RESTRAINTS OF TRADE: THE LEGAL PRACTICE

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I INTRODUCTION

This article assesses the impact of legal practice upon the enforceability of employment restraints of trade. Post-employment restraints range from those prohibiting use of confidential information acquired through employment (non-disclosure clauses), or the solicitation of previous customers (non-solicitation clauses), to wider clauses imposing an obligation on the employee not to compete with the employer for a defined period after the termination of the employment (non-compete clauses).

Employment restraints are becoming increasingly common. The common law principles have insisted that employment restraints are to be enforced very conservatively because they are likely to be contrary to public policy. Yet such conservatism is not always evident. Restraints may be seen to be over-enforced, or at least overly observed, where the courts do not apply the principles rigorously – for example, by not demanding proof of a legitimate business interest. Restraints may also be over-enforced because the legal practice discourages employees from challenging them in the courts. While the outcome of the particular case remains uncertain or indeterminate – on the basis of the vague standards to be found in the legal principles – the legal practice gives play to asymmetries and inequalities between the parties. Uncertainty is a greater burden for the party, without inside knowledge (of proceedings, courts and decisions), and without resources (financial, psychological, relational and reputational) to bargain hard and maintain litigation. That is usually, though not always, the employee. Our observation is that the practice has a chilling or intimidating effect, which means that employees observe restraints, even if they overreach, without challenging them in court. Even where they do challenge the restraint, they readily withdraw or they compromise when met with legal proceedings. This practice produces injustices and is also contrary to the public interest.

This article tests these common assertions against the evidence of the practice. We have gathered data about the legal practice around the state supreme courts. That data includes the legal principles, legal proceedings, cited decisions

and legal commentaries. But the article goes beyond this book law to report the impressions and insights gained from a set of interviews with practitioners.[1] These interviews provide a uniquely nuanced picture. They reveal that there are occasions of under-enforcement or genuine compromise. Overall, though, the momentum is with the employer and the practice is a daunting one for many employees to navigate. In this article, following the provision of an introductory context, we identify the uncertainty in the legal principles that contributes to the influence of the legal practice. In the third section, the legal proceedings are examined and some recent cited decisions are mentioned. The fourth section characterises the nature of the parties' decision making about litigation and locates the burden of uncertainty. The final section nominates some reforms that are aimed at reducing the burden, particularly as experienced by employees who are subject to the restraints. We believe that they merit further consideration.

II CONTEXT

A The Uncertainty of the Legal Principles

While it is not for this article to restate the general principles, it is necessary to identify the elements of uncertainty or indeterminacy in the law.[2] The current law calls for several judgments to be made: whether the employer has a legitimate interest, how the employee threatens that interest, whether the interest needs immediate protection, whether the protection needs to go so far, and whether the detriment to the employee and the public interest is too great.

Post-employment restraints range from those prohibiting use of confidential information acquired through employment (non-disclosure clauses), or the solicitation of previous customers (non-solicitation clauses), to wider clauses imposing an obligation on the employee not to compete with the employer for a defined period after the termination of the employment. The common law starts

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2 The decision in *Stacks Taree v Marshall (No 2)* [2010] NSWSC 77, [44] contains a concise statement of principles. The lead text is J D Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 3rd ed, 2008). There are also useful analyses in a number of texts on confidential information, contract, intellectual property and labour law.

with a presumption that restraints are unenforceable as contrary to public policy. This is not because of the quality of the bargain between the employer and employee, whether, for example, the contract is void for unconscionability or duress or lack of consideration.[3] Rather it is because restraints are against the public interest because they limit freedom of trade.

Nevertheless, the courts are prepared to enforce restraints in employment contracts if it is reasonably necessary to protect a legitimate business interest of the employer. The categories of interest include confidential information, connection with customers, and recently – though this is not settled law and is another source of uncertainty – the maintenance of a stable, trained workforce. The theory behind this protection might be – for it is rarely articulated – that restraints give employers an incentive to invest in the development of knowledge with some certainty that it will not fall immediately into the hands of a competitor if the employee moves.[4] Restraints encourage workers to stay on with the same employer; restraints prevent them from using that knowledge right away if they do go.[5] The restraint gives the employer time to exploit the competitive advantage that a new technology or a connection with a customer might provide.

At the same time, restraints restrict the employee's freedom. Even though the restriction is temporary, it might mean the employee does not take up work with a competitor at all and might even leave the industry for other kinds of restraint-free work.[6] At the least, the employee will experience financial hardship, unless they have another employment or income option. From management studies, research suggests that employees, especially now that lifetime employment is rare, will invest more heavily in knowledge if they can take the benefits away with them.[7] Moreover, the surrounding economy benefits as a whole from the mobility of workers with the knowledge they have accumulated.[8] The employers who lose the benefit of a particular employee gain from access to the pool of employees who are free to join them.

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3 The circumstances under which the employee contracts a restraint of trade range from the most deliberate to the most casual. The courts do on occasion place some store on the quality of the bargain, especially in determining whether the employee will experience hardship if an injunction is granted. Nonetheless, they do not observe a policy of freedom of contract.

4 See Gillian Lester, 'Restrictive Covenants, Employee Training, and the Limits of Transaction–Cost Analysis' (2001) 76 *Indiana Law Journal* 49.

5 See, eg, Stewart E Sterk, 'Restraints on Alienation of Human Capital' (1993) 79 *Virginia Law Review* 383.

6 See Matt Marx, 'The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals' (2011) 76 *American Sociological Review* 695.

7 For a discussion of this idea and its implications for the law, see 'Human Capital and the Changing Workplace' (2002) 34 *Connecticut Law Review* 717 ff (Commentary).

8 Matt Marx, Deborah Strumsky and Lee Fleming, 'Mobility, Skills, and the Michigan Non-Compete Experiment' (2009) 55 *Management Science* 875; Mark J Garmaise, 'Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment' (2011) 27 *Journal of Law, Economics, and Organization* 376; Sampsa Samila and Olav Sorenson, 'Noncompete Covenants: Incentives to Innovate or Impediments to Growth' (2011) 57 *Management Science* 425.

This research has been cited in the legal commentary to support an argument that restraints should be enforced conservatively, if they should be enforced at all.[9] The success of cluster or network economies such as Silicon Valley in California is attributed in part to the fact that non-compete clauses are unenforceable there. We rarely see that argument made in Australia.[10] However, the public policy check on restraints enables it to be considered within the terms of the law.

Instead, the common law proceeds on a pragmatic, discretionary basis. Restraints are enforceable if they are reasonable. When restraints are put before them, the courts ask whether the particular restraint is reasonably adapted to the protection of the employer's legitimate business interests. The legal process becomes a sorting system. In such a system, the legal principles do not provide the parties with bright line certainty to predict the outcomes. Legitimate interests have been given some definition, but the categories continue to expand, for example with some recent decisions supporting the recognition of a legitimate interest in a stable and trained workforce. The cases do not provide clear a priori rules as to what scope, time or territory of restraint is reasonable. The law is evolving and fresh decisions are being made in each jurisdiction.[11] These decisions vary in the strength of the restraint they support and they become resources that are marshalled by the cognoscenti to argue a position. Furthermore, findings of fact (for example about the potential for breach and harm) are usually vital to the outcome of the case.[12]

In an individual case, the court will test the restraint against the reasonableness standard. If the restraint is too long, or takes in too much territory, or prohibits too many activities, it runs the risk of being struck down and the employee freed of any restraint. That said, it should be appreciated that the courts are often prepared to give the employer provisional or partial enforcement of an overreaching restraint. The initial enforcement actions are typically interlocutory proceedings in which, substantively, the employer has merely to make out an arguable case or a serious issue to obtain the temporary but effective relief of an injunction.[13] Then, in New South Wales ('NSW'), legislation empowers the courts to construe a restraint that is excessive to reduce its operation to that of a

9 See Ronald J Gilson, 'The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128 and Covenants Not to Compete' (1999) 74 *New York University Law Review* 575. Alan Hyde writes that the argument still holds true: see Alan Hyde, 'Should Noncompetes Be Enforced?' (2010) 33(4) *Regulation* 6.

10 For exceptions, see William van Caenegem, 'Inter-firm Migration of Tacit Knowledge: Law and Policy' (2005) 23 *Prometheus* 285; Joellen Riley, 'Who Owns Human Capital? A Critical Appraisal of Legal Techniques for Capturing the Value of Work' (2005) 18 *Australian Journal of Labour Law* 1.

11 Most of the written decisions are not reported, but they can be located through the CaseBase and FirstPoint case law citators and the AustLII service. We thank Michael Cole for his excellent research assistance in this regard. The interviews confirmed that some decisions, notably in the interlocutory proceedings, are not written and therefore are not cited. This adds to inside knowledge.

12 A feature stressed by McDougall J in *Stacks Taree Pty Ltd v Marshall (No 2)* [2010] NSWSC 77, [54].

13 The balance of convenience test also applies; see below.

reasonable protection.[14] In the other states and territories, that facility is not available, but employers have endeavoured to avoid the common law's all-or-nothing approach by structuring the restraint as a step provision (a laddered or cascading clause), something the courts have generally accepted.[15] The court may then sever the restraints it considers too wide, allowing the employer to enforce the restraints that remain. While this practice assists the employers, it does not give employees clarity about the restraint that they will have to honour, whether at the time of the negotiation of the contract, or the end of the employment relationship, or the entry into litigation.

