'The Restraints of Trade Act 1976 (NSW): Rewriting the Blue Pencil Doctrine'

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Introduction

In May 2009 the New South Wales Law Society Journal reprised a lecture given by Graeme Turner[ii] at the College of Law in March 2009, entitled 'Litigating Employee Restraints of Trade and Confidential Information'[iii]. Mr Turner's lecture and subsequent article undertook to unravel the legal Gordian Knot of restraints of trade in employment contracts which, despite the existence of centuries-old common law rules[iv], as well as legislation enacted in New South Wales more than thirty years ago[v], continues to form the basis of litigation in this State.[vi]

The classical statement concerning the restraint of trade doctrine was made by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*[vii], wherein his Lordship said that:

"All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore *void*."[viii]

However, Lord Macnaghten also approved a qualification to this 'general rule' whereby those covenants in restraint of trade which are *reasonable*, by reference to both the interests of the *parties* concerned and the interests of the *public*, shall be rescued from the *blue pencil* of judicial 'amputation'[ix]. This distinction was echoed by Mr Turner in his recent publication, wherein he drew together the lines of judicial authority which originated in Lord Macnaghten's caveat and stressed again that there are *two issues of reasonableness*[x]: firstly "that the restraint imposes no more than adequate protection for the party in whose favour it was imposed; and, if so, that the public interest has to be considered further to demonstrate it is not injurious to the public."[xi]

Despite the clarity of Lord Macnaghten's synopsis, and the subsequent concatenation of judicial approbation[xii], courts are seemingly faced with a perpetual difficulty when attempting to characterise and apply a meaning of 'reasonable' that takes into account both the geographical and time limitations of the restraint before them.[xiii] And, in 2009, the case of *Spooner v Commonwealth Broadcasting Corporation Pty Ltd*[xiv] shed light upon a further difficulty that has hitherto eluded the Supreme Court of New South Wales.

Background

The *Restraints of Trade Bill* was tabled before the New South Wales Legislative Assembly pursuant to a report of the New South Wales Law Reform Commission[xv], which "reviewed the law relating to the validity and enforcement of covenants in restraint of trade and recommended the introduction of legislation to remedy the law which the commission regarded as unsatisfactory."[xvi] The Commission, which reported that "it was not aware of any dissatisfaction arising from the general rules of public policy in respect of restraints of trade"[xvii], cited as grounds for its recommendation "dissatisfaction in *some special cases*"[xviii] and, more importantly, what it described as "the problem of severance"[xix] .

The Commission outlined, as an example this *defect of the rules*, the corollary of three different restraint scenarios involving the sale of a business where the goodwill of the business extended throughout, but not appreciably beyond, the City of Sydney:[xx]

1. The seller promises that he or she will not engage in a competing business within the City of Sydney;
2. The seller promises that he or she will not engage in a competing business within the City of Sydney, or within other specified local government areas comprising the whole of the Country of Cumberland;
3. The seller promises that he or she will not engage in a competing business within the Country of Cumberland.

The Commission recognised that the first promise will not offend public policy and will therefore be valid. The second promise is wider than necessary for the protection of the buyer, given the nature and circumstances of the goodwill of the business, and will offend public policy. However, because the second promise comprises a number of separate promises, the Court may, by deleting the invalid promises, uphold the restraint as valid in its relation to the *City of Sydney*. The third promise, which cannot be sequestered into separate promises and is therefore not susceptible to amputation, is altogether invalid.

The thrust of the Commission's criticism was directed at the third scenario. It argued that a court's discretion to uphold a restraint clause was constrained under the common law rules, which the Commission described as *artificial*[xxi], as they placed too great an emphasis on how a restraint clause was drafted. The Commission perceived that, whereas the common law rules allowed courts (as in the second scenario) to confine "the operation of public policy so as not to avoid a promise to the extent to which it protects a legitimate interest"[xxii], courts were limited to striking down as entirely invalid a clause (as in the third scenario) which, although not drafted in sequestrable terms, was otherwise reasonable by reference to the public interest. This effect of these rules was that it was "impossible, even for the best of lawyers, to draw a promise in restraint of trade which gives full protection to a legitimate interest within the limits of public policy"[xxiii] without becoming unnecessarily verbose.

