




Well do you feel lucky?: Restraint of Trade/Anti Competition Clauses in Australian Employment Agreements



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Starting Propositions



- The concept of the “salaryman” is dead
- Surveys on staff loyalty and trust in employers
- Generation Y
- Increasing importance of (and resulting problems/ challenges from) restraints/ anti competition clauses

The Common Law Position



In Nordenfelt's case [1894] AC 535, Lord Macnaughten stated:-

"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. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in who's favour it is imposed, while at the same time it is in no way injurious to the public."

The Australian Position



The law in Australia accommodates the position that where a restraint is a reasonable one, judged by reference to the parties to the agreement and to the public, such a restraint will not void a contract .

The High Court, in Buckley v Tutty (1971) 125 CLR 353 at 380, stated:-

"The law treats unreasonable restraints as unenforceable because it is contrary to the public welfare that a man should unreasonably be prevented from earning his living in whichever lawful way he chooses and that the public should unreasonably be deprived of the services of a man prepared to engage in employment."

General Australian Position/ Trends



- The courts have taken a very tough stance against employers seeking to prevent future competition by former employees.
- Contrast with a less rigorous evaluation where the restrained party is the vendor in a merger/acquisition.
- Chiefly the courts will consider the character of the business and the nature of the employees' connection with it. The closer the relationship, the more dependant the business is on long term client patronage and employee seniority are factors inclined to convince the courts to allow restraints to stand.

General Australian Position/ Trends



- The longer/ broader the restraints in relation to time and or space extend, the heavier onus is on the ex employer to establish the reasonableness of the restraints.
- The practice has developed in Australia to incorporate clauses specifying multiple alternate restraints of time and space and basically "inviting" courts to sever the offending parts of the restraint without affecting the overall validity of the contract.
- Where the purpose of the restraint is not primarily to prevent competition but is designed to protect trade secrets and confidential information , the courts are more inclined to uphold the restraint.
- Restraints will also be upheld where they are designed to prevent an employ "*stealing*" a former employers customers, where good will/ client base is in the nature of a proprietary interest.

Restraints



Usual types of restraints include: -

- Prohibitions on competing with the former employer
- Prohibitions on enticing other or former employees
- Prohibitions on working for former clients
- Prohibitions on the solicitation of work from customers
- Formalising common law obligations on confidentiality

(Note: This of course leads to the question of what information is "*confidential*" such that it can be legitimately made the subject of an express restraint. It seems clear on the Australian authorities that the information must have a special quality that makes it different from common or industry wide knowledge).

Restraint Considerations



The matters generally considered in determining the reasonableness of any restraint include: -

- The geographical operation of the restraint
- The duration of the proposed restraint
- The existence and giving of adequate consideration
- Whether a legitimate interest/ confidential information is being protected, rather than simply attempting to delay or limit competition.

Wright v Gasweld P/L (1991) 22 NSWLR317



Kirby P (as he then was) detailed an extensive list of factors which will influence whether information can be deemed confidential, including: -

- Was skill and effort expended to acquire the information
- Is information jealously guarded and not made readily available to employees and cannot be acquired by others without risk or effort
- It was expressly stated to the employee that the material was regarded as confidential
- The practices of the industry support confidentiality
- The employee has only been authorised to share the information by reason of their seniority/ necessity of their role.

Severing Excessive Restraint Wording



- If a restraint is drafted too widely then an Australian Court may refuse to uphold it. However the courts have considered it possible to be able to sever certain words if it would make the restraint more reasonable and would not change its underlying purpose.
- In NSW, s4 of the Restraint of Trade Act 1976 provides that restraints are valid to the extent that they do not offend public policy whether the restraint is in severable terms or not.
- Nevertheless parties cannot draft the widest possible restraint and have the court determine what is appropriate. In many cases of this nature, the restraints have been held to be void for uncertainty.

BDO Group Investments v Ngo [2010]VSC 206



- VSC issued injunctions against 2 former BDO directors preventing them from joining a newly-established rival.
- The interlocutory injunction prevented them from: *'... working for any entity or person other than [BDO] or any of its subsidiaries or from carrying on, assisting, promoting or otherwise being engaged in or concerned in any business activity which competes with the business of [BDO] or any of its subsidiaries and from canvassing, soliciting, inducing or encouraging or enticing away [BDO] or any of its subsidiaries the custom of any client of [BDO] or any of its subsidiaries without the prior written consent of [BDO].'*
- BDO offered to pay their pre - departure pay until the end of trial & VSC accepted this indicated no relevant hardship to be suffered.

BDO Group Investments v Ngo [2010]VSC 206 (cont'd)



'In my view, the relative prejudice that may be caused to [BDO] as a result of the departure of the defendants, ... unrestrained by any interlocutory orders, is likely to be serious as a result of possible further departures and also as a result of financing difficulties with Bankwest [financier of merger]... There appears to me to be a significant risk that unrestrained departures of directors and staff may tend to have a significant adverse effect on the value of the goodwill of [BDO] which it acquired and which is the only security Bankwest holds

Reed Business Information v Seymour [2010] NSWSC 790



- Restraint applied to a sales executive preventing both disclosure of confidential information & from working on certain publications of her new employer (which directly competed with the former's).
- The Court however rejected the request to prevent her taking the job for 1 yr as causing substantial and unreasonable hardship as an injunction with only an undertaking as to damages could not fully compensate for the risk that making her effectively unemployed in the interim could result in forced sale of her house.

