



Anti-competitive aspects of sports

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Viewing sports league agreements from the perspective of the consumer (sports fans), this article identifies three significant areas where agreements among clubs within a league or code pose significant risk of causing consumer harm. Agreements to limit competition for player services not only operate to the detriment of players, but can harm fans by actually worsening competitive balance among teams. This can occur when financially strong but athletically weak teams are precluded by labour market restrictions from acquiring talent necessary to improve. The article suggests that restrictions be tailored to apply only to successful teams. Agreements concerning broadcast rights can also exploit consumers by restricting the number of games available, and by placing games on satellite and pay per view rather than free-to-air television. The article also discusses a major American problem of artificial reduction in the number of clubs within a league in order to induce local taxpayers to subsidise stadium construction and renovation. The application of the common law doctrine of restraint of trade and the Australian Trade Practices Act to restraints that harm consumers is analysed.

At a recent conference on sports and the law, one of Australia's most effective exports to the United States, Fox television executive David Hill, declared that the "consumer is king". In light of the current republican sentiment in your country, I'm not sure that this is the best metaphor, but it is the view I take in my own work — when I refer to anti-competitive aspects of sports, I refer to conduct by sports clubs and leagues that harm the consumer of sports — the sports fan. For these fans, there are three principal areas of potential competitive harm. Sports leagues can limit competition among member clubs for the services of players. These *labour market* restraints may unnecessarily restrain the wages and freedom-of-choice of players; more importantly, I suggest that overbroad restraints often actually harm consumers. Although justified as *preserving* competitive balance among clubs, these restraints can *reduce* balance by inhibiting a free labour market where inferior clubs can acquire those skilled players necessary to rise to the top of the table. Second, clubs can limit competition in the *television market* where they engage in the collective sale of television rights that reduce output and raise the price of the games to the ordinary sports fan. Third, by restricting those clubs eligible to participate in a premier competition, the remaining clubs can position themselves to exploit the *stadium market* by demanding subsidies from local taxpayers in the form of below-market stadium rental and tax subsidies for stadium construction or renovation.

Before entering into a detailed discussion of these three markets where consumers can be exploited, a preliminary word about market definition and

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market power is in order. Courts seem to spend an inordinate amount of time on this often difficult issue. To be sure, when the facts make it clear that a defendant charged with restraint of trade or a violation of a competition statute faces vigorous competition from many substitute producers, a court may wisely turn first to this issue and dismiss the complaint. A detailed analysis of the legality of an exclusive arrangement whereby Foxtel agreed to show Serie A Italian football in Australia should not be necessary, for example. However, whenever there is any serious evidence that a sports league has restricted competition among member clubs in the labour or television markets or is effective in demanding public subsidies by threatening franchise relocation, this is itself, in my view, *prima facie* evidence that the league possesses sufficient economic power to warrant careful analysis.

Governmental intervention, through direct regulation or through judicial review pursuant to the common law of restraint of trade or relevant competition statutes, is necessary to protect consumers, for two reasons. First, many sports leagues face, at least in their domestic market, no competition from reasonable substitutes for their fans' patronage, and thus they can exercise economic power over their fans.¹ Second, although leagues enjoy a fair amount of economic integration, they are not analogous to a single firm like McDonald's. Important business decisions by the latter are made by a Board of Directors whose loyalty and fiduciary duty is to the best interest of the corporation as a whole. In contrast, the Australian courts have recognised that member clubs do not owe a general fiduciary duty to act in the best interest of the entire league.² Thus, because clubs in our National Basketball Association couldn't agree on how to share revenue, the league actually adopted a rule reducing the number of opportunities for fans to watch Michael Jordan.³ One of the most interesting Australian sports innovations that warrants further international attention is the "Commission" system of governance in the Australian Football League. Although the six elected commissioners are ultimately responsible to the individual clubs, the problems of inefficient cartel management adverted to in the text may not be as serious where key decisions are made entirely by independent directors responsible for the best interests of the entire sport.

Labour market restraints

Competition-law regimes considering restraints on competition for players have often found them to be unreasonable as common law restraints of trade or violations of competition statutes.⁴ None the less, sports leagues can

1 Fans, at least in the short- and medium-run, develop strong loyalties to particular clubs and codes. An outsider is struck by the strong views of adherents of rugby league and rugby union as to the relative merits of their codes.

2 *News Ltd v Australian Rugby League* (1996) 139 ALR 193 at 315 (Full Fed Ct). See also at 214 (NSW Rugby League reorganised with nine-member board including two outside directors to ensure that clubs do not unduly influence decisions on what is best for league as a whole). The High Court had previously rejected the corporate analogy in *Buckley v Tutty* (1971) 125 CLR 353 at 373.

3 See n 14, *infra*.

4 See, eg, *Blackler v New Zealand Rugby Football League* [1968] NZLR 547 (CA) (agreement among rugby organisations preventing New Zealand player from being

properly claim that some restraints on unfettered competition may be desirable. As I elaborate in one completed article and another work-in-progress, the only legitimate justification for labour market restraints is to promote competitive balance among teams in the league,⁵ because of the demonstrable benefit to fans of having competitions where every team has a reasonable chance to win every few years.⁶ But what is usually ignored by courts and commentators evaluating this issue is how overbroad labour market restraints can actually *hurt* competitive balance, to the detriment of fans.