B The Influence of the Legal Practice

Under such conditions of uncertainty, the legal practice surrounding restraints matters. Uncertainty means that variables other than the legal merits of the particular restraint are active in determining the outcome of disputes and the observance of contracts overall. In restraint cases, these key variables can be characterised as the use of inside knowledge and hard bargaining – variables that on the whole appear to favour the employer over the employee.

Empirical legal studies have picked up on these variables. Grossman, Kritzer and Macaulay noted that parties with inside knowledge can anticipate legal problems and can often structure transactions and compile a record to justify their actions. They develop expertise and have access to specialists who are skilled in dealing with particular types of cases or issues. Repeat players can also benefit from informal relations with (and 'educate') institutional incumbents such as judges, hearing examiners and court clerks.[16] Genn found in hard bargaining that '[t]he goals of the parties in negotiation are diametrically opposed. In pursuing these goals, it is considered legitimate to exploit any weaknesses displayed by the opponent'. Connecting to inside knowledge, she observed that '[u]ncertainty about predicting the outcome of litigation provides the conditions under which delay and cost pressures push the parties towards settlement rather than trial'.[17]

To explore the role of these variables in our field, the research supplemented the cited decisions, texts and papers with a set of interviews with legal practitioners. We located 24 practitioners through a variety of sources, including professional contacts, participation in court cases, profiles on law firm websites and learned publications. We found that most (two thirds) of those practitioners were solicitors. They were employment law specialists in the big national

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14 *Restraints of Trade Act 1976* (NSW) s 4 ('*Restraints of Trade Act*'); see, eg, *Woolworths Ltd v Olson* [2004] NSWCA 372. See also Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) [14.28]–[14.36].

15 See, eg, *Hanna v OAMPS Insurance Brokers Ltd* (2010) 202 IR 420. See also David Cabrelli and Louise Floyd, 'New Light Through Old Windows: Restraint of Trade in English, Scottish, and Australian Employment Laws – Emerging and Enduring Issues' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 167, 173.

16 Joel B Grossman, Herbert M Kritzer and Stewart Macaulay, 'Do the "Haves" Still Come Out Ahead?' (1999) 33 *Law and Society Review* 803, 803–4.

17 Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press, 1987) 123, 137.

commercial law firms, the boutique workplace practices, and the traditional labour law firms. Some of these practitioners acted for employers, some for employees; some had a mixed clientele. We also interviewed barristers in several jurisdictions and judges from two of the state supreme courts.[18] We conducted interviews with practitioners in the capital cities of all mainland states (though the majority were located in Brisbane, Melbourne and Sydney).[19]

We learned that these employment law specialists have the bulk of the practice concerning enforcement of restraints among external lawyers.[20] They are able to generalise in a valuable manner from their involvement with multiple cases over considerable time. They are a very rich source of insight into the various legal stages of the enforcement of restraints. These practitioners were able to describe the various demands of litigation, the nature of advice given and the calculations made by the parties. It must be appreciated that these practitioners do not simply respond to legal principles; they are influential in representing and indeed making the 'law in action', by which we mean the tide of individual decisions, dispute settlements, employment contracts and other practices, not just the legal principles.

For this inquiry, the critical question was whether the use of inside knowledge and hard bargaining led to over-enforcement of restraints. By over-enforcement we mean that because of these variables employees observe restraints, with or without protest, which when tested would be found unenforceable or would be cut down to give more freedom.[21] This practice would be concerning because the courts' policing of the public interest would be routinely bypassed and the mobility of employees with their know-how and talent restricted as it were by default. Disparities in the burden of uncertainty could be significant for both the conduct of proceedings that scrutinise particular restraints and for the persistence of invalid restraints overall.[22] We have found that there is an active practice of conceding or compromising complaints about non-observance of restraints, which leave at least some period of restraint intact,

18 The interviews, carried out in 2010, 2011 and 2012, adopted a semi-structured format using a common set of questions and following leads the interviewees gave us. Each ran over an hour. At least two of the researchers were in attendance at each interview. Some interviews were recorded and transcribed; for others, notes were taken and written up.

19 We stress that the selection of the participants and the conduct of the interviews were in accordance with the approval granted by the Melbourne Law School Human Ethics Advisory Group, including the strict conditions of anonymity that the interviewees were not identified with particular quotes or comments.

20 The interview group also contains several corporate in-house counsel. We have not interviewed general practitioners or rural practitioners, who might take on the occasional restraint case.

21 This is a prospect raised by the United States studies. See, eg, Harlan M Blake, 'Employee Agreements Not to Compete' (1960) 73 *Harvard Law Review* 625; Cynthia L Estlund, 'Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law' (2006) 155 *University of Pennsylvania Law Review* 379; Rachel Arnow-Richman, 'Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes' [2006] *Michigan State Law Review* 963. However, none of these analyses is empirically based.

22 Charles A Sullivan, 'The Puzzling Persistence of Unenforceable Contract Terms' (2009) 70 *Ohio State Law Journal* 1127.

even if not to the extent found in the contract of employment. That practice is now considered.

III LEGAL PROCEEDINGS

A Commencing Proceedings

The focus in this section is the practice around the proceedings for enforcing restraints. That practice is governed by the rules of procedure but is also influenced by the ways the practitioners choose to conduct cases. Interviewees were asked about the practice surrounding each of the stages of proceedings, from the initiation of demands, possible commencement of proceedings, application for injunctions, settlement of disputes, through to the carriage of trials in the courts.

At the beginning of these stages, if an employer considers that an ex-employee has breached a restraint or is about to do so, the employer faces the decision whether or not to take legal steps, issue proceedings and seek remedies against the ex-employee. Significantly, a letter threatening legal action can be enough to obtain the employee's undertaking to comply.[23] One solicitor interviewee said less than one in fifty disputes he saw led to applications for injunctions.[24] One of our specialist lawyers said 'I'd probably do between five and ten restraint cases a year that get anywhere near a court'.[25]

Interviewees generally indicated that proceedings before the courts, although generally a small proportion of disputes that came to their attention, are subject to variation over time. Several interviewees observed there was more disputation when the employer needed to retain skilled people.[26] One interviewee noted that immediately after the global financial crisis in 2008, firms were more active in enforcing restraints;[27] though it was also suggested that there had always been spikes and troughs in the number of restraint actions.[28] On the indications from the interviews, New South Wales is currently the most active jurisdiction, followed closely by Victoria.[29] The Federal Court jurisdiction is also attracting a small number of cases through the attachment of the matter to a claim under the *Competition and Consumer Act 2010* (Cth) (and its predecessor, the *Trade*

23 For example, L11. In the bigger firms, with in-house counsel, the letters might go first from the employer. Nonetheless, a law firm letterhead carries weight. If we go further back into the firms, we can see that the employee may be reminded of the restraint (at the same time as documents and files are reclaimed).

24 L8, similar L9, L17. We rely on the practitioners for estimates. The courts do compile statistics on the proceedings commenced, but they are not categorised as restraint cases, rather as employment or intellectual property cases: see, eg, Supreme Court of New South Wales, *Annual Review* (2009) 55–62 <http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/supremecourtannualreview09.pdf>.

25 L17. A different lawyer indicated that they were up to their fourth dispute for the year in May: L11.

26 For example, L1, L8, L20, L22.

27 L7, similar L11.

28 L1.

29 For example, L5, L9, L10, L12, L21.

Practices Act 1974 (Cth)), the *Copyright Act 1968* (Cth), or the *Corporations Act 2001* (Cth) for breaches of a director's duties.[30]

Some sectors of the economy are more strongly represented than others. The interviewees suggested that the financial services sector has figured most prominently in recent years,[31] as well as other service sectors including real estate, recruitment, retail, distribution, medical services, information, insurance, media and hairdressing.[32] Enforcement is more likely in sectors where competition is intense and employees move laterally between employers. In this context it is confidential information about customers and the customer connections – the 'social relations which are operating alongside the professional work'[33] – that employers sought to control by enforcing the restraint.[34] As a result, restraints are not so vigorously pursued in sectors where customer connections are not so vital, such as manufacturing, though in these sectors restraints will be enforced to protect confidential information.[35]

B Applying for Injunctions

In cases where there is no early settlement (that is, prior to commencing proceedings – discussed further below) and legal enforcement action is taken, the majority of applications seek interlocutory injunctions and are placed in commercial and general equity lists among the urgent and expedited matters. The longer an employer leaves the application, the less convincing its argument for relief and the less practical utility it will have given the limited nature of most restraint periods.[36]

If an injunction is sought, a barrister is likely to be briefed to draft sound affidavits and put a case convincingly to a judge. In these expedited hearings,[37] in a practice or a duty court, judges only have limited time to assess the case.[38] Sound affidavits, and a familiar and persuasive advocate, provide reassurance to a busy or sceptical judge.[39] Our interviewees suggested that any capable commercial silk should be able to make the application.[40] Nonetheless, they

30 L7, L12. See, eg, *Metz Holdings Pty Ltd v Simmac Pty Ltd (No 2)* [2011] FCA 981; *Informax International Pty Ltd v Clarius Group Ltd* (2011) 192 FCR 210; *Blackmagic Design Pty Ltd v Overliese* (2010) 84 IPR 505.

