AGREEMENTS TO CO-OPERATE AT COMMON LAW

John Tarrant*

Participants in the resource industry, while generally operating as competitors, will often form alliances to explore co-operatively in a particular area. If such an alliance is undertaken pursuant to a contractual arrangement issues of restraint of trade can arise. Depending upon the circumstances the restraint may be held to be unenforceable. It is critical that parties to these arrangements consider the interest that they wish to protect when they form an alliance and that any restraint agreed to is reasonable to protect that interest. If the parties fail to specify a time duration for their contractual agreement to co-operate an additional issue arises as to how the courts will construct their contract. A court might conclude that the parties intended the restraint to be perpetual and conclude that the restraint is unenforceable, if a perpetual restraint is unreasonable in the circumstances. Alternatively a court might conclude that the parties must have intended that the agreement could be terminated by notice and imply a term to that effect

1. INTRODUCTION

Joint ventures are common in the mining and oil and gas industries. Companies often form joint ventures to spread risk and pool financial resources. As joint venturers the parties might agree to form an area of mutual interest, or some form of alliance, to jointly explore in a specific area. As such the parties might agree not to compete against each other in the area of mutual interest. Effectively they agree, to a limited extent, not to be competitors. Instead they agree to co-operate.[1]

Contracts creating areas of mutual interest, or alliances, raise issues concerning restraint of trade. The common law does not encourage restraint of trade as a general rule and is particularly unenthusiastic in cases of restraint of employment; but it is more sympathetic in relation to reasonable restraints designed to protect the goodwill of a business from competition by a vendor.[2] The purpose of this paper is to explore the restraint of trade doctrine as it relates to agreements to co-operate. The agreement might be to co-operate exclusively within a particular area or in relation to exploring for a particular mineral.

The paper is divided into two parts. In part one, the nature of the restraint involved in contracts to co-operate will be examined. It will be shown that the restraint is different in nature to the restraint in employment cases and restraints which are permitted to protect goodwill. This is primarily because, although there is a restraint element, the primary focus of agreements to co-operate is the desire to pool resources and share risk. There is also a degree of mutuality in the obligation not to pursue one's own interests independently. The relevant restraint becomes a necessary consequence of the desire to co-operate but is not the primary focus of the parties. These elements of co-

* Lecturer, Law School, University of Western Australia. I am grateful to an anonymous referee for helpful comments on an earlier draft of this article. All errors remain my own.

1 If any agreement to co-operate results in a substantial effect on competition then issues of anti-competitive behaviour arise; see *Trade Practices Act 1975* (Cth). However, these issues are beyond the scope of this paper and will not be discussed.

2 *English Hop Growers Ltd v Dering* [1928] 2 KB 174 at 180-181.

operation and pooling of resources are notably absent in the employment and goodwill cases. In the second part of the paper the focus will shift to the duration of agreements to co-operate. This will involve the consideration of two scenarios. First, cases where the period of co-operation is agreed between the parties and is expressly provided for in the contract, and secondly, cases where no duration is specified. In relation to a specified duration the issue to be considered is whether the duration is such as to make the restraint unenforceable because the duration of the restraint is unreasonable to protect the interests of the parties. In relation to cases of unspecified duration the possibility that a term will be implied to allow termination of the agreement will be considered. If such a term is implied then any concern over indefinite duration is dealt with by the implied term.[3]

2. THE NATURE OF THE RESTRAINT

2.1 Policy considerations

The reluctance of the courts to allow agreements in restraint of trade is reflected in the following comments of Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co*[4] that both the public and the individual have an interest in free trade and therefore 'all restraints of trade of themselves, if there is nothing more, are contrary to public policy'.[5] Essentially there is a conflict between freedom of trade and freedom of contract and as Isaacs J explained in *Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd,*[6] 'Freedom of trade cannot, without sufficient legal justification, be restricted by agreement simply on the principle of freedom of contract'.[7] Smith[8] argues that this concern for one freedom while in turn restricting another freedom makes the doctrine of restraint of trade 'a strange beast'.[9]

