salary cap breaches by Carlton involving extra payments to leading players Fraser Brown, Stephen O'Reilly, Craig Bradley and Stephen Silvagni. Carlton's plight was made worse by the fact that it still had a suspended sentence on a \$57,000 fine and the loss of a second and third round draft choice from a previous breach in 1998.⁷⁹

The willingness of the AFL, like the NRL, to enforce meaningful penalties, it is suggested, is the most important outcome from these severe breaches. Fines are never sufficient, as the richer clubs may well be prepared to pay even a hefty fine in return for a premiership, particularly as a premiership win will usually produce greater income.⁸⁰ The loss of competition points or draft selections on the other hand will have a real impact on the ability of any club to win present and future premierships. This can be seen by the dramatic fall of Carlton who have finished in the bottom two for three of the past four years, including its first ever wooden spoon in 2002, with the club again finishing last in 2005 and 2006. Like the NRL, the AFL has now indicated that it is prepared to deduct competition points as well as imposing fines and taking away draft choices, with this move receiving the support of the clubs.⁸¹

Thus, while the author agrees with Buti that one of the arguments against the implementation of a salary cap system is the difficulty of enforcing it, recent events indicate that, first, they have been detected and, second, the penalties imposed by the governing bodies have, and will continue to act, as a deterrent against future breaches. It is suggested that proof of the impact lies in the fact that AFL clubs are now willing to trade even their best players, rather than risk breaching the salary cap, and suffer the consequences of the imposition of harsh penalties.

78 A Hawse, 'Gallop's warning: rort the cap and you will lose titles', *The Sunday Mail*, 25 August 2002 at 150.

79 C Le Grand, 'Cap breaches cloud Blues' draft choices', *The Australian*, 12 November 2002 at 14. It should be noted too that this breach was discovered by accident when Fraser Brown made a claim for long service leave payments. It then became clear that he had received a much higher salary than that indicated on the official contract lodged with the AFL: see R Gluyas, 'I guess that is why they call it the Blues', *The Weekend Australian*, 30 November 2002 at 50.

80 This was mentioned by former executive commissioner of the AFL, Alan Schwab, when giving evidence in *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242 at 256-7.

81 M Davis, 'Clubs accept point penalties for salary cheats', *The Australian*, 21 March 2003 at 34.

Protecting the Interests of the League and the Clubs

As previously mentioned, the restraint of trade doctrine places the onus on the party imposing the restriction to show that it is no more than what is necessary to protect their interests. Professional team sports have a tendency to be highly regulated and cooperative organisations with restrictive labour market controls because the attractiveness of competition depends on a high degree of uncertainty about the result of any competition, and so the measures are seen as reducing the chances of a few teams dominating the competition through their economic power. This therefore raises the question as to whether the salary cap used by the NRL and AFL has helped to create a more even competition.

Does a Salary Cap Create a More Even Competition?

The first problem with looking at this issue is whether the evenness of a competition can actually be measured. Buti cites the evidence from the VFL/AFL that in the period from 1984 to 1997 only seven clubs won the premiership compared to four in the 11 years prior to the introduction of the salary cap, to support a claim that the salary cap has not created a more even competition.⁸² The author, however, would argue that these figures indicate that the AFL is a more even competition, and would further note that in the 1990s seven clubs won the premiership compared to a combined total of five clubs during the 1970s and 1980s; every club made the finals at least once in the 1990s, except for Fremantle who only joined the competition in 1995; and in the 1990s most of the teams achieved, or went close to what the author describes as their 'finals quota'.⁸³

Le Grand,⁸⁴ meanwhile, makes the point that the overwhelming anecdotal evidence from the 2003 season was that the difference between the best and worst teams in the competition has never been smaller. Essendon coach, Kevin Sheedy, Sydney coach, Paul Roos, and the Western Bulldogs' coach, Rodney Eade, have all made comments in the media about how even the AFL competition now is.⁸⁵ In regard to the NRL, CEO David Gallop has recently cited the increase in crowd numbers and sponsorships as being evidence that the salary cap was responsible for making the 2005 season the most successful competition ever.⁸⁶ Thus, even if acceptable empirical data cannot be obtained, the anecdotal evidence from those within the industry does indicate an acceptance that the labour market controls, such as the salary cap, have achieved the stated objective of creating a more even competition.

