



Is Your Restraint Clause Valid? CK Win Highlights Issues

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Restraint of trade clauses are often found in employment contracts and Australian businesses are increasingly choosing to use restraint clauses in contracts between commercial entities. When used in this form, however, they serve to restrict the freedom of third parties (the employees), so certain criteria must be met in order for the restraint to be valid.

In a recent case, ClarkeKann successfully represented a client in a restraint of trade case before the Supreme Court that illustrates the issue of validity.

In this particular case, our client had freely negotiated a restraint clause as a contract term with another business entity. Following the contractual agreement our client wanted to prevent (or restrain) the other entity from employing its past and present employees. ClarkeKann successfully sought an urgent interim injunction against the other business entity at an interlocutory hearing, and was then successful in maintaining the interim injunction following a contested hearing.

In his decision to uphold the interim injunction, Justice Robb explained that for a restraint of trade clause between two contracting commercial entities to be valid, there must be:

1. a legitimate interest to protect, and
2. the restraint must provide reasonable protection for that interest.

This means, that the restraint must be more than a mere restraint on competition, and more than a mere protection on a company's workforce.

A three step approach is to be taken to determine the validity of a Restraint of Trade clause:

1. Independent of public policy considerations, will the breach infringe the terms of the restraint, properly construed?
2. So far as it is applicable to the breach, is the restraint contrary to public policy?
3. Does section 4(3) of the *Restraint of Trade Act 1976* require the restraint?

According to ClarkeKann Partner Chris Kintis, who acted for the client, "To enforce a restraint of this nature, you have to consider the breach of the restraint clause itself, and whether enforcing the restraint would be reasonable".

"A restraint in a contract between commercial entities may appear to be reasonable but it can still be found to be invalid because of the manner in which it impinges upon the freedom of one of the parties' employees."

Do you have a question about the validity of a restraint of trade clause? Contact [Chris Kintis](mailto:Chris.Kintis@clarkekann.com.au) at ClarkeKann for confidential advice by phoning 02 8235 1251.

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