

PROTECTING YOUR INTEREST WITH RESTRAINT CLAUSES PART I: - GET WHAT YOU PAY FOR

*Murray Thornhill, Commercial Law & Litigation Director & Notary Public,
Vince Pelligra, Commercial Litigation Solicitor and
Torren Gildersleeve, Litigation and Wills and Estate Planning Solicitor
Hudson Henning & Goodman*

When you buy a business and pay for its goodwill, you will likely seek to protect that goodwill from future competition by the Vendor.

Usually, the sale of business agreement will create a range of different restraints which restricts the Vendor to a number of descending options on length of time for the restraint and decreasing geographical area. Contracts are normally drafted this way to avoid the all or nothing consequence of a Court striking out a term it considers to be too broad.

Sale of business agreements usually don't provide for what happens to the value of goodwill where the restraint has been reduced by the Court. The price paid for the goodwill may not reflect changes to the restraining clause.

One solution is to include an express term in the sale of business agreement that sets out what is to occur if certain restraints are held to be unenforceable. The parties expressly include a formula in the agreement to adjust the purchase price of the goodwill - depending on which of the various possible restraints is eventually determined to be reasonable. So you only pay for what you are getting.

Next week, we will look at how to draft the sale contract to ensure your rights are protected under the Fair Trading Act or Trade Practices Act.

This is general information only, and does not constitute specific legal advice. If you would like further information in relation to this matter or any other matters, or if we can assist you, please email us at reception@hhg.com.au.

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WA Solicitors Pty Ltd trading as
HHG Legal Group,
Hudson Henning & Goodman
and Wheatleys Legal
ACN 122 853 507
ABN 54 122 853 507

www.hhg.com.au
reception@hhg.com.au