EMPLOYEE NON-COMPETE RESTRAINTS: RESOLVING UNCERTAINTY

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Employment contracts often restrain the employee from competing with their former employer after their employment ends. These restraints can have a serious impact on employees, as they inhibit their ability to earn a livelihood. According to the restraint of trade doctrine, such restraints are only enforceable if they provide 'reasonable' protection for a legitimate interest of the employer. In this article, we attempt to resolve several continuing legal issues and uncertainties in the enforcement of post-employment non-compete restraints, including the scope of the employer's legitimate interests, the relevance of the employee's interests, the requirements for severing unreasonable restraints, the enforceability of 'cascading' restraints, and others.

I INTRODUCTION

It is common for employment contracts to continue to restrain the employee's conduct after their employment ends.[1] These restraints can take several forms. Some restrain the employee from using or disclosing the employer's confidential information (confidentiality restraints). Others restrain the employee from soliciting the business of the employer's customers or clients (non-solicitation restraints) or from providing services to them entirely (non-dealing restraints). The employee might also be restrained from encouraging other employees to leave the employer to work elsewhere (non-recruitment restraints). The most severe form of restraint is a non-compete restraint, which restrains the employee from working for (or being otherwise involved in) a competing business.

The negative effects of non-compete restraints, on both individual employees and the economy more generally, have been increasingly recognised.[2] Such a

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1 There is not much evidence in Australia, but it has been estimated that between 27.8 and 46.5% of United States ('US') employees are subject to non-compete restraints: see Alexander JS Colvin and Heidi Shierholz, Economic Policy Institute, *Noncompete Agreements* (Report, 19 December 2019) 2.

2 The US Federal Trade Commission provided a comprehensive discussion of the literature in its recent Notice of Proposed Rulemaking: see Non-compete Clause Rule, 88 Fed Reg 3482, 3484–93, 3500–08 (19

restraint can prevent the employee from working in the only field in which they have any relevant skills or experience, hindering their ability to earn a living. For this reason, and spurred in particular by the revelation that non-compete restraints were being imposed on United States ('US') fast food workers,[3] a number of jurisdictions have even gone as far as prohibiting them (in whole or part), including several US states[4] and Ontario.[5] The US Federal Trade Commission has also proposed to ban employee non-compete restraints (and to require employers to rescind existing restraints),[6] and the United Kingdom ('UK') government held a consultation in early 2021 on the possibility of legislative intervention.[7] Most recently, the federal Assistant Minister for Competition, Charities and Treasury requested advice from the Australian Competition and Consumer Commission and Treasury on the competitive impact of non-compete restraints and possible government responses.[8]

As the law currently stands, however, the enforceability of employee non-compete restraints is regulated in all Australian jurisdictions by the common law restraint of trade doctrine.[9] The authoritative statement of that doctrine is in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* ('*Nordenfelt*'):

> All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. 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, so framed and so guarded as to afford adequate protection to the party

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January 2023) (to be codified at 16 CFR pt 910) ('Non-compete Clause Rule'). For a brief overview of the literature, see Hui Xian Chia and Ian Ramsay, 'Employment Restraints of Trade: An Empirical Study of Australian Court Judgments' (2016) 29(3) *Australian Journal of Labour Law* 283, 289–93.

3 Dave Jamieson, 'Jimmy John's Makes Low-Wage Workers Sign "Oppressive" Noncompete Agreements', *The Huffington Post* (online, 13 October 2014) <https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180?1413230622>.

4 California, for example, has a long-standing prohibition: see Cal Bus and Prof Code § 16600 (West 2023). Other states are following at a rapid rate, particularly in prohibiting their imposition on low wage workers: see Non-compete Clause Rule (n 2) 3494.

5 See *Working for Workers Act*, SO 2021, c 35, sch 2 item 4, inserting *Employment Standards*, SO 2000, c 41, s 67.1–2. There is an exception allowing non-compete restraints to be imposed on employees who are 'executives'.

6 See Non-compete Clause Rule (n 2).

7 Department of Business, Energy and Industrial Strategy, *Non-compete Clauses: Consultation on Measures to Reform Post-termination Non-compete Clauses in Contracts of Employment* (Consultation Paper, 2021). The reform options included prohibiting non-compete restraints or requiring the employer to continue to pay the employee's salary during the restraint period: 10–13.

8 Andrew Leigh, 'How Uncompetitive Markets Reduce Wages', *Treasury Ministers* (Opinion Piece, 23 March 2023) <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/articles/opinion-piece-how-uncompetitive-markets-reduce-wages>.

9 The exception is New South Wales, in which the common law has been partly modified by statute: see *Restraints of Trade Act 1976* (NSW). The restraint of trade doctrine also applies to other kinds of restraint, such as those imposed on the seller of a business, but arises most often in practice in the employee context: see Chia and Ramsay (n 2) 295–6. It is more difficult to show that an employee restraint is reasonable: see *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 701 (Lord Atkinson), 708–9, 713–14 (Lord Parker) ('*Herbert Morris*').

> in whose favour it is imposed, while at the same time it is in no way injurious to the public.[10]

In the substantial majority of cases, there is no suggestion of the restraint being unreasonable in the public interest, and the only issue is whether it is reasonable in the interests of the parties. Although the cases provide guidance about when non-compete restraints will be reasonable, ultimately '[a] decision upon the question of reasonableness depends upon a judgment the reasons for which do not admit of great elaboration'.[11]

The nature of the applicable test is such that there is a risk, which in our view has materialised, of inconsistency and uncertainty in the enforcement of post-employment non-compete restraints. This is likely to the detriment of employees, who generally have less access to legal advice than their employers to help them navigate (or exploit) the uncertainty.[12] While there are many valuable texts discussing the relevant law,[13] there are still several core issues that have not been dealt with satisfactorily, or that are simply unresolved. These relate to a wide range of matters including the scope of the employer's legitimate interests (particularly in confidential information), the relevance of the employee's interests, the extent to which lesser restraints are capable of protecting the employer, the weight to be attached to contractual acknowledgements of reasonableness, the permissible duration of non-compete restraints, the requirements for severing unreasonable restraints, and the enforceability of 'cascading' restraints. The purpose of this article is to address these issues. Although some of our claims apply to other kinds of restraints, non-compete restraints will be the focal point.

