The Reasonableness of Restraints: An Analysis of the Enforcement of Post-Employment Restraints

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Restraints of trade in employment contracts are as common as they are controversial. They have been criticised by many scholars and practitioners for their supposed detrimental consequences in restricting employees' rights to use their skills and experience, promulgating an inequality of bargaining power between employers and employees, and limiting market competition. Acknowledging these criticisms, this article explains the reasons why restraints are both important and necessary in employment relationships. It also provides guidance about the contemporary common law approach used to determine the enforceability of employment restraints and may therefore assist practitioners in drafting enforceable restraints.

INTRODUCTION

The recent interlocutory restraint of eight Herbert Smith Freehills partners[1] has thrust the restraint of trade doctrine into the spotlight[2] and highlighted its significance in modern Australian commerce. Debate surrounds the enforcement of post-employment restraint clauses, and courts are confronted with a clash of interests between employers and workers.

While employers view post-employment restraints as necessary to protect their business interests and promote stability in the labour market, they are ideologically opposed by many workers' advocates, who perceive restraints as unnecessary interventions that distort market forces, inequitably favour employers and inhibit an employee's ability to use their skills, experience and know-how.

Many Australian labour law scholars[3] have adopted a libertarian[4] approach in emphasising the detriment of restraints as "legal handcuffs"[5] that reduce competitiveness, productivity and labour mobility. This article takes a different perspective. Through a protectionist lens,[6] it contends that the non-enforcement, or more limited enforcement, of restraints would have a negative effect on employers

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[1] *Pryse v Clark* (2017) 264 IR 451.

[2] See M Han, "Freefall: How Top Law Firm Went to War with Itself", *Australian Financial Review*, 14 March 2017 <http://www.afr.com/business/legal/the-freexit-herbert-smith-freehills-leavers-and-remainders-20170301-gunufv>; A Zhang, "Herbert Smith Freehills Sues Eight Partners Leaving for White & Case", *Legal* Week, 10 February 2017 <http://www.legalweek.com/sites/legalweek/2017/02/10/herbert-smith-freehills-sues-eight-partners-leaving-for-white-case/?slreturn=20170403005809>.

[3] P Murphy, "Employment Contracts and Productivity: The Relationship of Post Employment Restraints to Productivity in Knowledge Based Economies" (Paper presented at the *LawAsia Employment Law Conference*, Hanoi, August 2015); C Arup et al, "Restraints of Trade: The Legal Practise" (2013) 36(1) *University of New South Wales Law Journal* 1; J Riley, "Sterilising Talent: A Critical Assessment of Injunctions Enforcing Negative Covenants" (2012) 34(4) *Sydney Law Review* 617.

[4] Libertarian theory posits that there should be minimal legal intervention in the labour market and that the labour market should be left to self-regulate according to free market forces and the social order: see A Stewart et al, *Creighton and Stewart's Labour Law* (The Federation Press, 6th ed, 2016) [1.15]–[1.16]; A Stewart, *Stewart's Guide to Employment Law* (Federation Press, 5th ed, 2015) [1.2].

[5] Murphy, n 3, 5.

[6] Protectionist theory is the opposite to libertarian theory and posits that legal intervention is necessary to properly regulate and maintain the efficient operation of the labour market: Stewart et al, n 4, [1.13]–[1.14]; Stewart, n 4, [1.1].

by exposing their business interests, reducing their productivity, breeding instability and impairing their competitiveness.

Countering the "handcuffs" thesis, it argues the necessity of enforcing restraint clauses in employment contracts. It does so by first examining the effectiveness of the current common law test in producing reasonable outcomes for both employees and employers. Secondly, it analyses how the enforcement of restrictive covenants protects employers' legitimate business interests. Thirdly, it assesses the detrimental consequences of not enforcing restraints and the inadequacy of contemporary common law and statutory protections for employers. Finally, it contends that restraints should be enforced to uphold the sanctity and authority of contract.

In doing so, this article is intended to provide a distinct perspective from contemporary scholarship, which has largely argued against the enforcement of restrictive covenants in Australia. It also intends to provide a guide for practitioners about how the courts determine the enforceability of restraints.

EFFECTIVENESS OF THE CURRENT COMMON LAW TEST

The common law seeks to reconcile two conflicting policies: first, "that a man should be free to use his skill and experience to the best advantage";[7] and secondly, that covenants should be observed and enforced.[8] The current common law approach balances the post-employment interests of employers and their former employees. It renders restrictive covenants prima facie unenforceable as restraints of trade contrary to public policy,[9] with the party seeking to rely on a restraint bearing the onus of proving its enforceability.[10]

Restrictive covenants are only enforceable if they are proven to protect a "legitimate business interest" and the protection sought is no more than is "reasonably necessary" to protect that interest.[11] The "reasonableness" of a restraint is determined by its duration, its area of coverage and the activities it applies to.[12] The circumstances "at the time of contracting" determine what is a reasonable restraint. The question is whether the restraint was reasonable at the date of contract, having in mind the best estimate that the parties could make at that time for the future.[13]

Therefore, the current common law approach produces the most appropriate outcome for employers and employees according to "all circumstances"[14] of each case. Particularly by considering restraints prima facie void, it initially prioritises employee rights, correcting any supposed inequality of bargaining power favouring employers and urging courts to impose restraints only when they are necessary. It also serves employees' interests by considering clauses (now very common in employment contracts) that compel employees to agree to the reasonableness of restraints inconclusive of their reasonableness at law. In this context, the courts have recognised the inequality in bargaining power that is present in some contractual negotiations by holding that such clauses are only given weight when the parties are

[7] *Portal Software v Bodsworth* [2005] NSWSC 1179, [63]; *Attwood v Lamont* [1920] 3 KB 571, 577.

[8] *Stenhouse Australia Ltd v Phillips* [1973] 2 NSWLR 691, 697; also see I Neil and D Chin, *The Modern Contract of Employment* (Thomson Reuters, 2012) [12.40].

[9] *Nordenfeldt v Maxim Nordenfeldt Guns and Ammunition Co* [1894] AC 535, 565 (Lord Macnaghten); *Koops Martin v Dean Reeves* [2006] NSWSC 449, [26]–[27]; *Buckley v Tutty* (1971) 125 CLR 353, 376; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 125 CLR 353, 376.

[10] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 706–707; *Buckley v Tutty* (1971) 125 CLR 353, [16]; *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423, [66]–[70]; *Habitat 1 Pty Ltd v Formby* [2016] WASC 376, [56].

[11] *Nordenfeldt v Maxim Nordenfeldt Guns and Ammunition Co* [1894] AC 535, 565; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 706; *Lindner v Murdock's Garage* (1950) 83 CLR 628, 653.

[12] *Woolworths Ltd v Olson* [2004] NSWCA 372, [40]; *Lindner v Murdock's Garage* (1950) 83 CLR 628, 638, 647–648, 653; *Gerahty v Minter* (1979) 142 CLR 177, 181, 188.

[13] *Just Group Ltd v Peck* (2016) 264 IR 425, [38]; *Geraghty v Minter* (1979) 142 CLR 177, 180; *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423, [66]–[70]; *Habitat 1 Pty Ltd v Formby* [2016] WASC 376, [56].

[14] *Cactus Imaging Pty Ltd v Glenn Peters* (2006) 71 NSWLR 9, [11]; *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657, [50]–[55]; *Smith v Nomad Modular Building* [2007] WASCA 169, [40]–[43].

held to be on equal footing or the covenantor (employee) has obtained legal advice.[15] Even in these circumstances, they are "valid considerations but not necessarily decisive".[16]

Employees' interests are also advanced by the courts' inclination, in cases of ambiguous restraint clauses, to construe the clause in favour of the employee so that, as between the reasonably available constructions, the one that imposes the lesser restriction on the employee will be preferred.[17]

As such, the current common law approach balances the two competing policies referred to above. Its effectiveness in producing just outcomes is evident in cases where courts have refused to enforce "unreasonable" restraints that have merely limited competition,[18] or were excessive in length or scope.[19] Courts have shown a tendency to refuse to enforce restraints of longer than six months, holding anything longer as intruding on employees' interests.[20] This was exemplified in *OAMPS Insurance Brokers Ltd v Shackcloth*,[21] where an 18-month restraint was ruled unenforceable for exceeding the time an employer reasonably needed to protect its interests. Also, in *Just Group Ltd v Peck*,[22] a restraint was held unenforceable because it applied for an unnecessarily long time, over a geographical area that was too broad, and restricted the relevant employee from working for businesses that did not compete with the plaintiff.[23] These cases show that the courts are quick to refuse to enforce restraints that possess unreasonable qualities.

However, there are two significant cases where restraints longer than two years in duration have been held enforceable. On their face, these judgments may seem remarkable, but after having regard to the circumstances of each case, the enforced duration of each restraint was justified. First, in *Genesys Wealth Advisers Ltd v Miles*[24] both the New South Wales Supreme Court, Court of Appeal[25] and High Court[26] upheld a 30-month restraint on a financial advisor. This period was held to be justified because the restrained employee was a managing director who had significant access to confidential information and strong connections with the firm's financial services clients. Secondly, in *Pearson v HRX Holdings Pty Ltd*[27] a two-year restraint was held to be reasonable. This was because the restrained employee was the chief operating officer of his former employer, had extensive knowledge of the former employer's clients and operations to render him the "human face of the business", held shares in his former employer, and was remunerated for 21 months of the two-year restraint period.

