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POST-EMPLOYMENT RESTRAINT OF TRADE: NO ONE SIZE FITS ALL [PART 1]

It is now a more common practice for employers to include in an employment contract some form of post-employment restraint on the employees' ability to directly compete with the employer, solicitation of former employer's clients, entice away former co-workers, and disclose confidential information.

The restraint is normally drafted by combining the usual variables which include geographical limitations on where the ex-employee may work, a time limit on engaging in an employment of a similar nature and the prescribed conduct which is to be the subject of the restraint.

As early as 1894, the stance of the Courts has been to presume all employment contracts include terms which are unduly restrictive of a person's ability to carry on his/her trade freely are void and unenforceable on public policy ground.¹ The opposite of undue restrictions would be, in circumstances, for the former employer to prove that the restraint goes no further than is reasonable to protect its legitimate interests.² Broadly, Courts will look at three issues:

1. on a strict interpretation, whether the conduct of the ex-employee is covered by the restraint;
2. the "protectable" interest alleged by the former employer that is the subject of the agreement; and
3. whether the restraint is reasonable for the protection of that interest.³

To rebut the presumption of invalidity is a fact-finding exercise. The balance is to be struck between the need of the employer to protect legitimate business interests as against the right of the employee to earn a living.

Often and by default, a generic post-employment restraint clause is present in an employment contract. It's all good if the working relationship "expired" on good terms. What if otherwise happened? A fundamental issue then is such generic restraint clause is not tailored to fit the circumstances and needs of the employer.

In this first part of the two parts discussion, we introduce the legal position in Victoria with examples from previous cases.

Philip Barton

Partner
E-mail: pnb@andrice.com.au

Don Brookes

Partner
E-mail: deb@andrice.com.au

Michael Coldham

Partner
E-mail: mrc@andrice.com.au

Edward Liu

Solicitor
E-mail: ecl@andrice.com.au

Anderson Rice Lawyers

Level 10
555 Lonsdale Street
Melbourne VIC 3000

Phone: +61 3 9672 2666

Fax: +61 3 9642 0271

Email: lawyers@andrice.com.au

¹ See, *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535.

² *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535; followed in *Buckley v Tutty* (1971) 125 CLR 353.

³ *Buckley v Tutty* (1971) 125 CLR 353. See, for example, *Brilliant Lighting (Aust) Pty Ltd v Baillieu* [2004] VSC 248.

The former employer must ascertain the alleged interests it wishes to protect. Such interests include some advantages or assets inherent in the business belong to the former employer.⁴ Examples from the previous judicial decisions include confidential information (including trade secrets) and customer connections. Clearly, using confidential information obtained during the term of employment by an ex-employee as a "springboard" to his / her personal success would be, prima facie, restrainable.⁵ However, employers should note that trade secrets or other confidential information does not include an employee's own "know how" such as the stock of knowledge, skill and experience built up by working over a period of time;⁶ this remains true even if the ex-employee was trained at the former employer's expense.⁷

Ex-employees may also be restrained for appropriating former employer's client lists and their contact details.⁸ In this regard, Courts generally inquire into seniority and responsibility of the ex-employee, actual duties carried out and degree of contact with clients.

Duration of the restraint is closely linked to the nature of protectable interests. For confidential information, it would be reasonable for the restraint to last as long as a trade secret remains secret.

The reasonableness of the geographic restraint is primarily decided with reference to the current and proposed operations of the employer and the previous workplace location of the ex-employee.

Unless the ex-employee was at fault, restraining an ex-employee from earning an income during the restraint period should be "softened" with some form of "restraint payment" to the ex-employee to avoid financial hardship to the ex-employee.⁹

The balance is to be struck between the need of the employer to protect legitimate business interests as against the right of the employee to earn a living.

In the next installment of the Anderson Rice Industrial & Employment Relations Newsletter, we will outline the issue with generic post-restraint restraint clause with a case law illustration.

⁴ *Stenhouse Ltd v Phillips* [1974] AC 391; *Allan Janes LLP V Johal* [2006] EWHC 286 Ch, [2006] IRLR 599.