Stacks v Marshall [2010] NSWSC 34



- Lawyer left a regional firm & restraint of 12 mths sought to be applied to prevent soliciting former clients & poaching employees and 10km of 2 post offices.
- Marshall offered undertakings to not to solicit employees for 12 mths and clients he had dealt with in preceding 12 mths for 6 mths.
- NSWSC - Stacks had a legitimate interest to protect clients as the firm had gone to considerable lengths to introduce Marshall to clients and to market his services.
- Additional issue – should restraint be limited to clients Marshall worked with? (A: Yes)
- Stacks argued for 12 mths restraint based on time to train & introduce replacement to clients. Marshall argued that the restraint should be how long it would take to sever his connection with the clients e worked with.

Stacks v Marshall (cont'd)



- Area ban too wide as it would prevent Marshall from providing legal services to anyone within these areas, even if they had never been Stacks clients.
- As an officer of the court, Marshall was deemed unlikely to breach his offered undertaking.
- *'Accordingly, it seems to me, a blanket covenant against competition, which protects not only [Stacks'] legitimate interest in its own clients, but also competition in respect of those who are not, or have never been its clients, goes further, on the particular facts of this case, than is reasonably necessary for the protection of [Stacks].'*
- Court awarded Marshall 80% of his costs.

Prime Creative Media v Vranjkovic [2009] FCA 1030



- Client Information could still be confidential even though the information might also be available via 'public' sources (i.e. phone directories) due to the convenience and time factors in compiling.
- Editor changing to a competing publication and used former's database. She admitted to use but argued she had compiled it and information publicly available (> 1000 contacts).
- Court – Contact list was confidential not due to secrecy of its contents but in its easy to use format only available to employees.
- Injunction granted with case management to determine appointment of a computer expert to audit for retention of information.

Marlov P/L v Murat Col [2009] NSWSC 501



- Restraint of 7.5 km radius of his former real estate agency and breach of restraint on soliciting customers.
- Court – no solicitation and radius restriction void.
- *'... the business of the real estate agency is different from other kinds of trades or professions where there is a real interest in preserving the relationship with a customer. A real estate agency does not sell goods on a regular and frequent basis to customers in the same way as a retailer of food or other goods. A real estate agency does not, as a general rule, have customers who regularly consult it for advice as in the case of professional advisors such as solicitors, accountants and financial advisors...'*
- Contrary to public interest in that it restricts competition. Prevents him from joining >30 agencies within radius & no suggestion of misuse of confidential information (simply directed at restricting competition).

Northern Tablelands Insurance Brokers P/L v Howell [2009] NSWSC 426



- 7+ yrs as insurance accounts executive.
- Injunctive relief sought. Clause provided: 'For a period of 12, 24 and 36 months after the Term, the Employee must not (solicit, poach, or facilitate either)
- Court – Employer had repudiated the contract therefore no continuing subsistence of the restraint, but in any event the clause was uncertain and unenforceable as there was no available means of determining which time constraint should be observed and enforced.

Miles v Genesys Wealth Advisers Ltd [2009] NSWCA 25



- Finance executive, had received independent legal advice about the restraints & negotiated on equal footing before agreeing to a Deed of Release.
- Court – upheld 30 mth restraint stating:
'Although the Court does not regard such an admission as conclusive, the Court gives it considerable weight where the parties have negotiated on an equal footing and with the benefit of legal advice ...'
- Court also found that removing the restraint would result in the business only being protected by the second limb of the restraint, which prevented the executive soliciting member firms of the former employer. The court was concerned that the executive could circumvent the soliciting restraint by using other sales staff to indirectly solicit these members using his information.

Tullet Prebon (Aust) P/L v Purcell [2008] NSWSC 852



- NSWSC held contractual restraints on a financial broker were binding for 6 months (contract specified 14 mths)
- "gardening leave" restraints must be reasonable.
- *"... from the expiry of 6 mths after the end of (Purcell's) actual employment, an injunction would no longer serve a legitimate protectable interest of ("TPA"), but merely sterilise (Purcell) and prevent competition... In those circumstances, if I were wrong in concluding that the restraints were valid and enforceable only for a period of 6 mths after the end of actual employment or 3 mths following expiry of the term of the contract - whichever is the shorter - I would nonetheless, as a matter of discretion, decline injunctive relief beyond that period'*
- The court ordered Purcell pay TPA's costs.

Think Global Recruitment v Moultrie [2008] NSWSC 869



- NSWSC refused injunctions to enforce confidentiality covenants or “restricted business restraints” against a group of recruitment executives, but did order the surrender of unsolicited electronic files forwarded to one by a continuing employee.
- The Employer had closed its Australian office and operated a virtual office, which appeared to have little or no business activity.
- 3 defendants gave strong evidence about the adverse effect an injunction would have (several on 457 visas).
- Defendants offered undertakings to the Court that certain data would be documented and be available at trial to quantify damages if restraints valid.