This case shows how a balanced approach has been applied to determine the enforceability of restraints. Contrary to contemporary libertarian criticism that Australian courts have taken a "pro-employer" stance,[28] the courts have been unwilling to favour either employers or employees, and have

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[15] *Queensland Co-operative Milling Assn v Pamag Pty Ltd* (1973) 133 CLR 260, 268; *Woolworths Ltd v Olson* [2004] NSWCA 372, [39]; *Seven Network Operations Ltd v James Warburton (No 2)* (2011) 206 IR 450, [70]–[72].

[16] *Capital Aircraft Services Pty Ltd v Brolin* [2007] ACTCA 8, [22].

[17] *Just Group Ltd v Peck* (2016) 264 IR 425, [38]; *Portal Software v Bodsworth* [2005] NSWSC 1179, [67], [73]; *Butt v Long* (1953) 88 CLR 476, 487; *Mills v Dunham* [1891] 1 Ch 576, 589–590.

[18] See, eg *Bearingpoint Australia Pty Ltd v Robert Hillard* [2008] VSC 115; *Double T Radio Pty Lt v Marr and Bishop* [2001] VSC 415; *Stenhouse Australia Ltd v Phillips* [1974] 1 All ER 117.

[19] See, eg *Birdanco Nominees Pty Ltd v Money* (2012) 36 VR 341; *Seven Network Operations Ltd v James Warburton (No 2)* (2011) 206 IR 450; *Aussie Home Loans v X Inc Services* [2005] NSWSC 285; *Talk of the Town v Hagstrom* (1990) 99 ALR 130.

[20] Arup et al, n 3, 13.

[21] *OAMPS Insurance Brokers Ltd v Shackcloth* [2008] NTSC 29.

[22] *Just Group Ltd v Peck* [2016] VSC 614.

[23] Unanimously upheld on appeal in *Just Group Ltd v Peck* (2016) 264 IR 425 (Riordan AJA, Beach and Ferguson JJA).

[24] *Genesys Wealth Advisers Ltd v Miles* [2008] NSWSC 802.

[25] *Miles v Genesys Wealth Advisers Ltd* (2009) 201 IR 1.

[26] *Miles v Genesys Wealth Advisers Ltd* [2009] HCATrans 182.

[27] *Pearson v HRX Holdings Pty Ltd* (2012) 205 FCR 187.

[28] J Riley, "No 'Poaching'? Why Not? A Reflection on the Legitimacy of Post-employment Restrictive Covenants" (2005) *Commercial Law Quarterly* 3; A Stewart, "Drafting and Enforcing Post-Employment Restraints" (1997) 10 Australian Journal of *Labour Law* 181; Riley, n 3.

decided the enforceability of restraints according to the facts of each case. Any trend of enforcing restraints is more appropriately attributed to employees attempting to transgress the boundaries of reasonable restraints rather than the courts incorrectly applying the common law test.

Furthermore, contemporary criticisms of the common law test of "reasonableness" as inconsistent, "flabby"[29] and "elastic"[30] are unfounded. The lack of uniformity in enforcing restraints illustrates the fairness of the test, as it ensures restraints are enforced in a manner that balances employer and employee interests in each case. While some judgments may give the impression of "elasticity", most differences of approach result from judges attempting to apply the law to the commercial context of each case. No result will ever be the same because the facts of each case are unique.

As Harman LJ explained, "the limits of the [restraint of trade] doctrine are very widely set out and differ a good deal from case to case, so that no one is a binding authority for any other because the circumstances differ".[31] This notion is illustrated in the seminal case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunitions Company*[32] where a restraint of 25 years applying anywhere in the world was held enforceable. In its context, the restraint was reasonable. However, today, noting the effects of globalisation, the breadth of international competition and extensive customer base for ammunitions, such a restraint is likely to be held unreasonable. *Nordenfeldt* highlights the way the courts effectively balance employees' freedom to contract with the protection of employers' businesses when enforcing restraints according to the context in which the restraint is imposed.

By considering restraints prima facie void and only enforcing them when they are reasonably necessary to protect legitimate business interests, the contemporary law on restraints respects employees' freedom to pursue their employment and exploit their productive capacity without unreasonable restriction.

PROTECTION OF LEGITIMATE BUSINESS INTERESTS

While the current breadth of protection for employers has been criticised for over-extending the range of "protectable interests" in the seminal common law cases[33] to "quite ephemeral interests",[34] this has been a necessary shift. Since the early 20th century, Australian business has changed. Employers are now subject to greater international competition and threats to their businesses. The law has adapted to these changes by extending the range of "protectable" business interests.[35] The most significant of these changes and their necessity to protect employers and their businesses are assessed below.

Trade Secrets and Confidential Information

Restrictive covenants may prevent the use of trade secrets and confidential information for a specific period of time.[36] These restraints destroy the "springboard"[37] this information may provide former employees and create a "buffer zone" until confidential "information becomes progressively stale

[29] Riley, n 3.

[30] D Brennan, "Springboards and Ironing Boards: Confidential Information as a Restraint of Trade" (2005) 21 *Journal of Contract Law* 71, 85.

[31] *GW Plowman & Son Ltd v Ash* [1964] 1 WLR 568, 571.

[32] *Nordenfelt v Maxim Nordenfelt Guns and Ammunitions Company* [1894] AC 535.

[33] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 710; *Attwood v Lamont* [1920] 3 KB 571, 633.

[34] Riley, n 3, 631.

[35] *Seven Network (Operations) Ltd v James Warburton (No 2)* (2011) 206 IR 450, [67]; *Paul Fishlock v The Campaign Palace Pty Limited* (2013) 234 IR 1, [297] (Sackar J).

[36] *Littlewoods Organisation Ltd v Harris* [1978] All ER 1026, 1479; *Cactus Imaging Pty Ltd v Glenn Peters* (2006) 71 NSWLR 9, [13] (Brereton J); *Smith v Nomad Modular Building Pty Ltd* [2007] WASCA 169, [37] (McLure JA, Buss JA agreeing); *Pioneer Concrete Services v Galli* [1985] VR 675, [710]; *Woolworths Ltd v Olson* [2004] NSWCA 372, [38]; *Wallis Nominees Pty Ltd v Pickett* (2013) 45 VR 657.

[37] *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, 338.

and recollection diminishes or becomes irrelevant".[38] They are vital to protect the second, "middle" category[39] of information in Goulding J's *Faccenda*[40] tripartite categorisation,[41] which is not protected by the equitable or implied common law duties of confidentiality. By way of background, this tripartite characterisation may be summarised as:

(1) Information of a trivial nature or which is so easily accessible from public sources that it cannot be regarded as confidential;
(2) Information which may have originally been confidential because of its character or because the employee was told it was confidential, but which has become part of the employee's skill and knowledge;
(3) Trade secrets so confidential that even though they may have been learned by heart, and even though the employee has ceased employment, can only be used for the employer's benefit.[42]

The ability of contractual restraints to prohibit the use of information in categories two and three emphasise their necessity, as such information can damage an employer's business if placed in the hands of a competitor. Many cases[43] exemplify the importance of restraints for this purpose, particularly *Woolworths Ltd v Olson*,[44] where a restraint was enforced to protect a former Woolworths executive from using a confidential system of inventory management in his new employment with Woolworths' competitor Franklins. If this inventory system was placed in Franklins' hands, it could have had a multimillion dollar impact on Woolworths' business.

Whether information falls within the second or third categories is a question of fact in each case,[45] adjudged at the time of contracting.[46] Merely because an employer believes that information is confidential or a "trade secret" does not make it so under law.[47] Information falling within the third category is often ostensibly confidential. However, classification of information within the second category is more contentious. Courts will determine the "confidentiality" of information in question by considering all the circumstances of each case, particularly:

(a) The fact that skill and effort was expended to acquire the information;
(b) The fact that the information is jealously guarded by the employer, is not readily made available to employees and could not, without considerable effort and/or risk, be acquired by others;
(c) The fact that it was plainly made known to the employee that the material was regarded by the employer as confidential;

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[38] *Seven Network (Operations) Ltd v James Warburton (No 2)* (2011) 206 IR 450, [80].

[39] This information falls between the first category of information, which is unprotectable, and the third category of confidential information or trade secrets, which is automatically protected by the equitable and implied common law duties of confidentiality.

[40] *Faccenda Chicken Ltd v Fowler* [1984] ICR 589.

[41] Accepted in Australia in *Wright v Gasweld Pty Ltd* (1999) 22 NSWLR 317, 333 (Kirby P), 339–341 (Samuels JA); *Riteway Express Pty Ltd v Clayton* (1987) 10 NSWLR 238; *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 73 IPR 326 [46]; *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995, [21]. This is despite its rejection by the English and Welsh Court of Appeal in *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 137.