A discussion of the common law might at first glance seem somewhat behind the times, given the move towards legislative reform in other jurisdictions. Judges, given the institutional limits of their role, might not find it possible to consider many of the detailed policy issues[14] relating to the connection between labour mobility, innovation, and the performance of the economy more broadly, especially in the context of the shift towards a knowledge-based economy.[15] Technological

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10 [1894] AC 535, 565 (Lord Macnaghten) ('*Nordenfelt*').

11 *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 308 (Walsh J) ('*Amoco*').

12 See Christopher Arup et al, 'Restraints of Trade: The Legal Practice' (2013) 36(1) *University of New South Wales Law Journal* 1.

13 The most comprehensive is JD Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 4th ed, 2018), but other useful sources that touch on a number of distinct issues include Harlan M Blake, 'Employee Agreements Not to Compete' (1960) 73(4) *Harvard Law Review* 625 <https://doi.org/10.2307/1338051>; Stephen A Smith, 'Reconstructing Restraint of Trade' (1995) 15(4) *Oxford Journal of Legal Studies* 565 <https://doi.org/10.1093/ojls/15.4.565>; Adrian Brooks, 'The Limits of Competition: Restraint of Trade in the Context of Employment Contracts' (2001) 24(2) *University of New South Wales Law Journal* 346; Rob Jackson, *Post-employment Restraint of Trade: The Competing Interests of an Ex-employee, an Ex-employer and the Public Good* (Federation Press, 2014); Ian Neil and Nicholas Saady, 'The Reasonableness of Restraints: An Analysis of the Enforcement of Post-employment Restraints' (2018) 46(2) *Australian Business Law Review* 99.

14 Judges have nevertheless played an important role in shaping the enforceability of non-compete restraints: see Frank Carrigan and Peter Radan, 'The Post-employment Restraint of Trade Doctrine: A Critical History' (2020) 31(1) *King's Law Journal* 121 <https://doi.org/10.1080/09615768.2020.1741157>.

15 Non-compete Clause Rule (n 2) 3492; Chia and Ramsay (n 2) 291.

and other developments have also fundamentally altered business and employment practices compared to a century ago, when many of the leading cases that define the common law were decided. The simple reason for focusing on the common law is that it is still the law, and the importance of properly understanding it is (if anything) heightened if the passage of time is indeed testing its limits. Whether Australia should follow the legislative reforms in other jurisdictions is an important but entirely separate question.[16]

II REASONABLENESS GENERALLY

Before turning to specific issues, we will provide a general outline of the relevant law. According to the statement in *Nordenfelt* (extracted in Part I), to be reasonable in the interests of the parties, a restraint must be 'so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed', in this case the employer. As Lord Atkinson later clarified in *Herbert Morris Ltd v Saxelby* ('*Herbert Morris*'), this test will be satisfied '[i]f the restraint affords to the person in whose favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against'.[17] An employer has at least two legitimate interests that they are entitled to protect,[18] namely, their confidential information and customer connections:

> [The employer] is undoubtedly entitled to have his interest in his trade secrets protected, such as secret processes of manufacture which may be of vast value. And that protection may be secured by restraining the employee from divulging those secrets or putting them to his own use. He is also entitled not to have his old customers by solicitation or such other means enticed away from him. But freedom from all competition per se apart from both these things, however lucrative it might be to him, he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee.[19]

As this indicates, an employer can (attempt to) protect their confidential information by simply restraining the employee from using or disclosing it. However, the employer might also be entitled to protect it by imposing a non-compete restraint. As Lord Denning MR explained in *Littlewoods Organisation v Harris* ('*Littlewoods*'):

> [E]xperience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not: and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only

16 Various reform options are mentioned in Arup et al (n 12) 26–9; Jackson (n 13) ch 9. The existing common law nevertheless has defenders: see Neil and Saady (n 13).

17 *Herbert Morris* (n 9) 700.

18 Although in most cases these (and the third interest discussed below) are the only relevant legitimate interests, other legitimate interests have been recognised in specific contexts: see, eg, *Buckley v Tutty* (1971) 125 CLR 353, 377 (Barwick CJ, McTiernan, Windeyer, Owen and Gibbs JJ); *De Belin v Australian Rugby League Commission Ltd* [2019] FCA 688, [238]–[244] (Perry J) (discussing the legitimate interests of sporting leagues).

19 *Herbert Morris* (n 9) 702 (Lord Atkinson).

> practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade.[20]

The employer's ability to use non-compete restraints in this way is not unlimited. The employee cannot be restrained entirely from working for competitors of the employer, only from working in a role that involves competition with the employer's business and to which the confidential information is relevant.[21]

The employer is also entitled to protect its connection with its customers.[22] A restraint can be imposed on this basis if the employee, during their employment, is able to obtain 'personal knowledge of and influence over the customers of his employer',[23] usually because of the employee's 'close and personal contact' with them.[24] Again, while this interest can be protected directly by restraining the employee from soliciting the business of those customers,[25] it can also support more onerous restraints. The employer can sometimes restrain the employee from providing services to those customers entirely, if the employee's connection with the customers is such that they might voluntarily seek the employee's services without solicitation.[26] The employer can also impose a non-compete restraint, again due to the difficulty of detecting and proving a breach of lesser restraints.[27]

More recently, a third legitimate interest has been recognised, being the employer's interest in their 'staff connection – that is, in maintaining a stable trained workforce'.[28] This interest can justify a restraint on an employee encouraging other employees (over whom they have influence) to leave and work for another business,[29] and sometimes a restraint on even accepting unsolicited

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20 *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1479 ('*Littlewoods*').

21 See, eg, *Cadgroup Australia Pty Ltd v Snowball* [2016] NSWSC 22, [33] (Black J) ('*Cadgroup*'); *Just Group Ltd v Peck* (2016) 264 IR 425, 446–8 [48]–[55] (Beach and Ferguson JJA, Riordan AJA) ('*Just Group Appeal*'); *JMB (NSW) Pty Ltd v West* [2020] NSWSC 1380, [67]–[70] (Parker J) ('*JMB*'); *Shire Real Estate Pty Ltd v Kersten* [2021] NSWSC 1255, [23]–[33], [46] (Parker J) ('*Shire Real Estate*').