The *Restraints of Trade Act* 1976 (NSW)

It has been said that "New South Wales…is a jurisdiction in which the common law in relation to restraints of trade is substantially modified by the statutory overlay of the *Restraints of Trade Act* 1976 (NSW)"[xxiv] , and that "so far as restraints of trade are concerned, the position [in New South Wales] is now governed by s.4 of the *Restraints of trade Act* 1976 (NSW)".[xxv]

The *Restraints of Trade Bill* was formally enacted on 15 November 1976[xxvi] with its purpose, as recommended by the Law Reform Commission, "to enact, as a basic principle, that a restraint is valid to the extent to which it is not against public policy whether it is in severable terms or not".[xxvii] Indeed this recommendation formed the wording of section 4(1) of the Act. By the introduction of this simple provision, being the central provision of the Act, the Legislature effectively overcame *the problem of severance* identified in the third scenario outlined above, by empowering Courts to "ignore the fact that the restraint goes beyond what is reasonable if it can be enforced to an extent which is reasonable."[xxviii]

Albeit that section 4(1) has the effect of saving a restraint which would previously have been struck down, the section is subject to two important qualifications. Firstly, section 4(2) precludes a Court from upholding the validity of a restraint which would be void for reasons other than public policy, such as *uncertainty*.[xxix] Secondly, section 4(3) arms the Court with the discretion to order that a restraint is invalid, either in its entirety or to such an extent determinable by the Court, 'by reason of, or partly by reason of, *a manifest failure by a person who created or joined in creating the restraint to attempt to make the restraint a reasonable restraint*…and any such order shall, notwithstanding sub-section (1), have effect on and from such date (not being a date earlier than the date on which the order was made) as is specified in the order.' The Court's discretionary powers under this provision are then *extended*[xxx] by the seemingly unambiguous provision in section 4(5) that "[an] order under subsection (3) does not affect any right (including any right to damages) accrued before the date the order takes effect."

These qualifications to section 4(1) were expressly enacted "to discourage the making of recklessly wide restraints in the first instance"[xxxi], which the Commission had envisaged under the common law rules.[xxxii] However, the Attorney General further commended the Bill to the House for reason that, by virtue of the qualification contained in section 4(3), "the incidence of cases where the court is required to intervene to read down unduly wide restraints will be reduced" and "[the] vesting of power in the court to make an order declaring a restraint invalid wholly or in part from a specified date will also bring certainty to the future relationship and conduct of the parties."[xxxiii]

Whilst this evinces a very creditable aspiration by the Commission and Legislature for the *Restraints of Trade Act*, the volume of litigation concerning contractual restraints of trade since 1976[xxxiv] suggests an almost complete failure by the Act to achieve these just goals. Furthermore, *Spooner v Commonwealth Broadcasting Corporation Pty Ltd* demonstrated another flaw in the Act, the outcome of which arguably would not have been countenanced under the old common law rules.

Spooner v Commonwealth Broadcasting Corporation Pty Ltd

In March 2006 the plaintiff commenced employment with Blue Mountains Broadcasters Pty Ltd, which is part of the Australian Radio Network group of companies, and he was soon promoted to the position of General Sales Manager. In the following June, the plaintiff transferred his employment to the defendant company (itself a member of the Australian Radio Network) whereupon he began working for a prominent Sydney FM radio station. Each of the relevant

employment contracts entered into by the plaintiff contained a restrictive covenant, couched in identical terms, which provided as follows:

1. For 6 (six) months after the plaintiff ceased working for the defendant, he would be restrained from contacting, personally or otherwise, or procuring or seeking to procure business from any person who is, or was in the last 6 (six) months of the plaintiff's employment, a client of the employer; and
2. For 3 (three) months after the plaintiff ceased working for the defendant, unless with the consent of the General Manager of the employer or Chief Executive Officer of the Australian Radio Network group of companies, he would be restrained from providing "any services (whether directly, indirectly or through any third party) to any operator or licensee of any commercial FM radio station [in Sydney], which are the same or similar to the services provided by [the plaintiff] to the employer."

