

# Casebook On Australian Company Law: Being A Supplementary Casebook To Sims Casebook On Company Law

## FEATURE Restraint of trade

- protection against soliciting clients must only affect the clients with whom the employer had contact
- the length of the restraint must be no longer than that which it will take the substitute employee to establish an equivalent relationship with clients
- the area must only be as wide as the area in which the ex-employee had contact with clients (or which was allotted to him or her at the initiation of the agreement)
- it is much safer to limit the restraint simply to clients with whom the ex-employee had contact than to divide off areas of restriction
- cascading clauses are essential if relying on time limits and areas of restraint<sup>14</sup>
- the introduction of subsidiary companies is fraught with danger given that the ex-employee may have no knowledge of the customers of such companies and may have had little to do with them
- if the ex-employee changed duties during the currency of the employment and those duties are significantly different or involve different clients, a new restraint needs to be entered into.

While there have been arguments surrounding whether a restraint of trade "deed" without further consideration is effective (See *Leonard v Booth*<sup>15</sup> and *Associated Ice Manufacturers Pty Ltd v A Barriss Pty Ltd*,<sup>16</sup> Heydon in "The Restraint of Trade




Doctrine"<sup>17</sup> states:

"It is enough if the general contractual rules for validity are satisfied, and amongst these is the rule that a contract under seal does not require consideration".

But the author continues:  
"Admittedly consideration would be needed if an injunction is sought, as it almost always is. Equity will not assist a volunteer".  
Consequently, in practical terms it is important that when a change in restraint clause is made or a new restraint is drafted, sufficient (but not necessarily adequate) consideration is given. A restraint of trade clause cannot be avoided. A confidentiality clause cannot come to the aid of a plaintiff where, no matter how expertly and intricately drafted, it is sought to be used as a substitute for a restraint of trade clause. As was pointed out in *Littlewoods Organisation v Harris*:<sup>18</sup>

"It is thus established that an employer can stipulate for the protection against having his confidential information passed on to a rival in trade. But experience has shown it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not, and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by

List A Welcomes New Readers – Alice Muhlebach, Andrew McRobert and Fiona Hodgson

 <p><b>Fiona Hodgson</b> Fiona practises in commercial, environmental and government law. She has extensive experience in corporate governance disputes and investigations (including anti-bribery and consumer claims). Her environmental practice includes contaminated land claims, water management and environmental indemnities. She has advised governments on civil claims, regulatory processes, administrative law and FOI and has been recognised for her expertise in <i>Best Lawyers Australia</i> 2014/2015, <i>Chambers</i> 2016 and <i>Global Investigations Review</i> 2016. Fiona's experience includes 10 years as a partner at Ashurst, and prior to that 10 years practice in the UK.</p> <p>Fiona is reading with Stewart Maiden and her senior mentor is Wendy Harris QC.</p>	 <p><b>Andrew McRobert</b> Andrew has 12 years' experience as a solicitor practising in intellectual property, information technology and commercial law. Recently, Andrew was Special Counsel with NPL, where he conducted patent infringement matters (e.g. <i>Gilead</i>), parallel importation strategies (e.g. <i>Lonsdale</i>), and significant commercial disputes such as the <i>Seaford</i> (Oval) <i>Redfern</i> litigation, in which he acted for Matthew Joyce.</p> <p>Andrew holds a Bachelor of Laws, Bachelor of Science and Master of Laws (Intellectual Property) from Murdoch University, and a Master of Laws from Cornell University Law School, where he was awarded two academic prizes. Andrew is reading with Peter Wallis and his senior mentor is Bruce Caine QC.</p>	 <p><b>Alice Muhlebach</b> Alice has substantial experience in competition and consumer law, and the law regarding infrastructure access and economic regulation. She also accepts briefs in a wide range of other law matters.</p> <p>Prior to coming to the Bar, Alice was a partner in Ashurst's competition practice, where she advised clients on ACCC merger clearances and other matters arising under the Competition and Consumer Act 2010, including the Australian Consumer Law. She also acted for clients before the Australian Competition Tribunal, the Federal Court and the High Court.</p> <p>Alice is reading with Stephen Parmenter and her senior mentor is Michael O'Bryan QC.</p>
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