31 For example, L2, L7, L8.

32 For example, L6, L21, L22.

33 L21.

34 L3, L7, L8.

35 Other sectors are just wary of litigation, such as the legal sector itself: L7, similar L17.

36 See, eg, *Capgemini US LLC v Case* [2004] NSWSC 674.

37 It was suggested that it was difficult to expedite the process unless the employee has already commenced new employment: L7.

38 The interviews indicated that two to four hours was the normal amount of time given to hearing a case: for example, L3. One interviewee characterised the decisions of judges as an 'intuitive response' to the merits based on past experience: L24.

39 Justice Paul Brereton, 'Practice and Procedure before the Duty Judge in Equity' (Address to the NSW Bar Association, Sydney, 14 August 2008) <http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/brereton140808.pdf>

40 For example, L8.

identified a small number of barristers who had become specialists and who reappear in the busier jurisdictions. A number of interviewees stressed that they would always seek counsel with relevant experience in these types of matters. Such counsel tend to be at the more experienced and expensive end of the scale.

At the interlocutory stage, because the court is making an urgent and provisional decision, it only has to determine that the employer has an arguable case or that there is a serious issue to try.[41] It is clear from the cited decisions that applications for interim injunctions are dismissed from time to time on the basis that the employer's argument is weak.[42] Yet the employer receives some concessions.

The interviewees said it can be difficult for the employer to obtain the necessary evidence of actual or threatened breach, for instance from new employers about the competitive nature of the employment or about disclosure of information, or from clients who have been approached by the ex-employee.[43] The courts have been disposed to enforce non-competes in circumstances where direct evidence is hard to obtain, and time is of the essence, because they see the employer faces a problem proving the breach and enforcing the order.[44] The court relaxes the onus and says that it is enough to show that the employee is going to work for a competitor that could make use of the information.[45] Likewise, the court might enforce a non-compete because it feels a restraint placed merely on non-solicitation of customers could be defeated by pretence and subterfuge.[46] If the employer obtains only a limited order, it may be back in court seeking enforcement.

Yet, some courts are very mindful of the fact that the interlocutory applications are the practical determinant of the matter and they should seek to avoid a procedural injustice to the employee.[47] Furthermore, they view the impact on competition very seriously and tend to see blanket non-competes as

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41 For a clear enunciation of the proceedings, see *BDO Group Investments (NSW–Vic) Pty Ltd v Ngo* [2010] VSC 206.

42 See *Total RISC Technology Pty Ltd v Cannings* [2010] NSWSC 1124; *Marlov Pty Ltd v Col* [2009] NSWSC 501; *Woolworths Ltd v Banks* [2007] NSWSC 45. See also *Wallis Nominees (Computing) Pty Ltd v Pickett* [2012] VSC 82; *Allison v BDO (NSW–Vic) Pty Ltd* [2010] VSC 35; *BearingPoint Australia Pty Ltd v Hillard* [2008] VSC 115.

43 For example, L22. One interviewee highlighted that, in terms of enforcing restraints, the 'burden of proof is always difficult': L19. This means a question for the employer is whether to call on their own clients to supply affidavits: L7. Another key site of information is the IT systems of the firm. An employer might decide whether to search for incriminating material in emails or USBs from a computer that the employer supplied to the employee: for example, L2, L22.

44 This approach was confirmed by Hodgson JA in *Miles v Genesys Wealth Advisors Ltd* [2009] NSWCA 25, [24] (Hodgson JA).

45 For one lawyer, 'confidential information is the legal argument that you use to … justify a restraint': L21.

46 See *HRX Holdings v Pearson* [2012] FCA 161, upheld on appeal: *Pearson v HRX Holdings Pty Ltd* [2012] FCAFC 111; or at least to justify the argument to enforce a non-dealing restraint and not just a non-solicitation restraint: see *Hanna v OAMPS Insurance Brokers Ltd* (2010) 202 IR 420, 430 [34] (Allsop P).

47 One interviewee indicated that a judge went as far as to express the opinion that 'enforcement of restraints is not a matter for interlocutory relief': L17.

unreasonable.[48] The order will not prevent the employee from working with the new employer altogether. Sometimes, the court accepts undertakings from the employee instead of making a formal order.[49]

If the court considers that an arguable case is made out, it is rare to see a decision in which the hardship to the employee tips the balance of convenience against granting the employer the injunction. Generally, the balance of convenience is weighed in the employer's favour. The court is more concerned about the threat of an immediate injury to the employer's interest. The courts take the view that damages awarded after the event would not be an adequate remedy; for instance, they would be hard to estimate.[50] Yet the courts will want to create the least amount of hardship possible. An interlocutory injunction might not be granted if it would prevent the employee from earning a living.[51] However, to add to the uncertainty, the court may be sceptical of this claim or take the view the employee has brought the hardship upon himself or herself.[52]

C Out of Court Settlements

Most often, settlements are made before proceedings are issued. It is possible that the legality of some of these arrangements would be open to legal challenge.[53] However, they will operate while they remain consensual and the parties stay out of court.[54]

The interviewees indicated that proceedings are commenced strategically to give impetus to negotiations – as one interviewee said, 'if you don't issue the proceeding, there's no basis to get some sort of settlement'.[55] Unfortunately, official figures are not available for the settlements reached at these stages.[56] We were told some disputes were settled 'at the door of the court' after the application had been prepared and the papers served on the employee.[57] By this

48 See *Stacks Taree Pty Ltd v Marshall (No 2)* [2010] NSWSC 77, where the court enforced a non-solicitation restraint but not the non-compete.

49 See, eg, *Integrated Group Ltd v Dillon* [2009] VSC 361. Cf *Red Bull Australia Pty Ltd v Stacey* (2011) 214 IR 299, where the undertakings were not acceptable.

50 See *OAMPS Gault Armstrong Pty Ltd v Glover* [2012] NSWSC 1175; *BDO Group Investments (NSW–Vic) Pty Ltd v Ngo* [2010] VSC 206; *FNET Pty Ltd v Laksanabencharong* [2009] NSWSC 708.

51 See *Reed Business Information v Seymour* [2010] NSWSC 790; *Think: Education Services Pty Ltd v Lynch* [2011] NSWSC 984.

52 L12. See *John Fairfax Publications Pty Ltd v Birt* [2006] NSWSC 995, [49]. Here too some courts will note that the employee was well paid for the restraint under the terms of the original contract. If an employee accepts a payment in exchange for a restraint and still breaches the restraint, then this will be a good basis for gaining an injunction. This has made such an agreement more popular: L1. See *Woolworths Ltd v Olson* [2004] NSWCA 372, [61]; *Tullett Prebon (Australia) Pty Ltd v Purcell* [2008] NSWSC 437, [52].

53 For example, an additional contract may not qualify for the exemption from the application of competition policy contained in the *Competition and Consumer Act 2010* (Cth) s 4M.

54 While consensual, they may still be the product of hard bargaining, see Part V, below.

55 L3, similar L11.

56 The courts do compile statistics on the dispositions of cases, but again, like the statistics on proceedings commenced, they are not categorised as proceedings to enforce restraints: see Supreme Court of New South Wales, above n 24.

57 For example, L22.

time, the parties have further knowledge, including the identity of the sitting judge. Settlements are also made after the interlocutory proceedings or in the period leading to and including the trial.[58] A settlement at these points can become a consent order.[59] Or the parties may simply notify the court that a settlement has been reached and that they wish to discontinue. It does not seem the practice, even with the new case management techniques, that the courts will follow up all the proceedings that are issued. The defendant may apply for proceedings to be dismissed for lack of prosecution.

The interviews provided information about the content of settlements. Once proceedings are commenced, some settlements do result in the full extent of the restraint being observed. More often, though, when this stage is reached, a compromise was involved. In other words, although there is a restraint period in the contract of employment, quite often at the point of departure of the employee, some modification of the terms of the restraint is negotiated. The initial restraint is replaced by a more actively negotiated and adapted deal.

Where an employee announces his or her departure, some firms propose 'gardening leave' during a period of notice.[60] However, this arrangement may not settle the dispute, should the employee wish to leave straight away and work for another employer, or should the employer seek to add the restraint onto the end of the notice period.[61] A variation is for the employee to be offered an extra lump sum payment to respect the terms of the restraint.[62] Another inducement is to stagger the payment of accrued entitlements and severance benefits while the employee observes the restraint.

Some employers are prepared to re-negotiate the terms of the restraint clause once the employee has responded to their initial demand for compliance.[63] For example, the terms might not prohibit employment altogether, but instead itemise the information that was to be respected or list the customers who were not to be solicited. It was noted that, of the three parameters of a restraint, 'time is the more common area that you see a compromise reached because it's the most pragmatic way of dealing with it from both sides'.[64] One lawyer suggested that the dispute could and often would be settled by the two parties simply agreeing to a shorter restraint period than appeared in the initial contract.[65] Another agreed, suggesting a period of four to six weeks paid leave was an acceptable solution.[66]

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58 One interviewee also said that the use of cascading clauses 'encouraged settlement': L4.