82 Buti, above, n 3 at 145.

83 The finals quota involves looking at the number of times a club made the finals in a given decade in relation to the percentage of teams that make the final each year. For example, in the AFL eight teams out of sixteen (50 per cent) now make the finals each year. This means that the finals quota is now 50 per cent, that is, in a perfectly even competition each team would be expected to make the finals 50 per cent of the time which is five times per decade.

84 C Le Grand, 'Interstate clubs hold all the vital aces', *The Australian*, 5 June 2003 at 16.

85 J Halloran, 'Hayes enjoying club culture', *The Australian*, 11 July 2003 at 38. P Krupta, 'Draft, cap take hold', *The Australian*, 29 April 2005 at 29.

86 B Read, 'League tips cap to success', *The Australian*, 1 September 2005.

Other Interests of the League

The salary cap is also being used by the AFL to have some control over how certain clubs are run. The AFL, for instance, has forced the Western Bulldogs to use the minimum level of the salary cap as a condition of the financial assistance it is giving the club. As to why the AFL would help such a club to keep trading can be seen by looking at its \$780 million television contract which requires the AFL to provide eight games per week until 2011. More critical to this figure is the involvement of Sydney, as it is acknowledged that its presence in the competition added \$100 million to any television deal, which is why, when it had financial concerns in 2003, approval for any required assistance was immediately given.

The AFL, and all its constituent clubs, therefore needs the Western Bulldogs and Sydney in order to fulfil its requirements under the contract, and so receive the lucrative money on offer. A salary cap therefore arguably helps to provide financial stability so that a league such as the AFL can guarantee a given number of games for the duration of a long-term television deal. It should be noted that since the imposition of the salary cap in the then VFL no team has folded, though one club, Fitzroy, did merge with Brisbane to form the Brisbane Lions. Rugby league, on the other hand, since the unrestrained payments to players instigated by the Super League war, has seen eight teams fold,⁸⁷ some of which could not fully pay all their players and could not honour the later years of the players' contracts, as the Brett Kimmorley situation indicates. The author would therefore suggest that not only has the AFL salary cap helped to create a more even competition, it has also helped to create a more financially stable competition. It does mean that some financially well off clubs are restricted in how much they pay their players, and that the AFL has to provide financial assistance to some clubs. However, it is suggested that these are simply examples of what is required under the mutual interdependence that is the hallmark of the unique economic structure of sporting leagues.

Thus, it can be argued that the salary cap does pass the *Nordenfelt* test in regard to the interests of the league. The salary cap sets a maximum amount to the money that must be found to pay the players, and this, it is suggested, is clearly in the interests of the clubs. The fact that clubs in both the AFL and NRL have supported the heavy penalties imposed by their respective governing bodies for breaches of the salary cap also indicates that the clubs believe that the salary caps are in their best interests.

Salary Caps and the Interests of the Players

The previously mentioned examples of players having to accept pay cuts to stay at the clubs of their choice and others having to be delisted to allow their

⁸⁷ The Hunter Mariners, Perth Reds, Adelaide Rams, Gold Coast Chargers, South East Crushers were all teams that folded during the merger between Super League and the Australian Rugby League (ARL) run competition. Since the merger both the Northern Eagles and the Auckland Warriors have gone out of business, though they are still in the competition as Manly and the New Zealand Warriors respectively. North Sydney did merge with Manly to form the Northern Eagles, but are now not represented in the competition in any form.

clubs to remain under the salary cap show that, prima facie, salary caps are clearly against the best interests of individual players.

Buti⁸⁸ suggests that cases such as these where players have either needed to accept less money than they believe they are worth, or worse, having to accept pay cuts on contracts they have already signed, indicates that the salary cap represents an unreasonable restraint of trade. The author, however, would argue that it is reasonable as long as the amount of money the players had to relinquish is a reasonable amount, and that the salary cap protects the legitimate and protectable interests of the AFL. It should be noted that the majority of the previously mentioned examples involved less than a 10 per cent cut in wages and it is suggested that this is a reasonable amount, given that out-of-contract players had the opportunity to receive the remuneration they felt they deserved by moving to another club. If it is a player still under contract that is asked to take a pay cut, then this will represent a breach of contract, leaving the player free to find another club which still has room under its salary cap.⁸⁹ It should also be noted that not all of the situations involved actual pay cuts as such, just the difference between the amount the club could afford to pay under the restraints of the salary cap and the figure the player valued his services at when negotiating a new contract. Also of note is that some of these players took pay cuts to stay at a club which, in their opinion, offered them the best chance of on-field success, as for many players this can be more important than money.⁹⁰ Finally, the author would also point out that the number of players involved has been relatively small.