The courts have held that restraints of trade can be legitimate in certain circumstances including limited post employment restraints and restraints to protect the goodwill of a business. But there are important differences between post employment restraints and restraints to protect business goodwill. As Bleby J explained in *Hydron Pty Ltd v Harous,*[10] courts take a less favourable view in relation to employment constraints than vendor and purchaser constraints 'because there are different interests to protect'.[11] While the restriction in the goodwill cases is focused on protecting the value of the business acquired by the purchaser, in the employment cases the restriction is 'on the use of information obtained about the employer's business which would be of subsequent use to the employee or to the employee's new employer'.[12]

---

3 Other issues that could arise in relation to agreements to co-operate are implied obligations of good faith and a duty to act honestly and reasonably. However, these issues are beyond the scope of this paper and will not be discussed.

4 [1894] AC 535.

5 Ibid at 565.

6 (1919) 26 CLR 410.

7 Ibid at 440. See also *Peters American Delicacy Co Ltd v Patricia's Chocolates and Candies Pty Ltd* (1947) 77 CLR 574 at 591 (Dixon J); *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288 at 317 (Gibbs J); *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at 143 (Gleeson CJ, Gummow, Kirby and Hayne JJ); and *Cream v Bushcolt Pty Ltd* (2004) ATPR 42-004; [2004] WASCA 82 at [18] (Malcolm CJ).

8 SA Smith, 'Reconstructing Restraint of Trade' (1995) 15 *Oxford J Legal Stud* 565.

9 Ibid at 565.

10 (2005) 240 LSJS 33; [2005] SASC 176.

11 Ibid at [85].

12 Ibid.

It is submitted that agreements to co-operate are different from both post employment restraints and business goodwill constraints. What sets them apart is an agreement to participate co-operatively in a certain area for a certain period of time. Agreements to co-operate are essentially horizontal restraints in the nature of a limited cartel.[13] A horizontal restraint was at issue in *Adelaide Steamship Co Ltd v The King and the Attorney-General of the Commonwealth.*[14] A number of coal producers entered into an agreement to restrict the output of their coal mines and to raise and fix the price of their coal. Essentially the case concerned an agreement to co-operate, albeit in limiting production rather than agreeing to pool resources. Griffith CJ held that 'in considering the question whether a contract in restraint of trade is detrimental to the public regard must be had to the public at large'.[15]

Heydon notes that one argument in favour of agreements to form a limited cartel is that they often produce 'good results provided they are not unduly restrictive'.[16] In *Cremoata v Rice Equalization Association Ltd*[17] the High Court was concerned with an agreement whereby a number of millers who purchased rice entered into an agreement whereby they agreed what portion of the combined rice harvest they would each acquire. Fullager J held that 'there would seem to be no reason why traders should not agree to share an available market between them whether as sellers or as buyers'.[18] In *Albion Quarrying Co Pty Ltd v Associated Quarries Pty Ltd*[19] Herring CJ noted that participants in an industry may seek to co-operate to 'shelter from the icy blast of unfettered competition'.[20] It was therefore valid for industry participants to combine their efforts to 'effect economies'.[21]

Restraints in the nature of agreements to co-operate can be considered not to be contrary to the public interest because they are generally between only a small number of parties operating within a much larger industry. So, although the parties to the contract will have agreed to cease to compete in some limited way, there will continue to be considerable competition by other participants in the industry.

2.2 A legitimate interest

Heydon has observed that traditionally there were only three types of legitimate interest that could be protected by a restraint of trade clause.[22] These were covenants to protect goodwill, covenants restraining departing employees and agreements concerned with the controlling of prices or outputs of commodities.[23] However, agreements to co-operate to explore for minerals or petroleum within an area of mutual interest do not fall within these three traditional categories. The parties may not have a legitimate interest at the outset, however as the results of their co-operation begin

---

13 JD Heydon, *The Restraint of Trade Doctrine* (2nd ed), Butterworths (1999) Sydney, p 199. These types of restraints might also be in breach of the *Trade Practices Act 1975* (Cth). However, discussion of prohibited conduct under the *Trade Practices Act 1975* (Cth) is beyond the scope of this paper.

