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Health Alert

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Restraints of trade

Restraint of trade clauses are common in both employment contracts and sale and purchase of business agreements. Unfortunately, so are claims that these clauses have been breached and subsequent disputes over the reach and application of these clauses.

The recent New South Wales Court of Appeal judgment of *Sidameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA 418 clarifies the law in relation to restraints of trade. In particular, the judgment confirms that the party seeking to enforce the restraint does not have to be involved in exactly the same "industry" and therefore directly in competition in all aspects of its business with the party allegedly in breach of the restraint. Rather, one part of the test as to whether there is a breach of the restraint is whether the enforcing party has an interest that it is legitimately trying to protect.

In this case, the appellant (formerly known as **Symbion**) purchased the business of the Wyong Medical Centre (**Centre**) from the four doctors who operated it. At the same time, Symbion entered into services agreements with those doctors such that the doctors would continue to render services at the Centre for five years, and Symbion would supply services to the Centre such as administration and billing, equipment and premises.

Relevantly, the services agreements contained a restraint of trade clause that the doctors would not practice within 3 kilometres of the Centre for one year following the termination of the services agreement.

Following the doctors' termination of the services agreements, they joined a rival practice which was located two kilometres from the Centre.

It was accepted by Justice Gzell in the Supreme Court that there was no valid restraint of trade because Symbion did not share any goodwill in the doctors' practices and there was therefore no legitimate interest for Symbion to protect.

However, on appeal, Justice Young found that there was a legitimate interest for Symbion to protect. His view (which was shared by the other judges) was that Symbion had acquired, and was entitled to protect, the goodwill of the Centre. He rejected the view that a restraint of trade was not enforceable if the parties are in different industries (in this case, the doctors in supplying medical services and Symbion in supplying administrative services to medical centres).

What interests are able to be protected?

Typically, the interests that are able to be protected are commercial information (which is likely to be confidential to the enforcing party) or customer connections (such as goodwill, customer lists or information).

Why is this decision important?

While not making new law, the decision clarifies that for a restraint of trade to be valid in protecting a legitimate interest, the relevant parties need not be in precisely the same industry, or performing the same services.

Why do I need to know?

If your employment contracts contain restraints, or you are selling or purchasing a business with sale contracts that include restraints, you should be aware of the law in this area.

Justice Young confirmed in *Sidameneo* that these types of cases are very fact-specific, and it is difficult to judge one case on cases that have gone before. Every situation will be different and will turn on its own facts, but restraint of trade cases that come before the courts broadly fall into

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two categories: where a departing employee is joining or has already joined a rival business, or where a business has been sold and the former owners or employees are setting up a rival business.

In both those scenarios, the party seeking to enforce the restraint has concerns that its confidential information will be misused, and/or that its legitimate interests will be attacked.

In seeking to enforce the restraint, the enforcing party must show that there is at the very least some sort of overlap in what the (new and old) businesses do, such that there is a valid interest to be protected.

What else do I need to know?

Healthscope, the competitor of Symbion that ran the rival practice to which the doctors defected in *Sidameneo*, was also sued by Symbion for tortious interference with contractual relations in employing the doctors. While the case was not made out against Healthscope, it is a warning to any party that is considering taking on employees who may still be under a restraint to independently investigate the extent of the restraint and whether it is likely to be effective.

Counter-intuitively however, it was the actual lack of knowledge by Healthscope about the doctors' contracts and the restraint periods that assisted in the finding that Healthscope did not tortiously interfere with the contracts between Symbion and the doctors.

Very often, by the time these types of matters come to trial, the purported restraint period has expired and the only remaining dispute is over any damages owing to the party seeking to enforce the restraint. This case sets out the difficulty of making out such damages, although it is to be noted that where there is a finding that a former employee has breached a restraint and has misused confidential information, it may be easier to make out a claim for damages.

