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THE INTERCEPT THAT CHANGED THE GAME FOREVER: FIFTY YEARS OF *BUCKLEY V TUTTY*

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The thirteenth of December 2021 marked the fiftieth anniversary of *Buckley v Tutty* where the High Court of Australia, in upholding an earlier ruling of the Full Court of the Supreme Court of New South Wales in *Tutty v Buckley*, found the New South Wales Rugby League's retain and transfer system to be an unreasonable restraint of trade. The article points to the long-term importance of this decision, especially it being endorsed by lower courts and tribunals in striking down similar employment rules. Prior to the case, Justice Hardie of the Supreme Court of New South Wales found in *Elford v Buckley* that the NSWRL's retain and transfer system was not an unreasonable restraint of trade. The article will examine the differences in approach of Justice Hardie in *Elford* and the Supreme Court of New South Wales and the High Court of Australia, respectively, in *Tutty*. The article begins with a brief analysis of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition* which established the modern restraint of trade doctrine. It explores the meaning of 'carrying on trade' under this doctrine. It contrasts two possible meanings; 'absolute freedom' (subject to contractual and legislative norms) and 'Hobsonian freedom'. This distinction is used to explain the differences between the *Elford* and *Tutty* courts. The article provides an examination of the decisions of courts in previous sports cases – *Walker v Crystal Place Football Club*, *Hawick v Flegg*, *Eastham v Newcastle United Football Club* and *Nagle v Feilden* – in reaching an understanding of the decision making of the respective courts.

1 INTRODUCTION

The thirteenth of December 2021 marks the fiftieth anniversary of *Buckley v Tutty*[1] where the High Court of Australia found employment rules that denied players the right to change clubs, once their contract with their former club had expired, to be an unreasonable restraint of trade. The case marked a challenge to the New South Wales Rugby League's (NSWRL) retain and transfer system where a player, whose contract had expired, could not take up employment with a new club without the agreement of the club that had previously employed him. In the case of talented players, such permission usually necessitated the payment

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I would like to thank two anonymous referees for their helpful comments and suggestions.

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

of a 'high' transfer fee. This was income that the new club was prepared to pay to obtain the player which the player did not receive;[2] it constituted a 'rent' provided to the player's former club.

This decision has had a profound effect on the governance of Australian professional team sports, not just Rugby League. First, lower courts and tribunals have invariably followed *Buckley v Tutty* in cases involving other codes which have employment rules which, in principle, were similar to those of the NSWRL's retain and transfer system.[3] Second, the striking down of such rules strengthened the hand of player associations in collective bargaining negotiations with their respective leagues. Leagues, which saw such rules as being important to their operation, could conceivably protect them from legal attack by obtaining agreements from player associations in collective bargaining deals. Player associations could lever this 'free kick' to obtain improvements in wages and employment conditions for members.[4] Third, and following on from this, these collective bargaining agreements involved the working out of a means to overcome the unreasonable aspects of employment rules, such as transfer and

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2 A player who requested a transfer received 5 per cent of the transfer fee; a player placed on the transfer list by the club received ten per cent. NSW Rugby Football League, Constitution Standing Orders and Competition Rules, Printed 1961, Rule 27 (g).

3 Other transfer system cases: *Foschini v Victorian Football League*, Supreme Court of Victoria, no. 9868 of 1982 (unreported), *Walsh v Victorian Football League* (1983) 74 FLR 207, *Carfino v Australian Basketball Federation* (1988) ATPR 40-985, *Media, Entertainment and Arts Alliance v Marconi Fairfield Soccer Club*, Australian Industrial Relations Commission, Dec 1285/95 S Print M2565; *Buckenara v Hawthorn Football Club* [1988] VR 39 and *Harding v Hawthorn Football Club* [1988] VR 49 are two exceptions; between leagues: *Adamson v West Perth Football Club* (1979) 27 ALR 475; new competitions not affiliated or under the control of a league: *Hughes v Western Australian Cricket Association* (1986) ATPR 40-676, *McCarthy v Australian Rough Riders* (1988) ATPR 40-836, *Barnard v Australian Soccer Federation* (1988) ATPR 40-862, *Pay v Canterbury-Bankstown Rugby League Club* (1995) 72 IR 358, *Penrith District Rugby League Football Club v Fittler*, New South Wales Supreme Court, 8 February 1996 BC9600163 (unreported), *St George District Rugby Football Club v Tallis*, New South Wales Supreme Court, 28 June 1996 BC9602844 (unreported), *Australian Rugby League v Cross* (1997) 39 IPR 111; *Carter v New South Wales Rugby League* (1997) 78 IR 358; *Wickham v Canberra District Rugby League Football Club* (1998) ATPR 41-664 and *Goutzioulos v Victorian Soccer Federation* [2004] VSC 173 are two exceptions; the internal draft, a system where players whose contracts have expired and have not entered into an agreement with their former club are chosen – drafted - by clubs, with the worst performing team in the previous year's competition having first choice, the second bottom team second choice and so on, until the process is exhausted: *Adamson v New South Wales Rugby League* (1991) 31 FCR 242; and residential qualifications: *Hall v Victorian Football League* [1982] VR 64; *Nobes v Australian Cricket Board*, Supreme Court of Victoria, no. 13613 of 1991 (unreported); and *Avellino v All Australia Netball Association* [2004] SASC 56.

4 Braham Dabscheck, 'The Tutty Case' in Andrew Moore and Andy Carr (eds.), *Centenary Reflections: 100 Years of Rugby League In Australia*, ASSH Studies 25, Australian Society for Sports History, Melbourne, 2008, pp. 157-167; Braham Dabscheck, 'Player Shares of Revenue in Australia and Overseas Professional Team Sports', *Labour and Industry,* 2011, 22/1/2, pp. 57-82.

draft systems, to satisfy tests associated with the restraint of trade doctrine.[5] Fourth, it enhanced the benefits available to female players when traditional male sports decided to form professional female leagues, as has occurred in the last decade. Female players could utilise the services of already established player associations with well-developed relationships with their respective leagues. They did not have to confront the organisational and other problems which had dogged the male associations when they first formed.[6]

Under the Rules of the NSWRL, clubs were required to register players before they could play for the club. Once a player registered, he in effect became the 'property' of the club; someone who could be bought and sold to other clubs. This is demonstrated by the following two clauses from Rule 30:

> (c) A player who signs as a professional player should note carefully that he is in effect tied to his Club and cannot subsequently sign for any other club unless he is released – either by transfer or by the club agreeing to strike his name from their list of registered players.
>
> (f) Unless the Club agrees in writing that the player's name shall be removed from their list of registered players at a stated time then the Club is entitled to retain the player's name on its register indefinitely.[7]

At the end of each season, clubs prepared two lists; players they wished to retain and those that they were prepared to transfer, including the terms of the transfer fee they wished to receive. Players who objected to being placed on the retain list – in effect wanted to move to another club – and be placed on the transfer list could appeal to the Qualification and Permit Committee of the NSWRL.[8] Dennis Tutty played with Balmain from 1964 to 1968. He wished to obtain employment with another club and objected to Balmain placing him on their retain list. He asked to be placed on the transfer list, which was refused. He stood out of the game in 1969. He was given advice that the NSWRL's employment rules were, in all probability, an unreasonable restraint of trade. This advice was given to him after the decision in *Elford v Buckley*[9] where Justice

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5 Braham Dabscheck and Hayden Opie, 'Legal Regulation of Sporting Labour Markets', *Australian Journal of Labour Law*, 2003 16/3, pp. 259-283.