The following August, after receiving an offer of employment from another Sydney-based Media Company, which the defendant later characterised as one of its competitors, the plaintiff tendered his resignation in accordance with the terms of his employment contract. The plaintiff then sought advice from the defendant as regards whether it would enforce the restraint clause in his employment contract. Eventually, after the relevant notice period had expired, the plaintiff was advised by the defendant's solicitors that it *would* seek to enforce the restraint, against both the plaintiff and the competitor company should they enter into contractual relations, and furthermore that the plaintiff's request for compensation in lieu of the period of restraint had been refused.

By reason of the defendant's declaration, both the plaintiff and the competitor postponed the latter's offer of employment until the period of restraint had expired. The plaintiff claimed that he could not commit to expensive litigation where the outcome was uncertain, and the competitor company was concerned that it would otherwise have been liable to the defendant for the tort of intentional interference with contractual relations.[xxxv] By the time the restraint period had expired, the plaintiff had calculated his loss of income at almost $34,000.00.

The plaintiff's complaint in the subsequent proceedings was that the restraint clause imparted an unreasonable restraint, given the circumstances of the interests it sought to protect, and that section 4(5) of the *Restraints of Trade Act* offered the prospect of compensation which the defendant had hitherto refused.

The first clause of the plaintiff's restraint does not appear on its face, or by comparison with other decided cases on point, to be unreasonable in its duration. Nor is it uncertain. Indeed, it appears to be a well-drafted non-solicitation clause. However, in reliance upon the recent New South Wales Supreme Court case of *Craig Roberts v L Quay Futures Brokers*[xxxvi] , the plaintiff sought to argue that the restraint relied upon by the defendant was *too wide*, since it protected "not only what might arguably be characterised as legitimate - namely, the connection between [the plaintiff] and existing customers - but also that which cannot be characterised as legitimate - namely, a non-existent connection between [the plaintiff] and any 'prospective client/customer'."[xxxvii]

The plaintiff then contended that the second clause, which sought to protect the legitimate business interests of the defendant, also comprised a triable issue. The plaintiff sought to argue that the restraint was *unreasonable as between the parties*, since it afforded greater protection to the defendant than was necessary in the circumstances. To paraphrase the principal authority upon which the plaintiff sought to rely, the phrase was "wider than is reasonably necessary to protect [the defendant's] legitimate interests"[xxxviii]. This was because the restraint sought to protect interests of the defendant which, the plaintiff argued, were *not* protectable interests.

It is sufficient, for the purpose of this article, to summarise that confidential information and trade secrets (including marketing approaches, strategies and pricing structures)[xxxix], and the client base, trade connection and goodwill of a business[xl] are all interests that are protectable by restraint of trade clauses.[xli] However the plaintiff insisted that, since at no time during the period of his employment with the defendant was he privy to any information that could be considered confidential information or trade secrets, he would be unable to affect the defendant's client base, trade connection or goodwill by taking up employment with a competitor.

Despite the strength of the plaintiff's arguments, the plaintiff was denied the chance to argue his case at trial by virtue of section 4(3) of the *Restraints of Trade Act*. Before the plaintiff's case even

proceeded to trial, the case was dismissed pursuant to a notice of motion by the defendant on the grounds that the Act disabused the plaintiff of a tenable cause of action.