Other recent relevant decisions

Restraints can be valid even if an employee has been made redundant (rather than being terminated or leaving voluntarily), although it is likely that this will weigh on the balance of convenience test and whether court will, in its discretion, enforce the restraint: *Ecolab Pty Limited v Stephen Garland* [2011] NSWSC 1095

The correct length for a restraint will often be considered by the length of a business's contracts: for example, if the usual term of contracts is three months that may be a valid length for the restraint: A*TF Services Pty Ltd v Ronald Chapman & Anor* [2011] NSWSC 1024

An undertaking proffered to the Court to cease to carry on, or be engaged with any enterprise or in competition with a business similar to the complaining party will not necessarily avoid a hearing in relation to the validity of the restraints: *Red Bull Australia Pty Ltd v Stacey* [2011] NSWSC 1212

A party seeking to enforce the restraint needs to be able to specifically identify the confidential information that a departing employee had access to and how that information might be able to be misused: *Think: Education Services Pty Ltd & ors v Lynch* [2011] NSWSC 984

If the party allegedly in breach obtained legal advice on entry into the agreement which contains the restraint clause, this may add weight to the likelihood of the restraint being enforced: *Seven Network (Operations) Ltd v Warburton* (No 2) [2011] NSWSC 386

An agreement in an employment contract to pay a salary during the restraint period may amount to consideration for the restraint: *HRX Holdings Pty Ltd v Pearson* [2012] FCA 161

Written by Sonya Parsons.

Sonya Parsons
Senior Associate
+61 2 8248 3409
sparsons@thomsonslawyers.com.au

A standard form village contract for NSW – Have your say

The NSW Government has committed to developing a standard contract for retirement villages. According to its website, the NSW Government says "the objective of developing a standard contract is to make it easier for residents to compare and understand the differences in costs and conditions between villages before entering into a contract".

The consultation draft standard village contract was released on Thursday 29 March 2012 and is now live on the Fair Trading website, click here.

The public consultation period ends on **Friday 18 May 2012**.

Written by Marc Wyld.

Marc Wyld
Senior Associate
+61 2 9020 5708
mwyld@thomsonslawyers.com.au

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What's new in the zoo for charities?

In recent editions of our Health Alert we have provided updates on all that is new and coming up for charities and the not-for-profit sector. In this edition, we have prepared a simple schedule to summarise the planned reforms in this sector.

Development Area	Timing
Charitable fundraising regulation reform • *Charitable fundraising regulation reform - Discussion paper and draft regulation impact statement*, was released in February 2012.	Submissions to the discussion paper are due 5 April 2012.
Australian Charities And Not-for-Profits Commission (ACNC) • *Consultation Paper – Review of not-for-profit governance arrangements*, was released on 8 December 2011. The Government sought comments on what the core organisational governance principles applying to registered NFPs should be. • Exposure draft legislation for the establishment of the ACNC was released on 9 December 2011. It seeks to establish the ACNC, set out the objects and functions of ACNC, and provide a regulatory framework for charities and the NFP sector. • The ACNC Implementation Taskforce Discussion Paper was released on 9 December 2011. It sought comments on the proposed design and implementation of the new reporting framework for charities that will be administered by ACNC. The discussion paper also describes the staged establishment of the ACNC public information portal and the educational role of the ACNC.	The ACNC will operate from 1 October 2012. It will determine charitable status, including public benevolent status, for all Commonwealth purposes, provide education and support to the sector, and administer a regulatory and reporting framework for the sector. The ACNC will implement a general reporting framework and a public information portal from 1 July 2013.
Public ancillary funds • *Public Ancillary Fund Guidelines 2011* were released in December 2011. The purpose of the Guidelines is to set minimum standards for the governance and conduct of a public ancillary fund and its trustee. • The law has also been amended in the area of public ancillary fund.	The Guidelines commenced on 1 January 2012. Each public ancillary fund should review its compliance with the Guidelines and the new law as soon as possible, and amend its trust deeds as required.
Taxing NFPs on commercial activities • *Consultation Paper: Better Targeting of NFP Tax Concessions* was released on 27 May 2011. The Government sought public views on possible approaches to implement the Government's Budget announcement to better target NFP tax concessions to the altruistic activities of NFPs.	The exposure draft legislation is expected in early 2012. The new legislation will apply from 1 July 2012 for certain commercial activities that commenced after 10 May 2011.
Statutory definition of charity • *Consultation Paper: Statutory definition of 'charity'* was released on 28 October 2011. The Government sought public views on possible approaches to introduce a statutory definition of charity, applicable across all Commonwealth laws.	The exposure draft legislation is expected in 2012. The new legislation will be effective from 1 July 2013.
Restating the 'in Australia' special conditions for tax concession entities • Exposure draft legislation was released on 4 July 2011 to restate the 'In Australia' special conditions for tax concession entities, by ensuring that income tax exempt entities generally must be operated principally in Australia and for the broad benefit of the Australian community; and deductible gift recipients generally must be operated solely in Australia and for the broad benefit of the Australian community.	The second exposure draft legislation is expected in early 2012.
Review of companies limited by guarantee • The Government is working on a consultation paper on its review of the company limited by guarantee structure, and its continuing appropriateness for NFP entities.	The consultation paper is expected in early 2012.