59 This was noted by a couple of interviewees: L2, L24.

60 For example, L10. One interviewee even recommended placing an employee on 'gardening leave' instead of sacking them for potentially breaching duties: L1. Another, however, suggested 'gardening leave' was not a popular option for employers because of the money to be paid: L8.

61 These disputes are coming to court: see Amanda Coulthard, 'Garden Leave, the Right to Work and Restraints on Trade' (2009) 22 *Australian Journal of Labour Law* 87.

62 For example, L9. Another suggested that some employers just pay the employee for the period of the restraint: L7.

63 For example, L10; but another suggested that they 'hadn't ever seen it work': L3.

64 L4.

65 L11.

66 L20.

We asked the lawyers we interviewed whether employers in dispute with ex-employees ever reached understandings or arrangements with the new employer. None of our interviewees were aware of formal settlements being reached with the new employers. However, some suggested that the new employer sometimes agrees to place the employee in training for the duration of the restraint, or assigns the employee to work that does not compete with the original employer's interests.[67] Generally we learned that the new employers, when properly advised, tend to be very careful not to become too engaged with the dispute, for fear of being found to have induced a breach of contract. They had sometimes received letters of warning to that effect from the original employer's lawyers.

D Trials and Decisions

Our research found that few cases proceed from the interlocutory to the trial stage. As indicated above, in most cases the interlocutory decision is the practical determinant of the matter.[68] This fact is recognised by the courts, though they say they apply no special considerations to the decisions because of this effect.[69]

Nonetheless, in some instances, matters do proceed to trial either from an interlocutory proceeding or go there directly. The reasons for this vary, but are very interesting in light of the very considerable costs attached to trials and the fact that the few cases which do attract decisions will serve as guidance to the wider audience – their effect goes beyond the immediate parties. The most immediate concern is that the interim order may not cover the full period for which the employer wants to exploit the information or retain the customers.[70] Furthermore, while the employer's goal is likely to be an injunction, it may also be claiming damages or an account of profits.[71] Cases may also occasionally proceed because the employee is prepared to argue against the extension of the injunction to the full force of the restraint.[72] There is the possibility that one side or the other maintains proceedings because they have a point to prove or a principle to establish for the benefit of others in the firm and for the sector.[73]

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67 L7, similar L19. This has been reinforced occasionally in the orders the courts make: *Australian Insurance Holdings v Chan* (2010) 87 IPR 533. Some of the decisions find on the facts that there has been no breach by the employee.

68 This was affirmed by interviewees: for example, L2, L3.

69 *Linwar Securities Pty Ltd v Savage* [2006] NSWSC 786, [24].

70 In senior positions, the restraint might have been one year or longer.

71 One interview cited a decision in which a liquidated damages clause had been upheld: see *BDO Group Investments (NSW–Vic) Pty Ltd v Ngo* [2010] VSC 206. See also *Birdanco Nominees Pty Ltd v Money* [2012] VSCA 64; *Emeco International Pty Ltd v O'Shea (No 2)* [2012] WASC 348.

72 At the interlocutory hearing, the employee gives an undertaking to observe the restraint, but it is on the basis that the merits can be argued.

73 In New South Wales, several restraint cases have been taken on appeal to the Court of Appeal. Significantly, the appeals have been brought and lost by employees: see *Miles v Genesys Wealth Advisers Ltd* (2009) 201 IR 1; *Ross v IceTV Pty Ltd* [2010] NSWCA 272; *Hanna v OAMPS Insurance Brokers Ltd* (2010) 202 IR 420; *Jardin & Jardim Investments Pty Ltd v Metcash Ltd* (2011) 285 ALR 677. Each has been dismissed with costs awarded against the employees. See also, in Victoria, *Birdanco Nominees Pty Ltd v Money* [2012] VSCA 64, while the employer has lost the appeal in *Wallis Nominees (Computing) Pty Ltd v Pickett* [2013] VSCA 24.

Two facets of the courts' decisions were highlighted in the interviews. The first was legal advisers' estimations of what judges would decide about the reasonableness of certain restraint periods or, put in another way, the duration of restraints which the lawyers felt were 'safe'; and secondly their estimation of the willingness of judges to select or determine the extent of the restraint where clauses required interpretation, such as in the case of laddered or cascading clauses, or otherwise where the language of the restraint was not entirely clear. The lawyers' estimation on these two points is important because it translates into advice as to how to act when either presenting or resisting a demand concerning observance of a restraint. It is important in particular if it produces the chilling advice that, even if the employee contests the restraint, the employer will most likely get provisional or partial enforcement and achieve the desired effect.

Regarding the first facet, there were variations in the estimates of the terms of the restraints that the interviewees thought were generally safe. One interviewee was confident that a six-month restraint period would almost always be enforced, and felt that a year would usually be too long unless the employee was a senior manager.[74] Another interviewee suggested that the reasonableness of the clause depended on the nature of the industry – a guide could be the time it would take to reverse engineer the information to be protected or to ascertain it independently.[75]

A crucial factor the interviewees emphasised was the extent to which the clauses had been properly targeted to the role of the particular employee, restraining *x* services for *y* clients for *z* period of time, for example.[76] A common source of difficulty was that the restraint covered activities the employee had not undertaken but that were part of their firm's portfolio of businesses. This raises the question of the validity of non-competes as compared with non-disclosure or non-solicitation clauses.

As to the second facet, the parties may be able to avoid an all or nothing decision if the contract offered the court a range of restraints.[77] A poorly drafted restraint might be invalidated, but the courts may be prepared to retrieve the situation and give the employer partial enforcement. Generally, laddered clauses were judged to give considerable comfort to employers because they meant they could litigate and walk away with something. Such a step provision provides different longer periods or wider territories of restraint. The scope of activity may range from the general to the particular, from non-competition to versions of non-disclosure and non-solicitation.

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74 L1, similar L7, L8, L11.

75 L5. Another guide could be the time taken for the information to become obsolete. See *Miles v Genesys Wealth Advisors Ltd* (2009) 201 IR 1, 24 [65].

76 L1. It was suggested that the courts were willing to uphold longer restraints where the other aspects of the parameters (activity territory) were drawn narrowly: L12.

77 The interviewees who used them included L7, L19, L20. Another noted that given the parameters involved, cascading clauses become 'bloody complicated': L17, similar L4.

Recently, in *Hanna v OAMPS Insurance Brokers Ltd*, the New South Wales Court of Appeal upheld the proper use of laddered provisions.[78] While they still represent the minority of restraints,[79] we might expect to see them become more popular. One non-NSW interviewee noted that they steered away from ladder clauses on the basis of the risk that the court may find them void for uncertainty.[80] Another indicated that in his opinion some judges were comfortable with cascading clauses, while others disliked them on the basis of the uncertainty inherent in the clauses.[81] We had some sense that the enforceability of cascading or laddered clauses was ripe for major reconsideration by the courts, although the majority of interviewees still felt the courts were reasonably well-disposed towards them.

As one of our interviewees pointed out, in the NSW jurisdiction, these provisions are not really necessary.[82] This is because, as noted earlier in our article, the *Restraints of Trade Act* gives the courts the power to give the restraint partial enforcement, even if it cannot be 'blue pencilled'.[83] Provided they stay within the circumference of the restraint the parties have agreed, the courts may order the restriction that is reasonable enough to protect the employer's interest, rather than invalidate the restraint altogether for being cast too wide. The court can give the restraint a narrower construction, though it may not rewrite it. The usual outcome is that the court reduces the length of the restraint period.[84] This option meant that interviewees felt that the NSW jurisdiction was more accommodating of employers than the other jurisdictions.[85] There was a lower risk factor attached to litigating there, although if the clause is too vague, incomprehensible or uncertain, it cannot be saved by the *Restraints of Trade Act*.[86]

78 (2010) 202 IR 420. The steps were each independent and capable of being understood separate from each other. Cf *Emeco International Pty Ltd v O'Shea (No 2)* [2012] WASC 348, where the unreasonable restraint (all of the employer's customers and not just the customers the employee had dealt with) could not be severed but would have to be rewritten.

79 One interviewee noted that he had been involved in only one or two cases with laddered clauses in the last five years: L24.

80 L1. See *AGA Assistance Australia Pty Ltd v Tokody* [2012] QSC 176.

81 L11. One interviewee suggested that a twelve month outer limit for a cascading clause is now common: L9. See also Arthur Moses writing in 2004: 'There is a divergence of opinions between judges in New South Wales as to the enforceability of restraint of trade provisions that contain a cascading list of restraints, both as to the period of operation and the geographical operation of the restraint.' See Arthur Moses, 'Restraints of Trade in New South Wales' (2004) 1 *University of New England Law Journal* 199, 211.

82 For example, L23.

83 Noted by L2, L11.

84 See *Woolworths Ltd v Olson* [2004] NSWCA 372. In *Ross v IceTV Pty Ltd* [2010] NSWCA 272, [123], the New South Wales Court of Appeal relied on the *Restraints of Trade Act* to reduce the scope of the activity to be restrained. See also *Bis Industries Ltd v Toll Holdings Ltd* [2012] NSWSC 1427.