Players being delisted, however, is another question. It is suggested that the types of delisting brought about by Essendon's salary cap problems should decrease in the coming years simply because the clubs will become better at handling the salary cap, as even though it has been in operation since 1984 it has arguably only been rigidly enforced in the last five years or so.

The type of situation involving Shane Woewodin will, however, most likely occur again. This is because it will continue to be a part of football life that players placed on lucrative contracts with long-term security will need to continue to perform at a level that justifies the large percentage of a club's salary cap that their salary takes up. Certainly there is a strong argument that the players need to be better informed of a club's intention and the author

88 Buti, above, n 3 at 153.

89 One of the outcomes of the Carlton salary cap breaches was that the club was also going to be in breach for the 2003 season and therefore had to negotiate pay cuts from the players. All the players eventually agreed to the request though there was talk of some players refusing and seeking a release from their contracts. See G Denham, 'Blues pass cap around to stars', *The Australian*, 26 November 2002 at 16; M Davis, 'Players may kill cap, draft', *The Australian*, 28 November 2002 at 16. As the Brett Kimmorley situation indicates there is still the problem that while a club may be willing to sign a player who has left by means of a release from their contract, they may not be able to do so because it has no room under the salary cap. As mentioned, one suggested solution is that such players are then exempted from the salary cap so that another club can sign them. See J Dunne, 'Day in court for salary cap', *The Australian*, 19 October 2001 at 36.

90 See C Stewart, 'King of the Beasts', *The Weekend Australian Magazine*, 29–30 March 2003 at 16 regarding comments that the Brisbane players were willing to make some financial sacrifice in the quest for what money cannot always replace, namely on-field success. See also B McDonald, above, n 2, at Sport 3 and G Denham, above, n 2 at 27.

suggests that the implementation of a consent clause before any player can be traded would help in this regard. It is worth noting that one of the features of the new rules governing soccer that were implemented after the decision in *ASBL v Bosman*⁹¹ is that contracted players must give their consent before they are the subject of any possible transfer deal.⁹² The fact that Shane Woewodin's trade was conducted while he was on holidays indicates that this consent was very much lacking. However, it should also be noted that as a contracted player, Woewodin had the right to hold Melbourne to that contract, and refuse to go to Collingwood. While no AFL player has, as yet, enforced this contractual right, English Premier League soccer players Mark Bosnich and Dwight Yorke refused to move on loan to Glasgow Celtic or to be transferred to Middlesborough respectively after Manchester United had negotiated deals with those clubs.⁹³ Leeds' goalkeeper, Paul Robinson, likewise refused a move to Aston Villa even though Leeds had already agreed to the sale, and later moved to Tottenham.⁹⁴ It has also been suggested that if Woewodin had refused to go to Collingwood, 'Melbourne would have welcomed him back with open arms'.⁹⁵

What benefits, if any, do the players obtain from being a part of a salary cap system? From the players' perspective one advantage of the salary cap, at least in comparison with the maximum wage restraint, is that star players can be paid a remuneration that is more reflective of their position within the game. Both the NRL and the recently formed A-League have recently introduced additions to their respective salary caps to assist this by allowing a few top players to earn money outside the salary cap. In the A-League each club is allowed one star 'marquee' player who is paid outside the salary cap⁹⁶ while in the NRL two players from each club can earn extra money through sponsorship that is not counted in the salary cap.⁹⁷ However, for all players, both star and average alike, the main benefit of the salary cap can be greater stability in employment. In the AFL this has come from the financial security that the AFL's long-term television deal has provided as this has enabled the AFL to support clubs that have required its assistance. Compare that to the NRL during the period when it did not operate a salary cap, as the television deal that it managed to negotiate, at \$400 million for six years, was far less than that of the AFL, while some contracted players were not fully paid when

91 *Union Royale Belge des Societes de Football Association (ASBL) v Bosman* [1996] 1 CMLR 645.