6 Braham Dabscheck, 'Building Momentum: The Evolution Of Women's Wages In Australian Professional Team Sports' in *LawInSport* 21 November 2017, www.lawinsport.com/articles/item/building-momentum-the-evolution-of-women's-wages-in-australian-professional-team-sports. The female Australian Netball Players' Association formed in 2002. The Australian Women's Basketball Players' Association, formed in 2009, merged with the men's National Basketball League Players' Association, formed in 1989, in 2016 to form the Australian Basketball Players' Association.

7 NSW Rugby Football League, Constitution Standing Orders and Competition Rules, Rule 30 ('NSW Rugby Football League Rules').

8 Ibid Rules 24-31.

9 [1969] 2 NSWR 170 ('*Elford*').

Hardie, in *obiter dicta,* said the NSWRL's retain and transfer system was not an unreasonable restraint of trade.

Elford v Buckley was a hurdle Tutty had to jump over if he was to succeed in his claim against the NSWRL's employment rules. This article will examine the differences in approach of Justice Hardie in *Elford* and the Supreme Court of New South Wales and the High Court of Australia, respectively, in *Tutty.*[10] It will begin with a brief analysis of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition*[11] which established the modern restraint of trade doctrine. It explores the meaning of 'carrying on trade' under this doctrine. It contrasts two possible meanings; 'absolute freedom' (subject to contractual and legislative norms) and 'Hobsonian freedom'. The article will then examine four earlier 'sports' cases: *Walker v Crystal Place Football Club;*[12]*Hawick v Flegg;*[13] *Eastham v Newcastle United Football Club*[14] and *Nagle v Feilden*[15] in reaching an understanding of the decision making of the respective courts.

2 NORDENFELT V MAXIM NORDENFELT GUNS AND AMMUNITION

Nordenfelt v Maxim Nordenfelt Guns and Ammunition involved a case where Thorstein Nordenfelt had sold his machine gun and explosives business to another company and had entered into a covenant to not engage in such work for 25 years. He subsequently took up work with a rival company. Maxim Nordenfelt Guns and Ammunition initiated action to enforce the covenant.[16]

The case is significant because of the contribution of Lord Macnaghten who enunciated the principles which have guided common law courts in restraint of trade cases. He begins by saying, 'The public have an interest in every person carrying on his trade freely: so has the individual. 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.'[17] He points out, however, that while this is the general rule, there may be special circumstances where interference with individual liberty of action may be justified. He then went on to say

> It is 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 interests of the public, so framed and so guarded as to afford adequate protection to the

10 *Tutty v Buckley* [1970] 3 NSWR 463 (*'Tutty v Buckley*').
11 [1894] AC 535 ('*Nordenfelt*').
12 [1910] 1 KB 87 ('*Walker*').
13 (1958) 75 WN (NSW) 255 ('*Hawick*').
14 [1964] 1 Ch 413 ('*Eastham*').
15 [1966] 2 QB 633 ('*Nagle*').
16 *Nordenfelt* (n 11).
17 Ibid 565

> party in whose favour it is imposed, while at the same time it is in no way injurious to the public.[18]

Lord Macnaghten pointed out that 'different considerations must apply in cases of apprenticeship and cases of that sort, and cases of the sale of a business or dissolution of a partnership on the other'. He added, 'there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment'.[19] Nordenfelt had received over £200,000 when he sold his business, something he had willingly done. This negated his claim as to the covenant being an unreasonable restraint. Lord Macnaghten said to find otherwise would have been to violate 'a homely proverb current in my part of the country which says you may not "sell the cow and sup the milk"'.[20]

Lord Macnaghten also refers to a case decided by Chief Baron in 1839 where an unlimited restraint was imposed on a coal merchant's clerk. After he left his master's employment the clerk was forbidden from working in any capacity as a coal merchant for nine months; which Lord Macnaghten described as 'an absurd and unreasonable stipulation, if ever there was one.'[21] He cited Chief Baron who said 'it is against the principles and policy of the law as to any restraints on trade and the right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment'.[22]

If we can put to one side where there are exceptions where restraints may be reasonable, Lord Macnaghten employs powerful language in his enunciation of the restraint of trade doctrine; the right of every person to carry on their trade 'freely', and all restraints of trade being 'contrary to public policy, and therefore void'; plus his reference to Chief Baron's statement of the right of every man 'to be at liberty to struggle for his own existence' in pursuing lawful employment. An issue that might be raised here is what does the term 'carrying on trade' mean? Or, alternatively, is there a limit to the amount of 'freedom' available to an individual in carrying out their trade? Is such freedom 'absolute' (subject to contractual and legislative norms), or is it limited and constrained (outside contractual and legislative norms)?

Focusing on employment, does freedom here mean the ability to seek lawful employment with any employer who is prepared to employ you ('absolute freedom') or does it mean that you are able to obtain employment, and practice your trade, but forbidden from being employed by someone else only with the permission of your current/previous employer, even when your contract with

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18 Ibid 565.
19 Ibid 566.
20 Ibid 574, 572.
21 Ibid 568; Ward v Bryne (1839) 5 M & W 548; 151 ER 232.
22 *Nordenfelt* (n 11) 569.

that employer has expired? The ability to take up such employment may necessitate the payment of a fee from the new to the current/previous employer who claims that they hold the 'rights' to your employment. The employer has rules, rules that enable it to maintain rights to your employment indefinitely; rights that it is able to enforce by agreement with other potential employers in the trade concerned.[23] The choice that a worker has here is to accept employment on the terms offered by the employer, who has this continuing right to their employment, or to vacate their trade. This will be referred to as 'Hobsonian freedom'; an extension of the notion of 'Hobson's choice'. The Macquarie Dictionary defines Hobson's choice as 'the choice of taking either the thing offered or nothing, the absence of real choice.'[24] 'Freedom' here is nothing more or less than an oxymoron.

Is it reasonable for an employer, in concert with other employers, to create monopsonistic rules which restrict the ability of workers, as was the case with the NSWRL, to carry on their trade 'freely'? Under such a scenario, workers, it could be said, can work at their trade and stay in employment as long as they agree to the terms imposed on them by their employers. This is not a situation of 'absolute freedom' where workers are able to test the market in seeking to obtain the best terms and conditions from prospective employers in practising their trade. As we will see below the essential difference between the courts in *Elford* and *Tutty* was their respective approaches to the notion of 'freedom' contained in the restraint of trade doctrine. *Elford* developed an interpretation based on 'Hobsonian freedom'; whereas *Tutty* followed the precepts of 'absolute freedom' in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition*.