85 For example, L2, L4, L20, L21, L23. One (non-NSW) lawyer, however, saw the *Restraints of Trade Act* as 'unnecessary regulation': L22.

86 For example, L11.

E The Court as Variable

We asked the interviewees about their perceptions of the courts and the judges who preside over them in relation to restraint disputes. That is, we were interested in whether the parties needed to factor into their considerations any variability in the likely response to a restraint clause at the level of the particular court or bench. It is not uncommon for there to be uncertainty inherent in the law, but should we also be taking the legal realists' view of judicial decision making? This is not to deny that the courts work within the legal principles; after all, the internal doctrine of precedent asks this of them. Yet, judges enjoy discretion when the principles are fuzzy and the remedies malleable.

This exercise of discretion has structural features; we should not too readily assume that it is a function of individual biases or, as is sometimes disrespectfully said, what the judge had for lunch. In these courts, the applications are heard by very senior judges. They are commonly heard in the commercial and equity lists of the supreme courts. Given their practices at the bar, it is likely that they recognise the employer's arguments in favour of protecting business interests. Allowance might also be made for institutional considerations. In recent years, the state supreme courts have been friendly rivals for the filing of the interesting commercial cases, as have the supreme courts with the Federal Court.[87]

Yet restraint cases present dilemmas. The protection of legitimate business interests is inconsistent with freedom of trade and competition. The first employer's freedom to contract with the employee for restraints must be measured against the new employer's freedom to contract for employees, or with the customer's freedom to contract with suppliers. It is evident that the judges also want to see fair play. The principles give expression to this consideration in their concern to protect the first employer against 'unfair competition'.[88] But fair play is also a matter of due process, which can work in the employee's favour. Sometimes, the courts might insist on precision in the claims to confidential information in order to discourage cases being run to block or 'sterilise' employees. Occasionally, the courts will use the language of intimidation and oppression, for example when they say the litigation is *in terrorem*.[89] To discourage such litigation, claims have been struck out, trials brought forward, and the employer put to its proof.

Our interviewees differed over the extent to which they rated 'judicial activism' a variable. We raised the possibility in interviews that the New South

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87 Rachel Nickless, 'Litigants Snub Vic, Qld Courts, Take Cases to NSW and Federal Court', *Australian Financial Review* (Sydney), 3 February 2012, 47. The report stresses the efficiency and expertise of the courts, though it also quotes a leading practitioner as observing that: 'The NSW court is most anxious to be just, quick and cheap'. Our research suggests that those enforcing restraints would be happy with that if the interlocutory proceedings go their way.

88 *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9, 17–18 [25]. The respect the employers have for fair competition and their dislike of unfair competition was referred to by L4.

89 *Integrated Group Ltd v Dillon* [2009] VSC 361; *Liberty Financial Pty Ltd v Scott (No 4)* (2005) 11 VR 629; *Creative Brands Pty Ltd v Franklin* [2001] VSC 338. Note that these are all Victorian decisions.

Wales Supreme Court was more receptive to restraints than their Victorian counterparts. Some interviewees agreed with this, saying the *Restraints of Trade Act* provided more comfort for litigants.[90] Another reason given was the greater frequency of court action in Sydney,[91] where many of the service sectors are centred.[92] The receptiveness of the NSW judges need not be a function of attitude; it could be greater familiarity and ease with the legal principles and proceedings. For one interviewee, the NSW judges were more 'switched on' and they had the opportunity to build up experience hearing these cases.[93] However, the interviews were ultimately inconclusive on this point. Some interviewees in Melbourne suggested that it was Victoria which had the more searching or sceptical approach. One said it was 'difficult … to enforce a restraint' and that 'you've got a pretty hard battle with the judges there'.[94] Another highlighted a case in which the judge refused to make an interlocutory decision and offered to conduct the trial straight away.[95] Others though saw little difference between NSW and Victoria.[96]

We asked whether forum shopping was occurring, either between the state courts themselves or between the state courts and the Federal Court.[97] One interviewee was clear that it was.[98] Choice of forum is subject to the rules about jurisdiction, cross-vesting and the forum of convenience. However, there is enough overlap in this field to invite the lawyers to make a choice for their own organisational convenience or possibly because they think they will receive a more sympathetic hearing.

We asked in each jurisdiction if it mattered which particular judge heard the application. The interviewees regarded this as a crude question. They took the view that of course the identity of the judge should be considered when submissions were put; such a sensibility is part of the litigation craft. Nonetheless, their priority as lawyers was to make out a carefully measured case. In Brisbane, the interviewees saw little difference between the judges in their approach to restraints.[99] In Sydney, the same reassurance was given.[100]

90 L17, L23.
91 For example, L23.
92 L21.
93 L24.
94 L17. In a 2009 Continuing Legal Education paper, Robert Dean QC remarked that: 'There is a real tension developing between the Victorian courts and other states with respect to interpretation of clauses where the parties have been clumsy in the wording of the restraint. The Victorian courts will not make good the restraint': Robert Dean, 'Protection of Know-How and Customer Lists', in Robert Dean and Timothy Ginnane, *Protection of Customer Lists and Confidential Information* (Leo Cussen Institute, 2009) 14. Whether there is tension with other states, the Victorian Court of Appeal has made clear its reluctance to sever apart and revise a clause. See *Wallis (Computing) Pty Ltd v Pickett* [2013] VSCA 24, [110] (Redlich JA).
95 L17.
96 For example, L5, L10.
97 See also Andrew Stewart and Janey Greene, 'Choice of Law and the Enforcement of Post-Employment Restraints in Australia' (2010) 31 *Comparative Labour Law and Policy Journal* 305.
98 L24.
99 For example, L7.
100 For example, L11, L12.

Generally, the legal advisers had a reasonable level of confidence in the judges' ability to translate broad underlying principles into balanced decisions. In other words, most interviewees felt the judges understood the broader issues at stake and would bring their understanding to a careful consideration of the clause before them.

All the same, we did receive hints that a few judges were more active than most in apprehending the interests of employers. In Victoria, one interviewee responded by observing that the newer appointments to the Supreme Court had a more modern understanding of the employers' claims.[101] Judges in New South Wales have been active in extending the scope of the business interests which are capable of protection.[102] Even if this is so, some interviewees felt for the most part that there was not much scope to influence which judge would hear their case, as these matters were usually urgent and would be heard by the duty judge or other judges who were asked to help with the load. Some courts, however, do not rotate judges as much as others, so it is possible to narrow the field and even to make a phone call or consult the list to see who is sitting that week. In some courts it is possible to choose between divisions and lists – this also narrows the field.[103]

IV THE BURDEN OF UNCERTAINTY

So far the focus of this article has been on how practitioners see the legal principles and proceedings. In this section, we will model the nature of the employer and employee's decision making about the risks of engaging in and persisting with litigation through the stages we have identified. In principle, if a party has the law on their side they can go to court to obtain a ruling on the merits. However, under conditions of uncertainty, the benefits to be gained from the law have to be discounted by the chances of success, which are not so easy to calculate. The chances of gaining the benefits must also be set off against the costs of engaging in the process and in particular the risk of the costs (financial and otherwise) of losing one's suit.[104] All this is rational decision making. But the parties are not always acting rationally.

A Employee Resources

It is an obvious point, but to maintain proceedings in restraint cases, whether as plaintiff or defendant, the party must have the underlying financial capacity to absorb these costs. The parties may not be evenly matched in terms of their resources and therefore their preparedness to negotiate uncertainty. Superior

101 L10.

102 See, eg, *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9, 26–7 [55].

103 L24.

104 For a useful modelling of the economic decision making involved, see Jenny Phillips and Keith Hawkins, 'Some Economic Aspects of the Settlement Process: A Study of Personal Injury Claims' (1976) 39 *Modern Law Review* 497.

access to knowledge reduces the burden of uncertainty. Superior capacity to absorb costs enhances bargaining power. Yet in principle legal expertise is available to anyone. Financial costs can be significant for employers as well as employees and the potential costs are not confined to money. The costs can be psychological, relational or reputational. In these regards, the feedback from the interviews was especially useful for testing the law in action propositions and in particular the differentials between employers and employees.

For the employee to traverse the law and participate in the proceedings, he or she must have access to legal assistance. Such access varies. For some unworldly employees, it is a major step to consult a lawyer, rather than rely on managers, colleagues, unions, family and friends for advice. Not knowing the legal profession, some employees end up with small, non-specialist firms.[105] Yet many of our interviewees, including those from larger firms, had advised employees.[106] Some sought the assistance of lawyers on their own initiative: senior executives and media stars, for example. Very few were referred by unions, and generally union membership is low in the sectors where restraints are commonly used, such as IT and financial services.[107] There was evidence that some senior employees consulted the firms they knew from their work with the employer. The firm referred them on to a boutique employment firm or labour law firm because of the conflict of interest.

Some well remunerated senior employees can afford to take legal advice, but do not necessarily have the financial means to draw out a conflict or have the matter dealt with by a court. The gravamen of their legal advice relates more to the nature of the compromise they might hold out for, given the estimation of the strength of the employer's case that their legal adviser proffers. For a less senior employee, even the legal fees for a consultation and a response to a letter might look costly.