Let me begin the discussion with two North American illustrations of restraints that really do seem to improve competitive balance. Major League Baseball rules limit the number of players on each club's roster to 25, and, with a variety of complex exemptions for younger players, require that surplus players be placed on "waivers" where their contracts can be claimed by other teams. If two or more teams select a player, the team with the poorest record gets the player. This rule prevents teams from stockpiling the best players and permits players not among the top 25 on a championship team to move to a lesser roster. Our National Basketball Association has two-round entry draft with teams selecting in reverse order of finish in the prior season. Because the sport is played with only five players, a single star can truly transform a poor team to a great one. On the other hand, it is unlikely that a player not among the top 60 choices has unique abilities that need to be assigned outside of the market system.

In contrast, consider salary caps that have been adopted by several leagues in North America and Australia. Justified also on competitive balance grounds, these rules impose the same limits on all teams, regardless of their standing. Although it may well promote competitive balance to prevent a *top* team from adding to its already prodigious talent by expanding its payroll, I see little cause to limit the ability of an *inferior* team from investing in player talent. To use an example near and unfortunately dear to my heart, the Los Angeles Dodgers baseball club, flush with the backing of Rupert Murdoch's News Corporation, has a player payroll this year in excess of US\$80 million, among the three highest in baseball, and yet finished the season far below mid-table.

employed by professional Australian rugby team held void as unreasonable restraint at common law); *Buckley v Tutty* (1971) 125 CLR 353 (HC) (restraints on ability of player to sign with another team an unreasonable restraint at common law); *Eastham v Newcastle United Football Club* [1964] Ch 413 (same); *Mackey v National Football League* 543 F 2d 606 (8th Cir) (1976) (rule permitting league commissioner to impose prohibitive compensation on team signing player previously contracting with other team illegal under US Sherman Act); *Union Royale Belge des Societes de Football Association v Bosman* No C-415/93, [1996] 1 CMLR 645 (Advocat General's initial opinion finding requirement that transfer fee be paid to club losing player after expiration of contract violates restraint of trade provision of Treaty of Rome affirmed on other grounds, but using same legal standard as applicable to competition law provisions of Treaty). But see *Rugby Union Players' Ass'n v Commerce Comm'n (No 2)* [1997] 3 NZLR 301 (HC (Commercial List)) (*Rugby Union Players'*) (upholding complex restraint system as justified under public benefit standard of New Zealand Commerce Act).

5 See S F Ross, "The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws", (1997) *Univ of Illinois L Rev* 519; S F Ross, "Sports League Restraints Under the Competition Act and the Canadian Common Law" (forthcoming).

6 *Philadelphia World Hockey Club Inc v Philadelphia Hockey Club Inc* 351 F Supp 462, 486 (E D Pa) (1972).

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Some have criticised the practice of outbidding other clubs for talented players as “poaching (justifiably described as ‘cheque-book warfare’)” that “is recognised as an unseemly and undesirable aspect of the conduct of the game”.⁷ I’m not sure I agree. Although the Dodgers’ particular exercise of cheque-book warfare seems a miserable failure, I fail to see how it would hurt competitive balance if (this is my wishful thinking, of course) Murdoch were to fire all the flunkies he imported into what had been a great organisation, brought in fresh front-office blood, and allowed these new Dodger executives to spend even more to acquire really good players, rather than overpaid mediocrities. On the other hand, if baseball had a tight salary cap (such as that used by our National Football League or your AFL), it would seriously impair competitive balance by preventing the Dodgers from improving quickly for the 2000 season. Given how many Americans support the Dodgers, such a cap would reduce the overall quality of the game to the detriment of sports fans.

A similar concern arises from the recent rugby union litigation in New Zealand. The Commerce Commission and the courts upheld an agreement whereby players in provincial competition cannot be transferred without agreement on a fee, subject to payment by the acquiring club of a maximum fee established by rule.⁸ The commission, in my view, gave too little weight to the concern that a superior club could refuse to transfer a back-up player to an inferior club at an affordable fee (or would, apparently, prefer to “loan” the player to the inferior club with right of recall); this practice, if prevalent, could cause real harm to the ability of lesser teams to improve, and could reduce the overall quality of the provincial competition if some of the better rugby players in New Zealand are sitting on some contending club’s bench instead of on the field for another team.

I concede that this analysis may not translate precisely from the capitalistic sports leagues of North America to the cooperative sports regimes Down Under. In a capitalistic sports league, the analysis assumes that leagues should employ a scheme of revenue sharing to mitigate differences in market size, and that owners of inferior clubs will then have sufficient funds to invest in increased player talent. While Australian leagues do not face the problem of equalising competition between the Green Bay Packers and the New York Giants (the strong rugby market of Sydney has numerous clubs in the National Rugby League, as does the strong Australian rules market of Melbourne in the Australian Football League), because clubs are owned by ordinary members it may be difficult for a declining club (say, Melbourne Demons of the AFL) to find the financial support to re-invest. Moreover, the AFL’s Wayne Jackson has boasted of an impressive degree of competitive balance that appears to exist in that league at present. Still, the application of a salary cap to prevent the teams at the bottom of the table from restocking their rosters with talented out-of-contract players seems hard to justify.⁹

⁷ *Foschini v Victorian Football League* (SC(Vic), No 9868/82, 15 April 1983), at 26-7, quoted in *Rugby Union Players*, above n 4, at 316.