⁵ *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317.

⁶ *Herbert Morris Ltd v. Saxelby* (1916) 1 AC 688.

⁷ *Brown v. Krippner Pty Ltd v Hanlon* (1995) ATPR 41-386.

⁸ See, e.g., *IF Asia Pacific Pty Ltd v Galbally* [2003] VSC 192.

⁹ See, *Woolworths Ltd v Olson* [2004] NSWCA 372.

CASE ALERT: LARNER V PARKS VICTORIA (C1-03-07820)

On 29 July 2008, the Age newspaper reported that a \$6m award has been made to a person who was severely injured as a result of a gum tree branch falling on his tent in windy conditions. Most people at first glance would question this decision having regard to knowledge that one does not camp under a Murray River Red Gum because they have a propensity to shed their branches from time to time.

What stood out in this case was the examination of the facts that concluded:

- the Murray River Reserve should be discriminated from the generally understood phrase "a virgin forest"
- The magnitude of the risk was of the "highest order"
- The Reserve is a high use area
- That Parks Victoria had identified the risk in their Managerial Guidelines and Tree Management Policy of 1995
- That there were insufficient Ranger Staff to advise the Public of the danger and
- that most of the public did not know that branches of this class of tree do not necessarily fall down near the tree but spiral out from it to twice their radius.

The 1999 Tree Management Guideline Policy said:

"...regular monitoring in regards to areas where large numbers congregate and where there is a significant risk of injury from trees in order to detect structurally hazardous trees or other factors which cause tree hazards"

The Judge went on to say:

"I must say, I find it somewhat scandalous that a State Department charged pursuant to the Management Agreement (Exhibit 12) to manage reserves where large numbers of the public frequent, should, when advised of the grave risks and steps which needed to be taken to alleviate that risk, determine to do nothing whatsoever to educate their staff on the issue or take any of the steps recommended in its own policy or guidelines. That is, the evidence before me is that the rangers in this Reserve have no training whatsoever in risk management or tree risk assessment, nor have any steps been taken since 1999 to provide such training. The evidence before me is that the manner in which the defendant conducted its operations was that the Murray River Reserve was at such a low operational level, given the defendant's self-assessed level of service category as set out in LOS, Exhibit 13, that there



were no resources allocated nor was there any likelihood of any resources being available for such education and the costs of same. Given the demonstrated catastrophic risk of injury identified in the report, Exhibit D, and the evidence of the defendant's knowledge of death and injury caused by such risks, I find such lack of action reprehensible."

His Honour went on to examine what could have been done because the law does not place an unreasonable burden on land management or business to prevent harm from occurring. He said:

"I find that the defendant, in response to the risks identified, failed:

- (a) to appropriately train or educate its staff;
- (b) to appropriately advise entrants to the Reserve by way of:
 - (i) signage;
 - (ii) notices;
 - (iii) newspaper articles; or
 - (iv) by the use of existing rangers, or the employment of additional rangers, to provide oral advice when visiting camping sites;

of the unusual danger and risk that falling limbs from red gums provenanced at the Murray River Reserve presented to entrants to the Reserve."

This case is a classic when it comes to reviewing what was known and what was acted upon. The classic rule of law distinguishes the burden of adequate precaution weighted against the probability of harm. In this case his Honour formed the clear view that Parks Victoria knew from their own material that there was a real and significant damage and did not do anything about it. The other issue for me related to the fact that at this site there were 130 river red gums and only one was dead, which was the subject tree.

Going forward resourcing land management agencies is a very real issue, education programs for the public and signage all play an important role. The cost of employing more staff during peak periods and the use of volunteers to facilitate that process and the printing of education material and signage is seen by the courts as the correct answer to this class of incident. Much will be discussed about this case in the future but in the world of risk management the implementation of report recommendations is an important process as to the audit process for that outcome.

EMPLOYER'S RECORD-KEEPING OBLIGATIONS

Employer's record-keeping obligations under the Workplace Relations Regulations 2006 were simplified in 2007.

A sample checklist is produced below for your compliance check.

Why such compliance check is necessary?