[42] See *Faccenda Chicken v Fowler* [1984] ICR 589, 589–590; *Forkserve Pty Ltd v Pacchiarotta* (2000) 50 IPR 74, [18].

[43] *Woolworths Ltd v Olson* [2004] NSWCA 372; *Nexus Adhesives Pty Ltd v RLA Polymers Pty Ltd* (2012) 97 IPR 160; *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995; *Smith v Nomad Modular Building Pty Ltd* [2007] WASCA 169; *Consolidated Paper Industries Pty Ltd v Matthews* [2004] WASC 161; *Prime Creative Media Pty Ltd v Vranjkovic* [2009] FCA 1030; *Digital Products Group Pty Ltd v Opferkuch* [2008] NSWSC 575.

[44] *Woolworths Ltd v Olson* [2004] NSWCA 372.

[45] *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, 334; *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423, [108].

[46] *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423, [101]; *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1479.

[47] *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, 333; *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995, [21]; *AIM Maintenance Ltd v Brunt* (2004) 28 WAR 357, [68]. This is despite its rejection by the Court of Appeal in *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 137.

(d) The fact that the usages and practices of the industry support the assertion of confidentiality; and
(e) The fact that the employee in question has been permitted to share the information only by reason of his or her seniority or high responsibility within the employer's organisation.[48]

The courts apply these considerations to ensure that only the use of sufficiently "confidential" information is restrained.,[49] Application of these considerations has also led to the establishment of a line of authority that favours employees. This line of authority proposes that contractual restraints cannot prohibit the use of "know-how", information in the public domain or information that employees can remember.[50] Nor can a restraint prohibit the use of "valuable commercial information", because this is not sufficiently confidential and would violate public policy by limiting competition if restrained.[51] Further, information will only be held to be confidential if it would prejudice an employer's interests if misused by a former employee.[52] Only information that is properly confidential and that has the potential to damage an employer's business may be restrained.

For these reasons, it seems inappropriate to suggest that restraints protecting confidential information impair productivity or labour mobility, because the courts balance these factors by using the considerations set out above, and the overarching test of "reasonable necessity". Contrary to the "legal handcuffs" theory, enforcing restraints for this purpose enhances innovation, as employers know that such innovation will be protected. In turn, it increases productivity as employers invest more resources into their workers and businesses, because they know they are likely to retain their services and have their innovation protected. This encourages improvements that are valuable to the particular employer in the first instance and, in many cases, ultimately to the wider economy.

Apart from common law restraint, it must be noted that employees are bound by the equitable duty of confidentiality (or fidelity) in the post-employment period.[53] This indefinitely protects employers' confidential information and complements the operation of post-employment restraints. Additionally, at common law, a duty of confidentiality may be implied into contracts where a restraint clause does not explicitly prevent the use of confidential information,[54] serving the same purpose as the equitable duty of confidentiality. It may be argued that these duties absolve the need to enforce express contractual restraints covering confidential information; however, as explained below, because contractual restraints cover a wider subject matter and involve a lower threshold of proving "confidentiality" of information, this is not so.

Customer, Client and Trade Connections

Restrictive covenants protect employers' client relationships and trade connections. The importance of their enforcement for this purpose is amplified where a former employee held a senior position or was exposed to particular clients as the "human face of a business".[55] The function of restraints in this context

[48] *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, 334 (citations omitted).

[49] *Europa International Pty Ltd v Child* [2016] NSWSC 923, [124]; *Ezystay Systems Pty Ltd v Link 2 Pty Ltd* [2015] NSWSC 1105, [126]; *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, [129].

[50] *Miles v Genesys Wealth Advisers Ltd* (2009) 201 IR 1, [22]–[27]; *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, [41]–[50]; *Faccenda Chicken Ltd v Fowler* [1987] 1 Ch 117; *Dais Studio Pty Ltd v Bullet Creative Pty Ltd* [2007] FCA 2054; contrast with the English decision of *East of England Schools CIC v Palmer* [2013] EWHC 4138.

[51] *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, 326 (Gleeson CJ), 339 (Samuels JA); *Manildra Laboratories v Campbell* [2009] NSWSC 987, [85]; *Artedomus v Del Casale* (2006) 68 IPR 577, [29].

[52] *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423, [101]; *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1479.

[53] *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148. A Brooks, "The Limits of Competition: Restraint of Trade in the Context of Employment Contracts" (2001) 24(2) *University of New South Wales Law Journal* 346, 348; Stewart, n 29, 188.

[54] *Pioneer Concrete Services Ltd v Galli* [1985] VR 675; *Triangle Corp Pty Ltd v Carnsew* (1994) 29 IPR 69; *Dais Studio Pty Ltd v Bullet Creative Pty Ltd* (2007) 74 IPR 512.

[55] *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 449, [25] (Brereton J); *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657, [25]; *Jardin and Jardim Investments Pty Ltd v Metcash Ltd and Metcash Trading Ltd* (2011) 214 IR 448, [94]–[97].

was shown in *Towers, Perrin, Forster & Crosby Inc v Taplin*[56] where a restraint prevented five former Towers Perrin employees from soliciting any of its clients and using confidential information while working for their new employer Deloitte. It was also more recently exemplified in *Andrews Advertising Pty Ltd v Andrews*[57] where a senior executive was restrained from working for any competing advertising agency to protect the company's interest in maintaining its relationship with a major client. As the cases show, this type of restraint is vital to protect valuable client relationships, which businesses may spend years to build and maintain.

Without restraints, former employees could limitlessly solicit customers, suppliers or clients and potentially "rip the heart" out of a business. This is especially so in the case of disgruntled employees.[58] As the Supreme Court of Canada explained in *Elsley v JG Collins Insurance Agencies Ltd*:

> … the nature of employment may justify a covenant prohibiting an employee not only from soliciting customers, but also from establishing his own business or working for others … This may indeed be the only effective covenant to protect the proprietary interest of the employer. A simple non-solicitation clause would not suffice.[59]

This reiterated the oft-cited comments of Lord Denning MR in *Littlewoods Organisation Ltd v Harris*, who encapsulated the purpose of non-solicitation restraints by explaining:

> … experience has shown that 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 which he is not to go to work for a rival in trade.[60]

These comments highlight the rationales for enforcing restraints – being the most suitable method of protecting customer, client and trade connections. Without restraints, there would be insecurity for employers, especially in competitive industries such as the financial and legal services industries. This could force employers to relocate to other jurisdictions where they are protected by restraints, breeding volatility in the Australian economy and exhibiting an analogous phenomenon (but in relation to employers) to that of "employee relocation"[61] advocated by some "handcuffs" theorists.

However, restraints on customer, client and trade connections are not arbitrarily enforced. They must be confined to the general scope of the employer's business[62] or at least that part of it in which the employee was engaged.[63] As Allsop P (as the Chief Justice then was) explained:

> The judge is required to evaluate the evidence about connection and adopt an appropriate approach to assessing what is required to protect reasonably the connection.[64]

This again highlights the suitability of the current common law approach to enforcing restraints – respecting employees' rights to use their skills, experience and know-how while also ensuring employers' legitimate interests in protecting their business connections.

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[56] *Towers, Perrin, Forster & Crosby Inc v Taplin* [1999] VSC 439.

[57] *Andrews Advertising Pty Ltd v Andrews* (2014) 99 ACSR 164.

[58] See *Labelmakers Group Pty Ltd v LL Force Pty Ltd (No 2)* [2012] FCA 512.

[59] *Elsley v JG Collins Insurance Agencies Ltd* [1978] 2 SCR 916, 925–928; *Morris v Saxelby* [1916] 1 AC 688, 709.

[60] *Littlewoods Organisation Ltd v Harris* [1977] 1 All ER 1472, 1479; *Woolworths Ltd v Olson* [2004] NSWCA 372, [67].

[61] Murphy, n 3, 6–7.

[62] *Routh v Jones* [1947] 1 All ER 758, 761; *McGuigan Investments Pty Ltd v Dalwood Vineyards Pty Ltd* [1970] NSWR 686, 694–696.

[63] I Neil and D Chin, *The Modern Contract of Employment* (Thomson Reuters, 2012) [12.70].

[64] *Hanna v OAMPS Insurance Brokers Ltd* (2010) 202 IR 420, [43] (Allsop P, Hodgson JA and Handley AJA agreeing).

The Effectiveness of Restraints Protecting Client and Customer Connections

The effectiveness of restraints for this purpose is inhibited by the potential for clients and customers to be solicited immediately after the restraint period ends. While in some cases the restraint period may provide enough time for a former employer to maintain their business connections after the relevant employee ceases work; in others, restraints may only delay the inevitable.

Another deficiency in post-employment restraints protecting business connections was highlighted by the Full Federal Court (Keane CJ, Griffiths and Foster JJ) in *Pearson*, which explained that "the protection afforded by the non-solicitation and confidentiality provisions is unlikely to be perfect given the difficulties of proof of breach".[65] This deficiency is acute in the case of covenants against solicitation. Restraints applying to business connections may be diverted by employees who claim that former clients approached them in their new business.