22 It can also protect its connection with *potential* customers, if the requirements discussed in the text are satisfied: see *Emeco International Pty Ltd v O'Shea [No 2]* (2012) 225 IR 423, 457 [183] (Edelman J) ('*Emeco*'). It can also protect its interest in potential customers in other specific circumstances: see, eg, *Pearson v HRX Holdings Pty Ltd* (2012) 205 FCR 187, 202 [59] (Keane CJ, Foster and Griffiths JJ) ('*Pearson*').

23 *Herbert Morris* (n 9) 709 (Lord Parker). For a useful discussion of the circumstances in which an employer has a legitimate interest in their customer connection, see *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657, 663–5 [20]–[29] (Warren CJ and Davies AJA) ('*Wallis*').

24 *Lindner v Murdock's Garage* (1950) 83 CLR 628, 636 (Latham CJ) ('*Lindner*'). See also 633 (Latham CJ), 650 (Fullagar J). However, an employee can sometimes have influence over customers with whom they had no contact: see *Emeco* (n 22) 458–9 [188]–[193] (Edelman J).

25 The restraint can only prevent solicitation of customers that the employee has knowledge of or influence over: see *Lindner* (n 24) 633–5 (Latham CJ); *Emeco* (n 22) 459–61 [196]–[208] (Edelman J).

26 *Koops Martin Financial Services Pty Ltd v Reeves* [2006] NSWSC 449, [84] (Brereton J) ('*Koops Martin*'); *Wallis* (n 23) 669 [52] (Warren CJ and Davies AJA); *Crowe Howarth (Aust) Pty Ltd v Loone* (2017) 266 IR 290, 297 [11] (McDonald J); *Dundoen Pty Ltd v Richard Wills (Real Estate) Pty Ltd* [2020] NSWSC 1534, [154] (Sackar J) ('*Dundoen Trial*'). Cf *Hanna v OAMPS Insurance Brokers Ltd* (2010) 202 IR 420, 430 [34] (Allsop P) ('*Hanna*'): 'It was not necessary for the clause to limit dealing only to clients with whom [the employee] had a strong connection.'

27 *Lindner* (n 24) 637 (Latham CJ), 655–6 (Kitto J).

28 *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9, 26–7 [55] (Brereton J) ('*Cactus Imaging*'); *Quantum Service and Logistics Pty Ltd v Schenker Australia Pty Ltd* [2019] NSWSC 2, [53] (Robb J).

29 *Cactus Imaging* (n 28) 26–7 [55]–[56] (Brereton J).

offers of employment from such employees, if they are likely to want to follow the employee voluntarily.[30]

Nevertheless, a restraint of any kind will only be reasonable if, on the facts within the parties' reasonable contemplation at the time of entering the contract, the restraint goes no further than is reasonably necessary to protect one or more of these legitimate interests, having regard to the precise activities it restrains, the geographical area in which it restrains them, and the duration of the restraint.[31] Even if a restraint is reasonable at the time of entering the contract, the court has discretion not to enforce it by injunction if it would operate unreasonably in the actual circumstances existing at the date of hearing.[32] An employer will also be prevented from enforcing a contractual restraint if the employment contract is repudiated by the employer.[33]

III SPECIFIC ISSUES

Although the principles for determining the reasonableness of a non-compete restraint are clear at a general level, there is still significant uncertainty at the level of application. In this Part, we address a number of inconsistencies and unresolved issues.

A Interests of Employee

The first (and overarching) issue is the extent to which the employee's interests are relevant to the reasonableness of a restraint. There is a significant body of law to the effect that the employee's interests should not be directly considered. Rather, whether a restraint is reasonable is a question only of whether it is necessary to protect a legitimate interest of the employer. This would be particularly significant in relation to non-compete restraints, given the increased burden they impose on the employee compared to other restraints. Any marginal benefit of the restraint to the employer would be sufficient to justify it, no matter the cost to the employee.

Such an approach can be traced at least to *Hitchcock v Coker* ('*Hitchcock*'),[34] and perhaps earlier. In the landmark case of *Mitchel v Reynolds*, Parker CJ decided that a voluntary (particular) restraint of trade would only be enforced if '[it] appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract', although this was contrasted only with restraints made 'without consideration'.[35] As Tindal CJ later clarified in *Hitchcock*, 'adequate' consideration

30 *Pryse v Clark* (2017) 264 IR 451, 469–70 [74]–[77] (McDougall J) ('*Pryse*').

31 *Lindner* (n 24) 638 (Latham CJ), 647–8 (Webb J), 650–2 (Fullagar J), 653 (Kitto J).

32 See *Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414, 439–44 [88]–[107] (Brereton J) ('*Tullett Prebon*').

33 See *Crowe Howarth (Aust) Pty Ltd v Loone* (2017) 54 VR 517, 568–85 [193]–[271] (Ashley, Priest and Beach JJA).

34 (1837) 112 ER 167 ('*Hitchcock*').

35 (1711) 24 ER 347, 349. As Heydon points out, '[t]he judgment contains material for a confusion between consideration in the sense of the requirement for technical validity of a contract, and consideration in the sense of a reasonable ground for being bound': Heydon (n 13) 16 n 105.

in this context refers only to 'such consideration as is essential to support any contract not under seal'.[36] If such consideration is present, a restraint will only be unenforceable if it is 'larger and wider than the protection of the [employer] can possibly require'.[37] An alternative approach, on which 'the Court must weigh whether the consideration is equal in value to that which the [employee] gives up or loses by the restraint', was rejected on the basis that '[i]t is impossible for the Court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not'.[38] The *Nordenfelt* test reflects Tindal CJ's approach, in that reasonableness between the parties turns only on whether the restraint is 'so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed'.[39] Lord Macnaghten justified this on the basis that 'the parties themselves [are] better judges' of the adequacy of the consideration.[40]

This approach was followed in early decisions of the High Court. In *Brightman v Lamson Paragon Ltd* ('*Brightman*'),[41] an employee argued that a non-compete restraint was unreasonable because it infringed his power to earn a livelihood. This argument was rejected. As Isaacs J explained, the law does protect the employee's interests, but only to the extent of rendering unenforceable a restraint that is not necessary to protect a legitimate interest of the employer. That rule represents the 'frontier line, so to speak, dividing the interests which the law preserves for both parties'.[42]