92 For a discussion of these new regulations see C Davies, 'Post Bosman and the Future of Soccer is Contract Law', (2003) 19 *JCL* 190.

93 Bosnich later transferred to Chelsea and Yorke later transferred to Blackburn Rovers, and is now playing for Sydney FC in the Australian A-League.

94 'Barcelona to make their play for Viduka', *The Australian*, 30 June 2003 at 19.

95 C Le Grand, 'Tricks of the trade have players looking for a fairer system', *The Weekend Australian*, 2-3 November 2002 at 9. It is also worth noting than in 1987 Gary Buckenara took his club Hawthorn to court in what turned out to be a failed attempt to return to Perth when the West Coast Eagles entered the competition. Once the court held him to his contract with Hawthorn he went on to play a starring role with the club the following season when he kicked a goal after the siren to enable Hawthorn to make the 1987 Grand Final. See *Buckenara v Hawthorn Football Club* [1988] VR 39.

96 M Cockerill, 'Salary cap may put lid on Lowy's ambitious programme', *The Sydney Morning Herald*, 23 December 2004 at 32.

97 S Honeysett, 'No limit to what the stars can earn', *The Australian*, 4 March 2005.

both the Northern Eagles and the Auckland Warriors went out of business. It is suggested, therefore, that in recent years players have accepted labour market controls because of the stability of employment that they have apparently provided.

Thus, it is suggested, even when looking at the party most disadvantaged by the salary cap, namely the players, it can still be said that the salary cap, while representing a restraint of trade, is a reasonable one, as it operates in their long-term collective interests.

Is the Salary Cap Injurious to the Public?

The third, and final, component of the *Nordenfelt* test is whether the restraint acts against the interests of the public. Buti correctly points out that this factor of public interest has received less attention by the courts, as it is intimately connected with the determination of what is reasonable between the parties.⁹⁸ Buti also goes on to state that it is not in the public interest to have a competition where the weaker clubs are supported by a system that places a restraint on the payments to players and that this deliberately underpaying of professional athletes is not in the public interest.⁹⁹

So, what benefit does the public obtain from the implementation of a salary cap system? The author would argue that it is a more even, more interesting competition played by players who are both fitter and more skilful because they now have the means to train full time for football. For the supporters of the traditionally less successful AFL clubs it is also a more rewarding spectator experience as none of the AFL clubs are now experiencing long periods of time being uncompetitive even for a finals berth.¹⁰⁰ In the AFL each club has managed to survive the change to full-time professionalism. All supporters, therefore, still have their original club to support, even if, in the case of South Melbourne and Fitzroy, it now means supporting a team based interstate.

It should be remembered that it is ultimately spectator support, both television and at the gate, that creates the revenue sufficient enough to support a professional league. Thus the league, clubs and the players all have an interest in the salary cap not being injurious to the public, and the author would argue that there is no detriment to the public in limiting the payment to

⁹⁸ Buti, above, n 3 at 152.

⁹⁹ Buti, above, n 3 at 153.

¹⁰⁰ During the 1990s for instance all clubs, except Fremantle who only joined the competition in 1995, made the finals at least once. Compare this to what happened prior to the introduction of a salary cap and draft systems, when clubs often went a decade or more without making the finals, with Hawthorn holding the record of 32 years from 1925 to 1956. Other long periods without making the finals include 24 years by South Melbourne (now Sydney) from 1946–69, Melbourne 22 years from 1965–86 and St Kilda 21 years from 1940–60. It is acknowledged that, percentage wise, more teams make the finals now than they did in some previous decades, but adjusting the figures to the present day 50 per cent of teams does little to change these figures. Hawthorn's record, for instance, would only be altered by a 5th place in 1943, and hence would still have had a period of 18 years without making the finals, one year in the finals, followed by another period of 13 years without making the finals. South Melbourne meanwhile would still have gone 17 years without making the finals.

players if it helps to create a more viable and competitive league that is in turn more interesting to follow.