The Workplace Ombudsman inspectors may issue infringement notices to Employers for, currently, \$110.00 per contravention for an individual or \$550.00 per contravention for a body corporate.

Record-keeping Standards?

Employers must sufficiently maintain detailed information of personnel records in a condition that allows a person (such as Workplace Ombudsman Inspectors) to determine the employee's entitlements and whether the employee is receiving those entitlements.

These records must be kept in a legible form in the English language and in a format, electronic or otherwise, that is readily available upon request.

What about errors in the records?

An error in the records is not fatal to the record-keeping obligation. However, the employer must correct it as soon as the employer becomes aware of the error and record the nature of the error with the correction.

How long these records must be kept?

The records must be kept for a continuous period of at least seven (7) years after the date on which the entry is made. This typically means seven (7) years after termination of employment relationship.

Sample Checklist

GENERAL EMPLOYMENT RECORD must contain:

- the name of the employer;
- the name of the employee;
- whether the employee's employment is:
 - (i) full-time; or
 - (ii) part-time;
- whether the employee's employment is:
 - (i) permanent; or
 - (ii) temporary; or
 - (iii) casual;
- the date on which the employee's employment began.

In the event that an employee is entitled to a penalty rate or loading, the minimum details in the **HOURS WORKED RECORD** include:



- the number of overtime hours worked by the employee during each day; or
- when the employee started and ceased working overtime hours.

If the employer and employee agree in writing to an **AVERAGING OF THE EMPLOYEE'S HOURS OF WORK**, a copy of that written agreement must be kept in the personnel file.

PAY RECORDS must contain:

- records of:
 - an incentive-based payment; or
 - a bonus; or
 - a loading; or
 - a penalty rate; or
 - another monetary allowance or separately identifiable entitlement;

and

- the gross and net amounts paid to the employee;
- and
- any deductions made from the gross amount paid to the employee.

If the employee is a casual or irregular part-time employee who is guaranteed a basic periodic rate of pay, the record relating to the employee must also contain a record of the hours worked by the employee.

PAY SLIP must specify:

- the name of the employer;
- the name of the employee;
- the date on which the payment to which the pay slip relates was made;
- the period to which that pay slip relates;
- if the employee is paid at an hourly rate of pay:
 - (i) the ordinary hourly rate; and
 - (ii) the number of hours in that period for which the employee was employed at that rate; and
 - (iii) the amount of the payment made at that rate;
- if the employee is paid at an annual rate of pay — that rate as at the latest date to which the payment relates;
- the gross amount of the payment;
- the net amount of the payment;
- any amount paid that is an incentive-based payment, bonus, loading, monetary allowance, penalty rate or other separately identifiable entitlement the employee has;
- the details in respect of each amount deducted from the gross amount of the payment including the name, or the name and number, of the fund or account into which the deduction was paid;

- if the employer is required to make superannuation contributions for the benefit of the employee:
 - (i) the amount of each contribution that the employer has made for the benefit of the employee during the period to which the pay slip relates, and the name of any fund to which that contribution was made; or
 - (ii) the amounts of contributions that the employer is liable to make in relation to the period to which the pay slip relates, and the name of any fund to which those contributions will be made.

SUPER CONTRIBUTIONS RECORD including employee's superfund election must contain:

- the amount of the contributions made;
- the period over which the contributions were made;
- the dates on which the contributions were made;
- the name of any fund to which the contributions were made;
- the basis on which the employer became liable to make the contributions, including:
 - (i) the keeping of a record of any election made by the employee as to the fund to which contributions are to be made; and
 - (ii) the date of any relevant election.

LEAVE RECORD including

- the accrual of that leave;
- any leave taken by the employee;
- the balance of the employee's entitlement to that leave from time to time.

If the employee has elected to forgo an entitlement to take an amount of leave, an employer must keep the following:

- a copy of the employee's written election to forgo the amount of leave;
- a record of the rate of payment for the amount of leave forgone and when the payment was made.

TERMINATION RECORD must contain:

- whether the employment was terminated by consent or by notice or summarily or in some other manner, specify the manner; and
- the name of the person who acted to terminate the employment.

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