D866 DUGGAN, S. The N.Z. Rugby Football Union player transfer arrangements.

SHELLEY DUGGAN

THE NEW ZEALAND RUGBY FOOTBALL UNION PLAYER TRANSFER ARRANGEMENTS: DOES THE COMMERCE COMMISSION'S APPROACH ACCORD WITH THE COMMERCE ACT?

LLB(HONS) RESEARCH PAPER
ADVANCED COMPETITION LAW (LAWS 530)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1997

CONTENTS

ABSTRACT

This paper examines the application of legal principles to professional sporting entities in the context of the Commerce Commission's decision authorising the New Zealand Rugby Football Union player transfer arrangements. It analyses the approach taken by the Commission to claim jurisdiction over the player transfer arrangements. In particular, the paper examines the Commission's formulation of the relevant markets, which were structured as markets to which the Commerce Act applies. Thus, the Commission's avoidance of the 'contract of service' exemption in section 2(1) of the Commerce Act by artificially constructing a market for the provision of services is scrutinised. Furthermore, the paper questions the Commission's disregard for the section 44 exemptions, which would act to remove the NZRFU player transfer arrangements from the ambit of the Commerce Act. The Commission's interpretation of the public benefit test is also examined. It is postulated that the narrow efficiency framework prescribed by the Commerce Commission may be inappropriate for professional sporting bodies.

The paper also summarises the common law restraint of trade doctrine, which has been applied extensively by the Australian courts to restrictive practices in the professional sporting environment. The New Zealand Rugby Football Union player transfer arrangements are examined to determine whether the proposed system would survive challenge under the restraint of trade doctrine. Finally, the paper concludes that sporting administrative bodies must now ensure that any restrictive arrangements imposed on professional athletes comply with the Commerce Act and the common law restraint of trade doctrine.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14,709 words.

The business of sport and leisure is part health, part personal achievement, part entertainment and part national pride. New Zealand is a great sporting nation. We are one of the few nations where sport is a major part of the national character, and is valued and supported by the great majority.[1]

I. INTRODUCTION

In September 1996, the New Zealand Rugby Football Union Incorporated (NZRFU) submitted an application for authorisation under section 58 of the Commerce Act 1986 to enter into and give effect to its proposed player transfer system. The system was to be implemented by the passing of regulations and the amendment of the NZRFU's rules. The proposed arrangements provided for the establishment of a transfer registration system for players and a requirement for provincial unions to negotiate a transfer fee. The principal characteristics of the system included the categorisation of players into various 'bands' of competency, a quota whereby provincial unions are restricted as to the number of players in each 'band' to be acquired each year, a transfer period and a maximum transfer fee payable to selling unions.

The Commerce Commission delivered a decision authorising the rugby union player transfer arrangements.[2] This determination is significant because it illustrates the Commission's willingness to apply the Commerce Act to professional sporting organisations. In this respect, the Commission takes an approach that accords with its present 'neutralisation' policy whereby sporting bodies will be subject to identical procedures as any other commercial entity. However, it is arguable that the Commission has claimed jurisdiction over the

---

[1] Wilson Whineray, Chairman of the Hillary Commission for Recreation and Sport, The Hillary Commission's Summary Annual Report, 1994-1995, 4.
[2] Commerce Commission Decision No 281, 17 December 1996.

NZRFU player transfer arrangements despite contradictory provisions in the Commerce Act. Although the Rugby Union Players' Association did not expressly challenge the jurisdiction of the Commission to consider the arrangements, the investigative nature of the Commission suggests that they should have considered the exemption provisions contained in section 44 of the Commerce Act to ascertain whether jurisdiction could in fact be claimed. The failure of the Commerce Commission to consider the section 44 exemptions also raises the issue of the relevance of the common law restraint of trade doctrine. The Australian courts have frequently addressed restrictions upon players under this common law doctrine. The applicability of this doctrine to the NZRFU player transfer arrangements may be significant, as the common law doctrine takes into account factors which differ from those considered under the public benefit test prescribed by the Commerce Act.

This paper will consider the applicability of competition laws to sporting entities in the context of the player transfer arrangements proposed by the NZRFU. Accordingly, Part II of the paper presents an overview of the professional rugby union environment, the proposed regulations and the Commerce Commission's final determination. Part III discusses the application of legal principles to sporting entities with particular emphasis on the Commerce Act 1986. Part IV discusses the exemption in the Commerce Act pertaining to contracts of service and the effect of this exception on market definition in the Commission's determination. Part V of the paper outlines the 'public benefit' test while Part VI critiques the approach taken by the Commerce Commission in applying the test. Part VII outlines the common law restraint of trade doctrine and its relationship with the Commerce Act 1986. Part VIII considers the application of the restraint of trade doctrine to the NZRFU player transfer arrangements. Finally, a conclusion is reached as to the legitimacy of the Commission's approach to the

NZRFU player transfer arrangements and the suitability of the Commerce Act to deal with professional sporting organisations.

II. OVERVIEW OF THE NZRFU PLAYER ARRANGEMENTS

A. The Parties

The New Zealand Rugby Football Union is the administrative body which governs the participants involved in rugby union throughout New Zealand. The NZRFU applied for authorisation under the Commerce Act 1986 to enter into and give effect to its proposed player transfer system. The system was to be implemented by the passing of regulations and the amendment of the NZRFU's rules.

There are 27 provincial unions nationwide, which are independent incorporated societies affiliated to the NZRFU. Each union has teams playing in the Senior A National Provincial Championships (NPC) and NPC Development grades. In New Zealand, there are approximately 130,000 rugby union players of whom 1,100 are directly affected by the NZRFU player regulations. As a result of the commencement of professional rugby, all Rugby Super 12 players, All Blacks and some Development players have contracts with, and receive remuneration from, the NZRFU. Many provincial unions also have contracts with NPC players, which vary significantly between unions, particularly in terms of remuneration.[3]

The Rugby Union Player's Association (RUPA) is an incorporated society established in 1996 to represent the interests of New Zealand rugby union

[3] Player remuneration may be based on number of games played, fixed per-match fee, bonus payments for a win, or proportion of gate takings.

players. As an interested party, the RUPA appeared before the Commission and made submissions. Although the RUPA had no financially active members in November 1996, it was stated at the Conference that they represented the interests of over 85% of the players in the First Division of the NPC competition. The RUPA actively opposed the NZRFU's application for authorisation and took the Commerce Commission's decision on appeal to the High Court. However, it is notable that the RUPA did not challenge the jurisdiction of the Commission to examine the NZRFU regulations. Rather, the RUPA contended that the institution of the player transfer arrangements would contravene the Commerce Act and should be found illegal by the Commerce Commission. The RUPA also argued that the public benefit alleged to be delivered by the arrangements was insufficient to outweigh the lessening of competition so that the NZRFU should not be granted authorisation. The RUPA's decision to challenge the NZRFU player transfer arrangements under the Commerce Act illustrates the practical difficulties in pursuing a class action based on the common law restraint of trade doctrine. The infrequent use of the class action in New Zealand reflects the administrative costs associated with a class action and the restrictive attitude taken by the New Zealand judiciary to Rule 78 of the High Court Rules which governs the use of class actions in New Zealand.[4]

The NZRFU have a number of prominent sponsors including Air New Zealand, Lion Nathan Ltd and Television New Zealand (TVNZ). With the development of the Rugby Super 12 competition in 1995, an exclusive agreement was signed with News Corporation Limited (News Corp) providing them with the rights to televise all rugby union matches played in New Zealand, South Africa and Australia for the next ten years. In return for television exclusivity, News Corp

[4] See *R J Flowers Ltd* v *Burns* [1987] 1 NZLR 260 where it was held that the consent of all parties is required even if pursuing a class action under the direction of the court.

agreed to pay a total of US$555 million to the rugby unions of South Africa, Australia and New Zealand over the next ten years. News Corp has subsequently on-sold some of these rights to local television networks such as Sky Network Television Limited which has further on-sold some of these rights to TVNZ.

B. The Regulations

Under the Regulations, rugby union players are split into a number of "bands".[5] These bands indicate the level of experience of the player and the competition in which the player has been most recently playing. Although the regulations have consequences for all levels of the sport, they only directly affect transferring players who fall within one of the bands and who will play in the acquiring provincial union's Senior A NPC team in that or any future year.

There are three fundamental aspects of the Regulations that are relevant for the purposes of the Commerce Act 1986.

1. The Quota System

Each provincial union is restricted in the number of players from each band or grouping of bands that it may acquire in any year.[6] The maximum number of transfers of band classified players that a provincial union may accept in any twelve month period is five. Within this total, an annual quota is also set for every specific band or grouping of bands. For most bands, the quota is set at two players. However, provincial unions can only acquire the services of one All Black per year.

---

[5] The pertinent bands are set out in Appendix A.
[6] See Appendix A.

Transfers above the quota can occur with the consent of the Player Transfer Review Committee on the basis that there has been an extraordinary and/or compelling change in the player's personal circumstances. This may include a change in employment, family circumstances, or an irretrievable breakdown in the relationship between a player and a provincial union.

2. The Transfer Period

Under the Regulations, the transfer of players falling within the specified bands can occur only in the period from 1 November to 30 November in each year. However, negotiations and agreements relating to transfer may take place at any time during the year. Transfers can occur outside the transfer period in circumstances where the Player Transfer Review Committee considers that there has been an extraordinary and/or compelling change in the player's personal circumstances.

3. Development Compensation Payment

The Regulations provide that whenever a banded player transfers between provincial unions, it is conditional on the payment of a transfer fee from the player's new provincial union to the prior provincial union. Provincial unions may negotiate as to the fee payable in respect of a particular player. The payment may be zero but it cannot exceed the maximum set for each band by the NZRFU. The maximum amounts were set following consultation with the provincial unions based on the agreed maximum value that the provincial unions place on the skills and experience of players at various levels.[7] In the event that agreement cannot be reached as to the amount to be paid to the selling provincial union, there can be a transfer if, and only if, the player agrees to the transfer and the acquiring provincial union agrees to pay the maximum

applicable Development Compensation Payment to the selling provincial union. However, if the acquiring provincial union is not willing to pay the maximum fee for that band of player and no agreement can be reached on a lower or nil fee, no transfer will occur unless the Player Transfer Review Committee has jurisdiction to consider the matter on the basis that there has been an extraordinary and/or compelling change in the player's personal circumstances.

During the authorisation process, the NZRFU submitted that the maximum values were not assessments of the financial value of the players but were compensation for a union's investment in that player's development. However, the Commerce Commission expressly decided that the payment was not based on the cost of player development but rather on the expected value of the player's services. This was illustrated by the fact that different maximum values apply to 'Star', 'Established' and 'Current' All Blacks, regardless of the fact that the same investment in development may have been made in each player. Therefore, the Commerce Commission concluded that although the primary purpose of the payment was to ensure compensation to the losing provincial union, the payment was, in effect, a transfer fee. The Commerce Commission, throughout its Determination, referred to the payment as a transfer fee.