This difficulty is amplified by the ambiguous legal definition of "solicitation". The broader judicial approach perceives "solicitation" as encompassing invitations extended by the person subject to the restraint and the acceptance of invitations by former clients or customers.[66] However, the narrower approach views "solicitation" as involving positive action of a worker in inducing a former client or customer's business, rather than simply responding to initial contact from a former client or customer.[67] Brereton J added further nuance to this definition by stating:

> … who makes the initial contact is not decisive … the line is crossed where the former employee, in response to an approach by a customer, does not merely indicate a willingness to be engaged, but positively encourages the customer to engage him or her.[68]

The ambiguity in the law surrounding "solicitation" is problematic for employers and employees. It is likely to inspire employees to transgress the boundaries of restraint clauses, "trying their luck" to see if responding to requests of former clients or customers will be construed as "solicitation" by the courts. Clarification is necessary to provide certainty, not only for employers but also employees, about how the law expects them to behave in the post-employment period. Nevertheless, it is suggested that restraints should only prohibit the narrower sense of "solicitation" – as prohibition of the broader sense has the potential for a restraint to act beyond what is reasonably necessary to protect an employer's trade, client and customer connections – sterilising competition and restricting the use of an employee's talent in dealing with customers.

The issues identified above again encourage the enforcement of post-employment restraints – as they provide the only, limited protection for employers' trade, client and customer connections. Precedent[69] where restraints have protected employers' business connections shows the importance of this protection, which, contrary to the "handcuffs" thesis, safeguards the competitiveness, stability and productivity of employers' businesses and rewards employers for expending resources to facilitate their business connections. However, the common law provides a balance – discouraging the arbitrary enforcement of such restraints, and thus respecting employees' rights to use their skills and know-how.

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[65] *Pearson v HRX Holdings Pty Ltd* (2012) 205 FCR 187, [53].

[66] *Barrett v Ecco Personnel Pty Ltd* [1998] NSWSC 545, [9]; *Barrett v Ecco Personnel Pty Ltd* [1998] NSWCA 30; see also *Integrated Group Ltd v Dillon* [2009] VSC 361, [60]; *Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd* (2004) 207 ALR 136, [99]; *Gana Holdings v Renshaw* [2013] NSWSC 381, [43].

[67] *Koops Martin v Dean Reeves* [2006] NSWSC 449, [12]; *Austin Knight (UK) Ltd v Hinds* [1994] FSR 52; *Planet Fitness Pty Ltd v Brooke Dunlop* [2012] NSWSC 1425, [19].

[68] *IceTV v Duncan Ross* [2007] NSWSC 635, [47].

[69] *Lindner v Murdock's Garage* (1950) 83 CLR 628, 633–634 (Latham CJ, Webb J agreeing), 650 (Fullagar J), 654 (Kitto J); *Pearson v HRX Holdings Pty Ltd* (2012) 205 FCR 187; *Portal Software v Bodsworth* [2005] NSWSC 1179; *Andrews Advertising Pty Ltd v Andrews* (2014) 99 ACSR 164.

Promoting Stability of an Employer's Workforce

Restraints protect an employer's legitimate interest in maintaining a stable workforce.[70] They prevent former employees soliciting employees which remain at their former employer and "team moves", which are prevalent in the professional services market. They also indirectly protect confidential information a team of employees may possess.[71]

The use of a restraint to maintain stability in an employer's workforce was exemplified in *Labelmakers Group Pty Ltd v LL Force Pty Ltd (No 2)*,[72] where two former employees were held to have breached a restraint by recruiting Labelmakers' key employees to resign and commence employment with their competitor Labelforce. It was also evident in the UK case of *Tullet Prebon v BGC Brokers*,[73] where BGC was held liable for using improper methods to poach a team of 10 brokers who were employed by Tullet Prebon. More recently, the utility of restraints to maintain the stability of the Herbert Smith Freehills partnership and its "ambitious, particularly younger (pre-partner) lawyers"[74] was evidenced in *Pryse v Clark* where the New South Wales Supreme Court imposed interlocutory injunctions on eight of the firm's former partners who "jumped ship" and sought to work in the new Australian offices of White and Case.[75]

It is argued[76] that restraints should not be allowed to protect staff connections, as employers do not have a legitimate interest in their staff as "assets" and because their current staff should not be burdened by the consequences of another employee's restraint in accordance with the privity of contract doctrine. However, restraints do not prevent individual staff members leaving their employer and following another employee's departure. They are still able to do this. Restraints only prevent an ex-employee from soliciting or "poaching" employees.[77] As such, a balance is struck between respecting an employee's freedom to choose their employer and an employer's interest in protecting their workforce from an ex-employee's improper conduct.

Nevertheless, a major limitation of this type of restraint is that employees can be "solicited" when a former employee's restraint period ends. Therefore, they only stall the inevitable if an existing employee has a clear desire to follow a former employee and change employment.

Like restraints protecting business connections, the effectiveness of restraints preventing "team moves" is also limited by the difficulties in proving solicitation. Solicitation often occurs behind "closed doors" with no record of contact between parties involved. It is often extremely difficult for employers to discharge the burden of proof that such solicitation has occurred, even with the assistance of subpoenas and discovery.

These issues render the enforcement of restraints protecting an employer's workforce even more important, as they provide the only, albeit temporary, shield for employers during the restraint period. Without these restraints, an employer's workforce would be susceptible to former employees who may utilise their connections to disrupt an employer's business, proliferating market instability and impairing productivity.

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[70] *Cactus Imaging Pty Ltd v Glenn Peters* (2006) 71 NSWLR 9, [44]; *Informax International Pty Ltd v Clarius Group Ltd* (2011) 192 FCR 210, [50]–[54].

[71] *Cactus Imaging Pty Ltd v Glenn Peters* (2006) 71 NSWLR 9, [54]–[58].

[72] *Labelmakers Group Pty Ltd v LL Force Pty Ltd (No 2)* [2012] FCA 512.

[73] *Tullet Prebon v BGC Brokers* [2010] IRLR 648.

[74] *Pryse v Clark* (2017) 264 IR 451, [76].

[75] *Pryse v Clark* (2017) 264 IR 451, [76]–[80].

[76] Riley, n 29.

[77] *Planet Fitness Pty Ltd v Brooke Dunlop* [2012] NSWSC 142; *Barrett v Ecco Personnel Pty Ltd* [1998] NSWSC 545; *Allied Express Transport Pty Ltd v Mears* [2010] NSWSC 1112.

SEVERANCE, READING DOWN AND "LADDERING"

While unable to rewrite or reconstruct restrictive covenants,[78] courts may read down and sever[79] covenants to ensure they operate reasonably for employers and employees. At common law, a restraint may be severed if a "blue pencil" can be run through the offending parts of the covenant without affecting the original nature of the clause and contract.[80] This applies in all Australian States. However, in New South Wales, s 4(3) of the *Restraints of Trade Act 1976* (NSW) statutorily extends the courts' power of severance, enabling the "beneficial surgery"[81] of a restraint to "attempt to make it reasonable"[82] for both employers and employees.[83]

While it may be argued that common law and statutory severance principles simply "save" employers' restraints and unfairly advantage employers,[84] this is not the case. A court will only sever a restraint after considering the "public policy"[85] of restraints being prima facie unenforceable[86] and determining whether the restraint is reasonable in all "circumstances in which the restraint was created".[87] Therefore, the power is exercised in a judicial manner after assessing all circumstances of the case. A restraint will not be severed to simply "save" it for an employer.

Common law severance has an even more "strictly circumscribed role".[88] It only occurs in limited circumstances, where a restraint clause is "not really a single covenant but is in effect a combination of several distinct covenants"[89] and where severance may occur without the addition or alteration of a word or without significantly affecting the remaining substance of the restraint.[90]

Both common law and statutory severance strengthen the courts' armoury in enforcing restraints, providing them with a tool to mould the terms of a restraint to be appropriate in the circumstances for both employers *and* employees. Severance advances employers' interests by enabling unreasonable restraints to be read down rather than ruled invalid, while also serving employees' interests by only allowing severance of covenants satisfying the common law test of "necessity" detailed above.[91] It provides the

[78] *Lindner v Murdock's Garage* (1950) 83 CLR 628, 648, 658–659; *Industrial Rollformers Pty Ltd v Ingersoll-Rand (Australia) Ltd* [2001] NSWCA 111, [165]; *Ross v IceTV* [2010] NSWCA 272, [91]; *Just Group Ltd v Peck* (2016) 264 IR 425, [39]; *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657, [94].

[79] *Hanna v OAMPS Insurance Brokers Ltd* (2010) 202 IR 42; *JQAT Pty Ltd v Storm* [1987] 2 Qd R 162; *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd* (1987) 17 FCR 505; *Austra Tanks Pty Ltd v Running* [1982] 2 NSWLR 840, [441]; *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 15 IPR 129.

[80] JD Heydon, *Restraint of Trade* (Lexis Nexis Butterworths, 3rd ed, 2008) 285–286; *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, [132]; *Attwood v Lamont* [1920] 3 KB 571, 578; *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516, [44]–[48].

[81] *Wright v Gasweld Pty Ltd* (1999) 22 NSWLR 317, 339.

