The following is a summary of restraint of trade law for dental professionals with limited case law, but a discussion of the elements that should be considered.

It is not legal advice.

Some Relevant Law on Restraint of Trade[1]

At common law, an agreement in "restraint of trade" is one in which a party agrees to restrict his or her liberty in the future to carry on trade with other parties in such manner as the parties choose.

1. The restriction is on a liberty that the party would have had but for the agreement.
2. The fact that the restraint can be said to have been freely bargained for by the parties to the contract does not provide a sufficient reason for concluding that the doctrine should not apply.
3. Every restraint of trade is presumed to be void, in the sense of being unenforceable, but this presumption can be rebutted.
4. The applicable test is that the presumption will be rebutted if the restraint is judged to be reasonable in reference to the interests of the parties concerned (the first limb of the test), and reasonable in reference to the interests of the public (the second limb of the test).

Public policy is the basis of the common law doctrine that unreasonable restraints of trade are void.

5. An unreasonable restraint of trade has no contractual effect. Restraints of trade are assumed to be injurious to the interests of the state or the community and are therefore against public policy.
6. The doctrine of restraint of trade seeks to give effect to, and at the same time to reconcile, two important and apparently conflicting aspects of public policy; on the one hand, the preservation of the freedom of the individual to employ his talents and industry in any lawful activity and, on the other, the preservation both of his freedom to contract and of his ability to enforce by legal process those contracts into which he may enter.

There are two elements of a claim based on restraint of trade.

7. First, the party complaining of the restraint must be the subject of a restraint imposed by another party or parties upon the exercise of the first party's profession or calling, or the carrying on of that party's business.
8. Second, the restraint must be either unreasonable as between the parties concerned, or unreasonable in reference to the interests of the public at large.

The existence of a relevant restraint must be established before any question of reasonableness arises.

9. The restraint element of a restraint of trade requires a restriction of a party's liberty to carry on trade at some future time with third parties. A restraint may also exist where it merely restricts the liberty of third parties. The existence of alternative opportunities for trade is of limited relevance.
10. The concept of restraint should be used "rationally and not too literally". This is to be judged by reference to its practical effect rather than what is expressly stated, and is to be considered

[1] In part extracted from the *Laws of Australia* in 2017

at the time the restraint was entered into and on the basis of potential as well as actual restraint.

The prominent test for establishing whether the doctrine of restraint of trade applies is known as the "structure of a trading society" test.

11. Under this test, the question of reasonableness does not arise unless the plaintiff has established that a restraint exists which is a deviation from accepted standards as part of the structure of a trading society.

A restraint of trade may be general or partial.

12. For example, in *Lindner v Murdock's Garage* (1950) 83 CLR 628, the partial restraint imposed on a worker by his employer prevented him from working in the business of a garage proprietor for a period of one year within two geographical areas specified in the agreement. The restraint was held to be void because it was more than reasonably necessary to protect the employer's business.
13. The circumstance that the restraint is less than total may be relevant to the question of whether the restraint is reasonable.
14. In contrast, it is possible for a general restraint to be valid, and worldwide restraints have also been held to be valid.

The form of a restraint of trade is not crucial in determining its validity, as the courts will look to the substance of the restraint.

15. Hence, the effect of the restraint will be considered rather than the form it takes:
16. Whether a particular provision operates in restraint of trade is to be determined not by the form the stipulation wears, but … by its effect in practice.
17. The courts will also look at the combined effect of a set of restraints. A restraint will not be defeated by the covenantee carrying on business under a cloak or a sham, for example under the veil of a company.

The categories of restraint of trade which will be scrutinised by the courts are not closed.

18. However, there are a number of common categories of restraint which can be identified. These include:
    (1) Restraints imposed by employment contracts which apply either during employment or after it has ceased. These may be particularly directed at preventing an employee's use of confidential information acquired during the course of their employment.
    (2) Restraints in agreements for the transfer of a business which restrain the vendor from competing with the purchaser.

Reasonable restraints of trade will not be interfered with by the courts.

19. In order to be considered reasonable, a restraint of trade must first be reasonable in reference to the interests of the parties and, second, must be reasonable in reference to the interests of the public:
20. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public.
21. The test of reasonableness will normally be applied as at the time that the agreement was

entered into by the parties.

The reasonableness of a restraint of trade and the category into which it falls are closely connected, as courts tend to take a stricter view of some categories of restraint than others.

22. The question of whether a restraint protects a legitimate interest as opposed to merely limiting competition is determined on the facts of each case and is not limited to the identification of a specific proprietary interest.
23. The specific category of restraint will therefore be relevant but not determinative of the legitimacy of the interest sought to be protected by the restraint, and it may be preferable to focus on the legitimacy of the interest to be protected rather than the category of restraint.
24. The courts in general take a stricter and less favourable view of covenants in restraint of trade entered into between employer and employee than of similar covenants between vendor and purchaser.
25. Consequently, it is important to focus on the issue of reasonableness rather than the particular category within which a restraint falls.