⁸ *Rugby Union Players*, above n 4.

⁹ This is not to suggest that tailored forms of salary restraint would not be appropriate. In addition to the one I propose — application of a salary cap to the top finishers in the prior season — a league may wish to limit the ability of clubs to spend in excess of reasonably anticipated revenues to avoid the risk of insolvency.

But there are applications. In its litigation over transfer fees, the New Zealand rugby players correctly observed that even in member-owned club competitions, a freer labour market would allow talented players who are not selected for a Super 12 team from a larger provincial club to move to a weaker or poorer club in order to compete against the best in provincial competition and enhance their ability to be selected for a higher level of play.¹⁰ This is particularly true for amateur or lowly paid athletes who might be willing to transfer for the same or lower salary to a poor quality club in order to get more playing time, but are frustrated by such a club's inability to pay a transfer fee to a rich, superior club.

In any event, the common law of restraint of trade prohibits restraints that are broader than necessary to achieve legitimate goals.¹¹ This demands an inquiry into whether revenue sharing among teams would be sufficient to permit such balance without "blanket restraints" that apply to all teams, such as a salary cap. This also suggests that leagues should be required to explain why an alternative "tailored restraint", that limits the payroll expansion of the good teams, would not be sufficient to achieve league goals.¹² In upholding a blanket restraint imposing transfer fees and quotas on the New Zealand rugby labour market, neither the Commerce Commission nor the reviewing court considered a tailored restraint imposed only on the top-finishing teams as a "counterfactual" alternative to the challenged system or a free labour market: *Rugby Union Players*'.¹³ See also *Hoszowski v Brown*¹⁴ (only alternative to transfer fee agreements is a completely free transfer system).

All this assumes that the challenged restraints are being imposed directly on players and indirectly on fans solely by virtue of an agreement among the clubs. When organised labour assents to labour market restraints in the context of collective bargaining, other issues arise. Although there are no reported common law cases on point, collectively bargained restraints that do not affect the ability of *other* leagues should be considered reasonable. From the players' perspective, they are reasonable because they were agreed to, presumably because the overall collective bargain advances the players' interests. From the fans' perspective, they are reasonable because whatever interests fans may

10 *Rugby Union Players*', above n 4, at 312. Rugby Union football is played on three levels in New Zealand. The New Zealand Rugby Football Union contracts with players on the All Blacks, New Zealand's national team, as well as with players chosen to participate on four New Zealand teams in the "Super 12" competition with teams from Australia and South Africa. In addition, individual provincial "unions" (or clubs) contract with players for the internal National Provincial Competition. The litigation concerned restraints on competition for players' services in the NPC.

11 *Adamson v New South Wales Rugby League* (1991) 31 FCR 242 at 289-90; 103 ALR 319 at 364-5 (Gummow J), cited in J D Heydon, *The Restraint of Trade Doctrine*, 2nd ed, Butterworths, Sydney, 1999.

12 Thus, if the Melbourne AFL club is facing declining revenues and memberships, there is little harm in a tailored salary cap that would not apply to them, since their resources are not going to be sufficient to meet the cap anyway. However, a club with a rich and storied past, like Collingwood, might well be able to raise revenue sufficient to justify investing in player talent. It can hardly be seen as imbalancing were Collingwood to increase its payroll next year to lure top players from Essendon.

13 *Rugby Union Players*', above n 4, at 308.

14 SC(NSW), No 1667/78, 6 October 1978, at 17, quoted in *Rugby Union Players*', above n 4, at 316.

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have in competitive balance is far outweighed by the fans' interest in having a league competition go forward without the disruption of industrial action, and allowing labour and management to collectively bargain has proven to be the best method of avoiding such disruption.¹⁵

Television restraints

The classic competition law violation is one where rival sellers agree to restrict output and raise price. I am still awaiting a challenge to colleagues who study economic history for them to identify a cartel that can top English football's Premier League.¹⁶ In 1991, 30 games were televised on the free-to-air ITV network with an average viewership of 7 million fans. In 1992, 60 games were televised on BskyB's satellite, at a cost of £250 per year plus purchase and installation of satellite equipment, to an average viewership of 1 million. In short, output was cut by 71% (from 210 million to 60 million viewers) while the marginal price paid by consumers rose from zero to more than £250 million annually.

American courts have recognised that competitive balance arguments do not justify sports league restraints on output in the television market, because of the ready alternative of a "tax" or revenue sharing scheme levied on teams that independently sell their rights.¹⁷ I have suggested in previous work that the proper test for the legality of collective rights sales is whether their effect is to increase or decrease the number of viewers, compared to what "would otherwise be" if the collective sale was not permitted.¹⁸ Thus, a league that clearly has the authority to schedule all its games on Saturday might be persuaded to schedule one game each week on Monday night. The collective decision to do so enhances output.

