

## Restraint of trade clause



### Quick guide

- A restraint of trade clause seeks to restrict your right to work elsewhere and your ability to engage with patients and staff of the practice during your engagement and after it ends.
- Check whether your contract includes a restraint of trade clause.
- If you are concerned that you may not be able to comply with the clause, seek advice before you sign the contract.

A restraint of trade clause seeks to protect the interests of the practice while you are working at the practice and after you leave.

Restraint of trade clauses include clauses that seek to prevent you from:

- working for a competing business or from starting your own competing business (non-compete clauses)
- soliciting patients, referrers or suppliers of the practice after you leave the practice (non-solicitation clauses)
- recruiting the practice's staff after you leave the practice or from encouraging the staff to leave their employment or engagement with your former practice (non-recruitment clauses).

It is common to hear that restraint clauses are not enforceable, but this not correct.

A court will generally consider a restraint clause to be valid, and therefore enforceable, if the clause is:

- certain in its terms (i.e. the clause makes sense and can be understood); and
- reasonably necessary to protect the "legitimate business interests" of the business).

In the medical practice context, legitimate business interests can include, for example, the interest of the practice not to be subject to unfair competition arising from the unfair exploitation of patient connections, confidential patient records and other confidential information of the practice like business costs and income, known only to a person because they have worked at the practice.

A court will consider whether the clause is valid or not based on the circumstances at the time the agreement is entered into, rather than the circumstances at the time the working relationship ends.

### Non-compete clause

A non-compete clause seeks to prevent you from working for a competing business or from starting your own competing business.

In considering whether the obligation is reasonable, the courts will consider:

**The geographical restriction** – the part of the clause preventing you from working in competition within a certain distance from the practice.

A court will not enforce a restraint if the geographical area is too broad.

The reasonableness of a geographical restriction will depend upon factors such as the location of the practice (urban or rural) and the likelihood that patients will leave the practice to see a medical practitioner at another practice. Generally speaking, a geographical restraint of 5km or less will probably be considered valid in urban areas while a greater restraint area might be valid in rural areas.

In some agreements, the term "Restraint Area" is used to describe the geographical restriction and is drafted as a cascading restraint clause. For example, the clause might say something like:

**Restraint Area** means:

- A 50km radius from the practice; or
- *If that is not reasonable, a 25km radius from the practice; or*
- *If that is not reasonable, a 10km radius from the practice.*

A cascading restraint clause provides for different levels of geographical restriction. Each variable is treated as an individual clause. If a court finds that one level of restraint is unenforceable, it can look to enforce a narrower restraint without the entire clause being invalidated. If there is not a cascading clause, the specific geographic restriction stated in the contract will only be enforced if the practice can satisfy a court that it has a legitimate interest in limiting competition within that geographic area.

Only in NSW, legislation allows the NSW Supreme Court to 'read down' a restraint that it finds is too broad and substitute some narrower area if the court accepts that some restraint is reasonable.

In some agreements, the geographical restriction is within a radius of the practice. The term radius means

"as the crow flies" rather than as you would drive by road. You can find radius distances in various websites.

**The time restriction** – the part of the clause preventing you from working for a competitor for a certain period of time after you stop working at the practice.

A court will not enforce a restraint if the time restriction is too long.

While it will depend on the circumstances of each case and the legitimate business interest that the practice is seeking to protect, a reasonable restraint period is often considered to be between three and six months after termination. However, a court will consider the entire context of the restraint. In some cases, a period of more than six months will be enforced.

In some agreements, the term "Restraint Period" is used to describe the time restriction and is drafted as a cascading restraint clause. It provides for different levels of time restriction. Like other cascading clauses, each variable is treated as an individual clause. If a court finds that one level of restraint is unenforceable, it can look to enforce a narrower restraint without the entire clause being invalidated. If there is not a cascading clause, the specific time restriction stated in the contract will only be enforced if the practice can satisfy a court that it has a legitimate interest in limiting competition for the stated time period.

Only in NSW, legislation allows the NSW Supreme Court to 'read down' a restraint that it finds is too long and substitute some shorter period if the court accepts that some restraint is reasonable.

#### **The restraint scope**

A court will not enforce a restraint if the scope of the restraint is too broad.