Conclusion

In light of the case of *Spooner v Commonwealth Broadcasting Corporation Pty Ltd*, the following observations can now be made of the law concerning restraints of trade in New South Wales:

1. If a person burdened by an unreasonable contractual restraint commences an action seeking redress, section 4(3) of the *Restraints of Trade Act* 1976 provides that the quantum of damages shall be assessed *prospectively* from the date of judgment;
2. If the plaintiff fails to conclude this action prior to the expiration of the restraint period, he or she shall be deprived of any remedy which might otherwise be available – whether the restraint was reasonable or not;
3. If the restraint period has not yet expired, section 4(1) *Restraints of Trade Act* 1976 (NSW) appears to require courts, when determining whether a restraint of trade is reasonable, to evaluate whether the restraint is reasonable by reference only to the public interest involved, and not as between the parties.

In relation to the first and second of these observations, it can be said that the issue of *restrospectivity of damages* was raised when the *Restraints of Trade Bill* was read by the Attorney General for the second time. It was contended by the Opposition that section 4(3) should have been amended to allow damages to flow to the plaintiff from "at least as far as the date on which the lodgment of the application was made to the Court" as opposed to "from a date not being a date earlier than the date on which the order was made"[xlii]. This was because, the Opposition remarked, the Law Reform Commission's Report provided no rationale for the entirely prospective operation of the Act and, whilst "that power to make an order having retrospective effect ought not lightly to be entered into, …there is a principle of our law that a party ought not to have an interest in delaying proceedings."[xliii]

The Attorney General rejected this contention for reason that *certainty of future conduct* of the parties was paramount to the Act, whereas "[restrospectivity] could encourage promises to extract unduly wide and reckless promises."

The Attorney General ended the second reading of the *Restraints of Trade Bill* with the following statement:
"I think the best thing to be done about this is to give it further consideration, perhaps in the light of the practical operation of the legislation. If the fears expressed by the honourable members opposite become a reality, and I do not discount that as a possibility, undoubtedly I shall have to come back to this place with my tail between my legs and seek to amend the legislation."

It is now clear that, since *Spooner v Commonwealth Broadcasting Corporation Pty Ltd*, when advising clients about the implications to them of a restraint of trade – whether in a contract of employment or for the sale of a business – the starting point in New South Wales is that *the time for challenging or seeking to negotiate the terms of the restraint is at the time of entry into the contract*. This position is by no means new.[xliv] However, *Spooner v Commonwealth Broadcasting Corporation Pty Ltd* shows that, once the period of potential redress has lapsed, section 4(3) of the *Restraints of Trade Act* 1976 acts entirely *prospectively* so that an action can be neither instituted nor maintained, nor any damages awarded, irrespective of the unreasonableness of the restraint. For this reason, it appears that the fears of the Opposition referred to by the Attorney General in the Second Reading Speech have now become a reality.

It is also now clear that the *blue pencil doctrine* concerning restraints of trade was incontrovertibly modified by the introduction of the *Restraints of Trade Act*, in the sense that the Act now allows courts to "ignore the fact that the restraint goes beyond what is reasonable if it can be enforced to an extent which is reasonable"[xlv].

However, the *Act* also demonstrates some profound shortcomings, which hitherto appear to have gone unnoticed. Firstly, whereas the common law rules had as a primary consideration the *bargaining position* of the contracting parties[xlvi] , drafters of restraint clauses since 1976 are no longer required to balance the relative bargaining strength of, for example, an employee and an employer. This is because section 4(1) of Act appears to have modified the common law so that courts are no longer required to weigh up the interests of the *parties* for the purpose of determining the reasonableness of a restraint.

Secondly, and contrary to the "principle of our law that a party ought not to have an interest in delaying proceedings"[xlvii], the result of the entirely prospective nature of the assessment of damages under section 4(3) is that drafters of restraint clauses are now encouraged to balance the likelihood of a challenge to the restraint against the time that it will take a court to hand down its judgment. Therefore, *an unreasonable restraint* – even if successfully litigated – *will impose no liability to the defendant if judgment is handed down after the restraint period has expired*.

