



Cascading Non-Compete Covenants Upheld - New South Wales (Australia)

Insights

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A recent decision from the Court of Appeals of New South Wales, Australia, illustrates the potential value of using a series of independent but “cascading” covenants to create options for enforceability of restrictive clauses depending on what a reviewing court may find to be reasonable. In *Hanna v. OAMPS Insurance Brokers Ltd.*, NSWCA 267 (Oct. 19, 2010), the Court of Appeals upheld a trial judge’s decision enforcing a 12-month restriction prohibiting a former insurance brokerage executive from soliciting or dealing with clients anywhere in Australia with whom he had contact during the final two years of his employment. Notably, the covenant said that he could not “during the Restraint Period” and “within the Restraint Area” directly or indirectly “canvass, solicit or deal with” the described clients, with the following definitions:

“2. Restraint Period means, from the date of termination of your employment:

- (a) 15 months;
- (b) 13 months;
- (c) 12 months.

Restraint Area means:

- (a) Australia;
- (b) The State or Territory in which you are employed at the date of termination of your employment;
- (c) The metropolitan area of the capital city in which you are employed at the date of termination of your employment.”

The contract also specified that “each restraint contained in this Deed (resulting from any combination of the wording in clauses 1 and 2 constitutes a separate and independent provision, severable from the other restraints.”

The defense argued that the covenant left the employee unable to determine where and for how long he was entitled to compete. The court rejected this argument, relying largely on the language specifying that the covenants were independent, and noting that a series of “repetitive and overlapping restraints of ever widening reach and subject matter” were a reasonable commercial response to the perils of the common law “blue pencil” rule. The court accepted the legitimacy of

the employer trying to obtain for itself “some post-contractual restraint ... within the temporal and geographic ranges identified.”

The lesson for companies with employees in New South Wales and those other British and American common law jurisdictions that continue to use a traditional “blue pencil” approach to the enforcement (or non-enforcement) of assertedly overbroad covenants? Consider whether a cascading set of interlocking but severable covenants might provide an avenue to obtain some level of post-employment protection when a contract is challenged by a former employee.

A copy of the court's opinion is available in pdf format below.

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[Hanna v OAMPS decision.pdf \(1.42 mb\)](#).

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