C. The Determination

In a Determination dated 17 December 1996, the Commission formulated three markets that could potentially be affected by the regulations. These were:

i. The *market for player services* in which players compete with each other to supply their skills or services to provincial unions and provincial unions compete with each other to acquire them;

---

[7] See Appendix A.

ii. The *market for the rights to player services* in which provincial unions compete with each other to buy and sell the rights to utilise the services of premier rugby union players; and

iii. The *market for sports entertainment services.*

The Commission found that the player transfer arrangements did not affect competition in the market for sports entertainment services. However, the Commission found that the quota and transfer system had the purpose and had or were likely to have the effect of lessening competition in the market for player services and the market for the rights to player services under section 27 of the Commerce Act. The Commission concluded that the Regulations would have, or would be likely to have, the combined effect of lessening competition in the said markets. The Commission also found that the maximum transfer fees constituted a price fixing arrangement under section 30 and thus were deemed to substantially lessen competition in the market for player services and the market for the rights to player services in terms of section 27. Finally, the quota system was found to be an arrangement or understanding with the purpose of preventing, restricting or limiting the supply of the rights to player services to, or the acquisition of player services from, the provincial unions and was an exclusionary provision under section 29 of the Commerce Act. Thus, the quota, transfer system and maximum transfer fee in combination were found to be anti-competitive under the Commerce Act.

Accordingly, the Commerce Commission was not satisfied that the Regulations would not result in a lessening of competition in terms of sections 27, 29 and 30 of the Act and could then consider whether authorisation should be granted under the Act. The Commission determined that the public detriments arising from the lessening in competition from the Regulations were limited and mainly

included the cost of administering the arrangements and the erosion of player skills when transfer wishes were frustrated by the arrangements. Although the public benefits arising from the arrangement were also limited, the Commission found them to outweigh the corresponding detriments. The benefits arose from maintaining the value of overseas television rights, preserving the performance of representative teams, preserving sponsorship and maintaining inbound tourism associated with rugby. The Commission concluded that the benefit to the public which would in all the circumstances result, or be likely to result, from the Regulations outweighed the lessening in competition that would result, or be likely to result, from the Regulations. As a result, the Commission granted an authorisation for the NZRFU to enter into and give effect to the player transfer arrangements pursuant to sections 61(6) and 61(7) of the Act.[8]

D. The Appeal

Pursuant to section 91 of the Commerce Act, the RUPA appealed to the High Court against the Commerce Commission's determination. In particular, the RUPA objected to the Commission's application of the public benefit test and claimed that "there was no or no sufficient evidential basis to support the finding that any public benefits which might flow from the transfer regulations would outweigh the material detriments".[9] In a judgment issued on 14 August 1997, Smellie J and Mr Gaire Blunt undertook a reasonably comprehensive examination of the benefits and detriments said to arise from the player transfer arrangements.[10] Smellie J noted that the Commission took a fairly conservative approach in its assessment of the linkage between the benefits and the

---

[8] Despite being worded slightly differently, the test under section 61(6) is essentially the same as that under section 61(7) in that it requires the weighing of public benefits against the detriments flowing from the practice. See *Re New Zealand Stock Exchange* Commerce Commission Decision No 232, 10 May 1989, para 62.

[9] *Rugby Union Players' Association Inc* v *Commerce Commission* Unreported, 14 August 1997, High Court, Auckland Registry, CL 2/97, 14.

Regulations. Additionally, the High Court stated that the Commerce Commission should monitor the application of the Regulations as the Commission could vary or revoke the authorisation if it finds it was misled, or there has been a material change of circumstances, or any condition upon which the authorisation was granted has not been complied with. The High Court dismissed the RUPA's appeal and upheld the Commission's determination granting an authorisation.

III. APPLICATION OF LEGAL PRINCIPLES TO SPORTING ENTITIES

Professional sports have traditionally been a social and legal soft spot, providing a haven for anti-competitive activities and contracts. The hesitant judicial application of legal principles to sporting bodies may be attributed to the public interest facilitated by certain anti-competitive measures or more likely, the subjective social desire to keep sport 'pure' and free from commercial and judicial realities. In the past, this has ensured a low salary structure and a virtual immunity for professional sporting procedures from legal challenges. However, it is not only the emotive character of sports that causes some difficulty in adapting legal theories to sports organisations. While considerations appropriate to trade and commerce are certainly relevant to the practices of a sporting organisation and its relationships with its employees, the additional importance of maintaining a marketable sporting competition adds a unique component to the application of law in this field.

Advocates of restrictive practices in the sporting arena repeatedly argue in both restraint of trade and competition law cases that organised professional team

---

[10] Above n 9, 34-47.

sports are a unique industry that should not be subject to traditional legal principles. They assert that the competing clubs are mutually interdependent because they must cooperate to produce the game.[11] Contrary to normal business practice, the product generated by a sports contest, competition between teams, is fundamentally dependent upon the existence of competitors. In this respect, the health of each club depends on the health of the league. If the stronger clubs or teams use their resources to drive out their competitors, the whole league will suffer.

The equalisation of competitive playing strengths between teams is commonly attained by controlling the distribution of player talent within the league by certain rules and procedures. These necessarily inhibit true competition within the player market and are restraints of trade. However, such rules may be adjudged as reasonably necessary to protect a team's investment in its players. The primary justification is that the lack of restriction may cause the equality of competition to decline because players would frequently jump from team to team and thereby destroy the team's existing harmony and coordination. Thus, the courts acknowledge that it is appropriate for rules to be implemented which help the weaker clubs in their competition with the stronger ones, keep the league evenly balanced and prevent the ultimate destruction of the entire league.[12]

In recent times however, there has been a marked shift in basic attitude towards professional sports. The players, legislature, judiciary and the public are recognising that sports are 'big business'. This emerging awareness has been reflected in both Australia and New Zealand by judicial willingness to consider professional sports within the scope of the antitrust doctrine. The first Australian

---

[11] See Samuel R Pierce Jr "Organised Professional Team Sports and the Antitrust Laws" (1958) 43 Cornell Law Review 566.

case to consider the application of the Australian Trade Practices Act 1974[13] to a sporting body was the High Court judgement of *Adamson* v *West Perth Football Club*.[14] This case concerned the Club's refusal to grant Adamson clearance to play for another club. Adamson claimed that this behaviour contravened section 45(2) of the Trade Practices Act[15] as the refusal had the effect of "substantially lessening competition". Although this claim was not upheld by the Federal Court, the High Court considered the issue of whether or not a sporting body should be deemed a "trading corporation" under section 4(1) and thus be subject to the Act. The majority held that even if no profits were distributed to individuals as shareholders, the competition between the two clubs was clearly an activity of commerce and not merely incidental to the promotion and encouragement of sport. Accordingly, Barwick CJ considered that "the presentation of a football match as a commercial venture for profit to the promoting body is an activity of trade".[16]

Notwithstanding this early recognition of sporting bodies as a commercial entity, it was not until 1986 that the Australian Trade Practices Act was successfully applied in a sporting context. In *Hughes* v *Western Australian Cricket Association Inc*,[17] the plaintiff successfully challenged the Cricket Council's rule that precluded players from taking part in unregistered cricket matches under section 45(2) of the Trade Practices Act. This trend continued in the highly publicised case of *News Ltd* v *Australian Rugby League*,[18] which concerned an attempt by News Ltd to set up an alternative rugby league premiership to

---

[12] See *Adamson* v *New South Wales Rugby League Ltd* (1991) 103 ALR 319.
[13] Australian equivalent of the Commerce Act 1986 (NZ).
[14] (1979) 23 ALR 439.
[15] The New Zealand equivalent is section 27 of the Commerce Act 1986 which prohibits contracts, arrangements or understandings which have the purpose, effect or likely effect of substantially lessening competition in a market.
[16] *Adamson* v *West Perth Football Club*; above n 14, 454.
[17] (1986) 69 ALR 660.
[18] (1996) ATPR 41-466 (Federal Court); (1996) ATPR 45-521 (Full Federal Court).

compete directly with the Australian Rugby League (ARL). Although Burchett J conceptualised the ARL as a joint venture, which was essentially non-commercial in nature, the Full Federal Court clearly decided that the ARL and its constituent clubs were engaged in trade and commerce rather than carrying on the virtuous activity of promoting rugby league. Accordingly, Justice Burchett's attempt to formulate a judicial "sporting exemption" was overruled in favour of an approach which ensured that all commercial laws, including the Trade Practices Act, applied to the ARL.

In New Zealand, a similar trend has begun to emerge. In *Re Speedway Control Board of New Zealand (Inc)*,[19] the Commerce Commission analysed competitor agreements and the incorporated rules of the Speedway Control Board which effectively prevented competitors from entering unauthorised race meetings. The Commission considered that these restrictions had the effect of substantially lessening competition in the market for the services of speedway competitors and were illegal under sections 27 and 29 of the Commerce Act 1986. The Commission made it clear that the non-profit making nature of the organisation was not relevant for competition purposes. Additionally, the fact that its membership was voluntary and that the members of the body had a common interest was insufficient to remove the Speedway Control Board from the ambit of the Commerce Act. Thus, a clear message was conveyed to sporting bodies that they were considered to be no different from any other commercial entities under the Commerce Act 1986.

It is submitted that the Commerce Commission's decision regarding the NZRFU player transfer arrangements accords with this modern approach. Although the Commission did not expressly discuss the applicability of the Commerce Act to

the NZRFU, it undoubtedly considered it to be a foregone conclusion that the NZRFU, as the national administrator of a professional sport, was subject to the Act. The revenue maximising nature of the competition and the vast marketing opportunities available to the NZRFU and its affiliated unions necessitates a realistic view of the professional rugby union environment. Thus, the approach taken by the Commerce Commission accords with the financial and commercial realities of modern sporting competitions and the nature of the competitive relationship existing between affiliated provincial unions for players, coaches, and supporters.

IV. THE EXCEPTION FOR EMPLOYMENT CONTRACTS AND THE EFFECT ON MARKET DEFINITION

A. Australian Approach

In Australia, the principal means of enforcement of the rights of restricted athletes has been by actions based upon the common law restraint of trade doctrine (discussed below). This is because attempts to bring actions under the Australian Trade Practices Act have to date been largely unsuccessful. Although professional sporting bodies may be considered "trading corporations" and thus be within the ambit of the Act, allegations of contravention of the Trade Practices Act have failed because the market in which clubs compete for the services of players is not, under the appropriate provisions, one to which the Trade Practices Act applies. Under similar provisions as the Commerce Act, the proscription on a corporation[20] from giving effect to a provision which is likely to have the effect of substantially lessening competition under section 45 of the

---

[19] (1990) 2 NZBLC (Com) 104,521.