In the NRL there is the same argument that the recent re-introduction of the salary cap has created a more even, and more interesting competition to follow, as evidenced by the closely fought 2005 season. What could be considered injurious to the public, however, is the fact that some Australian rugby league players have been lost to both English rugby league and Australian rugby union, meaning that some of the better players, such as Lote Toquiri, Wendall Sailor and Mat Rogers, have been lost to the game. The author, however, would argue that it has been better for the spectators to have lost a few players than to lose clubs, which is what happened before the re-introduction of the salary cap. What should also be noted in regard to restrictions on the players is that this fact indicates that they have opportunities to ply their trade elsewhere, which would support a claim that it is not an unreasonable restraint of their trade.

The Alternatives

With the restraint of trade doctrine, not only must the party supporting the contract show that the restraint goes no further than what is necessary to protect the interest of the party which it favours, but they may need to show that there are no alternatives that are less restrictive.¹⁰¹

One alternative to the present salary cap that has been suggested by both Buti¹⁰² and Ross¹⁰³ is a reverse salary cap. This works by limiting only the top clubs to a salary cap so that players will be attracted to the less successful clubs. The author, however, sees a number of problems with such a system. First, as Buti acknowledges, it would probably be necessary for the relevant governing body to financially subsidise the less successful and poorer clubs in order for them to afford the higher salary cap system.¹⁰⁴ Although this could be done by using revenue, particularly from television rights, it is suggested that this is not an ideal system because it involves treating some clubs differently to others.

The major practical problem would stem from the fact that, as Crockett J stated in *Foschini v Victorian Football League and South Melbourne Football Club*, relatively long-term contracts are a good way for a club to hold onto its players.¹⁰⁵ So if a club finishes at the bottom of the competition and it is granted a higher, league-backed salary cap which enables it to sign up some good players, the question then arises as to how long this increased salary cap should operate. If it is only for the following season then the bottom clubs may not be able to sign these new players for longer than one year because of the restrictions that will be placed on them by the salary cap. This, it is suggested, would totally defeat the purpose of the system. On the other hand, if it

101 Buti, above, n 3 at 141. For case law see *Mason v Provident Clothing and Supply Company Limited* [1913] AC 724 at 733, *Herbert Morris Limited v Saxelby* [1916] AC 688 at 670.

102 Buti, above, n 3 at 146.

103 S F Ross, 'Anticompetitive aspects of sports' (1999) 7 *Competition and Consumer Law Journal* 125 at 127.

104 Buti, above, n 3 at 147.

105 Unreported, Victorian Supreme Court, 15 April 1983.

operated for a much longer time period so that these clubs were able to sign these players for four or five years, then they may well end up dominating the competition for this period of time. In the AFL, for instance, admittedly with a good draft system in place, teams like Melbourne and Brisbane have both gone from last place one year to a place in the Preliminary Final the following year. Hence under this proposed reverse salary cap system a combination of temporary coaching problems and major injury problems to a few key players could give a club a league-backed advantage that enables it to dominate the competition for a number of years.

Conversely, if its salary cap was always linked to its position on the league ladder, that is, it decreased as it moved up the ladder, then the club would almost certainly face salary cap problems and as a result would most likely have to discard players. The only way around this would be to allow them to keep its higher salary cap and then continue to increase the salary cap for the following year's bottom club. This would obviously lead to a situation whereby the salary cap increases beyond inflation and most likely the means of the league.¹⁰⁶ It is for these reasons that the author believes that a reverse salary cap is, in reality, impractical.

Another alternative is to not have a salary cap as such, but to restrict player payments to a percentage of what is known as player-generated income. Player-generated income is defined as the income obtained from broadcasting rights, match fees, gate takings, sponsorship and licensing/merchandising.¹⁰⁷ This is the system used by both the Australian Rugby Union (ARU) and Cricket Australia. The ARU's player payments are presently set at 30 per cent of player-generated income,¹⁰⁸ while Cricket Australia's is 25 per cent of player-generated income.¹⁰⁹ The author suggests that could also be used in both the AFL and NRL to calculate the overall amount to be paid to the players, with this amount then being divided by the number of teams in the competitions to arrive at the salary cap for each club.