14 (1912) 15 CLR 65.

15 Ibid at 77.

16 Heydon, above n 13, p 202.

17 (1953) 89 CLR 286.

18 Ibid at 320.

19 [1945] VLR 1.

20 Ibid at 16.

21 Ibid at 17.

22 Heydon, above n 13, p 211.

23 Ibid. See also JD Heydon, 'Recent Developments in Restraint of Trade' (1975) 21 *McGill LJ* 325 at 335–342.

to produce results they may have a legitimate interest to protect. If the parties identify an area that could be prospective they will have created some form of business goodwill. One party is unlikely to want the other party to be able to solely pursue the opportunity identified from their joint efforts. Accordingly they have a legitimate interest to be protected. But in some circumstances, at the outset of the agreement, they might be described as only having a potential legitimate interest. In other cases one party may provide a database or some other specific contribution to the joint enterprise and in such cases they might have a legitimate interest to be protected from the outset.

The issue of what legitimate interest is held by joint venture partners was directly addressed in *Dawney, Day & Co Ltd v D'Alphen.*[24] A number of parties formed a joint venture bond broking business. The parties created a jointly owned company to pursue the business. One issue in the case was whether the parties had a legitimate interest to protect. Evans LJ noted the traditional categories of cases, including employment constraints and goodwill cases, and concluded that the 'established categories are not rigid, and they are not exclusive'.[25] Importantly Evans LJ held that a person who made a contribution to a joint venture 'had a clear commercial interest in the success of the joint venture … and is entitled to claim protection for that interest'.[26] In reaching these conclusions Evans LJ noted the comments of Lord Wilberforce in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*[27] that the 'doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason'.[28]

Accordingly it is submitted that those who enter into agreements to co-operate do have a legitimate interest to protect. The recent decision in *Ausdale Enterprises Pty Ltd v Sandford*[29] supports the contention that new types of legitimate interests will be recognised by the courts. In *Ausdale* the appellant operated an optometrical business. The respondent agreed to provide optometrical services to the appellant. The initial term of the agreement was for five years with an option for the respondent to extend the term for a further five years. The respondent was not employed on a fixed salary. Instead the contract provided that the respondent was entitled to the fees charged to the clients and the parties agreed to share the profits from the sale of soft contact lenses sold by the business. The appellant was entitled to all the profits from any other goods sold by the business. To ensure that he protected his income from providing his services the respondent negotiated a restraint clause that provided that he was to be the sole provider of services to the business for the term of the contract whether that was five years or ten years. However, the demand for services expanded and the appellant, in breach of the agreement, engaged an additional optometrist to provide services to the business. The respondent claimed damages and sought an injunction restraining the appellant from further breaches of the covenant. The plaintiff succeeded in the District Court and the defendant appealed to Court of Appeal of Western Australia. In dismissing the appeal McLure JA held that the respondent did have a legitimate interest to protect. Her honour held that the restraint provisions were 'the means by which the parties protected the respondent's source of income from internal competition'.[30] McLure JA held that the respondent 'had and continues to have a legitimate interest in generating income for the entire time he is contractually obliged to make himself available to provide optometrical services to the appellants' clients'.[31] As

---

24 [1998] ICR 1068.
25 Ibid at 1106 – 1107.
26 Ibid at 1108.
27 [1968] AC 269.
28 Ibid at 331.
29 [2006] WASCA 191.
30 Ibid at [29].
31 Ibid at [30].

the restraint was held to be reasonable to protect those interests the appeal was dismissed.[32] The decision in *Ausdale* confirms that courts will protect new types of legitimate interests as they arise.