[20] In New Zealand, it is a proscription on a person being defined in section 2(1) of the Commerce Act 1986 as "any association of persons whether incorporated or not".

Trade Practices Act[21] is inapplicable to the club-player market. The Trade Practices Act defines competition for the purposes of section 45 as competition in any market where a corporation acquires services or would be likely to acquire services.[22] Services are subsequently defined in section 4(1) of the Trade Practices Act[23] so as to exclude performance of work under a contract of service.[24] As the Australian courts have held that sports players fall within this exclusion, no redress is available under the Australian Trade Practices Act.

In the Full Federal Court decision in *Adamson* v *New South Wales Rugby Football League*,[25] the inapplicability of competition law to contracts relating to the employment of footballers was confirmed. However, Wilcox J expressed some dissatisfaction with this approach and stated:[26]

> From a policy viewpoint, some people might think it unfortunate that s45 does not apply to a case such as this. As I have pointed out, the internal draft rules undoubtedly have the purpose of restricting the supply of footballers' services (in the ordinary sense of that word) and the effect of substantially limiting competition in the marketplace for those services... It is difficult to see what policy purpose is being achieved by leaving inviolate arrangements under which potential employers agree not to compete amongst themselves... It is certainly not in the interests of employees. They find themselves, uniquely so as far as the Act is concerned, having to suffer any collusion amongst those with whom they would negotiate ... It seems to me that the present position is anomalous ...

Effectively, the 'contract of service' exemption means that sporting bodies can disregard any consequences arising from competition law in respect of their

---

[21] The equivalent provision in the Commerce Act 1986 is section 27, which prohibits contracts, arrangements or understandings that substantially lessen competition in a market.
[22] Section 3(1A) of the Commerce Act 1986 provides that "Every reference in this Act ... to the term "market" is a reference to a market in New Zealand for goods or ***services***".
[23] The New Zealand equivalent is section 2(1) of the Commerce Act 1986.
[24] It is important to distinguish between a contract of service and a contract for services. The relationship between an employer and an employee is founded on a contract of service and is commonly referred to as an employment contract. Conversely, an independent contractor is engaged in a contract for the provision of services made between the principal and the contractor.
[25] Above n 12.
[26] Above n 12, 338.

dealings with players. It is to be noted however, that players may seek redress under the common law restraint of trade doctrine. Certainly, this common law doctrine allows player interests to be considered in a manner not possible under competition law (discussed below). With all due respect to Wilcox J, it is surely arguable that a legitimate policy purpose was achieved by removing employment contracts from the ambit of antitrust law. Presumably, the ancient and well-developed doctrine of restraint of trade was seen to be sufficient to deal with restrictions upon player services. Indeed, the plethora of Australian restraint of trade cases holding player restrictions to be unreasonable is perhaps sufficient to illustrate the competence of the common law to deal with such restrictions.[27] Thus, it is unlikely that players must "suffer any collusion amongst those with whom they would negotiate" as the restraint of trade doctrine affords a potential remedy for disadvantaged players.

Nonetheless, *News Ltd* provides an illustration of the application of the Australian Trade Practices Act notwithstanding the exemption for employment contracts. At trial, Burchett J held that there was no competition for the services of premiership players because these players were employees.[28] However, the Full Federal Court reasoned that as the clubs were free in the future to engage players under *contracts for services*, they could be and were likely to be, in competition for these services. The Court stated that:[29]

> In these circumstances, it seems to us that in the competition and rivalry between clubs for premier players there was a real chance or possibility that there could be competition to engage players *otherwise than under a contract of service*. It thus follows that, at the time the commitment agreements and loyalty agreements were executed, the clubs were likely to be in competition for the 'services' of premier players (emphasis added).

---

[27] See *Adamson* v *West Perth Football Club* (1979) 27 ALR 475; *Hall* v *VFL & Clarke* [1982] VR 62; *Buckley* v *Tutty* (1971) 125 CLR 353.

It is submitted that the Full Federal Court has taken a dubious approach in avoiding the exemption for a contract of service by artificially constructing a market for player services. The Court created a market for the supply and acquisition of players under contracts for the provision of services although no such transaction had actually occurred. Thus, the Court took a rather cavalier attitude to the actual form of the player contracts and effectively encouraged a significant widening in the Act to include services under a contract of employment. On the narrowest interpretation of this approach, wherever the parties are free to adopt a contract for services, there would be scope for potential competition for services under such contracts, and competition claims could arise.

B. New Zealand Approach

Like the Australian Trade Practices Act, section 2(1) of the Commerce Act defines services as excluding the performance of work under a contract of service. The restrictive trade practices provisions in the Commerce Act refer to either services or competition in a market. A market is defined in section 3(1A) of the Commerce Act as "a market in New Zealand for goods or services". Thus, the prohibitions in Part II will not apply to employment contracts. Additionally, sections 44(1)(c) and 44(1)(f) exempt certain contracts from Part II of the Commerce Act. Section 44(1)(c) exempts:

> [T]he entering into of a contract of service or a *contract for the provision of services* in so far as it contains a provision by which a person ... agrees to accept restrictions as to the work, *whether as an employee or otherwise*, in which that person may engage during, or after the termination of, the contract (emphasis added).

Section 44(1)(f) exempts:

---

[28] Above n 18, 41,699 (Federal Court)

> [T]he entering into of a contract, or arrangement, or arriving at an understanding in so far as it contains a provision that relates to the remuneration, conditions of employment, hours of work, or working conditions of employees.

In order to avoid the application of the 'contract of service' exemption to the NZRFU player contracts, the Commerce Commission indulged in some rather creative reasoning with regard to market definition. The market for player services and the market for the rights to player services will be discussed in turn.

1. Market for player services

In its draft determination regarding the NZRFU player transfer arrangements, the Commission held that there was no market for player services as section 2(1) excluded the player contracts. However, in its final determination, the Commission concluded that there was a market for player services. It stated:[30]

> The Commission will not make a categoric determination of this issue but will proceed on the basis that some of the contracts might be contracts for services or that the market for player services might develop in such a way as to cause many contracts to be construed as contracts for services.

In this aspect of its decision, the Commerce Commission followed the questionable approach taken by the Australian Federal Court in *News Ltd* to avoid the application of the 'contract of service' exemption. On appeal, the High Court discussed the Commerce Commission's approach as follows:[31]

> ...the Commission was of the view, following the full Federal Court of Australia, that there was a real possibility that there could be competition to engage persons otherwise than under a contract of service in the narrowly defined sense. Thus, there is clearly room for the Commission's view that there could be a market for the rights to player services, at

---

[29] Above n 18, 42,654 (Full Federal Court).
[30] Above n 2, 21.
[31] Above n 9, 50.

least to the extent that some players in the market may be found to be independent contractors.

Unfortunately, Smellie J was not prepared to rule on this point and preferred to leave it for another occasion when the issue "is squarely before the Court and specifically addressed in the submissions of counsel".[32]

As discussed above in the Australian context, the manipulation of the market for player services by formulating potential transactions involving contracts for services subverts the true intention of the Act in exempting employment contracts from its ambit. It is notable that even if some contracts for the provision of services were found to exist, authorisation of the player transfer arrangements could not be permitted to the extent that it applies to contracts of services, as section 2(1) expressly exempts employment contracts from the Commerce Act. Additionally, the Commission's analysis of the market for player services proceeds on the assumption that the NZRFU is free to engage players either under a contract for the provision of services or an employment contract. However, the characterisation of any particular contract as a contract of service or contract for services is a matter of substance rather than form. Thus, the NZRFU may not *choose* to structure a player contract as a contract for services if, as a matter of construction, it bears the hallmarks of an employment contract.

The employee/independent contractor distinction in relation to professional rugby union players has always been a contentious issue. A long-running dispute exists between the All Black players and the Inland Revenue Department (IRD) as to the proper characterisation of the player contracts. The IRD argues that the All Blacks are employees while the All Blacks have been attempting to conduct their affairs as if they were independent contractors.

While a decision is still pending, it seems clear that the characterisation of player contracts will depend upon the rights and obligations contained within, and not the label attached by the parties. This accords with the leading case of *TNT* v *Cunningham* where Cooke P stated that:[33]

> When the terms of a contract are fully set out in writing which is not a sham, the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined.

Cooke P also formulated the test to be adopted in distinguishing between independent contractors and employees. The test requires that the following question be asked:[34]

> Is the person who has engaged himself to perform these services performing them as a person in business on his own account? If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service.

In determining this question, a central issue will always be the degree of control over the player. Thus, the terms of a player's contract as a whole must be examined, with due consideration given to the issue of control, in order to determine whether the player is an employee or an independent contractor. Various elements of the NZRFU player contracts point to a high degree of control being exercised by the NZRFU. These characteristics include the obligation for players to maintain their fitness, attend team meetings, and maintain a high standard of behaviour. Additionally, players have little opportunity to supply their own equipment and it is the responsibility of the NZRFU or provincial unions to provide for insurance.

---

[32] Above n 9, 50.
[33] [1993] 1 ERNZ 695, 701.
[34] Above n 33, 737.

Following the *TNT* judgment and having assessed the rights and obligations such as those above, the degree of control is such that the NZRFU player contracts are likely to be classified as contracts of service as specified in section 2(1) of the Commerce Act. Accordingly, the NZRFU player contracts are of an employment nature and the NZRFU cannot choose to act in such a way as "to cause many contracts to be construed as contracts for services". Therefore, the Commission's determination that the NZRFU may, in the future, choose to engage players under a contract for services rests on the erroneous assumption that the NZRFU can structure their player contracts as a contract for the provision of services. Effectively, the actual substance of the existing player contracts dictates that the market for player services be exempt from the Commerce Act.

Additionally, sections 44(1)(c) and 44(1)(f) of the Commerce Act exempt contracts of service *and* contracts for services from Part II of the Act in so far as they relate to work restrictions and employment conditions. In accordance with section 44(1)(c), the NZRFU player transfer arrangements contain restrictions as to the work that a player may engage in, whether the player is an employee or an independent contractor and are thus exempt from Part II of the Act. Section 44(1)(f) also prevents the application of Part II to the NZRFU player transfer arrangements as they constitute the entering into of an arrangement which relates to the players' conditions of employment. Although it is understandable that Smellie J chose not to address the section 44 exemptions as the issue was not expressly pleaded before the Court, it seems that the Commission neglected to consider these exceptions and claimed jurisdiction in the face of clearly contradictory provisions in the Commerce Act.

2. Market for the rights to player services

In addition to the characterisation of player contracts, the Commission formulated an alternative market for the purposes of analysing the effect of the Regulations. This was defined as the market for the *rights* to player services or alternatively the club-to-club market. This definition removed the need to discuss the 'contract of service' exemption as the players were not directly considered in this market. Additionally, the market formulation may have been an attempt by the Commerce Commission to avoid the application of the section 44 exemptions.