In *Herbert Morris*, Lord Parker provided a more ambitious defence, suggesting that it is actually 'in his interest' for restraints to be enforceable against an employee:

> [T]hough in one sense no doubt it is contrary to the interests of the covenantor [employee] to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so, he would lose other advantages, such as … the possibility of obtaining employment or training under competent employers.[43]

The approach on which the court weighs the advantages of the contract to the employee against the disadvantages was said to have 'long since been rejected as impracticable'.[44] More recently, McDougall J in *Stacks Taree v Marshall [No 2]* ('*Stacks Taree*'), stated that 'the validity of a restraint does not depend on its impact on the person restrained'.[45] Heydon also endorses the approach in the leading Australian text,[46] as does Smith.[47]

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36 *Hitchcock* (n 34) 174.
37 Ibid 173.
38 Ibid 175.
39 *Nordenfelt* (n 10) 565 (Lord Macnaghten).
40 Ibid.
41 (1914) 18 CLR 331 ('*Brightman*').
42 Ibid 337 (Isaacs J).
43 *Herbert Morris* (n 9) 707.
44 Ibid.
45 [2010] NSWSC 77, [129] ('*Stacks Taree*').
46 Heydon (n 13) 195–9.
47 Smith (n 13) 587–91.

This view of the law has been strongly criticised by some later courts. In *Goldsoll v Goldman*,[48] Neville J went as far as to suggest that 'the whole of the law in this particular matter is a blot upon what I consider in other respects an admirable system of jurisprudence', and that '[d]uring my connection with the law I have seen more undeserved suffering inflicted by this branch of it than by all the rest put together'.[49]

In any event, any blanket rule that regard must only be had to the legitimate interests of the employer (covenantee) has arguably been rejected by the High Court in *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* ('*Amoco*').[50] Gibbs J held that 'it is permissible, in asking whether a restraint is reasonable in the interests of the parties, to consider … the quantum of consideration received by the covenantor and the effect of the agreement on the position of the covenantor'.[51] On his understanding, the rule that the court does not inquire into the adequacy of consideration only means that 'the court may not weigh whether the consideration is *equal* in value to that which the covenantor gives up or loses by the restraint'.[52] Similarly, Walsh J (McTiernan ACJ agreeing) held that 'the quantum of the benefit which the covenantor receives may be taken into account in determining whether the restraint does or does not go beyond adequate protection for the interests of the covenantee'.[53] Although *Amoco* did not involve an employee, if the interests of the covenantor can be considered in other contexts, there is no reason (at least in principle) why they cannot be considered in the employment context.

Rob Jackson interprets the statements in *Amoco* in a similar way.[54] On the other hand, Heydon suggests that they should not be interpreted as acknowledging that the employee's interests are (directly) relevant, but instead as reflecting the premise that 'the more the covenantee gives, the wider the interest to be protected, and the greater the restraint that may be imposed'.[55] While it is true that providing more consideration can sometimes expand the covenantee's legitimate interests (eg, if the legitimate interest is to recoup an investment), this is clearly not always true. It is well established that a promise not to compete is not enforceable merely because the covenantee provided consideration.[56] Further, both Gibbs J and Walsh J in *Amoco* regarded it as relevant to the reasonableness of the restraint that it had the potential to impose an unreasonable burden on the covenantor in certain

48 [1914] 2 Ch 603.
49 Ibid 612.
50 *Amoco* (n 11).
51 Ibid 316.
52 Ibid (emphasis added).
53 Ibid 306.
54 Jackson (n 13) 18–20, although he only refers to the statements of Gibbs J.
55 Heydon (n 13) 197.
56 See *Furs Ltd v Tomkies* (1936) 54 CLR 583, 599 (Rich, Dixon and Evatt JJ): '[A] covenant [restraining competition] is allowable for the purpose only of protecting interests which are exposed to a risk of injury through taking a servant into an employment and thus giving him an opportunity of obtaining skill and experience which may be turned to the employer's disadvantage. It cannot simply be bought'. See also *Vancouver Malt and Sake Brewing v Vancouver Breweries* [1934] AC 181, 190 (Lord Macmillan for the Court).

circumstances.[57] This has nothing to do with the consideration provided by the covenantee or the scope of their legitimate interests, and focuses solely on the unreasonable effect of the restraint on the covenantor.

Alternatively, Heydon suggests that the statements reflect the premise that '[a] restraint which is sharply adverse to the covenantor will call for more justification (that is, for a wider interest) than a less onerous restraint'.[58] This is also not correct, if the employee's interests are not themselves relevant; what calls for the justification is the width of the restraint, which is not necessarily equivalent to its effect on the employee's interests. Therefore, these interpretations cannot explain the statements in *Amoco*.

Heydon also argues that taking the employee's interests into account has no historical basis.[59] This is not entirely correct. The statement of principle in *Nordenfelt* clearly recognises that the restraint must be reasonable in the interests of the *parties*.[60] The arguments in *Brightman* and *Herbert Morris* against having explicit regard to the employee's interests recognise the relevance of those interests in principle, and only suggest that the restraint of trade doctrine already reflects an appropriate balance between the interests of employees and employers. If the balance reflected in the doctrine's specific content at any time is regarded as inappropriate, reformulating it to reflect a more appropriate balance is therefore perfectly consistent with (and potentially even required by) the doctrine at a more general level.

In any event, the recent authority in favour of taking direct account of the employee's interests is overwhelming. A unanimous UK Supreme Court recently indicated that it 'appears' to be a requirement of reasonableness between the parties that 'the restriction is commensurate with the benefits secured to the promisor under the contract',[61] although it did not conclusively decide the issue. Many recent Australian cases also take the employee's interests into account.[62] An important factor is whether the employee receives an adequate financial benefit under their employment contract, with courts considering the employee's remuneration,[63] whether the employee receives additional benefits in return for the restraint,[64] and whether the employer is required to continue paying the employee's salary during the restraint period.[65] Courts also consider whether the restraint leaves

57 *Amoco* (n 11) 301 (Walsh J), 320 (Gibbs J).