3 WALKER V CRYSTAL PALACE FOOTBALL CLUB

Walker v Crystal Place Football Club involved consideration of whether or not an English football/soccer player who was injured was an employee and entitled to benefits available under the *Workmen's Compensation Act, 1906* (Great Britain).[25] All three members of the Court of Appeal found that Walker was employed under a contract of service. Justice Cozens-Hardy, for example, said:

> He is bound according to the express terms of his contract to obey all general directions of the club, and I think in any particular game in which he was engaged he would also be bound to obey the particular instructions of the captain or whoever it might be who was the delegate of the authority of the club for the purpose of giving those instructions.[26]

Justice Farwell expressed a similar view. He said:

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23 'NSW Rugby Football League Rules' (n 7) Rule 30.
24 *The Macquarie Dictionary*, Macquarie Library, Sydney, 1981, p. 843.
25 *Workmen's Compensation Act, 1906* (Great Britain).
26 *Walker* (n 12) 92.

> It appears to me that it is impossible for the Court to consider the practical utility of the service of the work performed. It may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is work. I cannot assent to the proposition that sport and work are mutually exclusive terms, or hold that the man who is employed and paid to assist in something that is known as sport is, therefore, necessarily excluded from the definition of workmen within the meaning of the Act. I put during argument the case of the huntsman and whips of a pack of hounds. The rest of the field ride for their own amusement, but the three I have mentioned are employed by and obey the orders of the master, and risk their necks, not entirely for their own amusement, but because they are paid to do it.[27]

The significance of this case is that the court acknowledged and recognised that employment relations in sport are subject to legal norms; that there is not, to quote Opie and Smith, a 'sports mystique' where sport can operate apart or above the law. Again, quoting Opie and Smith, sport and athletes should be perceived 'in commercial terms like working in a factory, building a house, farming wheat, staging a ballet or being a professional entertainer'.[28]

4 HAWICK V FLEGG

The NSWRL introduced its retain and transfer system in 1961. Prior to that, it operated a zoning and residential system where, once a player resided in a club's zone for 28 days, he was eligible to play for that club subject to receiving a clearance from the club he previously played for. Greg Hawick was a highly talented player of the 1950s. He played with South Sydney from 1950 to 1956, and the Wagga Kangaroos in 1957.[29] In 1958, he signed a three-year deal with North Sydney, even though he had not resided in its zone or received a clearance from Wagga Kangaroos. He apparently received a better offer from another club (Parramatta) and decided he would rather play with the Wagga Kangaroos in 1958, on the understanding that North Sydney would release him from his contract. At meetings which he did not attend and/or have a chance to defend himself, the NSWRL ruled that Hawick was bound to North Sydney and disqualified him from playing in 1958. He was also required to reside in North Sydney for 28 days, prior to making himself available for the 1959 and 1960 seasons.

Hawick sought relief in the Supreme Court of New South Wales. The NSWRL sought to rely on *Cameron v Hogan,*[30] a 1934 case involving a dispute in

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27 Ibid 93-94.

28 Hayden Opie and Graham Smith, 'The Withering Of Individualism: Professional Team Sports And Employment Law', *University of New South Wales Law Journal*, 1992, 15/2, p. 315.

29 Ian Collis, *The A To Z Of Rugby League Players: 110 Years – 10,000 Players!*, (New Holland Publishers Pty, Limited, 6th ed, 2018) 171 ('*The A To Z*').

30 (1934) 51 CLR 371.

the Victorian branch of the Australian Labor Party, where the High Court declined to become involved in the internal affairs of a voluntary association. The NSWRL, an unincorporated body, claimed that it was a voluntary association and should be subject to the same precepts that applied in *Cameron v Hogan*. Justice McLelland summarised the NSWRL's stance in the following terms:

> Counsel for the League has argued that upon the true construction of the rules, the general committee of the League is a body to which the plaintiff and the other members of the League have submitted all the questions which are under the rules within its jurisdiction, and that each of the members has agreed to be bound by the decisions of the general committee as a body designated for that purpose.
>
> The general committee, it is said, under those rules, as it were, is the supervisory body, and having regard to the rules in the constitutions there is no contractual relationship between each of the members as such.[31]

Justice McLelland then pointed to the NSWRL's Rule 18. It said:

> Every member, upon joining, becomes entitled to all the privileges the League can impart in accordance with these by-laws, and as his joining is a voluntary act on his part, so his acquiescence in these by-laws, or any that may be hereinafter enacted, is hereby implied as well as his submission to the restrictions enforced and penalties imposed by them.[32]

Maybe we can pose the issue in the following terms: by voluntarily agreeing (and maybe we don't need to include the word, voluntarily) to play Rugby League under the auspices of the NSWRL does a person wave goodbye to what would otherwise be regarded as their legal rights? Does sport trump the law?

Justice McLelland rejected the NSWRL's submission. He found 'that there is a contractual connection between each of the members of the League one with another'. He added, in sentiments to those expressed in *Walker v Crystal Place Football Club*, a case which he did not refer to:

> The people who play Rugby League no doubt do so because they enjoy the sport, take pleasure in it, and desire to foster it; but they also play the game in order to earn money, and in the case of players like the plaintiff they earn a considerable amount of their livelihood by playing the game of Rugby League.[33]

Concerning the facts in dispute, Justice McLelland found that Hawick was a member of the Wagga Kangaroos, had not taken up residence in North Sydney's zone and had not obtained a clearance from Wagga Kangaroos to sign with North Sydney.[34] He was, in effect, under the NSWRL's rules 'still' a member of

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31 *Hawick* (n 13) 259.
32 Ibid.
33 Ibid.
34 Ibid 258.

the Wagga Kangaroos. Moreover, he had been denied 'natural justice' in that he had not been given a chance to present a case before committees of the NSWRL, who had disqualified him from playing for a year.[35] Justice McLelland set aside the one-year disqualification. He said, 'that a disqualification lasting one season in the circumstances is of sufficient substance and sufficient interference with the plaintiff's livelihood to warrant interference by the court.'[36]

While Justice McLelland does not refer to *Nordenfelt*, his decision, nonetheless, reflects its restraint of trade precepts.[37] He did not look kindly on a system of employment rules which took away a player's right to be employed. It constituted a fundamental restraint on Hawick's ability to practice his trade and 'liberty to struggle for his own existence in the exercise of any lawful employment'.[38]

5 EASTHAM V NEWCASTLE UNITED FOOTBALL CLUB

English Soccer operated a retain and transfer system similar to that of the NSWRL (which Tutty subsequently objected to) with the exception that clubs could place players on both lists. George Eastham was a player with Newcastle United during the 1959/60 season. He asked Newcastle United to place him on the transfer list. It refused and placed him on their retain list for the 1960/61 season. Eastham refused to sign a new contract and continued his attempt, via an appeal to the Football League's Management Committee, to be placed on the transfer list. Eventually, Newcastle United relented and allowed Eastham to be transferred to Arsenal. Eastham sought a declaratory judgement from the court that the retain and transfer system was an unreasonable restraint of trade.