2.3 The status of the contractual constraint

If a restraint is held to be unreasonable it is sometimes said that the relevant term is void.[33] But in *Thomson v British Medical Association (NSW Branch)*[34] Lord Atkinson observed that reference to void in this context was a 'misuse of language' because a restraint is not 'void at common law but merely unenforceable at law'.[35] As Heydon notes, the most common reference now is to unreasonable restraints being referred to as unenforceable.[36]

Where an unreasonable restraint is held to be unenforceable the courts do not substitute what would be considered a reasonable restraint. However, in New South Wales the *Restraint of Trade Act* 1976 provides a statutory basis for a court to make an order giving effect to a restraint different from that expressly provided for by the parties. Section 4(3) of the Act provides that 'the Court, having regard to the circumstances in which the restraint was created, may, on such terms as the Court thinks fit, order that the restraint be, as regards its application to the applicant, altogether invalid or valid to such extent only … as the Court thinks fit'. In *Kone Elevators Pty Ltd v McNay*[37] Sheller JA observed that the statute 'enlarged the capacity of the Court to enforce just and reasonable covenants which may on their face be too widely expressed'.[38] Holler[39] argues that reform is desirable in other jurisdictions.[40]

3. ISSUES OF DURATION

3.1 The importance of duration

Duration of a restraint is important because it is directly relevant to the question of whether a restraint is reasonable to protect a legitimate interest. In *Bridge v Deacons (A Firm)*[41] the Privy Council observed that there 'appears to be no reported case where a restriction which was otherwise reasonable has been held to be unreasonable solely because of its duration'.[42] In *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd*[43] a vendor sold a small ship building business and agreed to a 10 year restraint agreement. Spender J held that the duration of the constraint was reasonable. In reaching that conclusion Spender J noted that in the context of protecting goodwill 'ordinarily a time restraint is to permit sufficient time for the former owner's connection with customers to fade

---

32 Ibid at [37]. Both Buss JA and Steytler P agreed with McLure JA.
33 See Heydon, above n 13, p 219; and *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 565.
34 [1924] AC 764.
35 Ibid at 769.
36 See Heydon, above n 13. The examples referred to by Heydon are *Joseph Evans & Co Ltd v Heathcote* [1918] 1 KB 418 at 431; *Buckley v Tutty* (1971) 125 CLR 353 at 380; *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428 at 469; and *R v General Medical Council; Ex parte Colman* [1990] 1 All ER 489.
37 (1997) 19 ATPR ¶ 41-564.
38 Ibid at 43,833.
39 M Holler, 'Restraint of Trade Agreements' (2006) *Brief* 21.
40 Ibid at 24.
41 [1984] AC 705.
42 Ibid at 717.
43 (1987) 72 ALR 643.

away'.[44] But in the case of ship building where there was little repeat business and the market was only small the purpose of the constraint 'was to shut the prior owner out of competing for potential new customers'.[45]

Heydon observes that 'occasionally long restraints on the sellers of little businesses are struck down'.[46] One notable restraint that was struck down involved a lifelong restraint. In *Pellow v Ivey*[47] a vendor of a hairdressing business entered into a restraint agreement with the purchaser in 1913 by which the vendor agreed to a lifetime restraint of trade. The vendor breached the agreement in 1932 and Bennett J held that the restraint was unenforceable because it went beyond what was necessary.[48]

In *Brown v Brown*[49] two brothers operated a well drilling business. However differences emerged between the brothers and they were unable to continue working together. One brother, Robert, agreed to buy out the interests held by his brother, Leonard. As part of the contract Leonard agreed to a 20 year restraint clause. The court held that the duration of the restraint was unreasonable and that an appropriate period of restraint was 12 years. Critical to the decision was the conclusion that the period chosen was not a reasonable period to protect the goodwill of the business. Rather the lengthy period may have been chosen to prevent any possible competition and conflict between the brothers.

As to what period will be reasonable a court will place significant weight on the duration agreed to by the parties. In *IRAF Pty Ltd v Graham*[50] Rath J observed that in considering restraint clauses a certain amount of conjecture is involved as well as the exercise of business judgment.[51] He held that 'considerable weight should attach to the period the parties themselves have selected'.[52]

Although the time period agreed to by the parties is important the starting point should always be to identify the legitimate interest being protected and then determining what constraint is reasonable. As Lord Reid observed in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd,*[53] it is better to identify the legitimate interest which the party is 'entitled to protect and then to see whether these restraints were more than adequate for that purpose'.[54] This approach has the attraction of focusing on the interest to be protected and thus a starting point of reference of what might be reasonable. That point of reference can then be compared to what the parties have agreed to.