For a variety of political and economic reasons, most North American and Australian leagues have kept most contests on free-to-air television, moving to higher priced media only when there is no free-to-air alternative. This is not the case in Europe, and the decision by the British Restrictive Trade Practices Court sustaining the Premier League contract would appear to be a defeat for consumers.

15 In contrast, the American approach that immunizes any labour market restraint imposed in the context of a collective bargaining *relationship*, even if not agreed to by the union, seems to go too far and is not an appropriate accommodation of the various interests at stake. See S F Ross and R B Lucke, "Why highly paid athletes deserve more antitrust protection than ordinary unionised workers" (1997) Fall *Antitrust Bull* 641.

16 CAVEAT & DISCLAIMER: I testified for Her Majesty's Office of Fair Trading in its legal challenge to the Premier League contract discussed below. My testimony was deemed by His Lordship, Mr Justice Ferris, to be interesting but completely irrelevant to the case: *In re Football Ass'n Premier League Ltd* (1996) No 1 (E&W) (Restrictive Practices Court, 28 July 1999), available at ¶249.

17 *Chicago Professional Sports Ltd v National Basketball Ass'n* 961 F 2d 667, 675 (7th Cir) (1992). In that case, the NBA sought to limit the ability of the Chicago Bulls to broadcast their games featuring Michael Jordan on the WGN superstation, a local Chicago station that is available via satellite to most American homes subscribing to cable television (approximately 75% of American homes have cable).

18 S F Ross, "An Antitrust Analysis of Sports League Contracts with Cable Networks" (1990) 39 *Emory LJ* 465, quoting from *National Collegiate Athletic Ass'n v Board of Regents of Univ of Oklahoma* 468 US 85, 107 (1984).

As a jurisprudential matter, the decision has little significance. The court rejected the government's interpretation of a British statute that expires in March 2000, which permits parties to justify any trade restraint on the ground that removal of the restriction would "deny to the public as users of any services . . . specific and substantial benefits".¹⁹ The court held that its responsibility was to compare the public welfare if the restraint were to be permitted, versus a scenario where the league was permitted to impose no restraints at all.²⁰ Of course, in the sports league context, barring any agreement among member clubs results in chaos — the question is *never* whether clubs should be able to agree at all, but whether their agreements restrain trade *unreasonably*, ie, more than necessary. The court's interpretation, which will not apply to the new British competition statute, of course would exonerate virtually all league agreements.²¹

Next, the court found that, among the public benefits of the collective sale was the fact that the scheme allowed the clubs to make monopoly profits, and that the clubs were properly using these profits on worthy causes such as stadium renovations, subsidies of lower-level football clubs, and competition with other European leagues for the best players.²² This has potential relevance in Australia²³ because the Australian Competition and Consumer Commission has the authority under the Trade Practices Act (TPA) to authorise exclusionary or competition-lessening agreements if it determines that the agreements result in a "benefit to the public".²⁴ Because this term is to be interpreted in its widest possible sense, covering innumerable possibilities of benefits,²⁵ the statute would give the commission the authority to reach the same view as the British Restrictive Trade Practice Court.²⁶

With respect, I would submit that allowing sports leagues to exploit their consumers through collective sales that raise price and reduce output, in order to provide a supposedly superior product for these same consumers, makes little sense. If Australian consumers truly value a higher level of rugby league, with players imported from elsewhere, then ARL clubs will be able to recoup the investment in terms of increased ticket prices and higher rights fees. There

19 *In re Premier League*, above n 16, ¶4 (citing the statute).

20 *Ibid*, ¶304.

21 In contrast, New Zealand's similar statutory scheme allowing its Commerce Commission to authorise competition-lessening agreements that benefit the public requires a comparison of the public benefits and detriments of the challenged agreement with "the Commission's pragmatic and commercial assessment of what is likely to occur in the absence of the proposed arrangement": *Electricity Mkt Co Ltd* (Commerce Comm'n, decision no 280, 13 September 1996), quoted in *Rugby Union Players'*, above n 4, at 308.

22 *Ibid*, at 327, 329, 332, 334.

23 Although primarily for rugby. Because Australian Rules football is not played professionally elsewhere, the AFL could not seek to justify collective rights sales on this basis. Other sports, like soccer and basketball, might benefit from additional profits, but it is not clear that those sports command the viewership likely to give leagues the power to reduce output and increase price through collective sales.

24 Trade Practices Act, ss 88(1), 90(8) (TPA).

25 See, eg, *Re ACI Operations Pty Ltd* (1991) ATPR 50-108; *Re Queensland Co-operative Milling Ass'n Ltd* (1976) 25 FLR 169.

26 For a suggestion that the commission used this power, incorrectly, to sanction the merger between the ARL and the Superleague, see W Pengilly, "Rugby league is reunited: but what does the ACCC say?" (1998) 14 TPLB 41.

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is no reason that competition won't achieve the socially-desired results in this instance.