The final alternative involves the operation of a free market with no salary cap in operation. However, it should be noted that Justice Smellie in *Rugby Union Players' Association v Commerce Commission*¹¹⁰ accepted that leaving sporting organisations to the free market did not work as, in the long term, the better players will move to the stronger clubs.¹¹¹ It is also suggested that the proponents of the operation of the free market in sporting competitions should

106 Note that with a draft system, on the other hand, the bottom clubs are given an advantage at the end of the each season, but it is an advantage that decreases very simply, if and when, they move up the league ladder and begin to receive later draft picks.

107 B Dabschek, 'Trying Times: Collective Bargaining in Australian Rugby Union' (1998) 15 *Sporting Traditions* 25 at 43-4.

108 P Jenkins, 'Players Strike it Rich in New Deal', *The Australian*, 12 April 2001. Note too that there have been calls from within rugby union for the introduction of a salary cap with both the ACT Brumbies and the Queensland Reds being concerned about the potential financial might that would be generated by a successful NSW Waratahs franchise. See W Smith, 'Brumbies, Reds call for salary cap', *The Australian*, 19 May 2005.

109 Cricket Australia recently tried to reduce the figure to 20 per cent so that Cricket Australia would have more money available for promotion and development of the game. The players, however, stood firm and Cricket Australia was forced to retain the figure at 25 per cent.

110 [1997] 3 NZLR 301.

111 [1997] 3 NZLR 301 at 304-5.

also reflect on some figures from European soccer where uncontrolled increases in player payments has seen many clubs face financial problems. In 2003 eighty per cent of Italian Serie A clubs were reported to be in severe financial strife, with the fact that player wages devour 85 per cent of the revenue being a major contributing factor.¹¹² Players from AS Roma, which has recently won a league title, reportedly had to sue the club for unpaid wages, while one of the giants of European and Spanish soccer, Barcelona, reported a \$97 million loss for the 2002–03 financial year.¹¹³ It is not surprising, therefore, that there have been suggestions that not only would a salary cap prove to be the solution to the problems experienced by Italy's Serie A,¹¹⁴ but also that it might be used in other European Leagues.¹¹⁵ As previously mentioned, in the United States the NFL has a well-enforced salary cap in operation, and this has, in conjunction with a draft system, arguably created an even competition.¹¹⁶

Thus, there has been a perceived need to implement a salary cap in a large market like the United States, or introduce one into another large market, like European soccer. It is suggested that the argument that one is needed in a smaller market like Australia, where the revenue that can be generated is considerably smaller, is perhaps even more compelling than it is for larger markets.

Conclusion

Creating and maintaining an even competition constitutes a protectable interest for a sporting league. In Australia the AFL, NRL and the A-League all seek to justify the implementation of a salary cap on the basis that it creates a more even and financially more viable competition. It is suggested that the case examples presented in this paper indicate that the salary caps in these competitions are working well. The amount of money that some players have had to take in pay cuts due to the salary cap has been relatively small. At the same time, while there are examples of players who could not choose the club, that is, the employer, of their choice, these represent a very small minority, given the hundreds of players that are employed each year by the clubs in these competitions. From the players' perspective it is also suggested that their standard playing contracts do offer some protection, either in the AFL to deny

112 'Serie A clubs face financial chasm' *The Sydney Morning Herald*, 20 December 2003 at 36.

113 'Barca's disposal', *The Australian*, 7 May 2003 at 19.

114 'Italians don cap', *The Weekend Australian*, 10–11 November 2001 at 63.

115 'Bid for salary cap', *The Australian*, 30 May 2001.

116 In regard to the NFL, even with salary cap and draft system there have been dominant teams, for instance, the Green Bay Packers in the 1960s, the Pittsburgh Steelers in the 1970s, the San Francisco 49'ers in the 1980s, the Dallas Cowboys in the 1990s, and in recent years, the New England Patriots. However, such a dominance has only lasted for five to 10 years and it has also been a different team in each decade that has dominated. Major League baseball on the other hand, which does not have a salary cap, has tended to have been dominated in each decade by the team with the biggest payroll, the New York Yankees. All the European soccer leagues are likewise dominated by the biggest and richest clubs: for example, in England it is Manchester United, Arsenal, and more recently, Chelsea; in Spain it is Barcelona and Real Madrid; Germany, Bayern Munich; Scotland, Celtic and Rangers.

a club the opportunity to trade them by holding the club to that contract, or by treating a request to take a pay cut as a breach of contract, thus enabling that player to join another club.