The market for the rights to player services was a market for the buying and selling between provincial unions of the *rights* to utilise the services of premier rugby union players. These rights "are to be provided, granted, or conferred in trade" and therefore are "services" within section 2(1) of the Commerce Act. Thus, the Commission attempted an alternative means of avoiding the application of the 'contract of service' exemption in section 2(1) by artificially redefining the market as a market which is recognised by the Act. By virtue of the market definition devised by the Commission, it is likely that section 44(1)(c) would not render the Act inapplicable in respect of the market for rights to player services as the clubs do not enter into contracts of service or contracts for services between themselves. Therefore, at the club-club level, the clubs have not entered into contracts containing a provision by which a person agrees to accept restrictions as to the work "in which *that person* may engage".[35] Although the affected players agree to comply with the NZRFU rules and thus, the player transfer arrangements, the player contracts are not directly considered in the market for the rights to player services. However, section

[35] It is to be noted that this result is a direct consequence of the Commission's artificial market definition.

44(1)(f) would act to exempt the market for the rights to player services in the same manner as the club-player market. The NZRFU player transfer system would constitute an arrangement between provincial clubs and contain a provision that "relates" to the conditions of employment of the players, thus fulfilling the requirements of section 44(1)(f). Accordingly, it seems that the Commission has not considered the exemptions contained in section 44 which would act to exempt the player transfer arrangements from Part II of the Act and thus place them outside the Commission's jurisdiction.

The Commerce Commission's decision authorising the NZRFU's proposed player transfer arrangements contains some rather doubtful reasoning in order to claim jurisdiction under the Commerce Act. The Commission artificially redefined the market to sidestep the 'contract of service' exemption in section 2(1) of the Act and reach the desired result. However, the lack of regard given to the section 44 exceptions resulted in jurisdiction being claimed over a situation which Parliament plainly anticipated would be dealt with under the common law restraint of trade doctrine.

It is to be noted that common law restraint of trade principles are expressly preserved under section 7(1) of the Commerce Act, which provides that the restraint of trade doctrine will apply to restrictive arrangements, to the extent that it is not inconsistent with the Commerce Act. The rationale for the preservation of the restraint of trade doctrine becomes clear when the exemptions in section 44 are considered. The type of transactions that are exempted from Part II through the operation of section 44, are situations that have been traditionally protected by the common law restraint of trade doctrine. It seems that Parliament has made a clear policy decision to ensure that these typical restraint of trade situations are protected solely under the common law doctrine. An

article by John Feil, General Manager of the Commerce Commission, is perhaps indicative of the Commission's disregard for the exemptions contained in section 44.[36] Although making direct reference to the preservation of the restraint of trade doctrine under section 7 of the Commerce Act, Feil makes no mention of section 44. Therefore, the Commission's oversight of the section 44 exemptions serves to directly contradict Parliament's true intention in excluding these situations from the Commerce Act.

V. THE PUBLIC BENEFIT TEST

A. Authorisation under the Commerce Act 1986

Parties to potentially anti-competitive and illegal trade practices can obtain immunisation from potential actions under the Commerce Act by applying to the Commerce Commission for authorisation. Authorisation of illegal behaviour requires the applicant to satisfy the Commission that the public benefit arising from the otherwise illegal practice outweighs the anti-competitive harm caused or likely to be caused. Thus, anti-competitive arrangements under section 27 and exclusionary arrangements under section 29 may be immune from the ambit of the Act if the public benefit test is satisfied. The test for authorisation of section 27 practices is found in section 61(6) which provides that the Commission shall not grant an authorisation unless it is satisfied that:

> The entering into of the contract or arrangement or the arriving at the understanding ... will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result or would be likely to result or is deemed to result therefrom.

Section 61(6A) was added in 1996 to make it clear that the lessening of competition in section 61(6) does not have to be substantial before the

---

[36] John Feil "Competition and Sport" [1997] NZLJ 146.

Commission has jurisdiction to grant authorisation.[37] The test for authorisation of section 29 practices is found in section 61(7) which provides that the Commission shall not grant an authorisation unless it is satisfied that:

> The entering into of the contract or arrangement or the arriving at the understanding ... will in all the circumstances result, or be likely to result, in such a benefit to the public that –
> (c) The contract or arrangement or understanding should be permitted to be entered into or arrived at.

Although section 61(7) does not expressly require a weighing of public benefit against competitive detriment, *Re New Zealand Stock Exchange* interpreted "such a benefit to the public" as "a net or overall benefit after any detriment to the public has been taken into account" and thus established a requirement to balance public benefits against any public detriments flowing from the practice in a similar manner to section 61(6).[38]

B. Public Benefit

The word 'public benefit' is not defined in the Act. Initially, the Commission appeared to consider a wide range of various socio-political and non-efficiency matters. *Re Weddel Crown Corporation Ltd*[39] was the first opportunity to consider the phrase and the Commerce Commission was careful to take a broad approach. The Commission stated:[40]

> The Act is worded broadly and there appears to be no limitation as to the nature of the public benefit which may be claimed . . . [a] benefit is something of value to the public.

The *Weddel* case concerned an application for authorisation of a collective agreement by a group of meat companies jointly facilitating the closure of meat

---

[37] Section 61(6A) provides that "For the purposes of subsection (6) of this section, a lessening in competition includes a lessening in competition that is not substantial".
[38] Commerce Commission Decision No 232, 10 May 1989, para 62.
[39] (1987) 1 NZBLC (Com) 104,200.

works. The Commission considered the benefit of a strengthened position in international markets to the farming industry and the New Zealand economy. Following this approach, numerous other cases have taken into account a variety of non-economic and social benefits including enhanced job security,[41] improved road safety,[42] better consumer information,[43] and community harmony.[44]

Recently however, the Chicago school's theory of competition policy has influenced the drafters and interpreters of the Act. The idea that public benefit equates to efficiency has effectively replaced the traditional view that competition law is concerned with economic, social, moral and political concerns. Acceptance of the Chicago school's theory culminated in the 1990 insertion of section 3A which directs the Commission to "have regard to any *efficiencies* that the Commission considers will result, or will be likely to result, from that conduct". Although judicial application of the public benefit test continues to be somewhat unsystematic and uncertain, it seems clear that the "efficiency gains and losses associated with a merger or practice are the principal considerations in the application of the Public Benefit Test".[45] Accordingly, in their 1993 review of the Commerce Act, Cabinet clearly indicated that productive, allocative and dynamic efficiencies should be regarded as the principal elements of the public benefit test.[46] However, perhaps the clearest indication of the Commerce Commission's restrictive approach is to be found in

---

[40] Above 39, 104,213.
[41] *Re Amcor Ltd-New Zealand Forest Products Ltd* (1987) 1 NZBLC (Com) 104,233.
[42] *Re Fletcher Challenge Ltd-New Zealand Forest Products Ltd* (1988) 1 NZBLC (Com) 104,283, 104,308.
[43] *Re Life Underwriters Association of New Zealand Inc* Commerce Commission Decision No 233, 15 December 1988, para 69.
[44] *Re New Zealand Cooperative Dairy Co Ltd/Waikato Valley Cooperative Dairies Ltd* (1991) 2 NZBLC (Com) 104,529.
[45] Ministry of Commerce "Review of the Commerce Act" Final Document, 1993.
[46] The paper recommended "amending section 3A of the Act to reflect that in assessing applications for the authorisation of anticompetitive mergers and practices: A the consideration of productive, allocative and dynamic efficiency will be the principal element of the analysis"

its 1994 guidelines, which were designed to "assist present and future Commission members to apply sound and consistent principles in reaching authorisation decisions, and to assist the business community to have a well-focused input into those decisions".[47] In accordance with the Cabinet review of the Act, the guidelines appear to focus heavily on efficiencies as the principal benefit, with a strong presumption favouring economic efficiency. Certainly, the gains listed as examples in the guidelines have a strong efficiency basis, including benefits such as economies of scale, economies of scope, better utilisation of existing capacity and cost reductions.

In practice, the weight attached to any public benefit or detriment depends upon the opinion of the Commission as to the significance of the projected benefit or detriment, given all the circumstances surrounding an application. In *Telecom Corporation of New Zealand Ltd/The Crown*, the Commission succinctly summarised the point in the following terms:[48]

> Neither detriments nor benefits are easy to quantify ... In the end, however, uncertain and incomplete dollar values are not the only items to be weighed. There are unquantified but nevertheless real changes in outcomes, and qualitative factors, which must also be taken into account. The Commission must, as a matter of judgement, reach a view on the relative weighting to give to all of the various competitive detriments and public benefits identified as relevant to its decision, and make that judgement accordingly.

C. Public Benefit in the Sporting Context

The government acknowledges that sporting associations have a valuable public function. This public function has been frequently recognised by the

---

[47] Commerce Commission "Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act" October 1994, 2.
[48] Commission Decision No 254, 17 October 1990; cited with approval by the High Court in *The New Zealand Cooperative Dairy Co Ltd* v *Commerce Commission* [1992] 1 NZLR 601.

government in the form of promotion of sporting bodies via funding and tax exemptions. In a Department of Internal Affairs draft discussion document concerning the development of government policy on sport and physical recreation, it was expressly recognised that "[s]port and physical recreation have wide ranging social and economic impacts on New Zealand".[49] In the document, various beneficial outcomes were recognised as flowing directly from sport. These include:

i. Sport and recreation as an integral part of our national identity;

ii. Strong communities and a variety of social policy goals;

iii. Health benefits;[50] and

iv. Crime prevention.[51]

These reports indicate that sport may provide social and economic gains to the community, which are 'public' in the sense they are externalities. The incorporation of these social and community considerations into the public benefit test seems unlikely, especially as many sports-related benefits and detriments are difficult to quantify or measure. However, the Commission's public benefit guidelines expressly address the treatment of benefits that are not readily measurable in monetary terms. The guidelines place these intangible improvements within an efficiency paradigm:[52]

> "Intangible" improvements with respect to the general wellbeing of New Zealanders – eg health (physical and mental) and environment (air, water, noise, visual pollution, preservation of endangered species) – can be considered as either increased outputs or

---

[49] Department of Internal Affairs "A New Zealand Government Policy for Sport and Recreation: A Discussion Document" 18 June 1996, 1.

[50] Statistically it has been proven that an increase of 10% in the number of physically active adults would provide $48 million in health care savings per year and reduce the risks of obesity, high blood pressure and cardiovascular disease; See "The Business of Sport and Leisure: The Economic and Social Impact of Sport and Leisure in New Zealand" Business and Economic Research Limited, April 1993, 43.