58 Heydon (n 13) 197.

59 Ibid 196.

60 See also *Herbert Morris* (n 9) 700 (Lord Atkinson); *Attwood v Lamont* [1920] 3 KB 571, 589 (Younger LJ) ('*Attwood*').

61 *Harcus Sinclair LLP v Your Lawyers Ltd* [2022] AC 1271, 1290 [48] (Lords Briggs, Hamblen and Burrows JJSC) ('*Harcus Sinclair*').

62 See also Jackson (n 13) 18–20.

63 *Emeco* (n 22) 455, [166] (Edelman J); *Steadfast ICT Security Pty Ltd v Peak* [2021] ACTSC 199, [278] (Mossop J); *Emission Assessments Pty Ltd v Jackson* [2022] WASC 60, [58] (Solomon J).

64 *Pearson* (n 22) 203 [63] (Keane CJ, Foster and Griffiths JJ); *Hotwork Australia Pty Ltd v Tomkins* [2020] NSWSC 494, [90] (Henry J) ('*Hotwork*'); *GBAR (Australia) Pty Ltd v Brown* (2020) 293 IR 322, 340 [112] (Bradley J) ('*GBAR*').

65 *Pearson* (n 22) 203 [63] (Keane CJ, Foster and Griffiths JJ); *BGC Partners (Australia) Pty Ltd v Hickey* (2016) 259 IR 318, 333 [105] (Stevenson J) ('*BGC Partners*'); *Hotwork* (n 64) [90] (Henry J); *JMB* (n

the employee with reasonable alternative employment opportunities,[66] whether it prevents them from using their only knowledge and experience,[67] or from earning a living,[68] and whether having time out of the relevant industry (during the restraint period) would affect their future employability or remuneration.[69] It has also been suggested that employees have a 'strong interest in a stable and reasonably predictable financial future'[70] and are 'entitled … to work in stimulating and remunerative employment'.[71]

Some courts have suggested that the employee's interests can be taken into account when deciding whether to refuse an injunction on discretionary grounds,[72] including when considering the 'balance of convenience' at the interlocutory stage.[73] We do not object to this as a method of accounting for unforeseen events, as long as it is recognised that employees' interests are still directly relevant when determining the reasonableness of the restraint in the first place. This is especially important given the suggestion that only 'exceptional or compelling reasons' will permit the court to decline an injunction on discretionary grounds.[74] Employees would therefore likely suffer if their interests were left to the remedy stage.

B Lesser Restraints

An issue that has arisen frequently in recent cases is whether a non-compete restraint is unreasonable because the employee is also subject to some lesser restraint that also protects the employer's legitimate interests. It is clear that a non-compete restraint will not be enforceable if lesser restraints provide adequate protection,[75] but it remains uncertain precisely when their protection will be regarded as adequate. When the relevant interest is customer connection, the issue is usually whether a non-solicitation or non-dealing restraint provides adequate protection. For confidential information, it is whether a restraint on using or disclosing the information provides such protection.[76]

It is often implied that the question only arises when the employee is actually subject to some lesser restraint. In *Stenhouse Australia Ltd v Phillips* ('*Stenhouse*'),

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21) [73] (Parker J); *Harden v Willis Australia Group Services Pty Ltd* [2021] NSWSC 939, [483] (Sackar J) ('*Harden*'). See also *DP World Sydney Ltd v Guy* [2016] NSWSC 1072, [65] (White J) ('*DP World*'). Cf *International Cleaning Services (Australia) Pty Ltd v Dmytrenko* [2020] SASC 222, [55] (Stanley J) ('*International Cleaning*').

66 *Emeco* (n 22) 456–7 [176]–[177] (Edelman J).

67 *Popham Holdings Pty Ltd v Franklin* [2016] VSC 597, [99] (Elliott J).

68 *Auto Parts Group Pty Ltd v Cooper* [2015] QSC 155, [64] (Bond J).

69 *Tullett Prebon* (n 32) 434 [71] (Brereton J).

70 *SAI Global Property Division Pty Ltd v Jones* [2018] NSWSC 438, [135] (Slattery J) ('*SAI Global*'); *Verint Systems (Australia) Pty Ltd v Sutherland* [2019] NSWSC 882, [89] (Slattery J) ('*Verint*').

71 *Harden* (n 65) [485] (Sackar J).

72 See, eg, *Tullett Prebon* (n 32) 443–4 [105] (Brereton J).

73 See, eg, *Pryse* (n 30) 473–6 [102]–[123] (McDougall J); *HiTech Group Australia Pty Ltd v Riachi* [2021] NSWSC 1212, [49] (Ward CJ in Eq) ('*HiTech*').

74 *Tullett Prebon* (n 32) 439–40 [88] (Brereton J).

75 *Stenhouse Australia Ltd v Phillips* [1974] AC 391, 403 (Lord Wilberforce for the Court) ('*Stenhouse*'); Jackson (n 13) 61–2; Heydon (n 13) 165.

76 Although a non-solicitation restraint can protect the employer's confidential client information: see *Cactus Imaging* (n 28) 20 [34] (Brereton J).

the Privy Council argued that '[t]he presence of one restraint diminishes the need for others, or at least increases the burden of those who must justify those others'.[77] In *Stacks Taree*, referring to *Stenhouse*, McDougall J held that 'where an agreement contains both a non-solicitation clause and a covenant not to compete, the reasonableness of the latter must be assessed by reference to the adequacy of the protection … offered by the former'.[78] Whether other restraints are actually present might be important in some cases,[79] but in most cases it should not matter. If a non-solicitation restraint, for example, *could* have protected the employee's legitimate interests, this surely demonstrates that a non-compete restraint goes further than reasonably necessary, regardless of whether the employee is actually subject to a non-solicitation restraint.

Unfortunately, the cases and commentary provide almost no guidance about how to approach this issue, and the reasoning in some cases is not entirely satisfactory. In *Pryse v Clark* ('*Pryse*'), for example, McDougall J suggested that the lesser restraints, including non-solicitation, non-dealing and non-recruitment restraints,[80] 'constitute a carefully drafted, wide-ranging scheme of protection for the identified interests', and 'are capable of functioning perfectly well without the additional restrictions' on competition.[81] This is perhaps true, but there are many cases involving a similar scheme of restraints in which a non-compete restraint was regarded as reasonable. Many employment contracts containing non-compete restraints also contain a range of lesser restraints, and it is not clear what distinguishes *Pryse* from these other situations.