In the current context of competitors agreeing to co-operate an element of mutuality is present. This element of mutuality provides a compelling reason for the courts to accept the duration expressly provided for by the parties. In *Geraghty v Minter*[55] the court was concerned with a restraint of trade included in a partnership agreement for an insurance loss adjusters' business.

---

44 Ibid at 662.
45 Ibid.
46 Ibid.
47 (1933) 49 TLR 422.
48 Ibid at 423.
49 [1980] 1 NZLR 484.
50 [1982] 1 NSWLR 419.
51 Ibid at 429.
52 Ibid.
53 [1968] AC 269.
54 Ibid at 301.
55 (1979) 142 CLR 177.

Mason J observed that the interest being protected was the goodwill of the business.[56] Commenting on the mutuality involved in a partnership context Mason J noted that the 'fact that the covenant is entered into by each of the partners and may become binding on any of them, depending upon the events which happen, is a factor which is to be taken into account in assessing whether it is reasonable between the parties'.[57]

These cases demonstrate that although the courts will often conclude that the duration specified by the parties is reasonable the courts will always start by identifying the legitimate interest being protected. The courts will then determine what is reasonable to protect that interest while noting the period selected by the parties. Because the courts adopt this approach it would be prudent for contracting parties to specify in their agreement the legitimate interest being protected and to expressly state that they have chosen a constraint that each party agrees is reasonable to protect that interest. If the chosen period is especially long the parties would be prudent to state the special factors that support the unusually long duration agreed to. The benefits of including these details in the contract can be seen from the decision in *Albion Quarrying Co Pty Ltd v Associated Quarries Pty Ltd.*[58] A number of quarrying companies entered into a 10 year agreement to co-operate in the selling of their crushed metal. In upholding the restraint of trade agreement as reasonable Herring CJ observed that the parties had noted in the recitals to their agreement 'that they have considered the matter most carefully and have come to the conclusion that it is essential for the welfare and success of their businesses that they should not only adopt the scheme but also abide by it'.[59] Accordingly it would be prudent to include in the recitals the interest to be protected and the fact that the parties have considered the matter carefully and adopted a restraint that they consider reasonable to protect their mutual interests.

3.2 Indefinite duration

A particular problem arises if the parties have expressly provided that an obligation is to continue indefinitely. Such a situation arose in the context of confidential information in *Maggbury Pty Ltd v Hafele Australia Pty Ltd.*[60] Hafele agreed not to use the confidential information 'at any time hereafter' and also agreed to 'forever observe the obligations of confidence'. Gleeson CJ and Gummow and Hayne JJ held that the restraint of trade doctrine applied to the restraints 'subject to their justification as reasonable in the interests of the public and the parties'.[61] However, because the reasonableness of the constraints had not been justified at the trial, they held that injunctions enforcing the restraints should not be granted.[62] Importantly Gleeson CJ and Gummow and Hayne JJ opined that there would be substantial difficulty in justifying the constraints.[63] This is consistent with the judgment of De Jersey CJ and Pincus and Davies JJA in *Maggbury Pty Ltd v Hafele Australia Pty Ltd.*[64] They held that the contract purported 'to give eternal protection, which can surely not be necessary'.[65] They went on to observe that situations could be imagined in which a permanent restraint might be necessary but that 'it appears that ordinarily, in a commercial

---

56 Ibid at 198.
57 Ibid.
58 [1945] VLR 1.
59 Ibid at 16.
60 (2001) 210 CLR 181.
61 Ibid at 203.
62 Ibid at 204.
63 Ibid.
64 [2000] QCA 172.
65 Ibid at [18].

context, a time limit of some sort must be fixed'.[66] This would suggest that it would be difficult in any commercial circumstances to justify indefinite constraints between corporations.

