

# IT BYTES

## ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

# ARE NON-POACHING CLAUSES ENFORCEABLE?



## WHEN DOES THIS QUESTION TEND TO ARISE?

A ‘non-poach’ clause is a contractual provision that seeks to restrain the hiring of one party’s employees by the other party to the contract. These clauses can occur in the context of two or more businesses agreeing to refrain from actively soliciting each other’s workers, and often extends for some time after the termination of the contract. Non-poaching clauses may appear as part of a services agreement, preventing one party from hiring the employees of the service provider.

While such clauses are relatively common, the law applying to their enforcement is complex.

## WHAT DOES THE LAW SAY?

Non-poaching clauses are subject to common law restraint of trade principles in nearly all states and territories. However, in New South Wales, non-poach clauses are subject to the *Restraints of Trade Act 1976* (NSW) (**‘NSW Restraints of Trade Act’**).

Under common law principles in all jurisdictions other than New South Wales, non-poaching clauses are unenforceable unless the restraint goes no further than is reasonably necessary to protect the relevant entity’s legitimate business interests. The Courts have applied a relatively high bar for demonstrating the existence of a legitimate business interest. The Courts also take an all or nothing approach so that, if any part of a **non-severable** non-poach clause is unreasonable, the clause is generally deemed to be void. As a result, complex drafting practices have emerged involving clauses formulated in a ‘cascading’ fashion, with the intention that a Court can strike out limbs of the clause which are deemed to be unreasonable, leaving behind a restraint of lesser scope which remains capable of being enforced. This requires a very technical approach to drafting in line with the legal principles, as the Court cannot re-write the restraint.

Unlike the common law approach, where non-poaching clauses are prima facie unenforceable, under the *NSW Restraints of Trade Act*, non-poach clauses are enforceable to the extent that they are not against public policy, even if the clause does not include severable terms (i.e the use of a ‘cascading’ or ‘waterfall’ drafting approach). Under s 4(1) of the *NSW Restraints of Trade Act*, the New South Wales Supreme Court can ‘read down’ elements of an otherwise unreasonable clause to make it reasonable, whereas in other jurisdictions the clause must be drafted in a cascading form to enable a Court to strike out the unreasonable aspects to allow the clause to be enforceable. Cascading provisions, when properly drafted, increase the prospect that at least part of the restraint will be enforceable.

The question of whether a non-poach clause can restrain two employers from poaching each other’s employees arose in the NSW case of *Quantum Service and Logistics Pty Ltd v Schenker Australia Pty Ltd* (**‘Quantum v Schenker’**).<sup>1</sup> Quantum and Schenker had entered into a services agreement under which Quantum agreed to provide services to a customer of Schenker. The agreement included a non-poach clause which stated that “neither party and their associated entities, sub-contractors or their employees will employ or approach for employment, the employees or ex-employees of the other party, during the term and until a minimum period of six (6) months following the termination of this agreement.” Approximately 6 months after the agreement was entered into, an employee of Quantum sought to accept employment at Schenker. Quantum sought an order to enforce the non-poaching provision and prevent Schenker from hiring this employee.

The NSW Supreme Court accepted that the restraint was prima facie invalid at common law. However, under the **NSW Restraints of Trade Act**, the Court found there was a prima facie case that the non-poaching clause was enforceable. The restraint was justified by the special circumstances of the commercial context, particularly Quantum’s vulnerable commercial position.<sup>2</sup> Other considerations relevant to establishing a legitimate business interest included the protection of confidential information, stability of the workforce and staff connection, especially where the employees were working in a secondment-like arrangement that made them more vulnerable to poaching. It was also relevant that the clause had been specifically inserted into the contract at Quantum’s request rather than being “boilerplate”. As a result, the employee was restrained from working for Schenker until a final hearing.

<sup>1</sup> [2019] NSWSC 2.  
<sup>2</sup> [2019] NSWSC 2, [164].



## WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

*Quantum v Schenker* demonstrates that a non-poach clause may be justified in some circumstances. However, caution should be exercised on a case-by-case basis to ensure that the restraint clearly identifies a legitimate business interest, the protections are reasonable to protect this interest, and the clause is not contrary to public interest considerations (e.g. by restricting competition).

When drafting a non-poaching clause, you should generally include:

- a. identification of the interest that you are seeking to protect;
- b. clear provisions setting out the operation of the restraint, outlining:
  - i. the time period in which it applies;
  - ii. the geographic scope to which it applies; and
  - iii. the subject matter to which it applies.

A non-poach clause can also be deemed unreasonable and therefore void if the scope of the time period, geographic area or subject matter is too broad, so care must be taken when drafting the clause.

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We would like to acknowledge the contribution of Cordella O’Loughlin to this article.

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