In *Shire Real Estate Pty Ltd v Kersten*, an interlocutory decision, one reason that Parker J gave against the reasonableness of a non-compete restraint was that the employees had given undertakings to the Court to comply with their confidentiality and non-solicitation restraints 'with full knowledge that if they do not comply with them, they may be severely punished for contempt'.[82] Other cases rely on similar reasoning, at both the interlocutory and final stage.[83] Again, this cannot be a sufficient reason on its own, since in many cases in which non-compete restraints are enforced, the court also awards an injunction to enforce lesser restraints, and the possibility of being punished for breaching this injunction is clearly not regarded as sufficient to negate the need for a non-compete restraint.

One reason mentioned in *Pearson v HRX Holdings Pty Ltd* ('*Pearson*') for why a non-compete restraint was reasonable was that a non-solicitation restraint would not protect against a customer seeking the employee's services voluntarily.[84] This is true, but the purpose of non-dealing restraints is to deal with this precise

77 *Stenhouse* (n 75) 403 (Lord Wilberforce for the Court).
78 *Stacks Taree* (n 45) [63].
79 See David Thorpe, 'The Use of Multiple Restraints of Trade in Sport and the Question of Reasonableness' (2012) 7(1) *Australian and New Zealand Sports Law Journal* 63.
80 See *Pryse* (n 30) 457–62 [25].
81 Ibid 471 [89]. See generally at 471 [87]–[92], 475–6 [120]–[122].
82 *Shire Real Estate* (n 21) [48]–[49].
83 *SAI Global* (n 70) [126] (Slattery J); *International Cleaning* (n 65) [51] (Stanley J); *HiTech* (n 73) [114] (Ward CJ in Eq).
84 *Pearson* (n 22) 200 [51] (Keane CJ, Foster and Griffiths JJ).

issue. In another case, however, a non-dealing restraint was not even regarded as sufficient for this purpose, since '[t]he mere presence of the [employee] at [the competitor] may be sufficient to attract the [employer's] customers'.[85] This argument is unconvincing; it is likely quite rare that customers would move to a competitor merely because of the employee's presence, if they are not having dealings with that employee.

A stronger reason, mentioned earlier, is that it is more difficult to detect and prove a breach of the usual lesser restraints.[86] It is far easier to prove, for example, that an employee is working for a competitor, than to prove that they solicited the business of the employer's customers, or had dealings with them. While this is an important consideration, it clearly cannot be conclusive on its own, as many decisions have regarded lesser restraints as adequate despite any difficulties of proof. And as Joellen Riley points out (discussing confidential information specifically), while the argument 'makes some common sense, [it] becomes oppressive when it favours the former employer's desire for a guarantee against possible leakage of some marginally valuable information, over the interest of the ex-employee in pursuing their chosen profession'.[87]

The premise of Riley's argument is that to decide whether a non-compete restraint is reasonable, courts should consider the additional benefit that the non-compete restraint gives the employer (in terms of preventing harm to its legitimate interests), and whether this additional benefit is sufficient to justify the additional harm to the employee's interests. This is consistent with the general principle, mentioned in Part III(A), that the employee's interests should be considered in deciding reasonableness.

Such an approach is arguably inchoate in the case law. On this approach, to determine the benefit of a non-compete restraint to the employer, it is necessary to consider both the *likelihood* and *extent* of harm to their interests. The argument that breaches of lesser restraints are more difficult to prove can be understood as concerned with the likelihood of harm. The greater ease of enforcing a non-compete restraint makes it is more likely to be effective in preventing the employee from using confidential information or customer connections. The fact, also mentioned in *Littlewoods*,[88] that it is difficult to distinguish confidential and non-confidential information creates an increased risk of inadvertent use or disclosure if the employer is permitted to work in competition with the employer. These arguments

85 *International Cleaning* (n 65) [57] (Stanley J).

86 See, eg, *Miles v Genesys Wealth Advisors Ltd* (2009) 201 IR 1, 22–3 [58]–[61] (Handley AJA) ('*Miles*'); *Pearson* (n 22) 200–1 [51]–[54] (Keane CJ, Foster and Griffiths JJ); *DP World* (n 65) [60]–[63]; *UP Australia Pty Ltd v McDonald* [2018] NSWSC 218, [47]–[49], [65] (Slattery J) ('*UP Australia*'); *Dundoen Pty Ltd v Richard Wills (Real Estate) Pty Ltd* [2020] NSWSC 15, [111]–[112] (Henry J) ('*Dundoen Interlocutory Application*'); *Dundoen Trial* (n 26) [154] (Sackar J). The argument in *Pearson* (n 22) at 202 [59]–[60] (Keane CJ, Foster and Griffiths JJ) can also be interpreted as concerning difficulty of proof.

87 Joellen Riley, 'Sterilising Talent: A Critical Assessment of Injunctions Enforcing Negative Covenants' (2012) 34(4) *Sydney Law Review* 617, 631–2.

88 *Littlewoods* (n 20) 1479 (Lord Denning MR).

are relevant and important, but are not themselves conclusive, since they only go to the likelihood of harm to the employer if the employee is allowed to compete.

A number of other cases can also be interpreted as considering how likely it is that the employee will use or disclose the confidential information if permitted to compete,[89] or that customers will be influenced to use or seek the employee's services.[90] In *Stacks Taree*, one reason for rejecting a non-compete restraint was that the clients had a stronger connection with the employer than the employee,[91] meaning that they were unlikely to seek the employee's services. In *Verint Systems (Australia) Pty Ltd v Sutherland*, Slattery J referred to the employee's limited contact with customers,[92] which indicates that the employee was less likely to have influence over them. In both cases, the Court's argument seems to be that harm to the employer's legitimate interests would be unlikely if the employee were permitted to compete. The fact that an employee makes an undertaking not to breach any lesser restraints is also relevant for the same reason. In *Stacks Taree*,[93] the fact that the employer was a solicitor further reinforced this argument, as it made it even more unlikely that he would breach his non-solicitation undertaking, meaning that a non-compete restraint was unlikely to provide any additional protection.