By contrast both Callinan J and Kirby J dissented in *Maggbury Pty Ltd v Hafele Australia Pty Ltd.*[67] Callinan J questioned the entire doctrine of restraint of trade and suggested that the 'time is ripe for considering whether the doctrine should have any application, or a much more limited application, in modern times'.[68] If that position was adopted, Callinan J opined, that Hafele should be held to their bargain 'unless they can demonstrate that the restraints cause the public significant economic harm of an anti-competitive nature'.[69] But noting that he was constrained by authority to apply the doctrine Callinan J concluded that 'the restraint went no further than was necessary in the interests of both parties and offended no public interest'.[70] This was the case even though 'the restraint was unlimited in terms of time'.[71] Kirby J agreed with Callinan J's conclusion and held that 'I see no reason of legal principle or legal policy why the law should not hold the exploiter to the confidentiality agreement that it executed'.[72]

It would be unusual for parties to enter into a perpetual obligation outside the context of confidential information, but if they did so the decision in *Maggbury* suggests that it will be extremely difficult to justify. Contracting parties should proceed with some caution if they are proposing to expressly enter into perpetual obligations.

3.3 Unspecified duration

Rather than specify that the contract is to be perpetual the parties may simply have overlooked stating any specific duration. In such circumstances the courts initially favoured an approach of a presumption of perpetuity. This position is reflected in *Llanelly Railway & Dock Co v London & North Western Railway Co*[73] where, in the Court of Appeal, James LJ held that prima facie 'every contract is permanent and irrevocable' unless it can be shown from the nature of the contract that 'it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination'.[74] This approach was supported by Lord Selbourne in the House of Lords in *Llanelly Railway & Dock Co v London & North Western Railway Co.*[75] But in later cases the courts, while continuing to look at the nature and construction of the contract, moved away from any presumption of perpetuity. In *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd*[76] Lord MacDermott referred to the judgment of Lord Selbourne in *Llanelly Railway* and observed that Lord Selbourne had not attempted to express any 'universal rule of construction'.[77]

---

66 Ibid.
67 (2001) 210 CLR 181.
68 Ibid at 214.
69 Ibid at 216.
70 Ibid at 218.
71 Ibid at 217.
72 Ibid at 208.
73 (1873) LR 8 Ch App 942.
74 Ibid at 949–950.
75 (1875) LR 7 HL 550 at 567.
76 [1948] AC 173.
77 Ibid at 203.

There is a potentially different approach to this issue depending upon whether the party agreeing to the restraint is a natural person or a corporation. In *T W Cronin Shoe Pty Ltd v Cronin*[78] the vendor of a shoe-manufacturing business agreed to a restraint preventing him from participating in the industry 'at any time hereafter'. Importantly the vendor who agreed to the restraint was a natural person. Macfarlan J held that the 'covenant appears to me to be no wider than is reasonably necessary for the protection of the plaintiff's interests'.[79] On the specific issue of the duration Macfarlan J held that if at any time 'during the defendant's lifetime he becomes interested in a shoe-manufacturing concern, that may be and probably would be a matter which would be of detriment to the plaintiff'.[80] Because the vendor was a natural person there was a natural limit to the duration of the restraint: the lifetime of the vendor.

A similar approach was taken by the House of Lords in *Fitch v Dewes*[81] where a clerk agreed not to engage in any way in the business of a solicitor within a very small geographical area. The contract made no reference to the duration of the restraint. The House of Lords held that the restraint applied for the duration of the life of the clerk. Viscount Cave held that where the goodwill of a business was to be protected it may be necessary 'to impose a restriction upon the covenantor for the remainder of his life'.[82]