Most significantly, though, the English court concluded that the restraints were indeed necessary to promote competitive balance, because it doubted the ability of leagues to fashion rules that permitted clubs to independently license television rights and to maintain a system of redistribution of television income among the various clubs in the league.²⁷ Although a plethora of football executives told the court of their fear that the competitive imbalance that now exists in English football²⁸ will get even worse were powerhouses like Manchester United, Arsenal, Liverpool and the like permitted to sell rights individually, on cross-examination no one explained why the Premier League would not or could not, as a condition for permitting individual licensing or scheduling of matches at non-uniform times, insist that a substantial percentage of the revenues gained be shared with other teams.

Most North American leagues, including the very profitable sports of collegiate football and collegiate basketball, have complex and extensive rights sharing agreements. Many feature the award of "senior" rights to a national television network, who can select its choice of games to be shown a week or so in advance. Individual clubs sell their own rights subject to the game being chosen by a national network. Leagues employ various schemes to tax and redistribute revenues from local sports.

It is true, as the learned barrister for the Premier League astutely observed in cross-examining me during that proceeding, that Major League Baseball currently suffers from significant competitive imbalance, attributable to a large degree by the vast differences in revenues available from local broadcasting that is not shared to any significant degree. For several reasons,²⁹ I don't believe the current problems faced by American baseball justify a ban on individual game licensing in Australia. In the first place, these problems are significantly harming baseball, and are the focus of current reform efforts. Although these may be stymied if owners hope, as they did in 1994, to impose the burden of supporting financially-weaker teams on the players, significant revenue sharing may yet develop.³⁰ Most importantly, the major obstacle to

²⁷ *Premier League*, above n 14, ¶343.

²⁸ From 1991-97, 81% of the places available for English football clubs in European competition, as determined by performance in English competition, were occupied by seven members of the 20-team Premier League. See T Hoehn and S Szymanski, "The Americanization of European Football" *Economic Policy* (forthcoming).

²⁹ None of which I had the mental agility to express during my testimony.

³⁰ Owners of financially weaker teams have a major trump card that they have been inexplicably unwilling to use in negotiating with their colleagues. The most valuable games for the wealthier teams are games played on the road; teams are generally reluctant to show too many of their home games on local television for fear of damaging live gate. Under American law, television rights are held by the home team: *Liberty Broadcasting Sys v National League Baseball Club of Boston Inc* 1952 Trade Cas (CCH) ¶67,278, at 67,499 (ND Ill). Major League Baseball teams have entered into a "master licensing agreement" whereby each team grants the visiting team the right to broadcast the game back to its home market. This reciprocal barter agreement is enormously unfair. The Seattle Mariners receive the right to broadcast games from Yankee Stadium back to their small market in Seattle in return for which the New York Yankees receive the right to broadcast games from Seattle back to the New York mega-market. Financially weaker teams with the temerity to terminate the master licensing agreement might find it easier to obtain revenue sharing. Faced with the

significant revenue sharing is that individual selling of local television rights historically preceded any collective selling, and the value of these local television rights have been capitalised into the purchase price of many franchises. Thus, having paid over US\$300 million for the Los Angeles Dodgers, a figure that includes the valuable rights to the revenue from sale of local television, Rupert Murdoch's corporate empire is going to be reluctant to agree to significant revenue sharing. In contrast, when significant individual selling is being introduced for the first time, and where clubs are not owned by capitalist investors who have paid for the local value, there would seem to be less of an obstacle to assure revenue sharing.

There is a more fundamental flaw in justifying a ban on individual sales on the ground that transactions costs, intra-league politics, or other factors might preclude an efficient revenue sharing scheme. The fundamental competition policy question is who gets to decide that competition does not work in a particular industry. Why should millions of Britons be denied the opportunity to watch desired football games because the owners can't agree on revenue sharing? If it is in society's interest to have revenues shared with other Premier League teams and smaller clubs as well, a far preferable solution, in my view, would be for the government to impose a tax on television revenues (perhaps administered by a special commission to prevent politicians from getting their hands on the money), and redistribute the money itself. This would provide the benefits of redistribution without the anti-fan effects of the current cartel scheme.

Stadium market

It is not clear to what extent this is a serious competitive problem in Australia, because of your system of cooperative ownership of clubs. Thus, although the AFL and various Sydney interests seem keen on luring the North Melbourne Kangaroos up to New South Wales, it appears that this will only happen if approved by the club's members, most of whom hail from Victoria. And although the National Rugby League is significantly reducing the number of its franchises, this does not seem to be part of a scheme to exploit local taxpayers, as would be the case if, for example, the league told Balmain and Western Suburbs that one of them would be eliminated and the league would choose on the basis of which local community provided the most tax subsidies for a new stadium for the remaining club.³¹

loss of lucrative rights to televise their away games, wealthier teams may suddenly become more generous. This would particularly be so if small-market teams also threatened to breach the clubs' agreements to maintain geographic territories for broadcast rights. If the Seattle Mariners' blocked the Yankees from televising games from Seattle, and actually threatened to sell their own rights in New York City, meaningful revenue sharing would likely be more forthcoming.