Restraints of trade on employment are interpreted more strictly than restraints imposed in the sale of a business.

26. The explanation for the distinction in this approach is that the legitimate interests of the party benefited by the restraint are different in each case. Upon acquisition of a business, the purchaser has a right to protect the goodwill which is acquired, and for which payment has been made.
27. The purchaser is entitled to restraints preventing the vendor from simply appropriating the goodwill for which he or she has just been paid.
28. In contrast, in the employer and employee situation, the employer has no right to completely prevent the employee from competing with the employer.
29. In a multi-million dollar national enterprise, the courts tend to be a little more tolerant of longer restraints than they are in connection with a worker who is deprived of the ability to earn his or her living during the time of the restraint.
30. A restraint of trade on employment may be treated as a restraint of trade to protect goodwill in the context of a sale of business, if the restraint of trade on employment forms part of the sale of a business that was conducted by the individual concerned.
31. The courts will not look at any covenant in an employment contract in isolation, if the circumstances that lead to the employment are interrelated to a business sale.
32. However, even in such a case this result is unlikely where the sale of business and the restraint of trade on employment are in separate covenants.

33. Where a former manager or proprietor is employed by the purchaser as part of the sale of business contract, it is only the goodwill of the business which is the legitimate subject of protection in the event of the termination of the contract of employment.
34. The legitimate duration of restraint is, therefore, the period during which the goodwill is not yet absorbed into the business of the purchaser, and is not related to the duration of the employment contract.
35. A restraint of trade on employment might be treated as a means by which the employer may take adequate protective steps in preparation for competition, although the restraint must not be anticompetitive.

36. It may be relevant to consider whether the restraint is consistent with a “right to work”, that is, the right to choose between prospective employers, and the right to an opportunity to gain a living by work which the employee freely chooses and accepts.
37. However, it is unlikely that the law enforces a “right to work”; rather, it merely removes unreasonable impediments on the capacity to work. It has been said that in Australia a “right to work” is no more than “a mere liberty”. Furthermore, there is no over-arching principle that interference with a person's entitlement to work constitutes a tort or other cause of action.

The courts are more likely to hold that the employer has an interest legitimately protected by a restraint where the employee is in frequent face-to-face contact with customers, where the employee alone knows the customers and their requirements, where the contact takes place away from the employer's premises, or where the employee is relatively skilled and not merely in a subordinate position working under the supervision of others.

38. What is important is the quality of the contact, in which there is an appreciable risk that customers will transfer allegiance to the employee, even in relation to customers who only deal with the employer infrequently.
39. A restraint may be inappropriate where the employer's customers are not of a recurring kind. Even where they are, customer contact alone is unlikely to be sufficient in the absence of an element of reliance on the employee by customers. For example, it may be reasonable to restrain employees where they have influence over the outcome of tenders, such as by having power over price, quality of product, availability of product, and ability to effect timely delivery. Also, it may be reasonable to restrain employees from diverting clients from the employer where the employees, in the course of their employment, had the opportunity to develop personal relationships with clients and to influence them. However, it does not follow that an employee will be able to take advantage of a relationship with a customer if that relationship merely assists in maintaining the employer's reputation.
40. The mere fact that an employee has friends or relations amongst, or makes friends with, customers of his employee, is not a sufficient connection to support a restraint.
41. On the other hand, if in the course of employment an employee gains special knowledge or influence over the employer's customers, such as would give the employee an unfair advantage in competition, that will support a restraint even if the customers include persons who have become friends or acquaintances of the employee.
42. Where the employee's duty is to build up the employer's customer base, the establishment of a customer connection is the purpose of employment, and not merely incidental to it. In such circumstances a restraint will be reasonable, so as to remove the temptation to cultivate the customers in anticipation of future competition, and to prevent exploitation of the customer connection, which the employer has paid the employee to develop for the employer's benefit.

43. Where the personal relationship between employees and the employer's clients is significant, a restraint is unlikely to be reasonable if it goes beyond the clients with whom the employees actually dealt.
44. This principle generally extends to customers of companies other than the employer. On the other hand, it may be reasonable to extend the restraint to cover clients with whom the employee did not have personal dealings, if the employee acquired influence or special knowledge with regard to the clientele by reason of the employee's role or seniority.
45. The courts may consider that an employee has solicited the employer's customers even where the employee's proposal to do business is in response to an invitation by the customer. Where there is a strong customer connection with the employee, solicitation may not be necessary

for the employee to attract customers of the employer, notwithstanding that the connection belongs to the employer. A “no dealing” restraint would be likely to be reasonable in that circumstance.