Justice Wilberforce described the retain and transfer system as:

> an employers' system set up in an industry where the employers have succeeded in establishing a united monolithic front all over the world, and where it is clear that for the purpose of negotiation the employers are vastly more strongly organised than the employees. No doubt the employers all over the world consider the system a good system but this does not prevent the court from considering whether it goes further than is reasonably necessary to protect their legitimate interests.[39]

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35 Ibid 257-258.

36 Ibid 259. Hawick played for North Sydney in 1959 and 1960 and had a stint as North Sydney's coach. *The A To Z* (n 29) 171; Alan Whiticker and Glen Hudson, *The Encyclopedia of Rugby League Players* (Gary Allen Pty Ltd, 1993) 147 ('*Encyclopedia of Rugby League Players*').

37 *Hawick* (n 13). There was some urgency in the handing down of the decision due to Hawick's availability for a forthcoming game. Justice McLelland said 'the short time at my disposal does not enable me to deal with the legal problems involved in detail', at 258.

38 *Nordenfelt* (n 11) 569.

39 *Eastham* (n 14) 438.

He found that the retain system operated as a substantial restraint of trade. Justice Wilberforce said:

> There may be players who have shown quite plainly that they are not going to continue with a particular club or to sign with it, and in their case, placing them on the retain list does substantially interfere with their right to seek other employment – and I emphasise this – does so at a time when they are not employees of the restraining club. That seems to me to operate substantially in restraint of trade.[40]

Justice Wilberforce also expressed misgivings concerning the operation of the transfer system and/or the combined operation of the two systems. He said:

> What makes the transfer system objectionable, in my judgment, is its combination with the retention system. When it is so combined – that is, when a man is retained and it is made known that his club is open to offer, or when a man is put on both the transfer and the retain list – he cannot escape outside the league, all he can do is (in the latter case) apply to have the transfer fee reduced. But even if it is reduced, no club in the league may pay it, and yet he cannot go outside…I come, therefore, to the conclusion that the retention system alone being in restraint of trade and when combined with the transfer system, the defendants do not discharge the onus which rests on them of showing that the restraints are no more than is reasonable to protect their interests.[41]

In short, Justice Wilberforce, found against employment arrangements which restricted the ability of a worker, in this case a soccer player, to seek and/or find employment by those who are prepared or wish to employ him once his contract with his former club had expired.

6 NAGLE V FEILDEN

Florence Nagle, a trainer of horses, sought a licence from the Jockey Club (of England). Even though the Jockey Club 'granted licences to man servants employed by her. In particular her "head lad"',[42] her application was denied 'on the sole ground she was a female'.[43] Nagle challenged this. The issue the Court considered was her claim having been struck out by Master Clayton in October 1965; a finding upheld by Justice Stephenson in January 1966.[44] The three judges who heard this case found that the decision of the Jockey Club amounted to an unreasonable restraint of trade and made strong statements concerning the right

40 Ibid 430-431.
41 Ibid 438, 439.
42 *Nagle* (n 15) 642.
43 Ibid 636.
44 Ibid.

of individuals to pursue their trade; thereby enabling Nagle to proceed with her appeal.

Lord Denning, in much the same way as Justice McLelland had in *Hawick v Flegg* in his examination of *Cameron v Hogan*, said that if the Jockey Club was a voluntary association, he used the term 'social club', it would have a legitimate defence in denying Nagle a licence. He said:

> I quite agree that if we were here considering a social club, it would be necessary for the plaintiff to show a contract. If a man applies to join a social club and is black-balled, he has no cause of action: because members have made no contract with him. They can do as they like. They can admit or refuse him, as they please. But we are not considering a social club. We are considering an association which exercises a virtual monopoly in an important field of human activity. By refusing or withdrawing a licence, the stewards can put a man out of business. This is a great power. If it is abused, can the courts give redress?[45]

His answer was yes; they can. He said:

> The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The court will not give effect to it…The true ground of jurisdiction in all these cases is a man's right to work…a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as courts will intervene to protect his rights of property, they will also intervene to protect his right to work.[46]

Justices Danckwerts and Salmon expressed similar sentiments. Justice Danckwerts said, 'courts have the right to protect the right of a person to work when it is being prevented by the dictatorial exercise of powers by a body which holds a monopoly.'[47] Justice Salmon said:

> One of the principal functions of our courts is, whenever possible to protect the individual from injustice and oppression…The principle that courts will protect a man's right to work is well recognised in the stream of authority relating to contracts in restraint of trade. The courts use their powers in the interests of the individual and of the public to safeguard the individual's right to earn a living as he wills and the public's right to the benefit of his labours.[48]

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45 Ibid 644
46 Ibid 644-645, 646.
47 Ibid 650.
48 Ibid 654-655.

He went on to say:

> I should be sorry to think that…we have grown so supine that…courts are powerless to protect a man against an unreasonable restraint upon his right to work to which he has in no way agreed but which a group with no authority, save that which it has conferred upon itself, seeks capriciously to impose upon him.[49]

Justice Salmon was particularly piqued by the Jockey Club refusing to grant Nagle a licence when it had granted one to her 'best lad'. He said:

> It follows that the plaintiff may succeed in this application if she can show that the defendants, whist recognising her good character and long experience and ability as a trainer, have refused her a licence solely on the ground that she is a woman. It would be as capricious to do so as to refuse a man a licence solely because of the colour of his hair. No doubt there are occupations, such as boxing, which may be reasonably regarded as inherently unsuitable for women. But evidently training racehorses is not one of them…In the present case we have the fact that a licence has always been granted to the plaintiff's head lad for the time being, and the admission that a licence would not be granted to a head lad unless the stewards were satisfied about the employer's character and experience and ability in managing a training establishment. If the defendants have infringed the plaintiff's legal rights by capriciously refusing her a licence, the fact that the granting her head lad a licence they have mitigated the wrong she has suffered would not in my view afford them any defence.[50]

Like *Eastham, Nagle* is a clear exposition of the restraint of trade doctrine being used to defend the individual's right to practice their trade free of (unlawful) interference by an overseeing body which has developed rules governing such trade.