By way of example, a court will not be likely to enforce a restraint that prevents you from practising medicine anywhere, as that will prevent you from working as a medical practitioner in a public hospital, government department or other business which is not competitive with the practice and which the practice has no legitimate business interest in preventing.

A court will likely enforce a restraint that prevents you from working for a competing business during the term of your engagement and for a reasonable period of time within a reasonable geographic area after your engagement ends.

#### **Non-solicitation clause**

A non-solicitation clause seeks to prevent you from soliciting patients or suppliers of the practice after you leave the practice.

##### **Soliciting any patient or supplier**

A non-solicitation clause may seek to prevent you from soliciting or contacting any patient or supplier of the practice.

A court is unlikely to enforce this clause because:

- it extends to patients you did not necessarily treat and suppliers you did not necessarily deal with during your engagement at the practice; and
- given that you are prevented by your duty of confidentiality from taking patient or supplier contact information when you leave the practice, you will not generally know which potential patients coming to you in your new practice were also patients of your former practice, or which organisations were suppliers of your former practice.

Although a broad clause like this may not be enforced, we strongly recommend that you do not take active steps to solicit patients or suppliers of the practice. For example, you should not take a patient or supplier list or target marketing directly to patients of the practice (e.g. post letters to patients of the practice).

You are not prevented from general marketing (e.g. advertising in the local paper, general letterbox drops).

##### **Soliciting patients you treated at the practice or suppliers you dealt with at the practice**

A non-solicitation clause may seek to prevent you from soliciting or contacting patients that you treated while working at the practice or suppliers you dealt with. A court will likely enforce this clause, especially if it is limited to not soliciting patients you treated or suppliers you dealt with in recent times (e.g. during your last 12 months at the practice).

If you are a specialist and patients are referred directly to you, you may wish to ask for this clause to be deleted as your patients may want to continue to see you when you move to a new practice.

#### **Treating patients who seek treatment from you or dealing with suppliers who approach you**

A non-solicitation clause may seek to prevent you from treating patients who elect to seek treatment from you without any contact or encouragement from you, or suppliers in the same circumstances. For example, the clause may seek to prevent you from "accepting any approach" from a patient or supplier of your former practice.

There is limited case law about restraint of trade clauses which seek to prevent a doctor from treating patients from a former practice.

In our view, the clause is not reasonable because it seeks to prevent your patients from choosing to follow you to a new practice. It also seeks to prevent you from accepting a patient of the practice as your patient in circumstances where you are not allowed to take a patient list when you leave the practice.

We strongly recommend you ask for this part of the clause to be deleted.

#### **Non-recruitment clause**

A non-recruitment clause seeks to prevent you from recruiting the practice's staff after you leave the practice or from encouraging the staff to leave their employment or engagement with your former practice.

A court is generally unlikely to enforce a clause that prevents you from recruiting any staff of the practice as this will extend to staff that you did not know during your engagement at the practice.

A court is generally more likely to enforce a clause that prevents you from recruiting staff that you knew and worked with at the practice, especially if it is limited to staff you knew or worked with in recent times (e.g. during your last 12 months at the practice).

You should read the clause carefully to see if you are prevented from recruiting staff who independently approach you for a role. Enforcing restraint clauses in NSW

In NSW only, a court can "read down" a restraint of trade clause in accordance with the *Restraints of Trade Act 1976* (NSW). This means that if a court finds that conduct has occurred which is prohibited by a restraint clause and the current clause is invalid because it is too broad in duration, scope or geographical restriction, it can enforce the clause to the extent that is otherwise reasonable.

## General

A practice may take steps to enforce a restraint clause if you work in a way that breaches the clause. This is likely to cause you a great deal of stress, and result in significant legal costs and inconvenience.

If you do leave a practice and have a restraint of trade clause in your contract, consider your next employment or engagement carefully and seek to comply with the requirements of the clause.

Restraint clauses can be very complex. If you are not comfortable that you understand and can live with the restrictions contained in any restraint of trade clause in your contract, once the contract comes to an end, obtain specific legal advice **before** you agree to sign the contract or do anything that may breach a restraint clause in your contract.

For more information or immediate medico-legal advice, call us on **1800 128 268**, 24/7 in emergencies.  
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