46. Covenants which refer to a particular “business” or to “competitors”, rather than specifying particular activities, are often considered unreasonable where the employer undertakes other “non-protectable” activities in competition.

A restraint may be inappropriate where it extends beyond the geographic area of custom known to the employee.

The duration of a restraint of trade should afford no more than adequate protection for the legitimate interest of the employer.

47. In cases of a non-solicitation covenant supported by customer connection, a reasonable duration of restraint is that which is required by the employer to be protected against solicitation, which may depend on the time required by a reasonably competent replacement employee to show his or her effectiveness and establish a rapport with customers.
48. It is also relevant to consider the time it would take for the influence of the former employee to wane with respect to the employer's clientele. Where the restraint covenant is supported by the interest of protecting a trade secret or confidential information, it is relevant to consider how long the information was likely to remain confidential and of commercial advantage, as at the time of the restraint.
49. Where the relevant interest is confidentiality, a restrictive covenant is unlikely to be reasonable if it seeks to prevent an employee recruiting for a non-competing business.
50. In *Beaches & Bush Properties Pty Ltd v Jennings* [2003] ATPR 41-958, a restraint for a period of six months concerning a real estate agent who had been in personal contact with clients, was held to be reasonable in light of the usual period of an exclusive agency agreement being 90 to 120 days.
51. In *Burton v Wright Trading Pty Ltd* [2007] QSC 17, a period of six months was considered sufficient to enable a stock-broker to protect that part of its client base which was not the subject of personal relationships with the employee, having regard to the daily or monthly frequency with which the employee maintained contact with those clients with whom he had a personal relationship, particularly in a small market.
52. Similar considerations in respect of duration inform the reasonableness of a covenant protecting staff connection in respect of its duration as are relevant to the reasonableness of a covenant protecting customer connection.
53. Thus, where the restraint is founded solely on protection of staff connection and not confidentiality of information, it is necessary to consider the time during which the hold of the former employee over the other employees might be expected to weaken. This may be affected by the seniority of the former employee. There is unlikely to be any influence over employees with whom the former employee did not have contact, except perhaps in the case of senior staff.

The purchase of a business will usually justify the imposition of some form of restraint of trade on the vendor of the business.

54. This is because the purchaser acquires a goodwill which is a legitimate interest to protect. The attitude of the courts towards such restraints is less strict than that taken towards restraints on employment, as they represent a commercial bargain struck between the parties for which the vendor receives good consideration.

55. Competition in this context includes competition by way of employment with a rival firm, as well as direct competition as a principal.
56. The amount of the purchase price paid, particularly for good will or distributed to it, is relevant to the question of reasonableness but not decisive.
57. It may be that if no part of the consideration for the business is allocated to goodwill, then a restraint is more likely to be considered unreasonable. The purchaser does not have a legitimate interest in the protection of other businesses already owned by or associated with the purchaser.
58. The purchaser's goodwill can be divided into components such as the nature of the business acquired, its scope and its geographic area. Once these components have been identified, the words of the restraint are tested against them to see whether the restraint provides more than adequate protection for the purchaser.
59. The purchaser cannot require the vendor to refrain from competing against other businesses which the purchaser may have, or may later acquire, if the vendor has not yet engaged in those businesses at the time of sale.
60. In determining whether the duration of a restraint is reasonable, account must be taken of commercial reality: the most important consideration is the time required for severing the relationship between the vendor and those clients who would patronise the business after sale.

Reasonableness must be determined in light of the interests of the public.

61. In some cases, it has not been necessary for this element to be separately relied upon, partly because of the existence of competition legislation and partly because it has been treated as an element of the first limb of the test to determine whether or not a restraint of trade is void, namely reasonableness as between the parties. In other instances, the public interest element is considered to be an important and separate question and perhaps the more important of the questions concerning a restraint.
62. The interest of the person burdened by a restraint of trade to protect his or her freedom to trade, or to follow a profession or calling, can be viewed as a reflection of the underlying policy that it is in the public interest that a person should be able to trade freely, subject to reasonable limitations.
63. For the most part, reasonableness in the interests of the public has been bound up with a consideration of reasonableness as between the parties. This is particularly the case with employment restraints where the contract in question is often not entered into on an equal footing and the emphasis of the courts is on the protection of the employee.
64. There is greater emphasis on the requirement of reasonableness in reference to the interests of the public as an issue distinct from reasonableness as between the parties in cases dealing with other restraints, such as those in contracts for the sale of a business.

65. This distinction in the treatment of employment and other restraints is founded on the policy view that it is in the public interest that commercial contracts entered into on an equal footing should be adhered to. Where commercial contracts are entered into on an equal footing, prima facie, the parties are regarded as the best judges of what is reasonable between themselves.