Turning to the *extent* of harm, in justifying the addition of a non-compete restraint, a number of cases refer to the significance of the confidential information obtained by the employee, or the significance of the customers with whom the employee has a connection. This is arguably the meaning of Edelman J's references in *Emeco International Pty Ltd v O'Shea [No 2]* to the 'confidentiality of information' and the 'extent of [the employer's] customer connection interest' to justify an additional non-compete restraint.[94] If the extent of the harm to the employer would be greater, this points in favour of the reasonableness of an additional non-compete restraint, which is more likely to be effective in preventing this harm than lesser restraints.

As mentioned, however, it is also necessary to consider the disadvantages of a non-compete restraint to the employee. In *JMB (NSW) Pty Ltd v West*, for example, Parker J regarded it as a reason against an additional non-compete restraint that it would prevent the employee from dealing with customers he had never had contact with, and even individuals who were never customers of his employer at all.[95] This implicitly recognises that a non-compete restraint is only reasonable if the additional harm to the employee is justified by the additional benefit to the employer.

89 *UP Australia* (n 86) [64] (Slattery J); *Dundoen Interlocutory Application* (n 86) [115] (Henry J).
90 *Dundoen Trial* (n 26) [154] (Sackar J).
91 *Stacks Taree* (n 45) [120] (McDougall J).
92 *Verint* (n 70) [72]–[75].
93 *Stacks Taree* (n 45) [121] (McDougall J).
94 *Emeco* (n 22) 457 [180]. See also 455–6 [167]–[171], 456 [175].
95 *JMB* (n 21) [65]–[66].

C Severance

Severance allows the reasonableness of a restraint to be preserved by removing parts that are unreasonable. For a restraint to be reasonable, it is not sufficient that it operates reasonably on the facts before the court; it must also be reasonable in all possible circumstances to which the parties contemplated that it would apply, or could have applied.[96] If a restraint could operate unreasonably in some circumstances, it cannot be enforced at all unless the unreasonable part can be severed from the reasonable part. The only exception is New South Wales ('NSW'), in which section 4(1) of the *Restraints of Trade Act 1976* (NSW) ('NSW Act') allows any restraint to be enforced to the extent that it is reasonable,[97] although as we discuss below, section 4(3) (at least in theory) brings the overall effect of the statute closer to the general law.

There is, however, significant uncertainty in the cases as to when severance is available. Recent developments in the UK also indicate that this issue is due for reconsideration. Since many restraints depend on severance in order to be enforceable, the resolution of this issue has significant practical implications.

The decision in *Attwood v Lamont* ('*Attwood*') has been influential in shaping the rules of severance in this context.[98] According to Younger LJ (Atkin LJ agreeing), an unreasonable provision can be severed if two requirements are satisfied, namely, the provision is both *severable* and *ought* to be severed. To satisfy the first requirement, the provision must be severable by 'blue pencil' and be a 'distinct covenant'.[99] The 'blue pencil' requirement is that severance must be achievable by deleting words (ie, 'running a blue pencil through it'),[100] without adding to or modifying the remaining words. In *Attwood*, the employee worked only in the employer's tailoring department, but was restrained from carrying on business as a tailor, dressmaker, hatter, and other occupations in which the employer engaged, which was unreasonable. Although the restraint could have been made reasonable consistently with the blue pencil requirement (by removing the occupations in which the employee had not engaged), nevertheless Younger LJ concluded that the restraint was a single covenant for the protection of the employer's entire business, rather than a series of distinct covenants restraining the employee from engaging in each kind of work.[101]

Even if an unreasonable provision is *severable*, on Younger LJ's approach the court must also consider whether it *ought* to be severed.[102] It is not entirely clear what this involves, although Younger LJ referred to a requirement stated previously by Lord Moulton that the unreasonable provision must be 'of trivial importance, or

96 *Lindner* (n 24) 638 (Latham CJ), 647–8 (Webb J), 650–2 (Fullagar J), 653, 658–9 (Kitto J).
97 The effect of section 4(1) is explained in *Orton v Melman* [1981] 1 NSWLR 583, 587 (McLelland J).
98 *Attwood* (n 60).
99 Ibid 593.
100 Ibid 578 (Lord Sterndale MR).
101 Ibid 593.
102 Ibid: '[E]ven if this [the restraint being a single covenant] were not so this case is not one in which any severance, even if otherwise technically permissible, ought to be made'.

merely technical, and not a part of the main purport and substance of the clause'.[103] In deciding that the provision in that case ought not to be severed, Younger LJ also referred to the fact that the restraints were in standard form.[104]

Whatever its content, the rationale of this requirement is clear. In a well-known passage (to which Younger LJ referred), Lord Moulton argued that:

> It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master. … [T]he hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the Court would in the end enable them to obtain everything which they could have obtained by acting reasonably.[105]

The extent to which the *Attwood* approach applies in Australia is unclear. Although Younger LJ's judgment has been endorsed in several recent cases, it is not always appreciated that he distinguished the questions of whether a provision is severable and whether it ought to be severed. The cases generally interpret his argument that the use of severance should be constrained in the employment context as the justification for the 'distinct covenant' requirement,[106] whereas in fact Younger LJ was using it to justify an entirely separate limitation on the availability of severance. This has concealed the existence of any further 'ought to be severed' requirement.

In *SST Consulting Services Pty Ltd v Rieson* ('*SST Consulting*'), the High Court said (in obiter) that an unreasonable provision can be severed if it can be removed by blue pencil and 'without altering the nature of the contract'.[107] This 'nature of the contract' requirement derives from the judgment of Jordan CJ in *McFarlane v Daniell*.[108] This approach is different to the one outlined in *Attwood*,[109] since it replaces the 'distinct covenant' requirement with the 'nature of the contract' requirement and drops any freestanding 'ought to be severed' requirement.

In *Wallis (Computing) Nominees Pty Ltd v Pickett*, the majority purported to apply the *SST Consulting* approach, but appeared to apply the *Attwood* 'distinct covenant' requirement instead of the 'nature of the contract' requirement.[110] In

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103 Ibid 594, quoting *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, 745 (Lord Moulton) ('*Mason*').