[51] This benefit illustrates the difficulty in quantifying and proving the utility of sport as the report was unable to provide hard data to prove this outcome occurs. However, note Lord Denning's judicial notice of the inherent value of sport in *Miller* v *Jackson* [1977] 3 All ER 338, 340-341.

[52] Above n 47, 10.

> reduced inputs and compared with total changes in inputs and outputs to see whether an "efficiency improvement" has been achieved.

Notwithstanding this acknowledgment of "intangible" benefits within the efficiency framework, it appears that the Commission will not seriously consider the non-economic and non-efficiency issues that arise in the sporting context under the public benefit test, particularly in light of the uncertain character of some of the benefits. In a practical sense, any social or community consequences will be deemed irrelevant unless they have a tangible efficiency element.

Therefore, while it is true that the increasingly commercial nature of sporting organisations appears to justify their amenability to competition laws, closer examination reveals that they may be distinguishable from other commercial entities as they impart social and community benefits to society. Unfortunately, the 'public benefit test', as interpreted by the Commerce Commission, does not allow these non-economic and non-efficiency benefits to be balanced against anti-competitive behaviour. Consequently, the Commission is unwilling to consider these positive externalities when applying the authorisation procedures to sporting bodies. Additionally, the intangible and uncertain nature of these outcomes means that the Commerce Commission, and indeed the New Zealand courts, cannot easily consider these gains in the context of the public benefit test.

VI. THE PUBLIC BENEFIT TEST AS APPLIED IN THE NZRFU DECISION

A. The Counterfactual

In its decision, the Commerce Commission noted that the "extent to which competition is reduced, and the amount of detriments flowing therefrom, are to be gauged against the counterfactual scenario".[53] The counterfactual is essentially a benchmark against which the Commission measures the likely competitive effects and public benefits. The formulation of a counterfactual allows the Commission to make a 'with' and 'without' comparison in a forward-looking manner. The Commission's public benefit guidelines state that:[54]

> [T]he gain that is to be assessed is the difference between two hypothetical futures – one with the acquisition or practice, one without it – and not the difference between the present and the future.

The Commission does not make a "before" and "after" comparison. This ensures that the alleged public benefits are dependent on the restrictive trade practice and would not occur in its absence. Thus, the counterfactual scenario chosen by the Commission has a significant effect upon the application of the public benefit test. In *Electricity Market Company Ltd*,[55] the Commerce Commission stated that:[56]

> The counterfactual is not necessarily the arrangement which might be preferred by the Commission or by others with an interest in the industry. The Commission does not have the mandate, nor the expertise to be the market designer. The counterfactual is simply the Commission's pragmatic and commercial assessment of what is likely to occur in the absence of the proposed arrangement.

---

[53] Above n 2, 63.
[54] Above n 47, 8.
[55] Commerce Commission Decision No 280, 13 September 1996.
[56] Above n 55, 11.

In its application, the NZRFU proposed two alternative counterfactuals. Firstly, the NZRFU suggested a continuation of the moratorium on player transfers.[57] Secondly, a system in which there is unrestricted transfer of rugby players between provincial unions was proposed, subject to contractual arrangements that the players have with their provincial unions.[58] In accordance with the latter submission, the RUPA also proposed an unrestricted transfer market in which players could transfer freely subject to contracts of short-term duration.[59]

In its determination, the Commission rejected all proposed counterfactual scenarios. Instead, the Commission formulated a counterfactual whereby a formalised system, administered by the NZRFU, would still be established to deal with player transfers. The counterfactual adopted by the Commission envisaged a transfer registration system and a requirement for provincial unions to negotiate a transfer fee, but without any restrictions in terms of a quota system, time period restriction, or cap on the transfer fee. The Commission considered that a number of factors indicated that some regulation of player transfers would be likely in the absence of the proposed regulations. These considerations included the fact that overseas research suggested that most sporting leagues regulate player transfers in some form and that several provincial unions indicated that an unregulated transfer system would not achieve the objective of an even, attractive competition.

---

[57] Prior to the NZRFU's application for authorisation, a moratorium was imposed whereby the provincial unions agreed not to negotiate for the movement of players between provincial unions over the 1995 and 1996 rugby union seasons. The NZRFU submitted that the moratorium was set in place to allow the NZRFU, provincial unions and players to adjust to the rapid transformation of rugby union from an amateur to a professional sport and was intended to create total prohibition on player transfers.

[58] The NZRFU submitted that the player contracts with provincial unions would be long term because of the uncertainty as to a player's future development or to ensure a return on a provincial union's investment in a player's training.

[59] The RUPA submitted that the player contracts would be predominantly short term due to the quasi-amateur nature of the NPC competition and the potential application of the restraint of trade doctrine.

On appeal to the High Court, the RUPA sought leave to challenge the counterfactual adopted by the Commission and stated that "in considering the question as to whether the claimed public benefits would flow from the transfer system, the Commission used a counterfactual which was not a pragmatically and commercially likely market in the absence of the Regulations".[60] Notwithstanding early comments by the NZRFU to the effect that it would not attempt to establish a market such as that envisaged by the Commission's counterfactual, the High Court nevertheless accepted later submissions by the NZRFU which supported the Commission's proposed counterfactual. Accordingly, the High Court was not persuaded that the Commission had chosen the wrong counterfactual.

B. Economic Efficiency

In its determination, the Commerce Commission expressly acknowledged that the focus of the public benefit test is economic efficiency.[61] The Commission considered that:[62]

> [A] public benefit is any gain and a detriment is any loss, to the public of New Zealand, with an emphasis on gains and losses being measured in terms of economic efficiency. However, changes in the distribution of income, where one person gains while the other simultaneously loses, are generally not included either as a benefit or a detriment.

While this approach accords with the Commission guidelines and past decisions, it may not accord with the intentions of parliament (discussed below). Certainly, it is in direct contrast to the common law restraint of trade doctrine, which considers whether the restraint is reasonable in the *interests of the parties*

---

[60] Above n 9, 16.
[61] Above n 2, 62.
[62] Above n 2, 63.

and *the public*. The restraint of trade doctrine emphasises the freedom of the individual to practice his or her trade as he or she pleases and enables the court to consider player interests in the course of its assessment. However, the Commission's interpretation of the public benefit test under the Commerce Act necessitates a rigid framework and does not allow this type of analysis to take place. Although an emphasis on unrestrained competition, rather than efficiency, has certain distributional consequences and would ultimately benefit the players, the efficiency framework adopted by the Commission ensures an approach whereby the allocation of resources and the interests of the restricted players are deemed immaterial. The Commission reinforces this view by emphasising the need for quantification of benefits and detriments wherever possible. This manner of application means that intangible and social benefits will be considered irrelevant or alternatively, will be given little weight in terms of the balancing exercise.

C. Detriments

The Commission found that the quota directly constrained the total number of players per year that a provincial union is able to acquire, and within that total, the number of players within the different bands that can be acquired. In addition, it concluded that the time period limitation for transfers could act as a further restraint, in that transfers are restricted to taking place within only one month of the year. Surprisingly, the Commission did not expressly consider the detriments arising from the implementation of a transfer fee arrangement.

In its determination, the Commission found the following detriments were likely to be caused by the restrictive elements of the player transfer system:

- *Allocative Efficiency.*[63] Mutually beneficial trades may be prevented or delayed because players could not be traded in a free market whereby acquiring provincial unions value their services more highly than selling provincial unions. Thus, players may not be allocated to their most valued employment. An attempt at quantification was made whereby the economic loss was calculated as $62,000 in the first year and $13,000 thereafter.[64] However, it is noted that these figures are based on assumptions of price elasticity, average transfer fees and the number of transfers likely to be prevented each year. These assumptions create substantial uncertainty in terms of the quantification process, particularly when the professional rugby union environment is so new to New Zealand.
- *Productive Efficiency.*[65] The Commerce Commission concluded that any bargaining costs would not increase as a result of the Regulations. Therefore, productive inefficiencies consisted of minimal administrative and policing costs.
- *Maintenance of player skill levels.* The Regulations are effectively designed to limit the number of player transfers. Thus, it is likely that some players may not be able to transfer to provincial unions that value them and may become disgruntled. As a result, these players may perform less well or become discontent, resulting in skill erosion. Similarly, the skills of emerging players may be developed less rapidly because they are relegated to reserve duties and yet be unable to transfer because their provincial unions wish to retain them for 'back-up' purposes. This detriment may be termed as loss of asset value due to the underemployment of players.

---

[63] This refers to the optimum method of allocating available resources.
[64] The moratorium on player transfers in 1996/1997 season means that more transfers would presumably be prevented in the first year of the regulations than any year following.
[65] This refers to production costs in terms of total output ie producing the most output at the least cost.

- *Innovative Efficiency.*[66] The RUPA suggested that the transfer period might diminish the incentive for unions to be innovative in terms of employment conditions and remuneration. However, the Commission discounted this potential detriment as minimal.

The Commerce Commission concluded that the overall detriments flowing from the Regulations were of limited size.

D. Benefits

The NZRFU formulated three founding principles in respect of the Regulations. These are as follows:

1. *Investment in "grass roots" development*

   The player transfer system rewards individual unions for developing young local players and provides an incentive for unions to invest in grass roots rugby.

2. *A players' market*

   The transfer market is player-driven. Players retain control of where they will play their rugby. No player can be compelled to transfer and no player can be prevented from transferring by his union.

3. *Competitive rugby*

   The transfer system will encourage even teams and competitive rugby in New Zealand. It protects the NZRFU's player strength by restricting the number of players that can move to a union.

The NZRFU submitted that the promotion of a more 'even' NPC competition, player development and team stability would generate certain direct and indirect public benefits. These linkages were considered by the Commission in turn:

---

[66] Frequently referred to as dynamic efficiency, this refers to progress in technology and innovation.

- *Promotion of a more 'even' NPC competition.* Extensive evidence was presented to the Commission indicating that an unbalanced league causes audiences to lose interest and attendances to fall. Thus, on numerous occasions, the courts have recognised that a legitimate aim of sporting organisations is competitive balance in teams. A professional sports league has an incentive to preserve uncertainty of outcome by ensuring the teams maintain equal playing strengths, in order to maintain popularity and financial viability. However, it is to be noted that competitive balance may be sought in a variety of ways including player transfer controls, collective bargaining and revenue sharing. Moreover, overseas studies have indicated that labour controls are an imperfect mechanism for achieving league balance.

The Commission accepted that the scope for the NZRFU to restrict transfers was limited because of the semi-amateur nature of rugby union in New Zealand. However, it was possible that the NPC would become more uneven in the absence of regulation. The Commission noted that:[67]

> [I]t seems likely that [the regulations] will have some effect, in terms of avoiding the excesses which might eventuate in a free market where provincial unions could compete for players to stay one step ahead of the others...the Commission accepts that there is a linkage between the Regulations and the evenness of the NPC competition, but believes *the strength of the linkage is low.*

This conclusion may be challenged, as the Commerce Commission appears to be making a comparison between the player transfer market with the proposed regulations, and a free market as anticipated by the NZRFU and the RUPA. However, the counterfactual scenario formulated by the Commission anticipates the imposition of a regulatory regime administered by the NZRFU, albeit without the anticompetitive elements at issue.