For further information or assistance in these areas, please contact Philip de Haan, Jim Baillie or Yat To Lee.

Philip de Haan
Partner
+61 2 9020 5703
pdehaan@thomsonslawyers.com.au

Jim Baillie
Special Counsel
+61 2 9020 5746
jbaillie@thomsonslawyers.com.au

Yat To Lee
Senior Associate
+61 2 9020 5742
ylee@thomsonslawyers.com.au

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New and improved Model By-Laws (Gazetted 1 March 2012)

Pursuant to section 39 and 60 of the *Health Services Act 1997* (NSW) (**Health Services Act**), a new set of Model By-Laws were gazetted on 1 March 2012 by Dr Mary Foley, Director-General (**Model By-Laws**). The Model By-Laws will replace the model by-laws gazetted on 30 June 2010 by Debora Picone, Director-General (**2010 By-Laws**).

The Model By-Laws apply to local health districts constituted under section 17 of the Health Services Act and speciality District Statutory Health Corporations established under Division 3 of Chapter 4 of the *Health Services Act*.

The *Health Services Amendment (Local Health Districts and Boards) Act* 2011, which was assented to in May 2011, established boards for local health districts and some of the amendments to the Model By-Laws are consequential to that change.

The key amendments to the Model By-Laws from the 2010 By-Laws are:

1. Making and Amendment of Model By-Laws

An entity proposing to make or amend its by-laws must obtain approval of its Board rather than the Chief Executive.

2. Meetings

The following changes have been made to the procedure for meetings:

- Where the Chair of the Medical Staff Executive Council (or the medical staff council) attends or is nominated to attend a meeting in his or her ex officio status, the Chair, may if not available, nominate an alternative member to attend in his or her place; and
- Only the members of the committee, subcommittee or council may vote at the meeting.

3. Committees

In the 2010 By-Laws, the Chief Executive was to establish and determine the members of the Committees. In the Model By-Laws, the Board plays a greater role, as follows:

- Board may appoint such committee members as they think fit, such members may also include a member of the Board;
- Board may remove any committee member as it thinks fit, subject to any corporate governance policy issue by the Ministry from time to time;
- A person may hold their office as a committee member for such period as the Board may determine; and
- The Committee must meet at such times as specified by the Board.

4. Peer Selection Process

The Model By-Laws prescribe a process for clinical staff to participate in the selection process for their professional grouping as follows:

- Junior medical officers will participate in the selection of the medical staff peer;
- Registered nurses, midwives, enrolled nurses or assistants in nursing will be eligible to participate in the selection of the nursing/midwifery staff peer; and
- Allied health professionals will be eligible to participate in the selection of the allied health staff peer.

5. Local Health District Clinical Council

Chief Executive is to establish a Local Health District Clinical Council to provide the Board and the Chief Executive with advice on clinical matters affecting the District. Membership is to be composed of a minimum of 9 members, including:

- Chief executive;
- Chair of the Medical Staff Executive Council or The Medical Council;
- At least one clinical member selected from the hospital clinical council; and
- Such other persons as the Board determines.

Click here for gazette.

Written by Sophie Parker.

Sophie Parker
Lawyer
+61 2 8248 3403
sparker@thomsonslawyers.com.au

Contract law made easy?

Contract Law provides the frame work within which we do business and it has a significant effect on business both large and small in terms of efficiency, time, cost and relationship management. Legal rules which apply to contracts are often hard to navigate for lawyers and non-lawyers alike.

Some of the major problems in the development of

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contract law in Australia is the many and varied influences throughout history as a result of Australia's colonial beginnings and the ever-present issues arising from being a federation where each state and territory and even the Commonwealth may have overlapping or disparate rules.