7 ELFORD V BUCKLEY

Rule 29 of the NSWRL's 1961 Rules stipulated that 'All agreements between Clubs and Professional players must be in writing, and must state the terms agreed upon'.[51] Greg Hawick was a member of the Western Suburbs team in 1966 and 1967. He continued playing with Western Suburbs during 1968, despite the parties not having entered into a written agreement, per Rule 29. There was a dispute between Elford and Western Suburbs over what, in fact, they had agreed to in their informal, oral agreement. Elford claimed he only agreed to play on in 1968; Western Suburbs said he had agreed to play for three seasons – 1968 to 1970. It also claimed that during 1968, Hawick 'had agreed to enter into a

49 Ibid 655.
50 Ibid 655-656.
51 'NSW Rugby Football League Rules' (n 7) Rule 29.

formal [three-year] contract'.[52] At the end of 1968 Elford sought to take up alternative employment. Western Suburbs and the NSWRL's Qualification Committee and Permit Committee, on appeal, denied this request. Elford commenced action before the Supreme Court of New South Wales that the NSWRL's employment rules were an unreasonable restraint of trade.

It might be recalled that in *Hawick v Flegg,* Justice McLelland had applied the then rules of the NSWRL – the requirement to live in a club's zone for 28 days and obtaining a clearance from the club that the player had previously been registered with – in overturning the NSWRL's decision to ban Hawick from playing for a year. In this case, Justice Hardie didn't give any weight to Rule 29. The fact that there was not a written contract did not concern him. He accepted that there was an 'oral agreement' and spent his time determining whose version of its length he would accept. He sided with the club.[53]

Hawick sought to rely on *Eastham v Newcastle United Football Club* and *Nagle v Feilden* in his application. Justice Hardie dismissed both cases as being of any relevance. With respect to *Eastham*, he agreed with the submissions of Western Suburbs and the NSWRL that there were significant differences between English Soccer and Rugby League in New South Wales. English Soccer clubs were 'limited companies employed on a fully commercial and profit-making basis' who employed 'full-time professional footballers'. This compared with Rugby League clubs who 'were unincorporated [voluntary] associations and not limited companies',[54] with players employed part-time.

Justice Hardie found the testimony of the club more convincing than Hawick on the length of the 'oral agreement'.[55] On the basis that Hawick was:

> under contract to play with the Club…or, alternatively, having led the Club to believe and act on the view that he was under such contract and decided to sign the formal contract in writing[56]…[and] that the plaintiff was at relevant times contractually bound to the club…the statement of claim – that he was no longer under contract to the Club falls at its threshold.[57]

Given this, there was apparently no need to consider whether the NSWRL's retain and transfer system was an unreasonable restraint of trade. Justice Hardie, nonetheless, decided to indicate his views in *obiter dicta* 'in case the matter should be taken to an appellate court, and in light of the full and detailed argument of

52 *Elford* (n 9) 174.
53 Ibid.
54 Ibid 175.
55 Ibid 174.
56 Not that he had.
57 *Elford* (n 9) 176.

counsel'.[58] He resurrected the 'voluntary association' mantra of *Cameron v Hogan* which Justice McLelland had rejected in *Hawick v Flegg*; and analogously, Lord Denning on 'social clubs' in *Nagle v Feilden*.

Justice Hardie acknowledged that 'The rules of the League, admittedly incorporated into the constitution of the Club, were held in *Hawick v Flegg*…to impose contractual obligations enforceable in the courts of the land.' He then pointed out 'The rules which are the subject of this litigation were not then in the constitution and thus not before the court in earlier litigation'. Despite no submissions having been made about the force of 'a distinction between rights available under formal agreements in writing between clubs and professional players (enforceable by courts) and privileges and benefits of membership conferred by the rules (recognizable and enforceable in the domestic forums and tribunals within the League)', he decided he would approach the plaintiff's claim that the 'challenged provisions of the rules purport to impose legal rights and obligations enforceable by ordinary curial remedies'.[59]

Justice Hardie acknowledged the important functions performed by the NSWRL in its stewardship of the code and the benefits it provided to all of those involved with its production. Through its rules and regulations, the NSWRL provided an environment which enabled individuals to earn income from their skills as Rugby League players. Even though such rules may operate to limit the pecuniary benefits and rewards' of players, 'such limitations flow from membership of the League and are for the benefit of all members'.[60] The NSWRL was not, however, under any 'legal duty to provide an organization and a competition designed to enable their playing members to sell their professional powers and skill at the highest figure which the law of supply and demand can produce'.[61] Nor did he believe that requiring players to obtain permission from their current club to take up employment with another club fell 'within the category of employment contracts or other obligation-creating transactions appropriate for the application of the doctrine of restraint of trade'.[62]

The NSWRL's 1961 Rules involved the creation of an employment regime in which professional players received payments for their skill and talent. The point of the litigation was that these rules limited the ability of players to 'profit' from their skills. The retain and transfer system placed a fetter on their income earning potential. While not engaging with Justice McLelland's findings in *Hawick v Flegg* and his rejection of the 'voluntary association' defence in *Cameron v Hogan* (Justice Hardie doesn't refer to the latter case), Justice Hardie held two contradictory

58 Ibid.
59 Ibid 174-175.
60 Ibid 177.
61 Ibid.
62 Ibid 177-178.

positions on the nature of the legal relationship between players and clubs – an oral agreement constituted a contract while the NSWRL's 1961 Rules did 'not fall within the category of employment contracts…for the application of the doctrine of the restraint of trade'. His finding with respect to the latter meant that the private law of the NSWRL trumped that of the Courts. Or alternatively, he had turned away from the observation of Justice Farwell in *Walker v Crystal Place Football Club* back in 1910. In the extract which follows Justice Farwell's comments concerning 'fox hunting'[63] have been converted to Rugby League:

> The rest of the field follow and are involved in the game for their own amusement, but Rugby League players are employed by and obey the orders of the master, and risk their necks, not entirely for their own amusement, but because they are paid to do it.

Finally, Justice Hardie briefly considered *Nagle v Feilden*[64] where the respective members of the Court had made strong statements concerning an individual's right to work. He dismissed its relevance on two grounds. *Nagle v Feilden* involved an appeal by Florence Nagle against a decision denying her a right to appeal against a decision by the Jockey Club that she could not obtain a licence as a trainer. This provided Justice Hardie with a 'procedural' means to dismiss its relevance: 'the case made in the statement of claim was based essentially upon the invalidity of the rules attacked and not upon decisions made or actions taken under them.' Second, the existence of the 'oral agreement' meant that Elford had not been denied a 'right to earn his living' which 'eclipsed' his restraint of trade claim.[65]

Justice Hardie's decision represents a repudiation of the 'absolute freedom' precepts promulgated by Lord Macnaghten in *Nordenfelt* and adopting an approach based on 'Hobsonian freedom'. Irrespective of the legal basis of his contract, Elford had received income from Western Suburbs and had been enabled to practice his trade. This was a benefit he received made available to him by the NSWRL. Justice Hardie did not see him as having a right to pursue his trade 'freely', to escape restrictions which reduced his ability to 'struggle for his own existence'.[66] Justice Hardie endorsed rules and regulations which reduced and restricted the ability of Elford to maximise the benefits that he could obtain from his trade. Implicit in Justice Hardie's decision is the notion that Elford should be thankful to the NSWRL for providing him with the chance to earn income as a rugby league player. And, continuing with this line of reasoning, if he was unhappy with the situation he found himself in, he could always retire