Therefore, the correct comparison to be made by the Commerce Commission is between the market with the proposed Regulations in place and the market with a non-restrictive regulatory administration in place. Thus, the strength of the linkage between the proposed player transfer system and the evenness of the NPC competition may be even weaker than anticipated by the Commission.

- *Promotion of Player Development.* The NZRFU claimed that an even competition would increase skill level, particularly because the development compensation payment would prevent the selling provincial union unreasonably holding on to players, provided the maximum fee is offered. Although the Commission accepted that there was some nexus between the Regulations and the promotion of player development, the strength of this relationship was likely to be weak.
- *Team stability.* Although the transfer period resulted in development of team strategies and tactics without disruption caused by mid-season transfer of players, this would be likely to occur without the proposed player transfer system as the current union-player contracts are typically at least the length of a NPC season.

Direct Benefits claimed by the NZRFU were:

- A more attractive NPC competition for spectators and viewers; and
- Enhanced domestic sponsorship, merchandising and broadcasting interest and funding.

Indirect Benefits claimed by the NZRFU were:

- Greater audience enjoyment of New Zealand international matches;
- Increased net foreign earnings for the NZRFU from television rights and business sponsorships;
- Saving on overseas marketing expenses for business;

---

[67] Above n 2, 81.

- Enhanced exports of New Zealand goods; and
- Greater inflow of foreign tourists.

The Commission considered these indirect and direct public benefits to be of limited size for the following reasons:

i. The linkage between the claimed benefits and the proposed player transfer system was perceived to be weak;
ii. The claimed benefits were inherently difficult to measure because commercial transactions had not yet occurred in the professional rugby union environment; and
iii. The market restrictions imposed by the Regulations were perceived to be mild, particularly when compared with the counterfactual.

Therefore, the Commission gave the claimed benefits little weight.

E. Balancing

When evaluating the perceived public benefits and detriments, the Commission was faced with a situation where both benefits and detriments were found to be of limited size. Thus, the Commission undertook a holistic exercise and stood back and looked at the benefits and the detriments in the round. On balance, the Commission thought that the public benefits outweighed the ascertainable detriments. Accordingly, authorisation to implement the proposed player transfer system was granted.

On appeal, the High Court placed considerable emphasis on the specialised expertise of the Commission staff. Additionally, Smellie J stressed the extensive evidence produced by the NZRFU and determined that it was open to the Commission to conclude that the benefits *comfortably* outweighed the detriments.

F. Did the Commerce Commission take the Right Approach?

In its determination, the Commission unquestionably applied the public benefit test in a manner that was consistent with the Commerce Commission's guidelines. However, it is submitted that this approach is not necessarily consistent with legislative intent. Although the Cabinet review of the Commerce Act recommended the amendment of section 3A of the Act to emphasise efficiency considerations, this recommendation was never implemented. Therefore, notwithstanding that the Commission is required to have regard to any efficiencies which result from the practice,[68] it does not necessarily follow that efficiency considerations are to be the principal element of the analysis. It is certainly arguable that when applying the public benefit test, the Commission should not necessarily be confined to issues of efficiency. Thus, the public benefit test under the Commerce Act should not be restricted so as to exclude non-efficiency considerations. It is submitted that this would still accord with the underlying premise of the Act of promoting workable competition. However, it would involve moving away from a 'pure' Chicago approach towards a populist view whereby concepts of fairness, control of illegitimate power, and the fostering of distributional values, as well as economic efficiency are taken into account. Additionally, this type of analysis removes the need for the Commerce Commission to mould any intangible benefits flowing from the promotion of sport into an artificial 'efficiency' framework.[69]

The Commission's decision regarding the NZRFU player transfer arrangements also serves to illustrate the inherent difficulties of subjecting professional sporting bodies to competition law. As noted above, modern professional

---

[68] See section 3A of the Commerce Act 1986.

sporting leagues place considerable emphasis upon revenue maximisation and maintenance of spectator interest in a similar manner to other commercial entities. However, the public nature of sport as a cultural activity ensures that some sporting issues cannot be easily analysed within the 'efficiency' framework of the public benefit test. Although notions of productive and dynamic efficiencies can be readily applied to commercial industries where consumers are purchasing a commodity, the cooperative nature of a sporting league provides a unique subject for analysis. In the NZRFU decision, the Commission was required to define the relevant market so as to look upon players as a commodity and thus enable analysis within the traditional 'efficiency' framework. The approach taken by the Commerce Commission thus necessitated an artificial manipulation of the benefits and detriments.

Additionally, it is a severe inadequacy of the public benefit test under the Act that player interests cannot be considered in an open and direct manner. Rather, any impact upon player interests must be considered in the context of efficiency arguments. The chief justification for this approach is that the Commerce Act aims to protect competition not competitors. Thus, a player may have personal reasons for desiring to change clubs such as personal dissatisfaction with the club or coach, inability to play in the position or team of his choice, inability to get exposure for representative selection, or because the training timetable is unsuitable. However, these very real detriments may not be considered within the context of the authorisation process, as they do not fit neatly within the 'public benefit test' in terms of efficiency considerations.

---

[69] See above n 47, 10-11.

VII. THE COMMON LAW RESTRAINT OF TRADE DOCTRINE

A. Common Law Interface with the Commerce Act 1986

It is important to distinguish between the application of competition laws under the Commerce Act 1986 and the use of contract law in sporting contexts. With respect to the latter concept, the common law doctrine of restraint of trade has been commonly applied to player contracts. It is notable that the Commerce Act does effectively prohibit some contracts in restraint of trade through sections 27 and 29, which scrutinise contracts, arrangements or understandings that lessen competition or contain exclusionary provisions. However, common law restraint of trade principles are also expressly preserved under the Commerce Act 1986. Section 7(1) states that "[n]othing in this Act limits or affects any rule of law relating to restraint of trade not inconsistent with any of the provisions of this Act". Thus, the common law doctrine of restraint of trade will apply to restrictive arrangements to the extent that it is not inconsistent with the Commerce Act 1986. A leading text on contract law maintains that it is preferable that contracts in restraint of trade, which are illegal under the Commerce Act, be dealt with under the Commerce Act.[70] However, a situation falling within one of the section 44 exemptions and therefore outside the jurisdiction of the Commerce Act will be exclusively governed by the restraint of trade doctrine.

It is arguable that if the Commission has jurisdiction to consider a restrictive arrangement under the Commerce Act, the common law restraint of trade doctrine should not apply, as it would be inconsistent with the application of the Commerce Act. Thus, the restraint of trade doctrine could not apply whenever the Commission could claim jurisdiction under the Commerce Act, regardless of whether authorisation has been granted. However, it is more likely that

restraints which have been authorised under the Commerce Act, may also be challenged under the restraint of trade doctrine as authorisation only gives immunity from action under the Commerce Act. Nonetheless, authorised restraints may not be modified under section 8 of the Illegal Contracts Act 1970 as section 89(5) of the Commerce Act prevents the application of the Illegal Contracts Act to any contract which contravenes the Commerce Act, regardless of whether an authorisation has been granted or not.

B. Restraint of Trade in the Sporting Context

Under the common law doctrine of restraint of trade, an impugned covenant is prima facie void as contrary to public policy.[71] However, a restraint may be authorised if the restriction is 'reasonable'. Lord Macnaghten provides the classic formulation of the test to be applied to such a restriction:[72]

> All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and, therefore, void. That is the general rule. But there are exceptions. Restraints of trade and interference with individual liberty of action, may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed, it is the only justification, if the restriction is reasonable – reasonable, that is in reference to the interests of the parties concerned and reasonable in reference to 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 following three requirements must be satisfied before a restraint of trade is allowed to stand:

i. There is a legitimate proprietary interest to be protected;[73]

---

[70] JF Burrows, J Finn and SMD Todd (eds) *Cheshire and Fifoots Law of Contract* (8ed, Butterworths, Wellington, 1992) 361.
[71] *Colgate* v *Bacheler* (1602) Cro Eliz 872.
[72] *Nordenfelt* v *Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 565.
[73] *Stenhouse Australia Ltd* v *Phillips* [1974] 1 All ER 117, 122.

ii. The restraint is reasonable in the interests of all parties; and

iii. The restraint is in the public interest.

In *Esso Petroleum Co Ltd* v *Harper's Garage Ltd*,[74] Lord Pearce usefully distilled these grounds into one broad principle:[75]

> There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable as between the parties. There is one broad question: is it in the interests of the community that the restraint should, as between the parties, be held to be reasonable and enforceable.

Whether a restraint is reasonable is a question of law and the onus of proving the restriction is reasonable lies on the party seeking to uphold the restraint.[76] In the sporting context, the administrative body or affiliated clubs will generally be seeking to enforce the restraint.

Numerous cases have dealt with the different forms of regulation and discipline *imposed* on players within sports leagues.[77] It is notable that the restraint of trade doctrine is not limited to a contractual relationship to which the player is a party.[78] Thus, the plaintiff need not show that the rules of the particular league which he impugns, constitute a contract between him and that league. Regardless of their form, the rules generally have the common effect of restricting the rights of the player to negotiate and contract with the team of their choice and in some cases preventing players from exercising their trade altogether. Such rules stem from the need to maintain a marketable sporting competition. The courts have recognised this aim as a legitimate function of any

---

[74] [1968] AC 269.
[75] Above n 74, 324.
[76] *Buckley* v *Tutty* (1971) 125 CLR 353, 377.
[77] *Eastham* v *Newcastle United Football Club Ltd* [1964] Ch 413 (transfer and retain); *Blackler* v *New Zealand Rugby Football League* [1968] NZLR 547 (clearance); *Buckley* v *Tutty* (1971) 125 CLR 353 (transfer and retain); *Adamson* v *West Perth Football Club* (1979) 27 ALR 475 (zoning and clearance).
[78] *Foschini* v *Victorian Football League* Unreported, 15 April 1983, Supreme Court of Victoria, 16.

sporting administration. In *Buckley* v *Tutty*,[79] the High Court of Australia found that it was a legitimate object of the League and the affiliated clubs to aim to provide a system that would ensure sufficient stability of membership and would prevent the stronger clubs obtaining all the 'best' players. Thus, evenness of competition was recognised as a justifiable interest of the League:[80]

> 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, for in that way the support of the public will be attracted and maintained, and players will be afforded the best opportunity of developing and displaying their skill. It is therefore legitimate to aim 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, and that will prevent the stronger clubs obtaining all the best players, thus leaving the weaker clubs with teams that are unable effectively to compete with their stronger opponents... 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.

