

PROTECTING YOUR INTERESTS WITH NON COMPETE RESTRAINT CLAUSES PART II: MISLEADING CONDUCT

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Goodwill plays a major part in the purchase of any business. When the purchaser of a business pays for goodwill he seeks to protect that goodwill from competition by the Vendor. This is done generally through non compete restraint clauses included in the Sale of Business Agreement.

In WA, there is no ability for the Court to re-write agreements that the parties have made. So if the restraint clauses are too wide then they may be considered by the Court to be too overbearing and as a result, struck out. It is therefore very important to get it right the first time.

Of course, the Vendor should not think that he could sell the business, extract payment for goodwill, give wide non compete clauses and, then hope to ignore those clauses and set up in competition on the basis that the clauses were too wide to be enforceable. This will be considered to be misleading and deceptive conduct on behalf of the Vendor under the *Fair Trading Act* and *Trade Practices Act*. However, a Vendor will not have that problem where they reasonably and honestly represent that they intend not to compete with the new business for an agreed time only to find out later that the clause is too wide to be enforceable.

Protecting your new business from competition with the Vendor is very important and the future of your business may hinge on ensuring that not only do you have non compete restraining clauses in your Agreement but, they are draft in a sustainable form.

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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