



VPro Lawyers Newsletter
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RESTRAINTS OF TRADE – IT KEEPS GETTING HARDER

Almost every business acquisition includes a restraint of trade against future competition by the sellers of the business, and often by members of senior management as well.

The Sear family sold their WA funeral business to Invocare. Marina Sear, who was one of the selling family shareholders, and was also a director and manager of the business, agreed to work for Invocare for the next 10 years. The business was carried on from five branches. Sear was directly involved in the management of, and with customers in, four of those branches, but she was only involved indirectly (as a director) in the fifth branch.

Sears' contract with Invocare, imposed a restraint of trade on her, to restrict her from competing with Invocare after the termination of her employment. The restraint was to operate within a radius of 20 kilometres from "any of the premises" where the Vendor's business had been conducted ie the five branches.

The Supreme Court considered the area of 20 kilometres to be reasonable, as was the requirement for a restraint of trade, to protect Invocare's goodwill and customer connection.

However, the Court held that the restraint was too wide – not because of the 20 kilometre radius, but because it included the fifth branch of the business (ie the branch where Sears had not been directly involved as manager).

In the result, the Court **STRUCK DOWN THE ENTIRE RESTRAINT OF TRADE**, and held that the whole restraint was unenforceable.

The principles in these cases are easy to state. An employer is entitled to protect their goodwill, trade connection and trade secrets. However, the application of these principles to multiple factual scenarios can be very difficult.

It seems clear that if you want to have an enforceable restraint of trade against senior (vendor) employees, then the detailed terms need to be carefully worked out in the light of the particular circumstances. The days of the "off the shelf" standard restraint of trade clause are a thing of the past.

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