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[ii] Barrister, 12th Floor Wentworth/Selborne Chambers.
[iii] (2009) Vol. 47 No. 4 NSW Law Society Journal May 59.
[iv] See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] UKHL 1, per Lord Morris of Borth-y-Gest at 8 ("The law has for many centuries set itself against restraint of trade"), and per Lord Hodson at 15 ("One has to remember always what is meant by restraint of trade and whence this doctrine derives. It has been said to have its origin in Magna Carta").
[v] *Restraints of Trade Act* 1976 (NSW).
[vi] See, *infra*, at fn.12.
[vii] (1894) AC 535.
[viii] (1894) AC 535 at 565 (italics added). This statement derived from the judgment of Lord Macclesfield in *Mitchel v Reynolds* (1711) 1 Peere Williams 181 at 182, 190-92 (see Mark Fillip, *Covenants not to Compete* (3rd lslf ed., Aspen Publishers, September 22, 2005). The test has been authoritatively re-defined, *inter alia*, by Lord Birkenhead in *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548 at 562 ("A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public"), by Latham CJ in *Lindner v Murdock's Garage* [1950] HCA 48; (1950) 83 CLR 628 at [6] ("It is well established that prima facie all restraints upon trade are invalid, but that they may be upheld if the party seeking to enforce them shows that circumstances exist which make the restraint reasonably necessary for protection of a covenantee's business and that it is not contrary to public interests"), and by Lord Pearce in *Esso Petroleum Co Ltd v Harper's Garage* (Stourport) Ltd [1968] AC 269 at 234 ("Although the decided cases are almost invariably based on unreasonableness between the parties, it is *ultimately* on the ground of public policy that the court will decline to enforce a restraint as being unreasonable between the parties. And a doctrine based on the general commercial good must always bear in mind the changing face of commerce. There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable as between the parties. There is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?").
[ix] For discussion of the meaning of 'amputation' in this context, see *Woolworths Limited v Olson* [2004] NSWCA 372 per Mason P (McColl and Bryson JJA agreeing) at [47].
[x] See also JW Carter and DJ Harland, *Contract Law in Australia* (4th ed. LexisNexis Butterworths, 2002) at [1640], citing *Esso Petroleum Co Ltd v Harper's Garage (Stourport)* Ltd (1968) AC 269 at 299, 307, 319 (however, cf. *Esso Petroleum Co. Ltd v. Harper's Garage* (Stourport) Ltd ([1968] AC 269 per Lord Pearce (see *infra* at fn.8), and *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty* Ltd (1973) 133 CLR 288 at 315-6. However, in the recent case of *Woolworths v Banks* [2007] NSWSC 45, McDougall J reiterated at [8] a *third* consideration that had previously been observed by his Honour in *Kearney v Crepaldi* [2006] NSWSC 23 at [54]: "The third is that the question of the validity of a covenant in restraint of trade (or, for that matter, a covenant against solicitation of employees) is not really a question of law. The principles (at least in the former case) are relatively clear. The application of the principles depends on the terms of the particular covenant and the factual circumstances: see *Dawnay Day & Co Ltd v De Braconier d'Alphen* [1998] ICR 1068 at 1111-1112 (Evans LJ, with whom Nourse and Ward LJJ agreed)."
[xi] See *infra* fn.3, at 60 (citations omitted).
[xii] See, *inter alia*, *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 per Lord Atkinson at 702 and Lord Parker at 707; *McEllistrim* v *Ballymacelligott Co-operative Society* [1919] AC 548 per Lord Birkenhead LC, and Lord Atkinson and Lord Shaw; *Heron v Port Huon Fruit Crower's Co-operative Association Ltd* [1922] HCA 20; (1922) 30 CLR 315 per Knox CJ, Gavan Duffy and Starke JJ at 324; *Lindner v Murdock's Garage* [1950] HCA 48; (1950) 83 CLR 628 per Latham CJ at 633-634, Fullagar J at 650 and Kitto J at 653; *Esso Petroleum Co Ltd v Harper's Garage (Stourport)* Ltd (1968) AC 269 at 295, 299, 307 and 318; *Buckley v Tutty* (1971) 125 CLR 355 per Barwick CJ,