It was evident from the interviews that advisers will impress upon clients the fact that going to court is a major decision. They emphasise the legal risks and hedge their advice with provisos. One interviewee in Sydney put the cost of opposing an application for an interlocutory injunction at $25 000,[108] another as high as $100 000;[109] yet interlocutory proceedings are short and relatively informal. The costs of contesting a trial are substantial to contemplate; one interview estimated the costs altogether at around $300 000. While some highly paid employees have reserves, most employees cannot face the financial prospects of proceedings alone.[110] They need support from a third party to defend

105 L21.

106 For example, L1, L4, L6, L11, L12, L17, L22.

107 The Association of Professional Engineers, Scientists and Managers Australia ('APESMA') is one notable exception: it gives advice to its members and refers them in a dispute to a labour law firm for assistance. See APESMA, *Workplace Support* <http://www.apesma.com.au/workplace/>.

108 L2.

109 L17.

110 One interviewee indicated that employees 'capitulate' to the threat of an injunction because they cannot afford to fight it: L12.

a legal action against them. Legal aid is not available in civil cases and these days few employees can call on the support of a union.

On the evidence of the cited decisions, the employees who do reach court have had the benefit of good legal representation. This reduces the burden of uncertainty, for it gives access to inside legal knowledge. Without exaggerating the proportions involved, it is notable that some employee representatives are running spirited defences, not just conventional arguments about the reasonableness of the restraint, but also challenges to the employer's conduct. These arguments give the cases more the flavour of an employment grievance than a commercial dispute.[111]

Most likely, that support comes from the new employer.[112] In some disputes, the new employer will have deeper pockets than the old employer. In some of these competitions, large established firms are able to pick up employees from successful small operations. Yet there are a number of implications for a new employer drawn into a restraint dispute. They may receive warnings from the first employer's representative not to breach the restraint and, as we noted above, they may take steps to avoid such a breach even if they go ahead with the hiring.[113]

In principle, the new employer risks inviting action for inducing a breach of contract; that is, breach of the restraint clause.[114] Another possible cause of action is third party liability for a breach of a confidence.[115] A defence to the tort of inducement is a bona fide belief that no breach is involved.[116] In some cases it is clear that the other employer is joined to the suit; one such case was the 'stoush' between the Seven and Ten networks last year.[117] Nonetheless, it emerged from interviews that new employers rarely fund their new employee's case directly because of the risk that they will be found to have induced a breach of contract.[118] Instead, new employers recommend arms-length independent legal advice for new employees caught up in a restraint case.

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111 In several recent cases, enforcement is challenged on the basis that the contract is vitiated, the employer has repudiated the contract, or even that the lawful termination was on the initiative of the employer. See, eg, *Ecolab Pty Ltd v Garland* [2011] NSWSC 1095; *Informax International Pty Ltd v Clarius Group Ltd* (2011) 192 FCR 210.

112 L2, L17, L2.

113 One interviewee said they recommend that the new employer communicate with the old employer to clarify the role of the employee in the new firm in order to avoid the appearance of underhand behaviour: L1. Another saw this behaviour simply as 'professional courtesy': L4.

114 Noted by L2, L3, L10, L11, L21.

115 Noted by L7.

116 L12, L21. Both knowledge of the contract and intention to induce a breach are necessary elements of the tort: *Edwin Hill & Partners v First National Finance Corporation plc* [1989] 1 WLR 225, 234 (Stuart-Smith LJ). See A P Simester and Winnie Chan, 'Inducing Breach of Contract: One Tort or Two?' (2004) 63 *Cambridge Law Journal* 132. In *Wilson HTM Investment Group Ltd v Pagliaro* [2012] NSWSC 1068, Bergin J found that Ord Minnett Ltd had induced financial advisors to breach their contracts of employment and restrained the firm from using confidential information the advisors possessed.

117 *Seven Network (Operations) Ltd v Warburton (No 2)* (2011) 206 IR 450. One lawyer indicated that the possibility of joining the new employer in an action was always considered: L2.

118 L9. One interviewee did suggest that the new employer might bankroll the attempt to oppose the restraint: L17. Another interviewee suggested that such support was not common, but it did happen: L7.

A distinctive feature of the Australian system, cost penalties – the possibility that the loser in court proceedings will be ordered to pay a proportion of the winner's legal costs as well as their own – are an additional factor affecting the burden of uncertainty. Cost penalties both reduce and increase the risk – the common factor is uncertainty. In the interlocutory proceedings, costs are usually awarded 'in the proceedings' or 'in the cause'.[119] They depend on the strength of the case. This means the employee does face the risk of an adverse costs order if he or she defends an application for an interlocutory injunction. After a trial, certainly, the losing employee can expect to be liable for the employer's party-to-party costs. Accordingly, the penalties for opposition can be stiff.

On the other hand, the availability of adverse costs orders should give some confidence to the employee with a strong defence to withstand the claim. However, party-to-party costs do not cover all costs and so the successful party can remain out of pocket. Moreover, the parties do not necessarily win or lose a case altogether. In the trials, some part of the employer's restraint may be upheld as reasonable and the employee may still be liable for costs.[120] The employer's multiple causes of action, as we see in the Federal Court, mean that costs will be apportioned according to success on each count.[121]

The costs of litigation are not just financial. The parties have to show resilience to stay the course, sometimes over an extended period of time. Our interviewees made the point that some employees were less robust emotionally than others to withstand the rigours of litigation. How well can an ordinary employee assess the probabilities of a restraint being enforceable? Without good legal advice, and perhaps even with it, the employee is simply taking a chance; he or she might exaggerate the probabilities considerably. Part of the litigation game is to impress upon the other side the strength of your position and the weaknesses in their position. Like a poker game, there is an element of bluff or intimidation. The prospect of provisional or partial enforcement increases the burden on the employee.[122]

Sometimes, the employee suffers trauma as a result of the enforcement of a restraint. This much emerged from our interviews but is also apparent from some of the decided cases. Importantly in this respect, we found that employers often deploy other measures which can put considerable psychological pressure on employees. When restraints are combined with other actions, searches through

119 See, eg, *Ecolab Pty Ltd v Garland* [2011] NSWSC 1095, [35]; *Gibney & Gunsun Inc v Stewart* [2009] NSWSC 855. However, costs orders may be reserved pending the trial of issue.

120 See, eg, *Transpacific Industries Pty Ltd v Whelan* [2008] VSC 403, [95]. Unfortunately, the costs orders are not generally reported.

121 An example of a costs order can be found in *Blackmagic Design Pty Ltd v Overliese* [2010] FCA 126.

122 An example of the need for advice is negotiating the complexity of the cascading clauses. According to one interviewee, if you 'multiply out the number of different areas, multiplied by the number of different activities, multiplied by the number of time periods … that will give you … a pretty high number … that's a lot of different combinations to have to comply with': L4.

employee's records can be bruising.[123] A raid at home, on the authority of an *Anton Piller* order, to seize documents and computers, will be confronting.[124] We were informed that employment contracts these days provide for fairly unrestricted access to email, internet, mobile phone records and the like where IT and telecoms facilities and devices are provided to employees. Records that can be accessed by employers might reveal personal affairs (such as email conversations and website browsing) which, while not strictly relevant to the breach, would embarrass the employee and reflect adversely on their credibility.[125]

Furthermore, the proceedings may disrupt the employee's relationship with the new employer, again because of the general uncertainty of the legality of the employee's work, or more directly if the original employer is seeking evidence of disclosure and use of information or contact with customers.

B Employer Resources

Employers experience the uncertainty of litigation adversely too. When the employer commences an action, it contemplates the prospect of the interlocutory application being dismissed or an unfavourable ruling at the end of a trial. Pressure of time counts most against the employer, because the restraint becomes continuously less beneficial to enforce. As noted above, the onus is on the employer to make out an arguable case to the court or at trial establish the case on the merits.

So, employers wishing to enforce restraints face pressures and run risks as well – as one lawyer expressed it, litigation is a 'high risk and high cost environment'.[126] If the employer has a sound case, they too can be encouraged by the fact that costs follow the event. Yet they will have to meet some of their own costs first.[127] The employer may not be successful in obtaining interim interlocutory protection. They also face the risk of an adverse costs order. If the application for an injunction is dismissed, the employer may be ordered to pay the employee's costs. On making the application for the injunction, the employer must give an undertaking to the court that it will pay the employee damages, should the case go on to trial and the employee wins on the merits.[128] Because of

123 We were told that searches of the IT system were not uncommon: for example, L2, L3, L4, L17, L19, L20, L21, L22. Employers were also known to look at the employee's Facebook, LinkedIn and Twitter accounts: for example, L17, L19.

124 For consideration, see *Griffith & Beerens Pty Ltd v Duggan* (2008) 66 ACSR 72. One interviewee did suggest that judges sometimes regretted granting Anton Piller orders because they ended up being used for harassment purposes only: L12.

125 L21.

126 L4.

127 It is true that large companies can contemplate thousands of dollars in expenditure and that legal costs are deductible from taxable income as a business expense. It was also noted that, in some industries, insurance is available that covers litigation over restraints: L12. Yet the costs mean that the employers think harder about the risks. For small and medium enterprises, the out of pocket expenses are a deterrent, possibly an obstacle to proceeding at all.