Thus, the Australian High Court acknowledged that some element of restraint upon professional players was reasonable as it would ensure club stability, well-matched competition and public support.[81] However, the Court concluded that the rigidity of the rules made them excessive and were invalid as an unreasonable restraint of trade.

In *Adamson* v *New South Wales Rugby League Ltd*,[82] the primary issue was whether the restraint went no further than was reasonably necessary to protect the legitimate interests of those who had imposed it. Accordingly, three 'legitimate' interests were identified as being protected by the internal draft:

i. Improving competitive equality between the teams;

---

[79] Above n 76.
[80] Above 76, 377.

ii. Maintaining the financial viability of the clubs; and

iii. The retention of players by the clubs by preventing mid-season transfers.

Firstly, the Court asked whether there was any evidence that the protectable interests of the League might be jeopardised if the restraint was not in place. It was established that before the introduction of the internal draft the League was prospering financially and the competition was strong and evenly matched.[83] Thus, any danger to the League's interests was not immediate or significant. Secondly, the Court asked whether there were other means of protecting the legitimate interests of the League. The Court was of the view that there were other ways of securing these advantages for the competition which would not unnecessarily restrain the players in choosing the club they wished to play for. Additionally, it was held that a salary cap alone would be sufficient to ensure the financial viability of the League.[84]

As a whole, sporting drafts have not been treated kindly by the courts, notwithstanding frequent judicial acknowledgments that sports administrative bodies have a legitimate interest in preserving the evenness of the league. It is likely that this result stems from the ability of an individual player to show a clear restraint on his or her freedom whereas the sporting organisation can only present a philosophical theory, which cannot be proved or quantified with any degree of certainty or specificity.[85] The liberty of the subject to conduct his business as he sees fit seems to be of paramount importance under the restraint of trade doctrine. Indeed, it appears to be virtually inviolable.

---

[81] Above n 76, 377.
[82] Above n 12.
[83] Above n 12, 370.
[84] Above n 12, 349-50.
[85] W Pengilley "Restraint of Trade and Antitrust: A Pigskin Review Post Super League" A paper presented at the 1997 Annual Workshop of the Competition Law and Policy Institute of New Zealand, Christchurch, New Zealand, 1-3 August 1997, 16.

C. Player Interests and Other Social Considerations

Adamson v *New South Wales Rugby League Ltd*[86] was also significant in terms of player interests. Wilcox J held that although the primary question would always be the extent of the League's need for protection, the Court must consider the effect of the restraint upon the player.[87] He maintained that the notion of 'reasonableness' necessarily involves the balancing of competing interests and in sports league cases, "the courts have always considered the effect of the agreement upon the players".[88] Accordingly, the restraint was only enforceable if it did "no more than reasonably protect the interests of the respondents [the League and affiliated clubs], having regard to the interests of the players".[89] The restraint was held to be unenforceable as the rules infringed the freedom and interests of the players in an excessive way while doing little to protect the interests of the League. Additionally, the restrictions were contrary to the common law principle that people are entitled to practice their trade as and where they wished, to exercise and develop their skills as they saw best and to make their own decisions as to their employment and lifestyle.

It is also important to note the distinction made by Gummow J between cases of contractual restraint and those of involuntary restraint by a combination.[90] This distinction is fundamental. Accordingly, where restrictions are imposed by a contract which is freely entered into, there is an opportunity for the parties to negotiate and if an agreement is reached through fair bargaining, a court will not readily hold the restraint to be unreasonable as between the parties.[91] However, where the restraint is involuntary and imposed by a combination, there should

---

[86] Above n 12.
[87] Above n 12, 341.
[88] Above n 12, 341.
[89] Above n 12, 356.
[90] Above n 12, 363.
[91] This accords with the approach taken in *Esso Petroleum Co Ltd* v *Harper's Garage Ltd* [1968] AC 269.

be a heavy burden on the restraining party to prove that it should be enforceable.

In the sporting context, the restraint of trade doctrine has been characterised by non-economic considerations in determining whether sports-related restraints are 'reasonable' in the public interest. Under the common law, courts have been able to recognise and consider the public interests of fostering talent and supporting all levels of a sport. In *Blackler* v *New Zealand Rugby Football League*,[92] North P considered the need to maintain national standards in rugby league when considering whether a contractual restraint of trade was reasonable and in the public interest. This case concerned the validity of a rule that a representative player in New Zealand would not be given clearance to play in the Australian professional league until he had represented his country for five years. While the public interest in avoiding a 'player drain' across the Tasman was recognised, the clearance rule was considered to be excessively drastic and therefore an unreasonable restraint. In *Hall* v *Victorian Football League*,[93] Murray J acknowledged that a club with control of a particular area could impose certain limitations as it supported all levels of football in the area and thus served the public interest of fostering talent and creating supporter loyalties.

On an assessment of the application of the restraint of trade doctrine to sporting bodies, it seems evident that the courts have included considerations of social and community benefits when determining whether a restraint should be affirmed in the public interest. The common law doctrine utilises standards that enable the restraint to be judged by regard to its commercial context, with

---

[92] [1968] NZLR 547.
[93] [1982] VR 64.

consideration being accorded both to the interests of the parties involved *and* to the interest of the public in allowing the restraint. This emphasis on consideration of community interests differs from the public benefit test adopted in the Commerce Act 1986, which focuses on economic considerations of efficiency and free competition. Unlike antitrust law, restraint of trade decisions tend not to reflect efficiency considerations. Rather, the underlying foundation reflects the lawyer's traditional consideration of the notions of equity and fairness. This is forcefully illustrated in *Adamson* v *New South Wales Rugby League Ltd*[94] where Wilcox J commented on the role of the League's Appellate Tribunal[95] set up to determine personal hardship exemptions:[96]

> [H]ow, in a free society, can anyone justify a regime which requires a player to submit ...intensely personal decisions to determination by others...On the view I take, the internal draft rules do very little to protect the interests of the [players]. They do much to infringe the freedom and the interests, economic and non-economic, of the players.

In contrast to the public benefit test in the Commerce Act, common law courts using the restraint of trade doctrine have placed considerable emphasis on the individual interests of the players including economic, intangible, personal and social matters. The overriding consideration seems to be the 'freedom' of the individual, which is historically a common law notion. This is very different from evaluating competition in a market. In the context of the Commerce Act, the Commission and the courts are quite prepared to sacrifice individual freedom in the interests of efficiency. However, the common law courts seem more eager to tolerate some inefficiency in order to preserve traditionally valued liberties. Additionally, section 7(3) of the Commerce Act provides that no rule of law with respect to restraint of trade affects the interpretation of any of the provisions in

---

[94] Above n 12.
[95] Similar to the Player Review Committee set up under the NZRFU Regulations to deal with extraordinary and/or compelling changes in a player's circumstances.
[96] Above n 12, 355-356.

the Act. Thus, considerations such as 'interests of the parties' and 'interests of the public' which are relevant to the determination of whether a restraint of trade is reasonable at common law, will be not be relevant in the context of the public benefit test as considered under the authorisation procedure in the Commerce Act. Given the different policy objectives that are sought to be fulfilled by the different legal techniques taken in the common law and the Commerce Act, it is therefore not surprising that the two approaches are inconsistent and somewhat contradictory.

VIII. APPLICATION OF THE COMMON LAW RESTRAINT OF TRADE DOCTRINE TO THE NZRFU ARRANGEMENTS

As noted above, section 7(1) of the Commerce Act presumes the continuance of the common law restraint of trade doctrine. Thus, although the NZRFU player transfer arrangements have been authorised under the Commerce Act, the common law doctrine of restraint of trade is still relevant.

In its determination, the Commission commented that:[97]

> Whilst the regulations are relatively mild compared with overseas labour market controls, it seems likely that they will have some effect, in terms of avoiding the excesses which might eventuate in a free market where provincial unions could compete for players to stay one step ahead of the others.

The implication flowing from this statement is that if the restrictions imposed were more draconian, the public benefit flowing from them would be higher. However, if this was to occur, the NZRFU runs the risk of infringing upon the freedom of the players to an unreasonable extent. In a paper presented at the

---

[97] Above n 2, 81.

1997 Annual Workshop of the Competition Law and Policy Institute of New Zealand, Warren Pengilley concludes that:[98]

> [T]he New Zealand Rugby Union was extremely wise to keep its rules relatively non-violative of the individual player's freedom even if, as the Commerce Commission intimates, this may bring about less economic efficiency.

He considers that it was significant that the NZRFU could unashamedly assert that "no player can be prevented from transferring by his [provincial] union" in order to avoid being classed as an unreasonable restriction under the common law restraint of trade doctrine. The Commission also considered it to be an important aspect of the arrangements that no player could be compelled to transfer from one provincial union to another against his wishes and that there was provision for "above quota" transfers if there were an extraordinary and/or compelling change in a player's personal services. However, it is moderately easy to envisage a situation whereby a player could be prevented from transferring by his union. This would occur if the acquiring union does not wish to pay the maximum Development Compensation Payment and the selling union refuses to accept a lower or nil fee, so that the player is effectively prevented from transferring by his union. The nature of this restriction is aggravated by the fact that uncertainty exists in this new professional environment as to the willingness of provincial unions to pay the maximum transfer fee. During the authorisation process, some unions suggested that the maximum payments were excessive, while others submitted that the stipulated amounts were reasonable. Thus, the restrictive nature of the player transfer system may equate to an unreasonable restraint of trade. Moreover, *Adamson* v *New South Wales Rugby League*[99] suggests that the existence of an appeal authority will

---

[98] Above n 85, 70.
[99] Above n 12.

not be sufficient to convert an unreasonable restraint of trade into a reasonable one.

Within the restraint of trade context, the New Zealand High Court has found it decisive that similarly restraining League rules were imposed upon the player rather than conceived through a process of negotiation.[100] Similarly, in the context of professional boxing, the High Court in *Watson* v *Prager* stated:[101]

> I do not doubt the necessity, in the interests of professional boxers, of the board exercising careful regulatory control over the contents of boxer-manager contracts. Enlightened paternalism, however, may be all very well in its way, but carries undeniable dangers. Omniscience is not an invariable companion of omnipotence, and the board's opinion as to the scope of the restrictions to be imposed on a boxer in a boxer-management agreement is not necessarily right.

Although *Watson* addressed the restraint of trade issue in the context of boxing, the reasoning is equally applicable to other professional sports. Throughout the authorisation process, the RUPA repeatedly emphasised the lack of consultation with the players with a view to devising an appropriate transfer system. Although this point was not specifically addressed by the Commission, the NZRFU produced no evidence of negotiation with individual players or player organisations. However, it was common ground that extensive consultation and cooperation had taken place with the provincial unions and 'other interested parties'. It seems somewhat ironic the players were considered to be outside the definition of interested parties.