Where the restraint applies to a corporate entity the courts have taken a different approach. *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd*[83] provides a clear example of the principle that contracting party would rarely intend any term of their contract to have a perpetual duration. In August 1951 the plaintiffs, who were manufacturers of aircraft ejection seats and associated products, entered into a contract with the defendants that granted the defendants the right to exclusively manufacture and sell the plaintiffs products in North America. Importantly the contract provided no provision for termination and no time period for the exclusive rights was provided for. In March 1954 the plaintiffs entered a similar agreement with a director of Canadian Flight. The plaintiffs later desired to terminate both agreements and sought a declaratory judgment from the court that they were entitled to terminate the contracts. McNair J held that 'where the contract leaves the matter open, I think that the common law approach would be to provide a solution which is reasonable'.[84] His honour observed that terms will be implied 'which are necessary to give business efficacy to the contract'.[85] However, in the context of the case under consideration McNair J opined that 'the question whether a contract such as this is permanent or revocable does not depend upon the insertion of an implied term, but depends upon the true construction of the language used'.[86] Accordingly he concluded that 'subject to there being anything in the agreements which is inconsistent with their being revocable, I would favour the view that they are revocable'.[87]

---

78 [1929] VLR 227.
79 Ibid at 229.
80 Ibid at 230. The decision of Macfarlan J was upheld on appeal; see *T W Cronin Shoe Pty Ltd v Cronin* [1929] VLR 244.
81 [1921] 2 AC 158.
82 Ibid at 168.
83 [1955] 2 QB 556.
84 Ibid at 578.
85 Ibid.
86 Ibid.
87 Ibid.

A similar approach was taken in *Crediton Gas Co v Crediton Urban District Council.*[88] The case concerned the supply of gas. In commenting upon the issue of duration where both parties are incorporated Russell J observed that 'it is impossible in these days when limited liability is the general rule to say that for that reason a contract, indefinite in point of time, by which a gas company secured a customer on particular terms, was intended to be permanent'.[89] Importantly he concluded that 'the nature of the contract involves an implication that either party can terminate it by notice'.[90] That is, the process if one of construction of the express terms of the contract rather than the implication of a term.

As Carnegie[91] has observed this type of construction is not an ordinary exercise of construction 'but a quite sophisticated exercise'.[92] It is a sophisticated form of construction because it is not the words used in the contract that are being interpreted but the wider context of the intention of the parties. This is evident from the decision in *Re Spenborough Urban District Council's Agreement*[93] where Buckley J opined that:

> Since ex hypothesi such an agreement contains no provision expressly dealing with determination by the party who asserts that this should be inferred, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement.[94]

These cases suggest there is a wider exercise of construction which does not involve the implication of terms. Although there is no express term providing for termination by notice a right to terminate will be inferred by looking at the common intention of the parties. Thus no implied term is necessary. If the intention of the parties is that the contract should not continue indefinitely then it will be inferred into the relevant express obligation that that obligation can be terminated by reasonable notice.

However, Australian courts have taken a different approach to the issue of unspecified duration. Two approaches are evident from recent cases in Australia. The first is to assume the restraint has an indefinite duration because no duration has been specified. The second is to conclude from the nature of the contract that the parties must have intended the restraint to be capable of termination by giving reasonable notice and to imply a term to give effect to that intention. The first approach is reflected in *Plume v Federal Airports Corp*[95] where part of a restraint clause appeared to have an indefinite duration. This may have been because of a drafting error that provided for a duration for part of the restraint but not the whole restraint. O'Loughlin J held that because no period of duration was specified the clause was intended to operate for the remainder of the natural life of the person agreeing to the restraint.[96] Because O'Loughlin J considered this was more than what

---

88 [1928] Ch 174.
89 Ibid at 178.
90 Ibid. An appeal to the Court of Appeal was dismissed; see *Crediton Gas Co v Crediton Urban District Council* [1928] 1 Ch 447.
91 AR Carnegie, 'Terminability of Contracts of Unspecified Duration' (1969) *LQR* 392.
92 Ibid at 406.
93 [1968] 1 Ch 139.
94 Ibid at 147.
95 (1997) 19 ATPR ¶41-589.
96 Ibid at 44,136.

was reasonably required the clause was held to be unenforceable. This approach is consistent with the assumption of perpetuity evident in *Llanelly Railway & Dock Co v London & North Western Railway Co*[97] but rejected in *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd.*[98] It is unclear why O'Loughlin J favoured an assumption of perpetuity, although the decision might have been influenced by the fact that the person bound by the restraint was a natural person. Accordingly the restraint would come to an end at the time of their death.