128 As noted by L3.

the *in terrorem* hazard, occasionally the courts have been prepared to award full indemnity costs, where for instance the employer brought the action without foundation or where the employer refused to compromise.[129]

This impact on employers was supported by our research, with many interviewees taking the position that they would not encourage employers to embark on speculative claims.[130] For all these reasons there are serious pressures on the employer as well to settle quickly and early and in a manner that at least protects their core interests. It was our impression that it is often apparent to employers that their restraints overreach and that a compromise is warranted and possibly effective. There is a great premium on a quick resolution that protects essential interests, such as real trade secrets or key client connections, we learned.

Employers risk other costs when they enforce restraints. One that was mentioned in several interviews was the costs of alienating customers.[131] For example, customers might be called to give evidence in court if there is a dispute over whether the employee solicited them or they approached the employee.[132] Customers, or suppliers,[133] might well react unkindly to an order that the employee must not deal with them, and the enforcement of the restraint is no guarantee that they will return their business to the original employer.[134] Interviewees said that they advised employers it was better to concentrate energies on substituting other employees in the customers' esteem, or matching the competitor's offers on price and service.

We asked interviewees whether there were circumstances in which the employer would consider the costs of alienating the employee or the new employer in pursuing a dispute.[135] For example, in a small, localised economy or industry, where relations are close, there is a possibility the employee might return, or that maintaining good relations with competitors or suppliers is mutually beneficial and precludes conflict over movement of staff.[136]

One interviewee indicated that a number of firms never enforce restraints, even where this meant it would become common knowledge amongst the employees that restraints were not enforced.[137] This lawyer indicated that decisions not to enforce were as much about the 'hassle factor' as the cost of enforcement. Another suggested that a firm may not proceed too far with enforcement in order to avoid publicity.[138] All the same, it was made clear in the

129 In *Seven Network (Operations) Ltd v Warburton (No 2)* (2011) 206 IR 450, the Seven Network was ordered to pay Network Ten's costs after consent orders were made.
130 For example, L4.
131 For example, L2, L4, L21.
132 For example, L2.
133 For example, L17.
134 For example, L2.
135 For example, L20, L22.
136 However, it was suggested that in duopoly situations, employers were not concerned about offending their competitor: L9.
137 L20.
138 L22.

interviews that, overall, the employers who were consulting legal practitioners were not seeing this 'big picture'.[139] The perspective of these employers was short term, to seek immediate action against the employee. Indeed, it was not always entirely a rational strategy: 'this is never about organisations, it's about people'.[140] Psychological and social factors can prolong litigation even when the cost-benefit equation points to compromise.[141] One lawyer was clear: 'I've never had a circumstance in which maintaining a good relationship with a competitor or another company has been a factor in the consideration'.[142]

We were also told that employers do not always listen to their lawyers' advice or heed their warnings concerning costs.[143] For example, we were told that some disputes were driven by resentment.[144] The dispute may, for example, be another episode in a long running feud with a rival employer, or there may simply be an axe to grind between the employer and the employee.[145] The employer may take the view that if a valuable employee cannot be retained, then no-one else should have the benefit of his or her services.[146] Personal animosities on both sides cloud judgments. The employer, personalised through a particular manager who is making the running, takes a dislike to the employee. The employer may feel the employee is being disloyal or showing him up.[147] Then, on the other side, the emotion and animosity may be the reason why the employee fights the restraint to the bitter end. The employee may feel that his or her contribution to the employer was not being valued and it should be noted that restraints are sometimes being enforced after the employer has terminated the employment or indeed declared the employee redundant. When respect and trust are lost, the relationship is not a consideration, nor possibly even the financial costs.[148]

In some circumstances, we learnt, it was important for the employer to make a statement.[149] The employer wants it clear they are no pushover.[150] In certain sectors, we were told, the employer litigation is pursued as part of a concerted strategy to establish a new business model. For example, the employer thinks that the corporate provision of medical services is undermined if employee practitioners are free to leave and set up their own independent practices again.[151]

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139 For example, L3.
140 L21.
141 For example, L2, L7.
142 L17.
143 One role of legal advice is to convince employers not to proceed where the case is not strong but the employer is personally affronted by the breach: L2.
144 For example, L24.
145 L23.
146 One interviewee referred to the adoption of a 'scorched earth policy' when a valued employee left a firm: L4.
147 For example, L2.
148 Stewart Macaulay, 'An Empirical View of Contract' [1985] *Wisconsin Law Review* 465.
149 For example, L21.
150 L1, L3, L18.
151 This example was raised by L3; see *Symbion Medical Centre v Alexander* [2010] NSWSC 1047.

Some uncertainty attaches to this strategy too, for it can invite a decision that is unfavourable to the employer's restraints.

In these circumstances, litigation is a show of strength – to scare the employee and ensure observance of the restraints.[152] Litigation also provides a deterrent to others. News of successes disseminates through the firm and the surrounding sector, suggesting that restraints are enforceable.[153] That said, a number of interviewees offered the view that employees did not see restraints as enforceable,[154] despite successful actions by employers in the area.[155] However, this does not mean that employees seeking advice will be told not to worry.[156] Nor that they will feel free to ignore the restraints.

V FINDINGS AND REFORMS

A Legal Proceedings

Many of our findings point to hard bargaining under conditions of uncertainty, thereby confirming law and economics insights into the relevance of extra-legal economic factors to outcomes (such as the role of transactions costs, and then micro-power analyses, involving unequal access to legal expertise, financial reserves and other sources of power). The research also shows that much of the hard bargaining goes towards submission or settlement: the employer's lawyer threatens to file with the court; the employee is advised of the factors weighing against a defence in court; and depending on nerve, cost constraints and the benefits at stake, the employee submits or some compromise is hammered out. In a few cases, proceedings are commenced and the dispute is settled or an injunction is granted. Fewer still go to trial and attract a ruling. Of those that do, some the employer wins. Decisions where the court chooses between steps, or in NSW an excessive restraint is read down, are still rare but are likely to increase.

The influence of the factors that weigh against proceedings cannot be broken down purely on employer versus employee lines. Nevertheless, unless the new employer is prepared to become involved, the employee is usually at a disadvantage compared to their former employer. This finding suggests that more restraints are enforced (and seen to be enforced) than would be found to have merit if they went to trial. There is a strong disincentive for employees to go into

152 L11.

153 One lawyer suggested that consequently some employees would see the clauses as strictly enforceable: L8.

154 For example, L4, L20. One of these lawyers went so far as to say that the 'predominant view amongst employers' is that restraints are unenforceable: L4. This was said in the context of an employer taking on a person putatively bound by a restraint to a previous employer.

155 One interviewee asserted that there was no evidence of 'trickle-down effect' from most court decisions to actual practice in relation to restraints: L23.

156 One interviewee highlighted the need to avoid advising an employee that a restraint was worthless given the risks involved: L1.

litigation. The employer can obtain a result without proceeding. Even if the employer compromises, it will leave some restraint in place. The disincentive is increased by the prospect that the employer can obtain provisional or partial enforcement. These circumstances encourage employers to overreach with heavy restraints and discourage employees from challenging their validity.[157] The likely result is that the employees pass up opportunities to move jobs or they stand out of the industry.

All the same, the factors can militate against the enforcement of restraints. As well as the legal costs, which would weigh heavily on smaller employers, there were the difficulties obtaining evidence; the lack of monitoring in some cases, so that whether the ex-employer finds out about the actions of the ex-employee is fortuitous; the desire to maintain good relations; the negative signal to others from a court loss; and the demoralising effect on other employees. Even a win can be a loss in certain situations. On this basis, it was our impression that employees tend to underestimate the factors that militate against the employer taking the matter to court and not settling, and therefore are more ready to compromise than is actually strategically required. However, some do use this situation to ignore the restraint.

Finally, enforcement draws the parties into legal proceedings in and around a supreme court. The insights of the repeat players, the lawyers themselves, are of great value here. The knowledge available to insiders helps parties predict – and even shape – the response of the courts. They can pitch the right arguments to the court and they can even characterise the decisions in their feedback to employers and employees. The ongoing relationships also give these lawyers insights into the nature of settlements that are considered acceptable. There were signs that the practitioners also act as peacemakers, giving advice not to proceed or to settle for a lesser restraint when they perceive that the employer's claim was unreasonable.[158] Indeed, as we have seen, they sell 'new transactional products' to the employers.[159] These are useful services given that the costs of dispute can run high. As well, the lawyers have their own reputation and integrity to protect. Nevertheless, inside knowledge interacts with hard bargaining. The specialists with the inside knowledge are in principle available to anyone; certainly they will work both for employers and employees. However, the party must command resources to enjoy the best of this access and to withstand the pressure from the other side in circumstances where it also has access to resources.

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157 See also Griffin Toronjo Pivateau, 'Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements' (2008) 86 *Nebraska Law Review* 672.

158 It is tempting to naturalise or normalise hard bargaining and inside knowledge but we do not think that lawyers or others should ever take them as a given.

159 For an elaboration of this role in another field, see Robert G Lee and Steven Vaughan, 'The Contaminated Land Regime in England and Wales and the Corporatisation of Environmental Lawyers' (2010) 17 *International Journal of the Legal Profession* 35, 55.