[82] *Restraints of Trade Act 1976* (NSW) s 4(3).

[83] See application of the Act in *Woolworths Ltd v Olson* [2004] NSWCA 372; *Ross v IceTV Pty Ltd* [2010] NSWCA 272; *Bis Industries Ltd v Toll Holdings Ltd* (2012) 228 IR 284.

[84] H Chia and I Ramsay, "Employment Restraints of Trade: An Empirical Study of Australian Court Judgments" (2016) 29 *Australian Journal of Labour Law* 283, 299; Stewart, n 29.

[85] *Restraints of Trade Act 1976* (NSW) s 4(3).

[86] Note that McDougall J suggested that in New South Wales, s 4(1) of the *Restraints of Trade Act 1976* (NSW) reverses this by presuming that restraint are "valid" until proven to be against "public policy": see *Pryse v Clark* (2017) 264 IR 451, [36]; *Stacks Taree v Marshall (No 2)* [2010] NSWSC 77, [42].

[87] *Restraints of Trade Act 1976* (NSW) s 4(3).

[88] *IF Asia Pacific Pty Ltd v Galbally* (2003) 59 IPR 43, [174].

[89] *Just Group Ltd v Peck* (2016) 264 IR 425, [39]; *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657, [92]; *Attwood v Lamont* [1920] 3 KB 571, 593.

[90] *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657, [94]; *Just Group Ltd v Peck* (2016) 264 IR 425, [39]; *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423, [216].

[91] *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995, [6]; *A Buckle and Son Pty Ltd v McAllister* (1986) 4 NSWLR 426.

courts with a vital tool to deal with the "modern phenomenon"[92] of laddered restrictive covenants[93] in a way that balances both employers' and employees' interests.

Despite their utility, laddered restraints are academically[94] and judicially[95] criticised for breeding uncertainty for employees. Professor Andrew Stewart has argued:

> Employers and other covenantees should be compelled to be clear as to what activities they wish to restrain, in what location and for what period. If they exceed the limits set by the law, and find that they cannot enforce the restraint in the face of conduct that could on any basis have been the subject of a reasonable covenant, then so be it. That is the price to be paid for taking insufficient care or being overly ambitious as to the scope of the restraint. The risk of losing out in that way surely does no more than balance the natural advantage that most employers enjoy through superior resources, access to legal advice and the intimidatory effect of the mere presence in a contract of a restraint, valid or not.[96]

This criticism is mitigated by the fact that the courts only enforce restraints that satisfy the common law test, regardless of how they are drafted – laddered or otherwise. When restraints are uncertain[97] or where the drafter is found to have not made a genuine attempt to define a valid restraint,[98] they will be held unenforceable. In many cases laddered restraints have been ruled unenforceable because they are uncertain.[99] As Pembroke J explained in *Seven Network Operations Ltd v James Warburton (No 2)*:

> There may be a case, as Allsop P observed in *Hanna v OAMPS*, where a complex and difficult restraint of trade clause, with multiple combinations and permutations, is so impenetrable as to lack coherent meaning.[100]

The courts' reluctance to enforce uncertain restraints or determine the meaning of ambiguous restraints for parties[101] protects employees' interests by ensuring they are not subject to excessively broad or indeterminate restraints.

These principles, in combination with the requirement for laddered restraints to satisfy the same common law test as all other restraints, ensure that they are enforced in a manner which balances employers' and employees' interests.

AN EMPLOYMENT MARKET WITHOUT RESTRICTIVE COVENANTS

If all contractual restrictive covenants were unenforceable there would be gaps in the law protecting employers' business interests. While some protection is provided by equity[102] and statute,[103] this does not cover all ex-employee conduct averse to an employer's business. As Mason P stated with the agreement of McColl and Bryson JJA, restraints are "easier to enforce than a breach of confidence or breach of

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[92] *Seven Network (Operations) Ltd v James Warburton (No 2)* (2011) 206 IR 450, [37].

[93] Restrictive covenants containing a series of overlapping restraints, some more extensive than others.

[94] Arup et al, n 3, 13–14; Stewart, n 29, 218.

[95] *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 15 IPR 129; *Brendan Pty Ltd v Russell* (1994) 11 WAR 280; *Tyser Reinsurance Brokers v Cooper* [1998] NSWSC 689.

[96] Stewart, n 29, 218.

[97] *Hanna v OAMPS Insurance Brokers Ltd* (2010) 202 IR 420, [13]; *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423; *Austra Tanks Pty Ltd v Running* [1982] 2 NSWLR 840.

[98] *Workpac Pty Ltd v Steel Cap Recruitment* (2008) 176 IR 464, [46]; *Workplace Access and Safety Pty Ltd v Mackie* [2014] WASC 62, [62].

[99] *Austra Tanks Pty Ltd v Running* [1982] 2 NSWLR 840; *Hanna v OAMPS Insurance Brokers Ltd* (2010) 202 IR 420, [13].

[100] *Seven Network (Operations) Ltd v James Warburton (No 2)* (2011) 206 IR 450, [41].

[101] *Bulk Frozen Foods Pty Ltd v Excell* [2014] TASSC 58; *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd* (1987) 17 FCR 505.

[102] Post-employment duty of confidentiality, see *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148.

[103] Particularly the *Copyright Act 1968* (Cth), *Freedom of Information Act 1982* (Cth) s 45, *Privacy Act 1988* (Cth) Pt VIII and *Corporations Act 2001* (Cth) s 183; for examples, see *Luxottica Retail Australia v Grant* (2009) 81 IPR 26; *Leica GeoSystems Pty Ltd v Koudstaal (No 3)* (2014) 245 IR 422.

copyright claim"[104] and therefore more effective in safeguarding employers' legitimate business interests. The inadequacy of the most prominent of these protections is analysed below.

Employees' Post-employment Duty of Confidentiality (Fidelity)

Analogous to the implied contractual duty of confidentiality,[105] this is the only equitable duty protecting employers in the "post-employment" period.[106] Effective where a contractual restraint is insufficient in scope,[107] lapses or is absent,[108] this duty prevents employees using or disclosing confidential information they obtain during their employment.[109] It may be favoured by employers because, if a breach is proven, it gives access to coercive equitable remedies such as an account of profits or remedial constructive trust. It may also be favoured because it perpetually protects confidential information and does not require proof of actual loss arising from the misuse of confidential information, like contract law.[110]

However, alone, it is insufficient to protect employers' business interests. This is primarily because it only applies to "information". Unlike the common law, it will not protect the full range of "protectable interests" such as staff and customer connections, explained above. Therefore, if the duty of confidentiality was the only protection for employers, they would be left vulnerable. Their clients and customers could be poached. So too could their employees be solicited to work for a competitor.

The equitable obligation of confidence is also deficient when compared to contractual restraints expressly protecting confidential information because it only applies to information that is sufficiently secret or unique to attract equitable protection.[111] As stated above, only the third category in the *Faccenda* tripartite categorisation[112] is protected in equity, whereas both the second and third categories can be protected by a contractual restraint. Kirby P (as his Honour then was) recognised this in *Wright v Gasweld Pty Ltd* by stating in the context of that case, "the information which the employer sought to protect here [falling in the second category] would not, in the absence of an express covenant have attracted the protection of Equity".[113] This distinction between the common law and equitable threshold was also recognised by Hodgson JA in *Miles v Genesys Wealth Advisers Ltd* who explained that "… it is important to keep in mind that this is not a case where what is relied on is (1) an equitable obligation of confidentiality (as in *O'Brien*)".[114]

Therefore, employers must prove a more comprehensive test to establish a breach of this equitable obligation of confidentiality than they do to prove a breach of a contractual term of confidentiality. The courts[115] have regularly applied this test, initially articulated by Megarry J (as the Vice Chancellor then was) in *Coco v A N Clark (Engineers) Ltd*.[116] First, the plaintiff must identify the confidential

[104] *Woolworths Ltd v Olson* [2004] NSWCA 372, [67].

[105] Brooks, n 54, 348; Stewart, n 29, 188.

[106] Although actions for breaches of fiduciary or equitable duties of good faith and fidelity during the term of employment may be brought against an employee after their employment terminates.

[107] *Landmark Underwriting Agency Pty Ltd v Killborn* [2006] NSWSC 1108.

[108] *APT Technology v Aladesaye* [2014] FCA 966.

[109] *Robb v Green* [1895] 2 QB 315; *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, 329.

[110] *National Roads and Motorists' Association Ltd v Geeson* (2001) 40 ACSR 1, [58]; *NP Generations Pty Ltd v Feneley* (2001) 80 SASR 151, [21].

[111] *Wright v Gasweld Pty Ltd* (1999) 22 NSWLR 317, 334 (Kirby P).

[112] *Wright v Gasweld Pty Ltd* (1999) 22 NSWLR 317, 333 (Kirby P), 339–341 (Samuels JA); *Riteway Express Pty Ltd v Clayton* (1987) 10 NSWLR 238; R Dean, *The Law of Trade Secrets* (Lawbook Co, 1st ed, 1990) 209, 222, 386; *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 73 IPR 326, [46].

[113] *Wright v Gasweld Pty Ltd* (1999) 22 NSWLR 317, 334.

