

# **POST EMPLOYMENT RESTRAINT OF TRADE**

**Presentation to  
Monash University Faculty of Law and  
Australian Labour Law Association**

**by Rob Jackson**

**22 September 2014**

# The History

- » Dyers Case 1414 Justice Hull
    - 6 month restraint void for apprentice dyer
  - » Sir Edward Coke
    - Chief Justice, Attorney-General, legal writer
  - » Mitchell v Reynolds 1711 Chief Justice Parker
    - 5 year restraint for sale of bakery
  - » Maxim Nordenfelt 1894 Lord Macnaghten
- And Australia?
- » Kaufman v McGillicuddy, High Court 1914

# The Drafting

- » Threshold Question:
  - Employee with or without a Business Interest?
- » Who is the Employer?
- » How Long?
  - Cascading / Waterfall / steps clause
- » How Far?
  - How relevant?
- » What Activity?
  - What Business or Industry?
- » Who? Only Customers?
  - Investors, referrers, suppliers
  - What is solicitation
- » And Employees?
  - What's the loss?
  - Team moves and an employer's interest in a stable workforce

# Garden Leave, Confidentiality, and Intellectual Property

## » Garden Leave

- Few cases, policy issues

## » Relationship with Confidential Information

- Truly confidential
- Know how
- Must be specific

## » Intellectual Property Considerations

- Copyright, Patent, Domain name

# Before The Litigation

## » Ethics

- Who is Your Client?
- Suing at all costs, and overarching obligations

## » Assess the Clause

- Capable of severance

## » Evidence

- From customers? Expert evidence, IT

## » Commercial Considerations

- Competing in the market



# Litigation

- » Affidavits, Undertakings and Injunctions
  - Springboard Doctrine, Anton Piller Injunction
- » Compensation
  - Loss of profit, valuing goodwill
- » Defining scope
  - Assessed when contract executed
- » Effect of Repudiation

# The World

- » No Employee Restraint Permitted
  - California, Russia, India
- » Employee restraint but at a price
  - Germany, China, and a different kind of price, Hong Kong
- » Employee restraint subject to statute
  - New South Wales, Georgia
- » Employee restraint subject to judicial policy
  - Victoria, England, New Zealand, New York

# Hero or Villain?

## » Samuel Slater

- Took English textile secrets to establish American textile industry

## » Pierre Samuel Du Pont

- Used US legal system to extend scope of confidential information

## » Harold Hirsch

- Expanded category of trade mark protection for Coca Cola in 1920s

## » Huanjuan Jin

- Attempted to take mobile phone technology secrets from US to China, still in jail, despite appeal



# The Advice

- » Beware Precedents and Templates
  - Covering letter of advice
- » Purpose? Protect Goodwill
  - Ex-employer and ex-employee may compete
- » ASSESS THE RISK
  - Industry - Duopoly, oligopoly, many players
  - Business - Conglomerate, part of a business
  - Product/Service - Price sensitive, patent, confidential information
  - Employee - Extensive know how, pre-existing industry contacts

# Conclusion: Beware Precedents, Be Ethical, Be Commercial

Rob Jackson

LL.B (Hons), Masters Intellectual Property Law

Accredited Specialist Workplace Relations and  
Commercial Litigation

Author "*Post Employment Restraint of Trade*"

Federation Press 2014

Partner - 03 8600 6016 – [rjackson@aitken.com.au](mailto:rjackson@aitken.com.au)