B Law Reforms

It is this imbalance of resources, particularly when coupled with the overall sense of uncertainty in terms of the enforcement of restraints, which indicates to us the need for changes to be made. From this research of the legal principles, legal proceedings, cited decisions, commentaries, and particularly the insights and impressions gained from the legal practitioners, we identify the following possible reforms. They are presented, in three broad categories, for further consideration; with space limitations they cannot be argued at length here.

1 Outlaw Restraints

This is the most radical of possible reforms and, therefore, the least likely to be adopted. We note, nonetheless, that several states in the United States have legislated to make restraints unlawful.[160] While that initiative should resonate with competition and labour policy, governments in Australia are unlikely to take command. Yet, in recent years, the state governments have put substantial resources behind the strategy of creating a clever cluster economy around their capital cities. The economic research suggests that a state government might well gain an advantage for its local economy if it outlawed restraints. There is more local knowledge transfer and knowledge workers may be attracted from other locations where restraints are burdensome. Policy would benefit greatly from a rigorous discussion of this option.

It is to be remembered that employers have other remedies against employees should restraints no longer be available. The argument has been made that the employers should make more of the protections for intellectual property or the protections in equity against breach of obligations of confidence or fiduciary duties and duties of good faith and fidelity.[161] The employers also have strategies beyond the law, such as the use of attractive staff retention packages, to protect their interests. On this basis, reliance on the non-compete is regarded as a lazy fallback option.

2 Limit Restraints

If it is realistic to think that the state governments would see it as a big step to override the common law and take an established power away from individual employers, other reforms can be considered. Legislation, possibly in the form of a national uniform law, could be deployed to place limits on the common law.[162] These reforms include placing upper limits on the length of the period of the restraints. Another would be to require employers to pay employees during the period of the restraint. These reforms are aimed at a better balance between the

160 For example, California, where the Silicon Valley cluster economy has thrived.

161 See, eg, *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* (2011) 86 ACSR 393. For this argument, see Andrew Stewart, 'Confidentiality and the Employment Relationship' (1988) 1 *Australian Journal of Labour Law* 1; Viva R Moffat, 'The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements' (2010) 52 *William and Mary Law Review* 873.

162 Again there are examples from overseas such as the United States; see Sullivan, above n 22.

employers and employees, even if the employer is found to have a legitimate interest to protect. Employees would be less indisposed by the restraints and freer to circulate.

In the absence of legislative reforms, courts could adhere more vigilantly to the principle that restraints are presumed against public policy. Arguments that give greater legitimacy to business interests, or suggest that wider and longer restraints are reasonable, should be viewed with a very wary eye. Greater specificity in the rules would come at the expense of the flexibility afforded the courts to fit the restraint to the circumstances of the case. Yet 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. The onus should firmly be on the employer to get the restraint right or face the prospect that any enforcement will be denied.

A more specific reform, and one both favoured by the US critics and consonant with the traditional common law position, is a policy of no modification to restraints – or, at least, only modification to make good the restraint if the parties can show they had genuine doubts about the appropriate restraint to apply to a particular position.[163] This approach denies ambit claims and refuses to enforce the lower steps in a cascading or laddered restraint or to read down a wide restraint until it is enforceable. In first drafting the contract, the employer must have used specific terms and have nominated precisely the restraint it wishes to enforce. Otherwise the court will strike down the restraint.[164] Pivateau argues that employers should nominate precisely the position from which the employee would be barred, the interest that is worthy of protection, and the extent of the restraint that is considered reasonable.[165]

Such a policy would militate against broad non-competes in contrast to particularised non-disclosure and non-solicitation obligations. The restraint would stand or fall on one nominated period of time and one territory of operation. Cascading clauses are still in the minority. But they will become increasingly popular if the courts do not reject them. It is not so much that they necessarily produce an unfair outcome in the individual case, as that they make it riskier for employees to challenge restraints.

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163 A version of this is to look back for genuine negotiations between the parties. Another, conceding that the employer inserts these clauses, is to ask whether the employer has acted in good faith and made a genuine attempt to structure a reasonable restraint. For application to cascading clauses, see *Workpac Pty Ltd v Steel Cap Recruitment Pty Ltd* (2008) 176 IR 464. For application to the use of the NSW *Restraints of Trade Act*, see *Marlov Pty Ltd v Col* [2009] NSWSC 501. The *Restraints of Trade Act* is very forgiving. In s 4(3), the Act gives the court discretion by reason of 'a manifest failure by a person who created … the restraint to attempt to make the restraint a reasonable restraint'. For background to the Act, see New South Wales Law Reform Commission, *Covenants in Restraint of Trade*, Report No 9 (1970) 9.

164 Professor Andrew Stewart has argued for some time for the eradication of cascading clauses: see Andrew Stewart, 'Drafting and Enforcing Post-Employment Restraints' (1997) 10 *Australian Journal of Labour Law* 181; lately as reported in Rachel Nickless, 'From Restraint to Restricted', *Australian Financial Review* (Sydney), 2 December 2011, 56.

165 Pivateau, above n 157.

3 Procedural Reforms

The third category of reforms relates to how restraint clauses, assuming that they are not outlawed, are adjudicated. Again, starting with the most radical option, it would be possible to shift the jurisdiction from the supreme courts and their commercial and equity lists to a more informal, possibly more employment-minded forum, such as the magistrates' courts or industrial tribunals.[166] Other jurisdictions, such as the federal industrial tribunal Fair Work Australia, have experience with the award of specific relief.[167] This reform raises the key question as to whether the restraint disputes should be regarded essentially as employment disputes between employers and employees or as commercial disputes between employing firms (in other words, as failures to deal constructively and fairly with employees or as contests between rivals for valuable capital assets). It would be necessary to keep cases of employment restraints separate from cases of other restraint situations, such as the sale of businesses. While the principles could be distinguished, the practical problem is the sometimes variable status of the professional – employee, director, partner, independent contractor.

An employment tribunal should reduce the expense faced by the parties; a contentious part of this reform would be the exclusion of lawyers from proceedings, except by leave of the forum. However, even if adjudication remains with the courts, there are a number of ways in which costs to the employee may be reduced (as employees tend to have access to less resources, and bear the greater burden of uncertainty, the emphasis is on reducing the costs of the employees). One such reform is to make it a jurisdiction in which the parties bear their own costs. But that reform would not necessarily even the equation.

While cost penalties continue to apply, as they do now, the courts should be reluctant to award costs against employees when they are granting employers interlocutory relief, approving a settlement or making good a restraint. Or they should at least limit the costs; senior and junior counsel and instructing solicitor makes an expensive team. The courts should assure the employer who is hiring the employee that it may fund the employee's defence without fear of tortious liability. Further, the courts should be prepared to award full indemnity costs against an employer who litigates an invalid or excessive restraint. If employees are to have access to the courts, they should be confident they will not be left out of pocket. That penalty would also increase the pressure on the employer to be conservative about restraints.

One final set of reform options focuses on interlocutory procedures, on the basis that it is often the practical determinant of the matter. First, it would be preferable for the courts to require the employer to make out a stronger case

166 One of our interviewees did suggest that they would be handled differently if they were submitted to specialist employment law tribunals, which channel disputes into conciliation first, with members much experienced in employment issues: L12. This reform is raised by Cabrelli and Lloyd, above n 15, 173.

167 Provisions concerning restraints have appeared in enterprise bargaining agreements lodged with Fair Work Australia.

before an interlocutory injunction is granted. Some of the courts are already doing so, 'putting the advocates through their paces'.[168] Furthermore, the balance of convenience should be inclined towards the employee. The courts should insist that the employers demonstrate they will suffer real harm if the restraint is not observed. They should not protect the employer's interest if the hardship to the employee is greater. The courts should be realistic about the impacts on the employees.

A cleaner reform, though a much bigger step to take, would be to withhold interlocutory injunctive relief altogether from employers and require them to go to trial (on an expedited basis) to plead the merits of the restraint. Moreover, at the trial, the employers would be put to their proof of actual damage. This would increase the risks for the employer. It may be argued that employers would be denied an effective remedy for breach of the restraint in those cases where the interest was legitimate. The breach will have occurred by this time. Further, even in those cases in which damages were an adequate remedy, most employees would not be in a position to pay them, though this might change if the employee has established his or her own firm to compete with the employer.[169] To remove interlocutory injunctive relief altogether, therefore, might shift the balance too far in the employees' direction. But the prospect of a trial would also increase some pressures on the employee. So perhaps the right path is to improve the interlocutory procedure.

VI CONCLUSION

In sum, the empirical research reported here demonstrates that there is much uncertainty in the operation of the law around the use of restraint of trade clauses in employment contracts. While most usefully nuanced, the evidence suggests that to a significant extent, this uncertainty weighs more heavily on the side of any dispute that is least able to bear it – the employee. In light of our findings, we have introduced a limited number of reform options – ranging from the radical to the limited, and from the substantive to the procedural – that would assist in reducing the over-enforcement, or over-observance, of restraint clauses. We hope that our work is useful in furthering the debate about this contentious area of law.

168 L24.

169 See, eg, *Clear Wealth Pty Ltd v Kwong (No 2)* [2012] NSWSC 1233.