[114] *Miles v Genesys Wealth Advisers Ltd* (2009) 201 IR 1, [22].

[115] *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 73 IPR 326, [102]–[105]; *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39, 51; *O'Brien v Komesaroff* (1982) 150 CLR 310, 326; *Campbell v Illawarra Golf Club Pty Ltd (in liq)* [2012] NSWSC 1252, [78]–[84].

[116] *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47.

information with specificity, and not merely in global terms. Secondly, the plaintiff must prove that the information has the necessary quality of confidentiality and is not, for example, common or public knowledge. Thirdly, the plaintiff must prove that the information was received by the defendant in such circumstances as to import an obligation of confidence. Finally, there must be an actual or threatened misuse of the confidential information, and not simply unauthorised disclosure. These four requirements can be difficult to prove and leave an employer vulnerable if they are unable to satisfy them.

A contractual restraint is much simpler to draft and enforce, particularly because an employer may prescribe the information to be protected. Further, a contractual term may plainly prohibit an employee from using the information it specifies, as opposed to equity which will only protect confidential information pursuant to a court order, which is often difficult and expensive to obtain.

Therefore, the equitable obligation of confidentiality is not only insufficient to protect employers' confidential information but, most importantly, to safeguard their other "protectable" business interests. While the equitable duty of confidentiality provides an effective complement to restrictive covenants, alone it appears inadequate to protect employers' businesses. As Stewart has further explained:

> A number of judges have indeed quite explicitly suggested (or approved the suggestion) that employers should use restrictive covenants rather than relying upon implied obligations of confidentiality. It has been said that this is actually fairer for workers, on the basis that at least with an express restraint they are aware of what they are agreeing not to do, and are protected by the doctrine of restraint of trade from restrictions of unreasonable scope.[117]

Duty of Confidentiality Implied at Common Law

Analogous to the equitable duty of confidentiality, under the common law a duty of confidentiality may be implied into an employment contract where there is no express restraint covering confidential information.[118] It operates identically to the equitable duty, although it does not give rise to equitable remedies when breached. This is a deficiency of the common law duty when compared with the equitable duty because, as stated above, equitable remedies such as an account of profits or remedial constructive trust are far more coercive than those available at common law. They not only provide more effective relief, but also deter breaches of the duty of confidence.

In addition to the limited relief it provides, the implied duty of confidentiality suffers from the same deficiencies as the equitable duty of confidentiality. It is more difficult to enforce than a contractual restraint because it requires a higher threshold of "confidentiality" to be proven[119] and does not protect employers' business interests beyond "information".

Thus, the common law duty is insufficient to protect employers' business interests – although it is a useful addition to the protection provided by contractual restraints. It may be particularly useful for employers where a contractual restraint does not expressly prohibit the use of confidential information, but only protects other business interests such as client solicitation. In such cases, the duty of confidentiality may be implied into the relevant contract to bolster the protection provided by a contractual restraint.

Corporations Act 2001 (Cth)

Section 183 protects employers by prohibiting former employees[120] from using information to gain an advantage for themselves or another[121] or to cause detriment to their employer.[122] Note 1 in s 183 makes it clear that this duty will apply after the person "stops being an officer or employee of the corporation".

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[117] Stewart, n 29, 191.

[118] Stewart et al, n 4, [17.32].

[119] *Wright v Gasweld Pty Ltd* (1999) 22 NSWLR 317, 334 (Kirby P).

[120] *Corporations Act 2001* (Cth) s 183(1).

[121] *Corporations Act 2001* (Cth) s 183(1)(a).

[122] *Corporations Act 2001* (Cth) s 183(1)(b).

Further, s 183 protects an unqualified degree of "information" obtained during employment and is therefore broader than restrictive covenants and the equitable duty of confidentiality, which only protect information that is sufficiently confidential.

However, alone, s 183 is ineffective because it only applies to protect the confidential information of corporate employers. It will not protect the significant proportion of employers[123] who do not satisfy the definition of "corporation" in s 57A. Further, like the equitable duty of confidentiality assessed above, s 183 only covers the misuse of "information" and not the full range of "protectable interests". This leaves employers vulnerable. Most importantly, evidenced by recent cases,[124] s 183 does little beyond the equitable duty of confidentiality to protect employers, only offering a different range of remedies, such as under ss 1324 and 1317H.[125]

As such, s 183, like the equitable and implied duties of confidentiality, provides an effective complement to the protection provided by contractual restraints, but alone is inadequate to protect employers' legitimate business interests.

Global Jurisdictional Comparison

Examples from foreign jurisdictions are cited[126] to justify the non-enforcement of restraints in Australia. It is posited that like these jurisdictions the refusal to enforce, or more limited enforcement of, restraints in Australia will increase competitiveness, innovation and entrepreneurship.

However, such hypotheses neglect the vicissitudes of the Australian labour market that make it unique from other economies, such as Australia's occupation dispersion, level of market competition and geographical location. For example, comparisons with the non-enforcement of restraints in California[127] are imprudent because Australia is more geographically isolated than California, has roughly half its population and produces approximately $1 trillion less gross domestic product. Further, evidence of the effect of India and China's limited enforcement of restraints is unhelpful because of the incomparable populations, international trade links and occupation dispersion of these countries. The uniqueness of the Australian economy creates the need for a distinct and well-tested method of enforcing restraints tailored to the Australian labour market. This method is provided by the current common law test.

Gauging the true effect of not enforcing restraints on the Australian economy is almost impossible. It will not be achieved by drawing tenuous connections between the effect of not enforcing restraints in other economies and the potential effect of doing so in Australia. It is difficult to postulate that, just because there are "significant … economies where such restrictions are not enforced",[128] they have no place in Australia. One cannot equate these economies' significance solely with their non-enforcement of restraints. As such, comparison with other jurisdictions where restraints are not enforced does not provide adequate reason for the refusal to enforce restraints.

In any case, a blanket prohibition on restraints in Australia would have an unpredictable effect. For the reasons articulated above, it is likely to leave employers vulnerable and damage the Australian

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[123] G Gilfillan, "Statistical Snapshot: Small Business Employment Contribution and Workplace Arrangements" (Research Paper Series 2015–16, Parliament of Australia, Department of Parliamentary Services, 2 December 2015) <http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4230400/upload_binary/4230400.pdf;f ileType=application/pdf>.

[124] *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 73 IPR 326; *Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd* (2009) 81 IPR 1.

[125] *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 93 ACSR 76.

[126] For example, Murphy, n 3, uses American research; M Marx, J Singh and L Fleming, "Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain" (2015) 44 *Research Policy* 394; C Hidalgo, *Why Information Grows: The Evolution of Order, from Atoms to Economies* (Allen Lane, 2015). See also Chia and Ramsay, n 85, 291; R Gilson, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete" (Working Paper No 163, John M Olin Program in Law and Economics, Stanford Law School, 1998).

[127] Chia and Ramsay, n 85, 286–287.

[128] Murphy, n 3, 18.

economy. Cross-jurisdictional comparisons simply emphasise how small the Australian labour market is, warranting the restriction of labour mobility and other "protectable interests" to safeguard employers in a highly competitive market.

While comparisons with foreign jurisdictions are imprudent for the reasons stated, if one was to draw such analogies the trend of enforcing restraints in foreign jurisdictions is just as common as the refusal to enforce restraints. In many foreign jurisdictions, restraints are rigidly enforced. For example, restraints are strictly regulated by Arts 74, 74A and 74B of the German Commercial Code, although these provisions are unique in that they oblige an employer to pay the restrained employee 50% of their remuneration for the entire restraint period[129] and only operate for a maximum of two years.[130] Similarly, under Art 2125 of the Italian Civil Code, a restrictive covenant must be written, limited in time, restricted to a specific activity and area, and provide financial compensation to the restrained employee. Further, 48 of the 50 US States allow the enforcement of restraints of trade, although each adopts a different approach to doing so.[131] Therefore, despite it being both beyond the scope of this article and unhelpful to explore the practical effect of the enforcement of restraints in jurisdictions such as Italy, the US and Germany, it is clear that the courts and legislature in these countries recognise the appropriateness of enforcing restraints. The examples above highlight that the foreign enforcement of restraints is identical, if not more common, than the refusal to do so.

Freedom of Contract

Critics of restrictive covenants argue that their enforcement impairs employees' post-employment freedom to contract. However, it must be acknowledged that employees consciously and freely choose to be bound by such covenants when they contract.[132] Refusing to enforce this contractual obligation undermines the authority and sanctity of contract.

While it is argued that unequal bargaining power induces employees to agree to restraints regardless of their content, this is not a reason to refuse to enforce them.[133] As stated above, courts will determine the enforceability of restraints according to the common law test and will not simply enforce a restraint because an employee has agreed to it. Equitable doctrines such as unconscionability and undue influence also operate to correct supposed inequality favouring employers and uphold employees' freedom to contract. These doctrines allow the court to rule a contract (and any restraint clauses it contains) voidable if it was entered unconscionably or with one party under undue influence. In New South Wales, the judicial power to set aside contracts procured by an inequality of bargaining power is strengthened by s 106 of the *Industrial Relations Act 1996* (NSW), which allows contracts to be declared void or their terms varied if they are proven to be "unfair".