The second approach favoured in Australia recognises that the issue is one of construction of the contract and the intention of the parties but the gap filling exercise is achieved by the implication of a term. This is reflected in *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd*[99] where the issue was the duration of a distributorship agreement. McHugh JA held that the 'existence of the term is a matter of construction' but the exercise 'does not depend only upon a textual examination of the words or writings of the parties'.[100] McHugh JA held that it involved a 'consideration of the subject matter of the agreement, the circumstances in which it was made, and the provisions to which the parties have or have not agreed'.[101] McHugh JA held that 'the answer depends upon whether the agreement contains an implied term'.[102] McHugh JA suggested that in some cases there must be a minimum duration of the contract so that a party can 'recoup any extraordinary expenditure or effort'.[103] This approach suggests that in some circumstances there will be two implied terms. One term will deal with the issue of a minimum period of duration before notice can be given to terminate and the second implied term will deal with what period of notice will be required.

The implied terms approach was also adopted more recently in *The Software Link (Australia) Pty Ltd v Texada Software Inc*[104] and *Husain v O & S Holdings (Vic) Pty Ltd.*[105] The implied terms approach suggests that the courts are not constructing a particular term of the contract; rather the courts are looking at the contract as a whole. When that exercise is undertaken, if it is concluded that the parties intended the contract to be determinable by notice, then a term is implied to give effect to that intention. These cases suggest that the implied terms approach is to be favoured over the approach of O'Loughlin J in *Plume v Federal Airports Corp.*[106]

3.4 The required notice

In *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd,*[107] discussed earlier, McNair J held that 'the question of length of notice has to be determined having regard to the facts as existing at the time when the notice is given, and is not to be determined at the time when the contract is made'.[108] In *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd*[109] McHugh JA

---

97 (1875) LR 7 HL 550.
98 [1948] AC 173.
99 (1988) 14 NSWLR 438.
100 Ibid at 443.
101 Ibid.
102 Ibid.
103 Ibid at 445.
104 [2005] FCA 1072 at [26] – [27].
105 [2005] VSCA 269 at [55] - [59] (Nettle JA). Both Chernov and Ashley JJA agreed with Nettle JA. See also *Foxeden Pty Ltd v IOOF Building Society Ltd* [2003] VSC 356; and *Pacific Products Pty Ltd v Howard* (2005) 241 LSJS 318; [2005] SASC 290.
106 (1997) 19 ATPR ¶41-589.
107 [1955] 2 QB 556.
108 Ibid at 581.

noted that the chief purpose of giving notice was to enable the parties to bring their relationship to an end in an orderly way 'so that they will have a reasonable opportunity to enter into alternative arrangements and to wind up matters which arise out of their relationship'.[110] McHugh JA noted that the matters to be wound up would usually include 'carrying out existing commitments, bringing current negotiations to fruition, and, where appropriate, obtaining the fruits of any extraordinary expenditure or effort carried out within the scope of the agreement'.[111]

These factors are all relevant in the context of agreements to co-operate. When agreeing to appropriate notice provisions contracting parties would be wise to include two relevant time periods. First, the parties should agree to a minimum period that must elapse before notice can be given to terminate. Secondly, the parties should agree on what period of notice is appropriate in the circumstances.

4. CONCLUSION

When industry participants agree to some limited form of co-operation they must consider the implications of the restraint of trade doctrine to their contractual agreement. Failure to adequately deal with restraint of trade issues may allow a party to the contract to avoid a restraint by having it declared unenforceable. Parties cannot rely solely on the terms of their contract to protect their legitimate interest unless they ensure that the terms of the contract are reasonable.

It has been shown above that the approach of the courts in restraint of trade cases is to identify the legitimate interest being protected and then determine what is reasonable to protect that interest. Because of this approach by the courts, parties should draft their contracts to co-operate only after identifying the legitimate interest they wish to protect. The parties should expressly state what is reasonable to protect that legitimate interest and if any special factors are relevant it would be prudent to state these in the contract.

---

109 (1988) 14 NSWLR 438.
110 Ibid at 448.
111 Ibid.