Sear v Invocare Aust P/L [2007] WASC 30



- A contractual undertaking not to engage or be involved in funeral services or similar business within specified areas (plus soliciting & poaching) for 5 yrs after termination was an excessive restraint and found void.
- 10 yr employment contract with payment of “bonus” which over period amounted to equivalent of 5 yrs income (consideration for restraint)
- Consideration paid was not recoverable

Sonnet Corp P/L v Wilson [2008] NSWSC 579



- NSWSC refused to enforce restraints on the former CEO of a communications company moving to a competitor.
- Had worked part time prior to leaving and for part of that period Wilson also worked for the so called competitor with Sonnet's knowledge and without complaint and other staff had gone to "competitor" without objection.
- Evidence on the extent of competition lacking.
- Seems that delay was an issue for the injunction – not indicated that conduct amounted to a waiver

Barrett and Ors v Ecco Personnel Pty Ltd [1998] NSWSC 545



- NSWCA upheld a restraint not to '...canvass, solicit, interfere with or entice away' any client for 4 mths post employment even where the former employee had been approached by clients of the former employer.
- The Court unanimously rejected the submission that 'solicit' should be construed so narrowly as to not cover the situation where a client approaches first
"This cannot be correct. One may acknowledge that in most instances the 1st approach will be made by the ex-employee to the former customer. Common sense however demands that this is not the exclusive means by which a solicitation may occur... I cannot see that to propose to do business ceases to be soliciting business simply because the recipient invited the proposal."

Cactus Imaging P/L v Peters [2006] NSWSC 717



- 12 mth restraint on Sales Manager not to solicit or poach to new employer although short intervening employment with a non competitor (Printing industry)
- Considerations – what parties had agreed/ signed, time for replacement to demonstrate competence & establish rapport, knowledge of pricing and marketing strategies likely current & amount to unfair advantage during restraint period.
- 12 mth prohibition on poaching was reasonable on evidence of need for protection of confidential information, but only for sales staff and only for involvement in a competing business.
- Restraint on soliciting reasonable given knowledge of pricing parameters and marketing strategies.
- Duration also valid on evidence it would take a year to establish relationship with a replacement employee.

Aussie Home Loans v X Inc [2005]NSWSC 285



- Executive employees who, under a group restructure, transferred from 1 employing entity to another were not subject to any post-employment restraints to “poach” staff or contractors.
- Court found restraint was against public policy – the 12 mth period was too long & was too wide as it included to all levels and staff recruited after departure).
- A covenant against poaching is not necessarily invalid where there is a legitimate interest.
- Restraint too long because staff covered by the poaching clause could be terminated on 1 week’s notice, the market was competitive and fluid and the terms of employment suggested industry accepted people to be able to move readily and unreasonable that only 1 mth notice under contract but then 12 mths restraint.
- Some defendants were not in contractual relationship with the Plaintiff entity

Woolworths Ltd v Olson [2004]NSWCA 372



- NSWCA enforced a restraint preventing employment with a competitor for 6 mths post (although the documentation specified 12 mths). NSWCA believed this alteration could be made while maintaining the balance.
- Olson was involved in a secret software development project. Resigned, signed on & dismissed during notice for breach of fiduciary duties & confidentiality (emailed software documents to his wife pre resignation).
- At 1st instance the restraint was held unenforceable because of scope and incapable of being read down.
- NSWCA held – Injunction did not offend public policy & consistent with restraint; restraint protected a legitimate interest. Prescribed payments during period meant Olson was not prevented from earning a living. ROTA s4(1) could be applied and common law principles did not constrain it; clause not void for uncertainty by referring to 12 mths.

Woolworths Case (cont'd)



Justice Mason: -

"... Placing oneself in the position of the parties it is, in my view, clear that Woolworths had a properly protectable interest in securing the right to impose a post-employment restraint upon the respondent to the effect that (subject to the "Restraint Payment") he would not become involved or interested in or concerned with a Competitive Business. ...

A reasonable employment restraint is easier to enforce than a breach of confidence or breach of copyright claim; it removes the temptation for the former employee to offer and for the new employer to solicit confidential information; and it provides certainty of definition as regards the area of confidential information to be protected...

This restraint goes beyond a mere covenant against competition. It protects a legitimate interest "

Reeves v Koops Martin Financial Services P/L [2006] NSWCA 221



- Appeal against restraint orders against a financial planner. The restraint wording referred to the words '*confidentiality of its business operations*', which the Court held to include approaches to customers of the former employer.
- NSWCA refused leave – phrase did extend to cover the identity & requirements of those customers and the clause protected this aspect of confidentiality. NSWCA also opined that evidence of a breach of 1 aspect of the restraint could justify sufficient concern about breach of another aspect to justify an injunction.
- In the absence of powerful considerations being raised against an injunction, no justification for leave to be given.

**So do you feel
lucky????**



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