However, it is acknowledged that only in rare circumstances would a restraint be procured by undue influence or unconscionable conduct to attract equitable intervention. As Hon Dyson Heydon explained:

> Unconscionable conduct could not be found merely in a lack of commensurateness between the restrictions on the covenantor and the benefits secured for the covenantor: a gross disparity would be necessary before conscience would be shocked.[134]

While inequality may permeate the employment relationship, despite not reaching the threshold to prove unconscionability or undue influence, in the modern market significant employer competition exists to place more bargaining power into the hands of employees. When coupled with the accessibility of legal resources, the vitiating factors identified above and prima facie unenforceability of restraints,

[129] *Handelsgesetzbuch* [Commercial Code] (Germany) § 74(2).

[130] *Handelsgesetzbuch* [Commercial Code] (Germany) § 74A(1).

[131] Chia and Ramsay, n 85, 286–287.

[132] C Dent, "Unpacking Post-Employment Restraint of Trade Decisions: The Motivators of the Key Players" (2014) 26(1) *Bond Law Review* 1, 2.

[133] Heydon, n 81, 89; Chia and Ramsay, n 85, 290.

[134] Heydon, n 81, 182–183.

it would appear that the inequality of bargaining power argument does not justify a blanket refusal to enforce restraints.

Any outright refusal to enforce restraints would challenge the certainty of contract. It would violate the "general policy of the law that people should honour their contracts"[135] and "principle that contracts freely agreed are meant to be observed",[136] by allowing employees to avoid their post-employment obligations. As Pembroke J explained in *Warburton (No 2)*:

> If there were not adherence to such a principle, the conduct of private and commercial affairs would become an uncertain jumble. And certainty is what the law of contracts strives to achieve.[137]

The High Court also stressed the sanctity of contract in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*, where Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ stated:

> The general rule … is that where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms.[138]

In the present context, the refusal to adhere to a restraint clause, properly agreed to by the relevant parties, disrespects the authority of contractual obligations. If the courts were to refuse to enforce restraints or implement a less onerous test than the current common law prescribes, it would diminish the binding nature of contract law. In these circumstances, the refusal to enforce restrictive covenants could be as detrimental to employment relationships as restrictive covenants are alleged to be. This sentiment was reiterated by Callinan J who explained that parties "should be held to [their] bargain unless they can demonstrate that restraints cause the public significant economic harm of an anti-competitive nature".[139]

Further Criticisms of the Current Enforcement of Restraints

Application of the Current Common Law Approach

It has been argued that the courts are not applying the common law, particularly the principle that restraints are prima facie unenforceable, "vigilantly" enough.[140] It has been said that:

> … the evidence suggests that some courts are allowing the employers too much leeway. The courts could send a much clearer message to employers that they cannot have provisional or partial enforcement.[141]

However, the contemporary case law examined in this article shows that the courts have been cognisant of the effect of restraints on employees, with numerous recent decisions commencing by recognising that employment restraints are prima facie unenforceable.[142] The courts have also been eager to read down restraints that unreasonably affect employees, recently evidenced in *Grace Worldwide (Australia) Pty Ltd v Steve Alves* where a 12-month restraint was halved under the *Restraints of Trade Act*.[143]

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[135] *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1, 9 (Gleeson CJ).

[136] *Queensland Co-operative Milling Assn v Pamag Pty Ltd* (1973) 133 CLR 260, 268 (Walsh J), 276 (Stephen J); *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 316; *Miles v Genesys Wealth Advisers Ltd* (2009) 201 IR 1, [66]; *Woolworths v Olson* [2004] NSWCA 372, [39]; *Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414, [47]–[58], [83].

[137] *Seven Network (Operations) Ltd v James Warburton (No 2)* (2011) 206 IR 450, [3]; *Paul Fishlock v The Campaign Palace Pty Limited* (2013) 234 IR 1, [292]; *Missingham v Shamin* [2012] NSWSC 288, [54].

[138] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [57].

[139] *Maggbury Pty Ltd v Hafele Pty Ltd* (2001) 210 CLR 181, 216.

[140] Arup et al, n 3, 27.

[141] Arup et al, n 3, 27.

[142] See *DXC Connect Pty Ltd v Deibe* [2017] NSWSC 1159, [70]–[71]; *Grace Worldwide (Australia) Pty Ltd v Steve Alves* [2017] NSWSC 1296, [96]; *Southern Cross Computer Systems Pty Ltd v Palmer (No 2)* [2017] VSC 460, [4]–[5]; *Freedom Finance Accounting Pty Ltd v Goldstein* [2017] VSC 179, [16]; *Thinkstorm Pty Ltd v Farah* [2017] NSWSC 11, [25].

[143] *Grace Worldwide (Australia) Pty Ltd v Steve Alves* [2017] NSWSC 1296, [109].

As stated above, it must also be remembered that the flexibility of the common law approach allows restraints to be enforced in a manner that balances employers' and employees' interests. In *Georges Apparel Pty Ltd v Giardina*, McDougall J refused to restrain an employee from competing with her former employer absolutely, holding that "sufficient protection can be obtained by"[144] the return of confidential information to her former employer[145] and the enforcement of non-solicitation terms.[146] In *DXC Connect Pty Ltd v Deibe*, Black J restrained an employee from using or disclosing confidential information and working for only one competitor "Data3", but rejected the plaintiff employer's application for a "springboard" injunction because it imposed "an unduly onerous burden"[147] on the relevant employee.[148]

Economic Detriment to Employees

It is posited that restraints should be sparingly enforced because they cause economic detriment to employees by preventing them from earning income in their occupation or industry and impairing their future ability to work.[149] Professor Joellen Riley has argued that "sound common sense"[150] has not been followed in recent cases,[151] where there has been no economic justification for granting injunctive relief, as the relevant employees have suffered greatly and employers gained little through the injunctive enforcement of restraints. However, it is unclear whether more recent precedent has not exhibited "common sense". As the cases cited above show, the courts are generally reluctant to enforce restraints that are not reasonable in the circumstances – often paying close regard to the ramifications of enforcing a restraint on an employee.

Courts consider both individual financial hardship[152] and impairment to an employee's future employment prospects[153] in exercising their discretion to impose a restraint, particularly on an interlocutory basis. The significance attached to these questions undermines criticism that enforcing restraints unjustly affects employees. Among recent cases, this is exemplified in *Reed Business Information v Seymour*, where Ball J refused to restrain an employee to the extent sought by her former employer because of the "very substantial hardship" such a broad restraint would cause,[154] and again in *Georges Apparel*, where McDougall J gave significant weight to the hardship potentially suffered by a defendant employee and *also* "her family – some of whom at least must be entirely innocent in whatever is the blame game involved in this case".[155] As Stewart has explained, while the courts focus on employers' interests, the "possibility of a covenant impacting severely on a worker's capacity to find employment may well sometimes tip the scales against a finding of validity".[156]

Riley is particularly critical of the financial detriment caused by the modern tendency to restrain moderately paid salary earners – explaining that by "the power of the word-processed precedent document, restraints that were once considered appropriate only to preserve the value of goodwill purchased from

[144] *Georges Apparel Pty Ltd v Giardina* [2017] NSWSC 290, [19].

[145] *Georges Apparel Pty Ltd v Giardina* [2017] NSWSC 290, [31].

[146] See *Georges Apparel Pty Ltd v Giardina* [2017] NSWSC 290, [9].

[147] *DXC Connect Pty Ltd v Deibe* [2017] NSWSC 1159, [61].

[148] *DXC Connect Pty Ltd v Deibe* [2017] NSWSC 1159, [79].

[149] See Arup et al, n 3, 3; Chia and Ramsay, n 85, 290.

[150] Riley, n 3, 627.

[151] Citing *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995; *Otis Elevator Company Pty Ltd v John Nolan* [2007] NSWSC 593.

[152] See *Emeco International Pty Ltd v O'Shea (No 2)* (2012) 225 IR 423, [48]–[49]; *Reed Business Information v Seymour* [2010] NSWSC 790, [67]–[71]; *Think Education Services Pty Ltd v Lynch* [2011] NSWSC 984, [90]; *DP World Sydney Ltd v Guy* (2016) 262 IR 156, [65].

[153] See *OAMPS Gault Armstrong Pty Ltd v Glover* [2012] NSWSC 1175, [33]–[36], [42].

[154] *Reed Business Information v Seymour* [2010] NSWSC 790, [65]–[71].

[155] *Georges Apparel Pty Ltd v Giardina* [2017] NSWSC 290, [28].

[156] Stewart, n 29, 185.

a business owner are now appearing in contracts for moderately-paid salary earners".[157] However, the enforcement of a restraint is not particularly concerned with the subject employee's salary or wage, but rather with the potential impact of this employee's future conduct on their former employer's business without restraint. For example, regardless of their salary, an employee may have strong connections with their former employer's valuable clients, or may possess highly sensitive commercial information – which if placed in a competitor's hands could cause immeasurable damage to their former employer's business. Therefore, it is inapposite to use the wage or salary of an employee subject to a restraint to argue against its enforcement. Rather, it is the legitimate interest that is sought to be protected by the restraint that is critical.