31 Recall that *News v ARL* found that rugby league clubs were in competition with each other for places in the ARL competition. If the purpose of eliminating one of these teams was not to stabilise the league or terminate a financially perilous club, but rather to artificially create a shortage of franchises to spur bidding by state and local governments, the collective refusal to include a team in the competition could well be an illegal exclusionary contract under the TPA. See W Pengilly, "Restraint of Trade and Antitrust: A Pigskin Review Post Super League" (1997) 6 *Canterbury L Rev* 610 at 638. Thus, I am not sure that Professor

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League policies toward franchise expansion and relocation do not raise competitive problems in the context of new leagues or the promotion of existing leagues in new markets. Although the grant of an exclusive baseball franchise in New York may raise problems, the same cannot be said for the grant of an exclusive Australian rules franchise in Sydney, where the code is trying to make a name for itself.

Stadium market exploitation is, however, a huge problem in the United States. Leagues systematically limit the number of franchises so that there is at least one viable market without a team, permitting each of its clubs to threaten relocation unless local taxpayers provide major stadium subsidies. Recently, Microsoft co-founder Paul Allen, one of the world's wealthiest men, purchased the Seattle Seahawks football team and succeeded in blackmailing the state of Washington into providing US\$400 million in funding for a new stadium for his team. When Houston, Texas voters rejected plans for a tax subsidy for their football team, owner Bud Adams relocated the team to Nashville, Tennessee in return for a US\$240 million subsidy (which included the diversion of US\$4 million from a reserve fund set up by local officials to ensure clean drinking water for poor people). If there was any doubt about where the money goes, consider two recent franchise acquisitions: the Minnesota Vikings, playing in a relatively antiquated stadium, were sold for US\$250 million. An expansion team awarded to Cleveland, Ohio, was sold for US\$530 million. The new Cleveland owner received both the franchise and the rights to play in a stadium built by local taxpayers for US\$280 million. The arithmetic works out perfectly!

Competing leagues as a solution?

The saga of Bud Adams and his football club illustrates both the problems and potential solutions to anti-competitive conduct of sports leagues. Since Nashville and Houston both wanted a football team, and both could support one, but only one was available, bidding for the team naturally reached stratospheric heights. But back in 1959, Adams was not an owner in a monopoly league; rather, he paid US\$25,000 for a franchise in the maverick American Football League. The incumbent National Football League, having just established the now-famous Dallas Cowboys, also named an owner to establish a franchise in Houston. Each league recognised that the city could only support one major football franchise, and so the bidding situation was entirely reversed. Only after Adams promised to spend US\$150,000 of his own money (approximately US\$855,000 today)³² to refurbish an existing stadium did the city leaders permit him, rather than the NFL, to establish the franchise.

In 1989, I suggested that anti-competitive abuses in American baseball and football could be corrected if each league were divided in at least two parts.³³ The competing leagues would be permitted (perhaps even required) to agree

Pengilley's comments, *ibid*, at 639, should be construed to mean that *any* intra-venture rules would necessarily be exempt from TPA scrutiny. See *ibid*, at 628-9 (referring to intra-venture rules as those necessary to conduct the competition).

³² See <http://www.stls.frb.org/fred/index.html>

³³ "Monopoly Sports Leagues" (1989) 73 *Minnesota L Rev* 643.

on a national championship (either a playoff format or a single contest pitting each league's champion against each other), and could agree on other joint aspects of game promotion where they did not exercise monopoly power (such as international licensing). Competition authorities would monitor league decisions to prevent predatory behaviour, but otherwise internal rules would be entirely left to each league to decide, subject to market pressures.

I recognised that sustained rivalry between sports leagues is a historical anomaly. Reviewing the American experience, though, I concluded that many "unsuccessful" experiments in competing leagues ended through the merger of the competing teams for the joint profit of their owners (as in the American and National Leagues of baseball, and the American and National Football Leagues), due to predatory conduct by the dominant league (as in the crushing of a maverick baseball league during the World War I era), or were due to a joint strategy of predatory expenditure based on the hope of victory or merger (as was the case with a rival basketball league in the 1970s). Thus, I suggested that if competition law authorities made it clear that no merger would be permitted and that predatory conduct would be punished, a different result might well ensue.

This is why I reacted with such interest at learning about the Superleague/ARL war. Would Australian rugby league confirm my hypothesis? Do the events here suggest that my thesis is in error? My tentative conclusion is that the merger is not inconsistent with my hypothesis.