63 *Walker* (n 12) 93-94.
64 (n 15).
65 *Elford* (n 9) 178.
66 *Nordenfelt* (n 11) 569.

and seek employment in another trade. John Elford spent the rest of his career in the NSWRL with Western Suburbs, retiring in 1976.[67]

8 TUTTY V BUCKLEY

The decision in *Elford v Buckley* was handed down on 27 August 1969.[68] Dennis Tutty's proceedings against the NSWRL's retain and transfer system commenced before the Full Court of the Supreme Court of New South Wales in May 1970. The case was heard before Chief Justice McLelland and Justices Jacobs and Street. Chief Justice McLelland was the same judge who had heard *Hawick v Flegg* a dozen years earlier.[69] Given his rejection of the 'voluntary association' defence of *Cameron v Hogan*, in that case, it would not be unreasonable to assume he would do the same in this case. But this was a case before the Full Court of the Supreme Court of New South Wales.

Two important differences should be noted between Elford and Tutty's cases. Tutty did not have the complication of an 'oral agreement/contract' and had stood out of the game since the end of the 1968 season because Balmain declined his request to be placed on the transfer list. The operation of the NSWRL's Rules had resulted in his being unemployed as a Rugby League player. Is it conceivable if the case had been heard by Justice Hardie, per his 'Hobsonian freedom' approach to the restraint of trade doctrine, the case would have been dismissed on the basis of Tutty deciding not to accept terms offered by Balmain; he had 'freely' decided to stop playing? It was his choice.

The NSWRL mounted two major defences of its 1961 Rules. The first was what is known as the single entity status of a sporting league.[70] The NSWRL maintained that the respective clubs were 'mere creatures of the League and exist primarily for the purpose of dividing the League into groups within which a competition may be organised'[71] The League constituted a single economic entity, the constituent clubs were not in competition with each other, and by implication there was no need for the courts to interfere in the allocation of players between clubs; they were all playing (or employed) for the same entity. The situation was akin to a bank worker moving from one branch to another in

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67 *The A To Z* (n 29) 113; *Encyclopedia of Rugby League Players* (n 36) 94-95.

68 *Elford* (n 9) 170.

69 Charles McLelland was appointed to the Equity Division of the Supreme Court of New South Wales in April 1952. He was made Chief Judge of the Equity and Probate Division in September 1958. He retired from the Court in 1973. Research Data Australia, Hon. Charles McLelland BA, LLB, KC, State Records Authority of New South Wales, researchdata.edu.au/hon-charles-mclelland-llb-kc/145441, accessed 1 October 2021.

70 Stefan Kessene, 'The Single Entity Status of a Sporting League' (2015) *Journal of Sports Economics*, 16(8) 811-818.

71 *Tutty v Buckley* (n 10) 470.

the next suburb. The second was that the League was a 'voluntary association', per *Cameron v Hogan*.

The Supreme Court found that the 1961 Rules which governed the relationship of clubs and professional players 'to have contractual force'. It went on to add:

> There is more in the present circumstances than a banding together of largely professional players in the Metropolitan District Clubs. Each Club has in respect of any professional player, or indeed any playing member registered with it, a valuable right of property in that the Committee of the Club can "sell" the players to another Club for a very considerable sum of money even though there is no current contract to support such a valuable right.[72]

The Court also pointed out that it had been submitted that clubs would seek the highest possible transfer fee they could obtain in selling a player.[73]

The Court then moved on to dismiss the *Cameron v Hogan* defence. The present case, it said:

> is one where there is disclosed by the Rules an intention that between the Metropolitan District Clubs and between the playing members thereof, mostly professional, the Rules were intended to create rights and duties which have legal force and effect…The Metropolitan District Clubs are employees or potential employers of their professional playing members…It is true that the pool of players is not labour in the usual sense because undoubtedly super added an element of sport and a feeling that the sport exists over and above the professionalism involved in it. One should not assume that such feelings do not exist in other areas of remunerated activity – teaching, science, art. However, this element which is super added in such cases does not prevent the activity when it is carried on between parties at a profit to each of them being described in the blunt language of the law as trade.[74]

The Court rejected the single economic entity defence raised by the NSWRL. It said:

> The Metropolitan District Clubs and, indeed, the affiliated Leagues are independent entities even though they have for the common purpose the largely subordinated themselves to the central organising association. Mr Stephen [of the NSWRL] stated in his evidence that each of the District Clubs is a separate body having its own rules, its own Committee and its own property and attending to its own general affairs with its own relationship to the League… [The Rules of the League] are concerned with the enhancement of the financial position of the constituent member

72 Ibid 471.
73 Ibid.
74 Ibid 473.

> Clubs with a consequential system of Retention and Transfer lists. It is not sufficient to say that any professional playing members who do not like the system should not play with the League. The same could be said of a group of employers in an industry who combined in restraint of the free trade of employees.[75]

With this statement, the Court, in effect, over turned the position adopted by Justice Hardie in *Elford v Buckley*.

The Court went on to say that 'the combination of the various Clubs is in restraint of the trade'. This was a conclusion which was not 'affected by the fact that the plaintiff is of necessity a member of the voluntary association which as a District Club combined in the system of constraint'. It added, 'Membership of an association does not debar a person from complaining that the association is acting in restraint of the member's trade'.[76]

The Court decided to 'adopt the direction of inquiry indicated by Wilberforce J… in *Eastham v Newcastle United Football Club'* and 'respectfully differ[ed] from the views expressed by Hardie J. in *Elford v Buckley*'.[77] The Court stated:

> It appears to us that by the present system it is ensured that the value of a player – his intrinsic worth in money as a player – goes not to him but to his previous or potential employer, the Club with which he happens to have registered…A player may be retained and yet not get any employment or match remuneration…We see no reason why this right of a man to the economic benefit of his own skill – a right which the law protects by the doctrine of restraint of trade – should find an exception in the case of a skilled football player.[78]

Finally, the Court turned its mind to whether a right of appeal to the Qualification and Permit Committee mitigated the unreasonableness of the system. It noted very few appeals against retention had been allowed; many more had been successful in lowering the fee 'demanded' by clubs. It said:

> we cannot see how a system which we hold to be in restraint of trade for the reasons which we have expressed can be shown to be a reasonable restraint because the amount of the Transfer Fee may thus be reduced on appeal. This factor does not substantially touch upon the vice which we find in this system. We therefore reach the conclusion that the retention and transfer system as presently framed is in unreasonable restraint of trade.[79]

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75 Ibid.
76 Ibid 474 citing *Pharmaceutical Society of Great Britain v Dickson* [1968] 2 All ER 686.
77 *Tutty v Buckley* (n 10) 475.
78 Ibid.
79 Ibid.

