

**Restraint & Anti-Poaching
Clauses;
IP & Confidentiality –
(Squabbles at the end of your job?)**

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- There is a global recession, so what of restraint of trade?
- Is it only the clause of a boom or is it still relevant?
- [2005] NSWSC 631 per White J:
 - 6 month restraint in IT against computer programmer
 - that employee was in a position through which he had gained intimate knowledge of customer's business requirements.
 - He was sitting on confidential information while negotiating his new job with a competitor.

- Basic Principles



[1894] AC 535

- No right to be unreasonably sheltered from competition:

- Legitimate interest of employer in terms of protecting eg customer relations; and
- Reasonable as to time, place, functions

(See also

[1916] 1 AC 688)

- The superstars of Australian Restraint Law:

Hon Justice Dyson Heydon

&

Professor Andrew Stewart -

- What of the “standard” cascading restraint? Cause for circumspection?

- Spender J in [1987] FCA 70 there were approximately 120 variables:
 - As long as separate, permissible?

 - Mechanical?

- 39(a) In consideration of the Purchaser entering into this Contract and to reasonably protect the goodwill of the business the Vendor the Second Vendor the Third Vendor the Fourth Vendor the Fifth Vendor and the Sixth Vendor and each of them do jointly and severally agree with the Purchaser that subject to Clause 39(b):
- This Clause shall have effect as if it were several covenants consisting of each separate covenant set out in sub-clause (ii) of this Clause 39(a) and of each combined with each such separate period of time set out in Sub Clause (iii) of this Clause 39(a) and of each such separate combination combined with each separate area set out in sub clause (iv) of this clause 30(a) and if any of the said several separate covenants shall be or become invalid or unenforceable for any reason then such invalidity or unenforceability shall not affect the validity or enforceability of any of the other separate covenants.
- The Vendor the Second Vendor the Third Vendor the Fourth Vendor the Fifth Vendor and the Sixth Vendor and each of them will for the period and within the area hereinafter specified without the prior written consent of the Purchaser whether directly or indirectly by themselves or jointly with or on behalf of any other persons or corporation or trust on any account or pretext by any means whatsoever or through ... an agent or independent contractor:
 - carry on or be engaged in or concerned with directly or indirectly (whether as proprietor, employer, servant, agent, principal, partner or in any other capacity whatsoever) or otherwise engage in the business of ship building of any description or any other business of a similar nature or
 - procure or solicit or encourage any other person to procure or solicit the custom of any former customer of the business; or
 - hold or beneficially own whether directly or indirectly and whether absolutely or contingently or hold options over shares in or be an adviser to any corporation doing any of the things referred to in clause 30(a)(ii)(a) or 39(a)(i)(b) above.
- The periods of time hereinbefore referred to are:
 - during the period of 10 years from and after completion;
 - during the period of 9 years from and after completion;
 - during the period of 8 years from and after completion;
 - during the period of 7 years from and after completion;
 - during the period of 6 years from and after completion;
 - during the period of 5 years from and after completion;
 - during the period of 4 years from and after completion;
 - during the period of 3 years from and after completion;
 - during the period of 2 years from and after completion;
 - during the period of 1 year from and after completion.
- The areas hereinbefore referred to are:
 - within the United States, Canada, Australia and/or New Zealand;
 - within Australia
 - within the East Coast of Australia.

■ *Hartley's v Martin* [2002] VSC 301 per Gillard J:

Valid in circumstances where

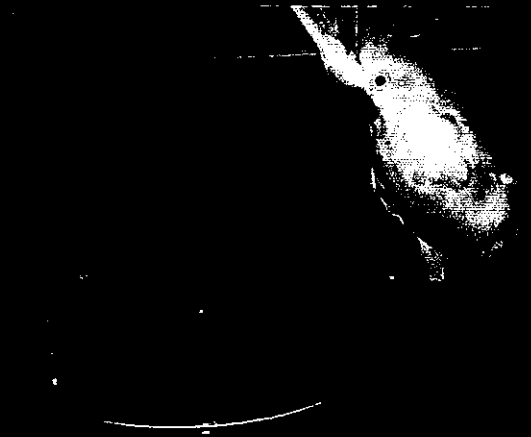
- financiers had been trained from little experience by employer and introduced to key clients.
- Secretary was a key employee
- Departure of “section”
- Key links to clients as legitimate interest (good will)
- Noted reasonability of clause – work 3 months and clients with close link over year.

- How much practical utility?
- Litigation costs
- Divulging commercial secrets
- No legitimate interest in friendship
- Transitional mechanism

Confidential Information & “Know-How”

- – general improvement in skills etc as opposed to deliberate copying of customer lists.
- Remedies for Breach of Confidence?

Aaaaaaghghhhhhh!!!



- University Sector in Flux
- *UWA v Grey* (No 20) 2008 FCA 498 per French J as he then was:
 - UWA lost at first instance.
 - Not follow own procedures for evoking IP policy
 - Note conduct of Grey and cross claims.
 - Being appealed.
 - Commercialisation of Research and Licences

Victoria University

eg 2004 VSC 33:

- Wilson lost
- Note his dependence of his University title and affiliations to getting work.

- Why is this area of law so confusing?
- Dr Robert Dean QC *Employment Law*
Employment Law
- Professor Jill McKeogh
- Issues include licences and sub contractors etc

For a further discussion of the issues raised in this paper, please watch out for the forthcoming article of Dr Louise Floyd and her PhD co-author .