My analysis begins with the proposition that the News Corporation did not create the Superleague as an end in itself, in order to provide consumers with a new and attractive *choice* for rugby league football (in the way, say, that News Corporation *did* create Foxtel as a new and attractive television choice, to compete with the Australian Broadcasting Corporation and the free-to-air networks). Rather, News Corporation's sole goal was to obtain rugby league programming for its television networks, a goal that seemed unattainable in the near term under the existing league structure because of contractual commitments between the ARL and media concerns controlled by Kerry Packer.³⁴ If my proposed policy had been adopted and enforced by Australian competition authorities, who would have made it clear to Murdoch that a merger with the ARL would not be permitted and that predatory conduct by

³⁴ See *News Ltd v ARL*, above n 2, at 244 (objective of the News' proposal was "to ensure that no other competition [could] exist in competition to Superleague"); *ibid*, at 247 (quoting News' executive that "control of the game must stay in the hands of the accepted authority of the game, and that is the Australian Rugby League" that News was "only seeking a slice of the television cake" and that News' officials were to discuss television rights with current rights-holder Kerry Packer following meeting with ARL officials); *ibid*, at 251 (strategy document by News' consultant proposed that "News should consider making early moves outside the establishment to secure a strong position, and then devising an arrangement with ARL and Packer" and that News must "devise an accommodation with Mr Packer 'to avoid diluting Super League's potential' since 'two competing competitions would be unattractive to both parties'"); *ibid*, at 263 (News' officials brief Rupert Murdoch that initial attempt to build a Superleague unsuccessful because News had wrongly assumed that threat of club defections would pressure ARL to accept concept and that ARL had ability to grant television rights to News, and laid out options for second effort, noting again that News could "credibly mount a rival Super League without the 'ARL establishment' even though the 'best' outcome was for the ARL to cooperate").

Murdoch to drive the ARL out of business would also not be permitted, I think it would have been unlikely that Murdoch would have entered the market at all.

Assuming, for the sake of argument, that the Superleague represented a genuine effort to compete with the ARL, in my view both sides engaged in predatory conduct inconsistent with how firms should behave in a competitive market. Instead of challenging ARL's long-term player contracts as exclusionary (as a rival hockey league in North America did when the National Hockey League had long-term contracts with every professional player on the continent),³⁵ the Superleague entered the market by engaging in tortious interference with contracts and, most significantly, by luring players and coaches with salary increases difficult to justify absent a resulting monopoly or merger. The ARL then responded with long-term loyalty agreements tying up clubs to the ARL competition for five years, even though before the entry of the Superleague the ARL had steadfastly refused to assure marginal teams that they would be able to participate in the competition. Tying up marginal teams to your league is not a response that makes economic sense if you assume that stable competition will continue. If anything, a firm facing new rivalry would normally be expected — if it weren't trying to destroy its rival by denying it available players and clubs — to retrench to gain strength. For example, prior to the entry of the Superleague, the ARL itself had recognised that, as league that evolved into a national competition from one originally based in New South Wales, that 11 Sydney-based teams, competing against clubs that had few counterparts in other metropolitan areas, was not viable.³⁶ With a market further congested by a new league, trying to maintain a competition with all 20 "pre-war" teams seems hard to justify in terms of long-term competitiveness.

Although it appears that Superleague started the predatory spending war, it was continued because of similar spending by the ARL. It is not clear to an outsider what to make of the ARL's response. Ordinarily, a firm who is simply seeking to compete profitably for market share against a long-time rival will not bid sums of money that are not sustainable from revenues. If, for example, Qantas wants to cut fares on flights from Sydney to the United States to A\$99, I would expect that Air New Zealand would simply let them have the market and concentrate elsewhere. Since the Sydney-US run was not essential for Air New Zealand's existence, and since Air New Zealand would surely not be trying to put Qantas out of business, no other course makes business sense. On the other hand, if the Superleague spending threatened to buy up so many players, coaches, and clubs that the viability of the ARL itself was in jeopardy, the ARL's response would appear to be more legitimate.

More clearly, the ARL's refusal to select any Superleague players for the popular state-of-origin competition seems predatory. Absent an intent to destroy the Superleague (or gain bargaining leverage in merger negotiations), one would normally expect the sponsor of one of Australia's premier events to permit the best quality players to perform.

The point of the discussion above is not to come into your country and

³⁵ See above n 6.

³⁶ Cf *News Ltd v ARL*, above n 2, at 261-2.

assess blame. Each side may well claim that its conduct was simply in response to the misconduct of the other party and it is certainly not my place to distinguish competitive aggression from competitive self-defense.³⁷ A competition analysis is also frustrated by an air of paradox about the treatment of market definition. News Corporation was only interested in building a new rugby league so that it could obtain desirable programming, of which rugby league football was clearly not unique, yet News Corporation claimed that it was the victim of exclusionary conduct. The ARL took a number of extraordinary steps to ensure that it was the only rugby league product available, yet it claimed that rugby league was simply one of many sports offering entertainment to consumers. In short, each side's conduct

³⁷ An outsider has particular difficulty analysing the competition law aspects of this case. Although News' lawsuit against the ARL alleged that the latter had violated the Trade Practices Act by signing up its clubs to five-year agreements, the ARL's cross-claim against News-related corporations and rebel clubs sought relief solely on non-competition claims, including breach of fiduciary duty, breach of contract, tortious interference with contract, misleading conduct, and the like. See *News Ltd v ARL*, above n 2, at 272-3.

