

VPro Lawyers Newsletter
Spring 2003



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EMPLOYEE RESTRAINT OF TRADE

RESTRAINT OF TRADE

AUSSIE HOME LOANS FAILS IN RESTRAINT OF TRADE CASE

Aussie Home Loans failed in a recent attempt to restrain its former Victoria State Manager ("Manager") from poaching employees or contractors of Aussie after the Manager set up a rival business. This occurred, despite a clause in the Manager's employment contract that for a period of 12 months following termination of his employment, he would not solicit, interfere with or endeavour to entice away any employee or contractor of Aussie.

The Court restated the well known authority that covenants which restrain ex-employees from competition are invalid unless the restraint is necessary (and goes no further than reasonably necessary) to protect the employer's trade secrets or trade connection with customers.

Can an employer be protected from a former employee soliciting its employees or contractors?

A restraint against enticing employees may be justified on the basis of confidential information which the ex-employee has about the employer's remaining employees, such as their particular qualifications, rates of remuneration and so on.

The Court concluded that the Aussie restraint, as it applied to Aussie's contractors was excessive and therefore invalid, because:

- it applied even to people who only began working for Aussie after the Manager's employment was terminated (the restraint could not be justified by the Manager's knowledge of confidential information about contractors who only joined Aussie subsequent to the Manager's departure);

- the restraint was too wide because it applied to contractors in states outside Victoria - the Manager would not have had access to confidential information about them. Also, those contractors were on very short term contracts, and should be allowed to move freely to other employment;

- the Manager's restraint was too long. His contract was terminable on one month's notice making a 12 month restraint period excessive.

The conclusion is that restraints against former employees seeking to entice away one's employees must only go so far as is reasonably necessary to protect the employer, and in particular:

- should be restricted to an appropriately limited category of employees (neither those who are too remote or too junior and not those who only become employed subsequent to termination); and

- the duration of the restraint must be reasonable having regard to the ex-employees contractual period of the employment.

June 2005

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