McTiernan, Windeyer, Owen and Gibbs JJ at 376; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty* Ltd (1973) 133 CLR 288 per Walsh J at 307; *Orton v Melman* [1981] 1 NSWLR 583 per McClelland J at 587; *Wright v Gasweld* (1991) 22 NSWLR 317; *ICT Pty Ltd v Sea Containers Ltd* (1995) 39 NSWLR 640; *Kone Elevators Pty Ltd v McNay & Anor* [1997] NSWSC 384; *K A & C Smith Pty Ltd v Ward* (1998) 45 NSWLR 702 at 728; *Rouen v Ryan* [2001] NSWCA 230 per Davies AJA at [13] *et seq*; *Peters (WA) Ltd v Petersville Ltd* [2001] HCA 45; (2001) 205 CLR 126; 181 ALR 337; 75 ALJR 1385 per Gleeson CJ, Gummow, Kirby and Hayne JJ at [27] *et seq*; *Woolworths Limited v Olson* [2004] NSWCA 372 per Mason P at [37]; *Craig Roberts v L Quay Futures Brokers* [2004] NSWSC 572 per McDougall J at [25] *et seq*; *Harlow Property Consultants Pty Ltd v Byford* [2005] NSWCA 658 per White J at [23]; *Kearney v Crepaldi & Ors* [2006] NSWSC 23 per McDougall J at [47] *et seq*; *Koops Martin v Reeves* [2006] NSWSC 449 per Brereton J at [26] *et seq*; *Cactus Imaging Pty Ltd v Glenn Peters* [2006] NSWSC 717 per Brereton J at [10]-[11]; *John Fairfax Publications Pty Limited v Birt and 6 ors* [2006] NSWSC 995 per Brereton J at [6]; *Russ Australia v Benny* [2006] NSWSC 1118 per Campbell J at [21] *et seq*; *Woolworths v Banks* [2007] NSWSC 45 per McDougall J at [9] *et seq*; *Brink's v Kane* [2007] NSWSC 62 per McDougall J at [38] *et seq*; *Marlov Pty Ltd v Murat Col* [2009] NSWSC 501 per Debelle AJ at [20] *et seq*.

[xiii] Although Lord Wilberforce said in *Esso Petroleum Co Ltd v Harper's Garage (Stourport)* Ltd (1968) AC 269 at 331, "it would be mistaken, even if it were possible, to try to crystallize the rules of this, or any, aspect of public policy into neat propositions", according to the Minister's second reading speech for the *Restraints of Trade Bill*, the difficulty faced by courts underpinned "a desire in the community, in the commercial world, for [restraints of trade] to be delineated" (New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1976, p.1184 (Mr Dowd, Member for Lane Cove).

[xiv] [2009] 6063/08 (Unreported, Associate Justice Macready, 18 June 2009).

[xv] New South Wales Law Reform Commission, *Covenants in Restraint of Trade*, Report No. 9 (1970) <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r9report> at 24 July 2009.

[xvi] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1976, p.1180 (Mr F.J. Walker, Member for Georges River).

[xvii] Ibid.

[xviii] New South Wales Law Reform Commission, *Covenants in Restraint of Trade*, Report 9 (1970) at [7] (italics added). These special cases concerned New South Welsh statutory exclusions to the restraint of trade doctrine which, at the time of the Commission's report, were section 3 of the *Trade Union Act* (now section 304 of the *Industrial Relations Act* 1996) and section 77(1) of the *Co-operation Act* 1923 (now section 78(5) of the *Co-operatives Act* 1992).

[xix] New South Wales Law Reform Commission, *Covenants in Restraint of Trade*, Report 9 (1970) at [8].

[xx] New South Wales Law Reform Commission, *Covenants in Restraint of Trade*, Report 9 (1970) at [9]. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1976, p.1180 (Mr F.J.Walker, Member for Georges River).