Moreover, the structure of the Trade Practices Act does not lend itself to the unusual merge-or-monopolise strategy embarked upon by Superleague. Section 45(2) of the TPA, as read in conjunction with definitions provided in s 4D of the Act, creates a market-based offense outlawing provisions that have the purpose or likely effect of substantially lessening competition, as well as a "per se" or automatic offence outlawing agreements among competitors with the purpose of preventing, restricting, or limiting goods and services to, particular classes of persons. See *News Ltd v ARL*, above n 2, at 328-30. Clearly, the ARL did seek to restrict services to Superleague. However, the automatic offence only applies to agreements "between persons any two of more or whom are competitive with each other". Section 4D(2) provides that two parties are deemed as competitors only if they would be in competition with each other but for some agreement between the two of them. One way to apply s 4D(2) would be to conclude that the only basis for the clubs who were parties to the ARL 5-year "loyalty" agreements to be in competition with each other in "a market for the supply of teams of Premier Players for participation in a competition": *News Ltd v ARL*, above n 2, at 331, was if there were competition between Superleague and the ARL. However, Superleague documents made it clear that News' desire to obtain the services of clubs was not in order to compete with the ARL but in order to either monopolise the market itself or to reach an agreement allowing it access to ARL television rights. See supra n 34 and accompanying text. Thus, in contrast to a genuine potential rival rugby league, it is not clear that, as News alleged, the clubs were, for these purposes, competitors under s 4D.

The full court, however, found that the clubs were in competition with each other to retain their position within the ARL, because the ARL traditionally reserved the right to exclude clubs from their competition, and so these automatic provisions of the TPA came into play: *News Ltd v ARL*, above n 2, at 339. The court also found that the clubs were in competition for the services of News Ltd as the organiser of a rival league, at 341-2, without pausing to consider whether the language or purposes of the TPA are served by applying its provisions in favour of a company whose intent is not to compete but to monopolise or merge on favourable terms. On the other hand, the TPA could be read to prohibit any exclusionary provision between parties who are in competition with each other in any regard. If so, since the clubs clearly do compete for players, broadcast rights, sponsorships, and the like, the automatic provisions of the Act would be applicable.

Moreover, absent some theory of automatic illegality, the TPA does not appear to constrain anti-competitive efforts to obtain a monopoly until the wrongdoer obtains market power (in contrast to American antitrust law, where the offence of attempted monopolisation permits courts to intervene to block misconduct before the wrongdoer achieves power, where there is a dangerous likelihood that such power will be achieved in the future.)

during the war seemed to support the opposite party's legal contentions.³⁸ For a penetrating critique of the trial court's market definition rulings in *News v ARL*, see Pengilley.³⁹ Professor Pengilley makes several observations that deserve note. First, although the trial judge found that the ARL had not reacted to innovations in other sports, he found the relevant market to be the four major Australian football codes because of special factors; Pengilley correctly suggests that the normal presumption would be that non-innovators do not face vigorous rivalry.⁴⁰ Second, the trial judge suggested that rugby union scheduled their games to avoid ARL games. While this suggests that rugby league might well constrain rugby union's ability to exercise power, the transitive property doesn't work in market definition. If rugby league is much more popular than rugby union, then it makes perfect sense for the latter to constrain the former but not the reverse. The analysis suggests, however, that the merger was not inevitable and that competition between rival rugby leagues is not necessarily impossible. The great American judge, Learned Hand, noted in a famous American opinion that a market could be "so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand",⁴¹ what economists call "natural monopolies". I don't believe the rugby war supports the claim that sports leagues are indeed natural monopolies.

Finally, I don't wish to suggest that Australian lawmakers or regulators should necessarily break up the National Rugby League, the Australian Football League, or anyone else Down Under. Vigorous enforcement of established restraint of trade doctrines,⁴² combined with effective collective bargaining as well as modest competitive pressure from other codes, might be sufficient to prevent significant consumer harm from labour market restraints. Your system of anti-siphoning legislation, even if modified to be tailored to preserve only those events likely to be shown on free-to-air television, may prevent the sort of problems faced by English football fans. The fact that clubs are cooperatively owned, and that the two markets where each football code is strongest features a plethora of local clubs in that code, may preclude exploitation of the stadium market. Whatever the specific legal doctrines that are applied to sports leagues, rigorous application of sound competition principles remains the best protection for sports fans, especially in a country featuring so many wonderful spectator sports.

38 Cf S F Ross, *Principles of Antitrust Law*, Foundation Press, Mineola, NY, 1992, pp 37-8, 53-4 (how parties' behave is highly relevant to how relevant markets should be defined).

39 "Restraint of Trade and Antitrust: A Pigskin Review Post Super League", above n 31, Part VII.

40 *Ibid*, at 642.

41 *United States v Aluminum Co of America* 148 F 2d 416, 430 (2d Cir) (1945).

42 Australian courts have struck down a number of sports league restraints as overbroad under the restraint of trade doctrine. See, eg, *Buckley v Tutty*, above n 4; *Adamson v New South Wales Rugby League*, above n 11. Although *Adamson* found that player restraints could not be challenged under the Trade Practices Act because of the statutory exemption for contracts of service, the full court in *News Ltd v ARL*, above n 2, at 342-3, suggested a loophole for players and others to challenge labour market restraints: if the player's relationship with the club is not an employer's contract for the employee's services, then the agreement is subject to the TPA. On the other hand, if the league attempts to evade the TPA by insisting that all contracts be contracts for services, this itself is a potential TP violation.