The onus of proof of establishing that a restraint of trade is reasonable as between the parties is upon the party seeking to enforce the restraint, and the onus of showing that a restraint of trade is not reasonable in the public interest rests with the party burdened by the restraint of trade.

66. Although the onus of proof to establish that a restraint is reasonable as between the parties lies with the party seeking to enforce the restraint, it is prudent for the party seeking to avoid

the operation of the restraint to plead all facts relevant to its case, because the court will examine all of the facts proved in evidence to answer the question of law.

Enforcing restraints of trade can be achieved by obtaining a declaration or an injunction restraining a burdened party from breaching the restraint, or damages may be awarded.

67. Damages may be awarded also in addition to or in lieu of an injunction.
68. The existence of other remedies based on breach of contract or tort for misuse of confidential information is not, in itself, sufficient reason to refuse enforcement of a restrictive covenant.
69. In the case of exclusive contracts of employment or for personal services, courts will not grant orders for specific performance requiring the defendant to work for or provide services to the plaintiff, but they may enforce, by way of injunction, negative covenants that require the defendant to refrain from working for or providing services to others.
70. Where a valid restraint has the substance of a negative covenant, an injunction ought to be granted unless there are good reasons to the contrary.
71. Courts will assess the reasonableness of the restraint in light of the facts at the time the agreement was entered into, though the facts as they exist at the date of hearing will be considered when deciding whether or not to grant an injunction.

Avoiding a restraint of trade can be achieved by resorting to an application for a declaration that the restraint is unenforceable, or for an injunction.

72. Courts do not refuse relief against a restraint of trade simply because there is no present threat of enforcement of the restraint.

To avoid a restraint of trade clause in a contract, a party may seek to claim that the contract is rendered unenforceable by the presence of an unlawful restraint of trade in it.

73. In such a case, the party seeking to enforce the restraint may also plead, in the alternative, that if the restraint is invalid, it can nevertheless be severed so that the contract remains enforceable.

SOME RECENT CASE LAW

In the recent decision of Applegarth J in *Vision Eye Institute Limited v Kitchen* [2014] QSC 260 from [258]-[268] the principles were neatly set out.

- The general principle is that a restraint of trade is prima facie invalid, but may be enforced if it affords no more than reasonable protection to the party in whose favour it is imposed and is not injurious to the public.
- The party who seeks to enforce the restraint has the onus of proving that the restraint is reasonable as between the parties. The test is whether the restrictive covenant exceeds what is reasonable and necessary for the protection of the legitimate interest.
- The reasonableness of the restraint is determined at the date of entry into the agreement.
- A covenant against competition is reasonable if it protects the goodwill that was purchased.
- The question of whether the protection given to the covenantee is excessive can give rise to issues about the width of the activities that are restrained, the area or scope of the restraint and whether the duration of the restraint is unduly long. The principal protection afforded by such restraints is of goodwill in the form of connection with existing or potential customers.
- Provisions in a restrictive covenant may be severed if they are capable of being regarded as divisible and deleted without materially modifying the effect of what remains. In addition, the

parties may expressly provide that each obligation has independent operation and is severable.

- Courts will not rewrite the parties' contract for them. However, within certain limits which are not alleged to have been exceeded in this case, a contract may contain cascading restraint of trade clauses.

The issue of Dental Practice Restraint was discussed in *Dental Corporation Pty Ltd v Hungki (Mathew) Lee and Anor* [2016] NSWSC 1859 (at [48]-[53])

- Sources of goodwill in a medical and dental practice are the identity and standing of the practitioner and his associates, the business name under which the practice operates and the premises themselves which might be described as "personal goodwill," "name goodwill," and "site goodwill" [2]
- Accordingly, while the Court gives weight to the fact that the parties have agreed upon the terms of a restraint there must be sufficiently persuasive evidence that the protection of the covenant is no greater than is reasonably necessary between the parties.
- In discharging that onus, that party must do more than merely point to the existence of a bargain; it must justify the restraint by reference to the circumstances of the particular case.
- For example, where a restraint of trade covenant is obtained to protect the goodwill of a medical practice it will be relevant to know what is the type of practice conducted and what are the characteristics of the locality in which it is conducted.

Specifics as to the enforceability of restraints in employment agreements after a sale and the restraints as a result of the agreements for the sale are set out in the judgment of the Court in *Idameneo (No 123) Pty Ltd v Dr Teresa Angel-Honnibal* [2002] NSWSC 1214 at [80]-[86].

A broad discussion as to the particularity of the factual matrix considered in similar cases is set out also in the judgment of Justice Young in *Sidameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA 418 at [88]-[96].

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[2] or as Justice Young refers to Dog, Rabbit and Cat goodwill.