[xxi] Op. cit., at [14].

[xxii] Op. cit., at [15].

[xxiii] New South Wales Law Reform Commission, *Covenants in Restraint of Trade*, Report 9 (1970) at [16].

[xxiv] Arthur Moses, 'Restraints of Trade in New South Wales' [2004] 1 UNELJ 10 at 200.

[xxv] See fn.3, at 61.

[xxvi] JW Carter and DJ Harland, *Contract Law in Australia* (4th ed. LexisNexis Butterworths, 2002) at [1738].

[xxvii] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1976, p.1180 (Mr F.J.Walker, Member for Georges River).

[xxviii] JW Carter and DJ Harland, *Contract Law in Australia* (4th ed. LexisNexis Butterworths, 2002) at [1738]. See also *Woolworths Limited v Olson* [2004] NSWCA 372 per Mason P at [47], citing with approval the judgments of Sheller JA in *Kone Elevators Pty Ltd v McNay & Anor* (1997) ATPR 41-564 at 43-833, and Beazley JA (with whom Rolfe AJA agreed) in *Rouen v Ryan* [2001] NSWCA 230 at [3]. It is also contended by the present authors, albeit without judicial authority, that the wording of section 4(1) has the contentious effect of ousting Lord Macnaghten's bifurcated caveat in *Nordenfelt*, such that – whether or not intended by the Parliament – a restraint of trade in an employment contract in New South Welsh must now only be reasonable by reference to the interests of the *public*, but not reasonable by reference to the interests of the *parties*.

[xxix] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1976, p.1181 (Mr F.J.Walker, Member for Georges River).

[xxx] See op. cit., p.1182 (Mr Madison, Member for Ku-Ring-Gai).

[xxxi] Op. cit., p.1181 (Mr F.J.Walker, Member for Georges River).

[xxxii] According to the New South Wales Law Reform Commission, *Covenants in Restraint of Trade*, Report 9 (1970) at [16]: "Only by such prolixity can the lawyer afford to his client protection which is as complete as the patience of the lawyer and other demands upon his time permit."
[xxxiii] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1976, p.1181 (Mr F.J.Walker, Member for Georges River).
[xxxiv] See fn.12, *supra*.
[xxxv] See *Zhu v Treasurer of NSW* [2004] HCA 56; (2004) 218 CLR 530.
[xxxvi] [2004] NSWSC 572.
[xxxvii] [2004] NSWSC 572, per McDougall J at [29].
[xxxviii] [2004] NSWSC 572, per McDougall J at [25].
[xxxix] See *Bacchus Marsh Concentrated Milk Co Ltd v Joseph Nathan & Co Ltd* (1919) 26 CLR 410, per Isaacs J at 441; *K A & C Smith Pty Ltd v Ward* (1998) 45 NSWLR 702 at 723.
[xl] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* (1894) AC 535; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] UKHL 1.
[xli] See *Lindner v Murdock's Garage* [1950] HCA 48; (1950) 83 CLR 628, per Latham CJ at 633-634.
[xlii] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1976, p.1182 (Mr Madison, Member for Ku-Ring-Gai).
[xliii] Op. cit., pp.1183, 1189 (Mr Dowd, Member for Lane Cove).
[xliv] See *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* (1894) AC 535, per Lord Macnaghten at 574; *Lindner v Murdock's Garage* [1950] HCA 48; (1950) 83 CLR 628 per Kitto J at 653; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty* Ltd (1973) 133 CLR 288 per Walsh J at 318; *Bridge v Deacons* [1984] AC 705 at 718-19.
[xlv] JW Carter and DJ Harland, *Contract Law in Australia* (4th ed. LexisNexis Butterworths, 2002) at [1738].
[xlvi] See *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308, per Lord Diplock at 1315.
[xlvii] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 1976, pp.1183, 1189 (Mr Dowd, Member for Lane Cove).