Restricting Employees' Freedom

Restraints are criticised for restricting employees' freedom to work and limiting competition.[158] They are also criticised[159] for too rigidly protecting employers' clients and customers and restraining the use of employees' knowledge even in situations where employees themselves "take the initiative"[160] to attract business for their employer, or maintain client and customer relationships through their "emotional intelligence"[161] – especially where customers or clients come from the employee's familial and social circles.[162]

However, as argued above, this restriction is justified when the common law principles are applied correctly, as these principles ensure employees are not unreasonably burdened by restraints – eg a restraint will not be enforced when it simply "sterilises" a person's skills and knowledge to prevent them becoming or aiding a competitor.[163] Most importantly, the restriction on employees' freedom and on competition must be balanced with the risks employers face if restraints are not enforced. Restraints give employers an incentive to invest in the development of knowledge and to innovate without uncertainty that this knowledge or innovation may fall into competitors' hands. They also encourage employers to invest in their employees without the risk that these employees will be poached by competitors, and provide employers with the opportunity to commercially exploit new technologies and to maintain customer and client connections. When these factors are considered, together with the common law approach that mandates that a restraint must only be enforced when reasonable for employers *and* employees, it appears that the common law achieves justice for employers and employees – only restraining employees to the extent that is reasonably necessary.

Enforcement of Restraints through Injunctive Relief

Riley has criticised the enforcement of employment restraints through interlocutory injunctions as unjustly impacting employees and "sterilising their talent" – preventing them from working in competition with their former employer "without meeting the usual threshold for justifying injunctive relief in place of an order for damages".[164] Riley explains that employees are being unfairly held "actually to perform an agreement not to compete, and not simply to pay for the damage that their ill-advised and now broken contract has caused another".[165] Riley also argues that this approach is "irrational and anti-competitive", "unnecessarily harsh to individual citizens" and "arguably being applied in a punitive way".[166]

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[157] Riley, n 3, 620.

[158] See Chia and Ramsay, n 85, 290.

[159] See C Arup, "What/Whose Knowledge? Restraints of Trade and Concepts of Knowledge" (2012) 36 *Melbourne University Law Review* 369, 401–405.

[160] Arup, n 160, 401.

[161] Arup, n 160, 405.

[162] Arup, n 160, 401.

[163] *Lindner v Murdock's Garage* (1950) 83 CLR 628, 640; *Tullett Prebon (Australia) Pty Ltd v Simon Purcell* (2008) 175 IR 414, [71]; *DP World Sydney Ltd v Guy* (2016) 262 IR 156, [48].

[164] Riley, n 3, 618.

[165] Riley, n 3, 618.

[166] Riley, n 3, 620.

However, courts do not take an arbitrary or unprincipled approach to determining whether an injunction should be granted. A well-established test is applied. This considers both the strength of the case against the employee (when determining whether a serious question is to be tried) and any hardship that it may cause them (as part of the balance of convenience consideration). Modern courts are also cognisant of the ramifications of restraining employees before a full trial occurs, as White J recently explained in a circumstance that often arises in connection with the interlocutory enforcement of restraints:

> The decision whether to grant or refuse the interlocutory injunction may, in a practical sense, determine the substance of the matter … In such a case, it is necessary to evaluate the strength of the plaintiff's case to determine where the *balance of the risk of doing an injustice* lies.[167]

Courts are quick to refuse interlocutory enforcement of employment restraints where damages would be adequate, evidenced in *DXC Connect*, where Black J refused to impose a springboard injunction because there was "no obvious reason … why damages or equitable compensation would not be an adequate remedy".[168] Also in *Pryse v Clark*, McDougall J, although eventually imposing an injunction on other grounds, considered that damages would have been adequate to compensate the Herbert Smith Freehills partnership for losses sustained by former partners breaching their partnership agreement.[169]

Courts' reluctance to simply refuse injunctive relief and later award damages for potential losses appears justified when it is considered that in many cases, allowing an employee to act without restraint may cause indeterminate and unquantifiable damage to their former employer's business. This is especially the case for restraints protecting customer and client connections, because the effect of losing clients and customers may never be calculable and could continue indefinitely. While it cannot be stated that damages are always inadequate, the case law examined in this article makes it seem that they regularly are.

Riley also posits that "[t]he trouble with the employment cases is that employers are often granted an injunction which goes further than an order restraining use of the allegedly confidential information".[170] However, courts have taken care to ensure that restraints are crafted to only restrain what is reasonably necessary to protect only legitimate business interests – as the case law examined and cited above shows. Any tendency for a restraint to go beyond what is necessary and reasonable is more appropriately attributed to the improper exercise of judicial discretion than to the principles governing the enforcement of restraints.

Interlocutory injunctions restraining employees have been additionally criticised for punishing employees.[171] However, this proposition seems to have a weak basis in fact. Any punitive award of injunctive relief would be contrary to common law *and* equitable precedent.[172] When enforcing a restraint through interlocutory relief courts are simply enforcing what the parties have agreed. They do so in a non-punitive manner, as the common law stipulates that interlocutory relief must only restrain an employee to the extent reasonably necessary to protect an employer's legitimate business interests.

Employees' Resourcing Difficulties

Critics of the enforcement of restraints argue that the common law produces uncertainty, which burdens employees because they do not have: the resources to bargain hard before and during restraint litigation; the resources to obtain adequate legal representation; the ability to withstand the rigours of litigation; and the necessary inside knowledge of proceedings, courts and precedent.[173] They argue that this makes

[167] *DP World Sydney Ltd v Guy* (2016) 262 IR 156, [24]–[25] (emphasis added).

[168] *DXC Connect Pty Ltd v Deibe* [2017] NSWSC 1159, [61].

[169] *Pryse v Clark* (2017) 264 IR 451, [112]–[114].

[170] Riley, n 3, 631.

[171] Riley, n 3, 627–629.

[172] *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, [3] (Spigelman CJ), [291]–[299] (Heydon JA).

[173] See Arup et al, n 3, 17–21.

employees reluctant to challenge restraints and leads them to "readily withdraw or compromise when met with legal proceedings".[174]

It is an obvious and common difficulty that employees are not as well-resourced as employers and that this breeds a level of inequality in restraint litigation. However, this difficulty is tempered by the prima facie unenforceability of restraints and the placing of the onus on *employers* to prove that restraints are enforceable. As this article has shown, the common law principles are receptive to the disadvantages employees face when met with litigation. It is notable that such resource difficulties are not encountered by all employees. Some will have sufficient resources to fight restraints themselves. Others will be fortunate enough to be resourced by their new employer in challenging a restraint.

Conclusion – Breaking the Legal Handcuffs

The enforcement of restraints will be eternally controversial. On one hand, they affect the essence of individuals' livelihoods: their capacity to work and generate income. On the other, they impact the essence of employers' success: the prosperity and security of their businesses. While contention surrounds their place in Australian labour law, restraints are an essential protectionist mechanism for regulating post-employment behaviour. This article has highlighted the detrimental consequences of refusing to enforce restraints on the labour market, with flow-on effects for business productivity and competitiveness.

The current common law test serves the public interest by prohibiting employers from using restraints to shield themselves from mere competition, while ensuring that employees can use their skill, experience and know-how.[175] If the "legal handcuffs" theory was accepted and the courts refused to enforce restraints, there would be serious, detrimental consequences for the economy and labour market. Without restraints, the market would be volatile due to immense labour mobility, unrestricted solicitation of clients and the free dissemination of employers' confidential information. This exposure would be compounded by the inadequacy of the existing equitable and statutory protections. While non-enforcement of restraints in international jurisdictions provide a seemingly attractive precedent for their non-enforcement in Australia, these jurisdictions are legally and economically unique from Australia and therefore provide weak precedent for this country to follow suit. Further, cross-jurisdictional comparisons show that the trend of enforcing restraints is just as, if not more, common than the refusal to do so.

While there is a tendency in some recent cases to give greater weight to the terms of the contract as opposed to the public policy that militates against enforcement,[176] the common law, if properly applied, "has fixed the appropriate balance between the competing claims and policies generally in favour of striking down restraints unless they can be justified".[177] It is desirable for courts to continue to enforce restrictive covenants within the limits proscribed by the common law.

Post-employment restraints provide the primary, albeit limited, protection of employers' legitimate business interests. Despite their enforcement being particularly important for employers, the current common law test and doctrine of severance (and *Restraints of Trade Act* in New South Wales) ensure that employees are not unreasonably affected by their enforcement. As long as this legal framework is maintained, the courts should continue to enforce restrictive covenants as necessary protectionist interventions to regulate behaviour in the labour market and promote stability, efficiency and productivity in the Australian economy.

[174] Arup et al, n 3, 1.

[175] *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317, 329 (Gleeson CJ).

[176] See *Miles v Genesys Ltd* (2009) 201 IR 1, [40]–[41], [66]; *Seven Network (Operations) Ltd v James Warburton (No 2)* (2011) 206 IR 450, [3], [70]–[72].

[177] *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, [37].