Attorney-General considers reform to Australian Contract Law

Reform of contract law was initially proposed more than 100 years ago before Australian Federation with no real progress. A new attempt at reform was launched on 22 March 2012, when the Attorney-General Nicola Roxon MP invited people and organisations across Australia to voice their views about the effectiveness or otherwise of Australia's contract law.

The invitation came by way of a discussion paper aimed at stimulating dialogue about the shortcomings and successes in Australian contract law and whether the law could be better suited to the needs of today.

Matters to consider

The drivers for reform point to what is a very complex system governing commercial relationships. Australian law is primarily governed by common law and equitable principles developed by judicial decisions in individual cases, but with legal principles supplemented and altered by various Commonwealth, State and Territory legislation. The interplay between the various contributors to contract law mean that a contracting party who is aware of the basic principles of contracting, may not be aware of the intricacies. By way of example, Australian contract law remains unclear about when evidence of the surrounding circumstances in which a contract was formed is permitted to assist in the interpretation of the written words of the contract. It is also unclear as to the extent to which parties are required to act in good faith when performing obligations under a contract.

Improvements in accessibility, certainty and the potential for harmonisation of laws would undoubtedly be particularly advantageous for smaller to medium sized businesses and not-for-profit entities as one would expect that in the long term such improvements would reduce 'red-tape' and the need for specialist advice.

Australia's contract laws are said to work well by international standards, however it will always be challenging for the law to keep up with technology and new and innovative methods of doing business, such as the increase in the number of transactions being conducted over the internet, and the development of a 'digital economy'.

Of particular note for larger business, is the Attorney-General's attention to promoting Australia in the international sphere so that Australia becomes an attractive place to conduct international business.

Options for change

The options for reform mooted in the discussion paper include; restatement of the current law in a single text; simplification to eliminate inconsistency between jurisdictions and abolishing rules which are outdated; or to embark upon a complete reform, which may include moving Australian contract law toward an international approach in line with international conventions.

If you have suggestions on how to improve the framework within which you and your business contract, and would like make a contribution, submissions are requested by no later than **Friday, 20 July 2012**. Click here to access a copy of the discussion paper or to find our more.

Written by Catherine Collogan.

Catherine Collogan
Senior Associate
+61 2 8248 5873
ccollogan@thomsonslawyers.com.au

When will eHealth record legislation be passed?

On 25 November 2011, on the recommendation of the Selection of Bills Committee, the Senate referred the provisions of the Personally Controlled Electronic Health Records Bill 2011 and the provisions of the Personally Controlled Electronic Health Records (Consequential Amendments) Bill 2011 to the Community Affairs Legislation Committee for inquiry and report by 29 February 2012. On 28 February the Senate extended the reporting date to 13 March 2012. The reporting date was again extended to 15 March and then 19 March 2012.

The report was tabled on 19 March 2012. With recommendations to review after two years of operation, the Community Affairs Legislation Committee has recommended that the Bills be passed – click here for the report.

Federal Parliament does not resume sitting until 8 May 2012 so further debate on these Bills will not occur until then.

Written by Ruth Hood.

Ruth Hood
Associate
+61 2 8248 3459
rhood@thomsonslawyers.com.au

Sydney
Melbourne
Brisbane
Adelaide

ThomsonsLawyers

For further information, please contact:

Lucinda Smith
Partner
+61 2 9020 5748
lsmith@thomsonslawyers.com.au

Jim Baillie
Special Counsel
+61 2 9020 5746
jbaillie@thomsonslawyers.com.au

Ken Ramsay
Consultant
+61 2 8248 3460
kramsay@thomsonslawyers.com.au

Kathie Sadler
Special Counsel
+61 7 3338 7515
ksadler@thomsonslawyers.com.au

Samantha Culshaw
Senior Associate
+61 2 9020 5712
sculshaw@thomsonslawyers.com.au

Marc Wyld
Senior Associate
+61 2 9020 5708
mwyld@thomsonslawyers.com.au

Ruth Hood
Associate
+61 2 8248 3459
rhood@thomsonslawyers.com.au

Sophie Parker
Lawyer
+61 2 8248 3403
sparker@thomsonslawyers.com.au

www.thomsonslawyers.com.au