9 BUCKLEY V TUTTY

The NSWRL appealed this decision to the High Court of Australia; before Chief Justice Barwick and Justices McTiernan, Windeyer, Owen and Gibbs. It heard submissions over April and May 1971, handing down its decision on 13 December 1971. The first issue the Court considered was whether the NSWRL's Rules operated as a restraint on Tutty's trade as a footballer. The High Court said:

> it is immaterial whether that is so, for it is now trite to repeat what Lord Atkin said in *Hepworth Manufacturing Co. Ltd. v Ryott*…
>
> "It is a misapprehension to suggest that this doctrine is confined merely to restraint of trade in any ordinary meaning of the word 'trade'; it extends further than trade, it undoubtedly extends to the exercise of a man's profession or calling."[80]

The doctrine regarding restraint of trade is not limited to any category of skilled occupations but applies to employment generally. The fact that football is a sport does not mean that a man paid to play football is not engaged in employment.[81]

In its next sentence the Court cited the observation of Justice Farwell in *Walker v Crystal Palace Football Club* that 'It may be sport to the amateur, but to a man paid for it and makes his living thereby it is work'.[82]

In *Elford v Buckley,* Justice Hardie dismissed the relevance of Justice Wilberforce's findings in *Eastham v Newcastle United Football Club* to Rugby League in that English Soccer clubs were 'limited companies employed on a fully commercial and profit-making basis' who employed 'full-time professional footballers'; whereas Rugby League clubs 'were unincorporated [voluntary] associations and not limited companies' who employed part-time players.[83] Even though the Court did not refer to *Elford v Buckley* as such, it rejected such a supposition. It said:

> the fact that a man does not work full time does not mean that he is not in employment. Some attention was devoted in the course of argument to the question whether the League or the district clubs organized their activities for profit, and whether they were engaged in trade, but it is unnecessary to consider those questions. The professional footballers employed by the district clubs are engaged in trade within the meaning of the doctrine, whether or not the district clubs themselves and the League are engaged in trade.[84]

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80 *Hepworth Manufacturing Co. Ltd. v Ryott* [1920] 1 Ch 1 26.
81 *Buckley v Tutty* (n 1) 371-372.
82 *Walker* (n 12) 93.
83 *Elford* (n 9) 175.
84 *Buckley v Tutty* 372.

The NSWRL maintained that even if players are engaged in trade its rules did not operate in restraint of that trade, rather they fostered and encouraged it. The NSWRL argued that in organising and operating the sport of Rugby League it provided players with an opportunity to profit from their skills 'and it is not a restraint of the trade of a player who wishes to remain a member of the League to require him to abide by its rules while he takes advantage of the benefits membership affords.'[85] It also repeated the single economic entity theory of Rugby League that it had presented to the Supreme Court of New South Wales.

The High Court rejected both of these submissions. It said:

> The district clubs which provide employment for professional footballers are, in truth, in keen competition for the more skilful (sic) players. The rules however prevent professional players from making the most of the fact that there are clubs prepared to bid for their services. If valid, the rules prevent a professional player who is a member of one club, even if he is not a contractually bound to play for it, from becoming employed as a professional footballer by another club, except for the concurrence of the former club or the Qualification and Permit Committee. This is plainly a fetter on the right of a player to seek and engage in employment…The rules in our opinion operate as a restraint of trade.[86]

The NSWRL then sought to defend its rules on the basis of the 'voluntary association' precepts of *Cameron v Hogan*; the League's rules did not involve contractual relations between members. In examining this submission, the High Court pointed to the decision of Justice McLelland in *Hawick v Flegg* who found there was 'a contractual relation between members of the League.'[87] The Court said:

> It is unnecessary to decide these matters because the doctrine of the common law that invalidates restraints of trade is not limited to contractual provisions. There is both ancient and modern authority for the proposition that the rules as to restraint of trade apply to all restraints, however imposed and whether voluntary of involuntary.[88]

The Court acknowledged that it was 'a legitimate object of the League and of the district clubs to ensure that the teams fielded in the competition are as strong and as well matched as possible', and for clubs to 'ensure some continuity of [the] membership' of their teams. With respect to achieving the latter, it recommended the use of staggered contracts. It said, 'It is not for a court to advise in advance what restraints would be reasonable; our function is only to consider whether the

85 Ibid.
86 Ibid 373.
87 Ibid 375; *Hawick* (n 13) 259.
88 *Buckley v Tutty* (n 1) 375.

rules in their present form impose a greater restraint than is necessary for the adequate protection of the interests of the League and its members'.[89]

The High Court concluded that the NSWRL's 1961 Rules did not for two reasons:

> In the first place, they enable a club to prevent any professional who has played in one of its teams from playing with another club, notwithstanding that he has ceased to play for the club which retains him and no longer receives any remuneration from that club. There is no time limited for the exercise of this power; a club may retain a former player no matter how short the period of his employment with it may have been or how much time has elapsed since his engagement expired. A member may be retained even by a club which refuses to employ him, or, if he, is employed, to select him to play in any team. We are not satisfied that the interests of the League or of the district clubs would be jeopardized if the clubs did not contain provisions so drastic.[90]

Second, it objected to the payment of transfer fees. It said:

> Although a club does not wish to retain a player, and is prepared to see him go to another club, it may fix a transfer fee, most of which goes to the club itself,[91] although it may be quite unrelated to any benefit which the player has received from his membership or association with the club. If a man has proved himself to be a valuable player his club can fix a substantial fee which may adversely affect his chance of obtaining a new engagement and may also affect the amount he is likely to be offered by another club as a joining fee. The transfer fee not only may prevent a player from reaping his financial rewards of his own skill but it may impede him in obtaining employment. It is no answer to say that the transfer fee may be fixed by reference to what it would cost the club to obtain another player equally skilful, for this is 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 imposed by the rules goes further than is necessary to protect the reasonable interests of the League and its members.[92]

And like the Supreme Court of New South Wales, the High Court did not see appeals by players to the Qualification and Permit Committee as mitigating the unreasonableness of the NSWRL's Rules. It said:

> However, a player is completely in the hands of the committee: he has no right to require it to decide in a particular way, or in accordance with any

89 Ibid 377-378.

90 Ibid 378.

91 A player who requested a transfer received 5 per cent of the transfer fee; a player placed on the transfer list by the club received ten per cent. 'NSW Rugby Football League Rules' (n 7) Rule 27 (g).

92 *Buckley v Tutty* (n 1) 378.