It is also to be noted that the NZRFU justified the imposition of maximum transfer fees as compensation for the investment in the player by the

---

[100] *Kemp* v *New Zealand Rugby Football League* [1989] 3 NZLR 463.
[101] [1991] 3 All ER 487.

transferring club. Such justification was considered by the Australian High Court in *Buckley* v *Tutty* to be insufficient to make the practice acceptable.[102] The Court stated:[103]

> The transfer fee not only may prevent a player from reaping the financial rewards of his own skill but it may impede him in obtaining new employment. It is no answer to say that the transfer fee may be fixed by reference to what it cost the club to obtain another player equally skilful, for this is only another way of saying that an employer may restrain an employee from working elsewhere unless he is compensated for the loss of his services. In this respect also the restraint goes further than is necessary to protect the reasonable interest of the League and its members.

Should a New Zealand court take this approach, it is unlikely that the NZRFU transfer fee will be considered to be reasonable under the restraint of trade doctrine. It is certainly arguable that the common law courts would regard the somewhat modest restraints as an unreasonable infringement upon the civil rights of rugby players and may regard the public benefit as unlikely to be delivered. However, it is also possible that the New Zealand judiciary would take a more liberal approach to the classification of the NZRFU player transfer system and find that the regulation or limitation of the transfer fees was necessitated in order to prevent the use of unreasonably high fees and thus undermine a player's marketability.

---

[102] Above n 76.
[103] Above n 76, 378.

IX. CONCLUSION

The NZRFU player transfer arrangements raise the fundamental issue of the balance of interests between the sportsperson and the ruling sports organisation. This same issue arises in the employment law context and has been dealt with by the application of the common law restraint of trade doctrine. Historically, this common law doctrine has provided an effective means to challenge practices used to control player marketability. In Australia, the restraint of trade doctrine has been frequently utilised by the courts in order to strike down restrictions which unfairly disadvantage players. However, the Commerce Commission's claim to jurisdiction in the context of the NZRFU's proposed player transfer arrangements means that the ramifications of competition law must now be considered in the professional sporting environment. Thus, any professional sporting organisation seeking to impose restrictions upon players must now ensure they are not acting in contravention of the Commerce Act, and also ensure that any restriction upon players is reasonable within the common law restraint of trade doctrine. Following the NZRFU decision, sporting bodies may be required to walk the tightrope between these two potential causes of action, both of which are equally fatal to the implementation of any restrictive player arrangements. Presumably, the Commerce Commission would have preferred that the NZRFU implemented a more restrictive arrangement, as it would have had a greater impact upon public benefits in terms of efficiency. However, the more regimented the arrangement, the more likely that it would offend against the restraint of trade doctrine as an unreasonable restriction.[104] Accordingly, any further player restraints in the sporting arena would be well advised to follow the lead of the NZRFU and

[104] Indeed, a highly restrictive arrangement may result in such anticompetitive effect that the public benefit is seen to be insufficient to outweigh the detriments under the Commerce Act.

compromise between competing objectives in order to comply both with competition law and with common law restraint of trade law.

The Commerce Commission's finding that they had jurisdiction over the NZRFU player transfer arrangements resulted in a rather artificial approach to market definition. For instance, the formulation of a market for the rights to player services avoided the need to consider the 'contract of service' exemption in section 2(1) of the Commerce Act. However, regardless of the market adopted for competition analysis, the exemptions in section 44 should have ensured that the Commerce Act does not apply to the player transfer arrangements. Unfortunately, the Commission neglected to consider sections 44(1)(c) and 44(1)(f) and effectively claimed jurisdiction over the player transfer arrangements notwithstanding contrary legislative intent.

Thus, the NZRFU decision has far-reaching consequences for professional sporting organisations, affiliated clubs and contracted players. Traditionally, the restraint of trade doctrine provided an avenue for player redress under established and well-developed principles which sought to protect legal freedoms. The potential application of the Commerce Act means that restrictive player arrangements will now be constrained to an efficiency framework under the public benefit test. Arguably, this type of efficiency analysis is unsuited to restrictive arrangements in the sporting arena where social and moral considerations are fundamental and player interests can be affected in a significant manner. The Commission's narrow interpretation of the public benefit test ensures that these non-economic considerations will be given little weight or disregarded altogether.

APPENDIX A

TRANSFER BANDS	MAXIMUM DEVELOPMENT COMPENSATION PAYMENT $	MAXIMUM NUMBER OF PLAYERS TO BE TRANSFERRED TO AN AFFILIATED UNION	
ALL BLACKS			
Star	125,000	)	
Established	75,000	) 1	
Current	50,000	)	3
ALL BLACKS			
Former	40,000	) 2	
RUGBY SUPER 12	30,000	)	
SENIOR A NPC			
1st Div	20,000	2	
2nd Div	15,000	2	
3rd Div	10,000	2	
NPC DEVELOPMENT			
1st Div	5,000	2	4
2nd Div	3,000	2	
3rd Div	2,000	2	
NZ COLT	20,000	2	
NZ U19 REP	15,000	2	
NZ SCHOOLS	10,000	2	
ACADEMY MEMBERS	20,000	2	
MAXIMUM TOTAL TRANSFERS IN ANY ONE TRANSFER PERIOD			5

BIBLIOGRAPHY

CASES

Adamson v *New South Wales Rugby League Ltd* (1991) 103 ALR 319.

Adamson v *West Perth Football Club* (1979) 23 ALR 439.

Blackler v *New Zealand Rugby Football League* [1968] NZLR 547.

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

Colgate v *Bacheler* (1602) Cro Eliz 872.

Eastham v *Newcastle United Football Club Ltd* [1964] Ch 413.

Electricity Market Co Ltd Commerce Commission Decision No 280, 13 September 1990.

Esso Petroleum Co Ltd v *Harper's Garage Ltd* [1968] AC 269.

Foschini v *Victorian Football League* Unreported, 15 April 1983, Supreme Court of Victoria.

Hall v *Victorian Football League & Clarke* [1982] VR 62.

Hughes v *Western Australian Cricket Association Inc* (1986) 69 ALR 660.

Kemp v *New Zealand Rugby Football League* [1989] 3 NZLR 463.

Miller v *Jackson* [1977] 3 All ER 338.

News Ltd v *Australian Rugby League* (1996) ATPR 41-466; (1996) ATPR 45-521.

Nordenfelt v *Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.

Re Amcor Ltd – New Zealand Forest Products Ltd (1987) 1 NZBLC (Com) 104,233.

Re Fletcher Challenge Ltd – New Zealand Forest Products Ltd (1988) 1 NZBLC (Com) 104,283.

Re Life Underwriters Association of New Zealand Inc Commerce Commission Decision No 233, 15 December 1988.

Re New Zealand Cooperative Dairy Co Ltd/Waikato Valley Cooperative Dairies Ltd (1991) 2 NZBLC (Com) 104,529.

Re New Zealand Rugby Football Union Incorporated Commerce Commission Decision No 281, 17 December 1996.

Re New Zealand Stock Exchange Commerce Commission Decision No 232, 10 May 1989.

Re Speedway Control Board of New Zealand (1990) 2 NZBLC (Com) 104,521.

Re Weddel Crown Corporation Ltd (1987) 1 NZBLC (Com) 104,200.

Rugby Union Players' Association Inc v *Commerce Commission* Unreported, 14 August 1997, High Court, Auckland Registry, CL 2/97.

R J Flowers Ltd v *Burns* [1987] 1 NZLR 260.

Stenhouse Australia Ltd v *Phillips* [1974] 1 All ER 117.

Telecom Corporation Ltd/The Crown Commerce Commission Decision No 254, 17 October 1990.

The New Zealand Cooperative Dairy Co Ltd v *Commerce Commission* [1992] 1 NZLR 601.

TNT v *Cunningham* [1993] 1 ERNZ 695.

Watson v *Prager* [1991] 3 All ER 487.

TEXTS

R Ahdar (ed) *Competition Law and Policy in New Zealand* (The Law Book Company Ltd, Sydney, 1991)

A Borrowdale (ed) *Butterworths Commercial Law in New Zealand* (3ed, Butterworths, Wellington, 1996)

JF Burrows, J Finn and SMD Todd (eds) *Cheshire and Fifoots Law of Contract* (8ed, Butterworths, Wellington, 1992)

Y van Roy *Guidebook to New Zealand Competition Laws* (2ed, CCH New Zealand Limited, Auckland, 1991)

GQ Taperell, RB Vermeesch and DJ Harland *Trade Practices and Consumer Protection* (3ed, Butterworths, Sydney, 1983)

ARTICLES

N Bieker and P von Nessen "Sports and Restraint of Trade: Playing the Game the Court's Way" [1985] ABLR 180.

J Feil "Competition and Sport" [1997] NZLJ 146.

J Francis "What is 'Good for the Players'?" [1997] NZLJ 82.

A Humphreys "Sport, Restraint of Trade and the Australian Courts: *Adamson* v *New South Wales Rugby League Ltd*" (1993) 15 Sydney LR 92.

J Hodder "Rugby Union: Player Transfer and Orderly Competition" (1997) 20 TCL 34.

R Patterson "How the Chicago School Hijacked New Zealand Competition Law and Policy" (1996) 17 NZULR 160.

S R Pierce Jr "Organised Professional Team Sports and the Antitrust Laws" (1958) 43 Cornell Law Review 566.

UNPUBLISHED RESEARCH

S David "The Public Benefit Test: The Course and Direction in a Decade" LLM Research Paper, LLM, Victoria University of Wellington, 1995.

H Lawrence "Professional Rugby Union Players: Employees or Independent Contractors?" Legal Writing Requirement, LLB(Hons), Victoria University of Wellington, 1996.

H J Nottage "When Sport and Competition Policy Collide: A Recommendation to Duck an Ominous Bouncer" Legal Writing Requirement, LLB(Hons), Victoria University of Wellington, 1996.

W Pengilley "Restraint of Trade and Antitrust: A Pigskin Review Post Super League" A paper presented at the 1997 Annual Workshop of the Competition Law and Policy Institute of New Zealand, Christchurch, New Zealand, 1-3 August 1997.

W C Pyke "The Public Benefit Test Revisited" LLM Research Paper, LLM, Victoria University of Wellington, 1992.

MISCELLANEOUS

Business and Economic Research Ltd "The Business of Sport and Leisure: The Economic and Social Impact of Sport and Leisure in New Zealand" April 1993.

Commerce Commission "Guidelines to the Analysis of Public Benefits and Detriments in the Context of the Commerce Act" October 1994.

Department of Internal Affairs "A New Zealand Government Policy for Sport and Recreation: A Discussion Document" 18 June 1996.

The Hillary Commission's Annual Report.

Ministry of Commerce "Review of the Commerce Act" 1993.