> accepted principle, and it cannot be assumed that the decisions of the committee will always and necessarily ensure that the restraint imposed by the rules is no more than a court would consider reasonable.[93]

Finally, the High Court briefly examined *Nagle v Feilden* where the Court of Appeal allowed an appeal against an order striking out the claim of Florence Nagle who was denied a licence by the Jockey Club because she was a woman.[94] The High Court observed:

> that although there was no contractual relationship, and no question that the plaintiff was a member of the Jockey Club, it was at least arguable that the court might grant the relief sought, because the courts have power to intervene to protect a person's right to work. We respectfully agree with those decisions.[95]

Following the decision, Dennis Tutty signed with Penrith. He later obtained employment with Penrith and Eastern Suburbs. He finished out his career with a return to Balmain, who after his retirement as a player employed him as the coach of its team.[96]

10 CONCLUSION

It is now more than fifty years since the High Court of Australia handed down its decision in *Buckley v Tutty*,[97] after an earlier decision of the Full Court of the Supreme Court of New South Wales, which found the NSWRL' s retain and transfer system to be an unreasonable restraint of trade. The article maintains that it has had a profound impact on the governance of Australian sports. Other courts followed its approach in similar cases; it strengthened the hand of player associations in collective bargaining agreements where such controls were traded for compensatory benefits; reduced the 'unreasonableness' of employment rules, such as transfer and draft systems, to satisfy tests associated with the restraint of trade doctrine; and enhanced benefits for female players who joined well established player associations with the formation of professional leagues, mainly in the last decade.

Prior to the commencement of proceedings in *Tutty*, Justice Hardie of the Supreme Court in *Elford v Buckley*[98] in *obiter dicta* found that the NSWRL's retain and transfer system was not an unreasonable restraint of trade. This article has sought to provide an understanding of the different reasoning employed by the respective courts in these cases. The article began with an examination of the

93 Ibid 379; *Tutty v Buckley* (n 10) 475.
94 *Nagle* (n 15).
95 *Buckley v Tutty* (n 1) 381.
96 *The A To Z* (n 29) 411; *Encyclopedia of Rugby League Players* (n 36) 348.
97 (n 1).
98 (n 9).

restraint of trade doctrine developed by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition.*[99] In undertaking this examination, consideration was given to the meaning of 'carrying on trade'. A distinction was made between 'absolute freedom' (subject to contractual and legislative norms) and 'Hobsonian freedom'. 'Absolute freedom' is where every person is able to carry on their trade 'freely', with all restraints of trade being 'contrary to public policy, and therefore void'; with every individual 'at liberty to struggle for [their] own existence' in seeking lawful employment. 'Hobsonian freedom' is where an individual, once having been employed, is not free to take up employment with another employer, even when their contract with that employer had expired, without the permission of that employer. The choice they had was to accept their employer's offer or vacate their trade. This was the essential difference in the decision making of the *Elford* and *Tutty* courts.

The article also examined various sports cases which played a role in the decision making of the courts. *Walker v Crystal Palace Football Club*[100] is the first case which acknowledges that employment relations in sport are subject to legal norms; that sport cannot operate apart or above the law. *Hawick v Flegg*[101] is important for two reasons. First, the Supreme Court of New South Wales viewed the NSWRL's one year disqualification of Greg Hawick as an unwarranted interference on his right to work and, hence, practice his trade. Second, the presiding Judge, Justice McLelland, was the Chief Judge of the Full Court of the Supreme Court of New South Wales in *Tutty v Buckley.*[102] Both *Eastham v Newcastle United Football Club*[103] and *Nagle v Feilden*[104] are clear and unambiguous examples of the 'absolute freedom' precepts contained in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition.*[105] In *Elford v Buckley*,[106] Justice Hardie dismissed the relevance of these cases for the NSWRL's retain and transfer system. Both the Supreme Court of New South Wales and the High Court rejected his reasoning in examining the impact of the same rules in the case of Dennis Tutty.

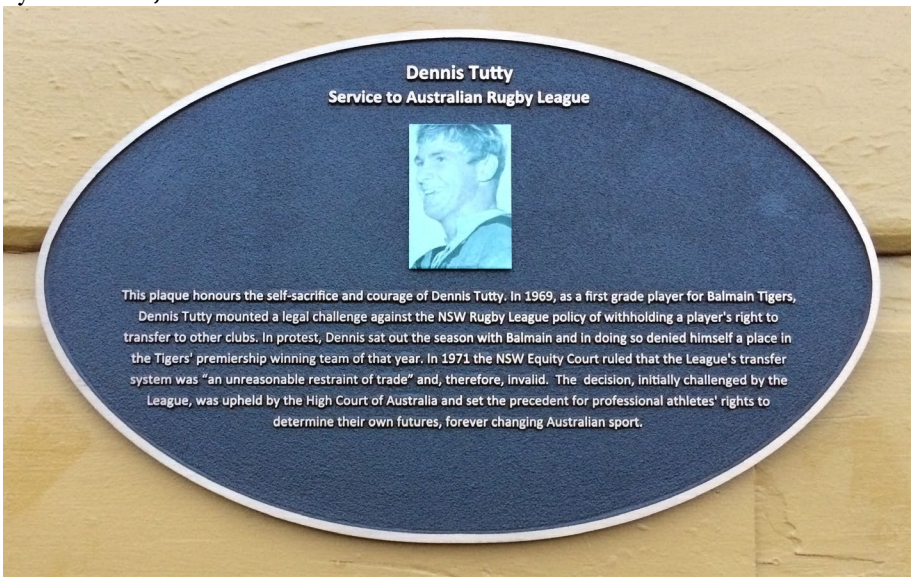
99 (n 11).
100 (n 12).
101 (n 13).
102 (n 10).
103 (n 14).
104 (n 15).
105 (n 11).
106 (n 9).

11 POSTSCRIPT: A CEREMONY AT LEICHHARDT OVAL

The *Sun Herald* of the fourth of March 2018 contains a brief report on a ceremony held at Leichhardt Oval. It says, 'In front of dignitaries including the Inner West Council mayor Darcy Byrne and representatives of the Rugby League Players' Association, [Dennis] Tutty was honoured with the unveiling of a plaque at his former home ground.'[107] The Plaque (see Figure 1) is entitled 'Dennis Tutty: Service to Australian Rugby League'. The Plaque goes on to say:

> This plaque honours the self-sacrifice and courage of Dennis Tutty. In 1969, as a first grade player for Balmain Tigers, Dennis Tutty mounted a legal challenge against the NSW Rugby League policy of withholding a player's right to transfer to other clubs. In protest, Dennis sat out the season with Balmain and in doing so denied himself a place in the Tigers' premiership winning team of that year. In 1971[108] the NSW Equity Court ruled that the League's transfer system was "an unreasonable restraint of trade" and, therefore, invalid. The decision, initially challenged by the League, was upheld by the High Court of Australia and set the precedent for professional athletes' rights to determine their own future, forever changing Australian sport.

Figure 1
Plaque honouring Dennis Tutty installed at Leichhardt Oval. Photograph taken by the author, 2 March 2018.



[107] Adrian Proszenko, Tutty made lucrative NRL transfers possible, (2018) Sun Herald, 4 March, 49.

[108] This is an error. The decision was in October 1970, *Tutty v Buckley* (n 10) 463.