104 *Attwood* (n 60) 596 (Younger LJ).

105 *Mason* (n 103) 745–6.

106 See, eg, *IF Asia Pacific Pty Ltd v Galbally* (2003) 59 IPR 43, 75 [182]–[183] (Dodds-Streeton J); *Integrated Group Ltd v Dillon* [2009] VSC 361, [34]–[36] (Hargrave J); *Emeco* (n 22) 463 [216]–[218] (Edelman J); *Habitat 1 Pty Ltd v Formby [No 2]* (2017) 275 IR 49, 80 [171]–[172] (Banks-Smith J) ('*Habitat 1*').

107 (2006) 225 CLR 516, 531 [46] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*SST Consulting*').

108 (1938) 38 SR (NSW) 337, 345 (Jordan CJ) ('*McFarlane*').

109 But see Heydon (n 13) 303–6, who attempts to fit *Attwood* into the *SST Consulting* approach.

110 *Wallis* (n 23) 676–7 [93]–[100] (Warren CJ and Davies AJA).

contrast, Redlich JA adopted a requirement that severance be 'appropriate', referring to the policy considerations mentioned above.[111] In *Just Group Ltd v Peck* ('*Just Group*'), the Victorian Court of Appeal effectively adopted the *Attwood* approach, although instead of leaving the question of whether the restraint 'ought to be severed' at large, it restated the requirement as being that the restraint must reflect 'a genuine attempt to establish reasonable protection for the legitimate interests of the employer'.[112] The Court also suggested, somewhat ambiguously, that in applying this requirement, the Court must give 'appropriate attention to the intentions of the parties'.[113] These statements were all obiter, however; due to its conclusion that the restraint was not severable, the Court did not address the submission that there is no separate basis for refusing severance if a provision is otherwise severable.[114] In *Findex Group Ltd v McKay*, the court accepted the approaches in both *SST Consulting* and *Just Group*, without distinguishing them.[115] It then proceeded to apply both approaches, again without distinguishing them,[116] leaving the position uncertain.

In the UK, *Attwood* has seen somewhat less support,[117] culminating in it being overruled recently by the Supreme Court in *Egon Zehnder Ltd v Tillman* ('*Egon Zehnder*').[118] The Court recognised, for the reasons mentioned above, that '[t]he courts must continue to adopt a cautious approach to the severance of post-employment restraints',[119] but thought that this concern would be given better effect by adopting a new, two-stage approach. The first stage involves the application of the 'blue pencil' test. While the Court acknowledged that this test can operate 'capriciously', it nevertheless regarded it as an 'appropriate brake' on the availability of severance.[120] The second stage is to consider 'whether removal of the [unreasonable] provision would not generate any major change in the overall effect of all the post-employment restraints in the contract'.[121] In determining whether a change would be 'major', '[t]he focus is on the legal effect of the restraints, which will remain constant, not on their … changing significance for the parties and in particular for the employee'.[122]

The Court rejected the requirement that the unreasonable provision be a distinct covenant, suggesting that its application is 'largely dependent on the

111 Ibid [109]–[110].
112 *Just Group Appeal* (n 21) 442–3 [39] (Beach and Ferguson JJA, Riordan AJA).
113 Ibid, quoting *Rentokil Pty Ltd v Lee* (1995) 66 SASR 301, 306 (Doyle CJ).
114 See *Just Group Appeal* (n 21) 448–50 [56]–[57] (Beach and Ferguson JJA, Riordan AJA).
115 [2020] FCAFC 182, [144]–[147] (Markovic, Banks-Smith and Anderson JJ) ('*Findex*').
116 Ibid [148]–[157] (Markovic, Banks-Smith and Anderson JJ). This is likely because the Court did not need to distinguish them, as on the facts both led to the outcome that the relevant provision was not severable.
117 See *Egon Zehnder Ltd v Tillman* [2020] AC 154, 173–80 [56]–[78] (Lord Wilson JSC for the Court) ('*Egon Zehnder*').
118 Ibid 184 [91].
119 Ibid 181 [82].
120 Ibid 182 [85].
121 Ibid 183 [87].
122 Ibid. It is not clear what the 'legal effect' of a restraint is, if not its effect on the parties. One possibility is that the court is referring to its effect on an ordinary or average employer or employee.

eye of the beholder' and promotes form over substance.[123] It also rejected any requirement that the unreasonable provision be 'trivial or technical', on the basis that it narrows the situations where severance is available beyond the extent required by 'public policy'.[124]

These different approaches represent several possible options that might be adopted in Australia. The High Court's statement in *SST Consulting* does not conclusively resolve the issue, since the statement is obiter, and *Egon Zehnder* indicates that it is ripe for reconsideration. In deciding between the approaches, the starting point is to recognise that, as Felicity Maher convincingly argues, 'a generally applicable approach to contractual severance must make room for public policy. Whether a contractual provision, or part, should be severed cannot *only* be a question of the intention of the parties'.[125] The public policy that is relevant will depend on the reason why the provision is unenforceable in the first place.[126] This is why, as the Court accepted in *SST Consulting*, the same test for severance will not be appropriate in every context.[127]

In our view, the approach in *Just Group* is preferable, although with some modification. Since the 'blue pencil' requirement is well-established and seemingly uncontroversial (in Australia),[128] we do not challenge it. In contrast, the 'distinct covenant' requirement was convincingly criticised in *Egon Zehnder*, and should arguably be abandoned. The requirement in *SST Consulting* that severance not change the 'nature of the contract' is also quite vague, and it is unclear how it engages with any relevant public policy. In *McFarlane v Daniell*,[129] the case from which it derives, the applicable policy reasons were radically different, since the issue was whether the *employee* (rather than the employer) should be able to sever the unreasonable restraints and enforce the remainder of the contract (to require the payment of outstanding wages). The requirement in *Egon Zehnder* that severance not produce a major change in the effect of the restraints is clearer, but still leaves a significant amount of uncertainty in deciding what changes are 'major'.

The requirement in *Just Group* that the contract reflects a genuine attempt to create a reasonable restraint is easier to apply and engages more directly with the relevant public policy of preventing employers from attempting to impose unreasonable restraints,[130] which is a policy of significant weight.[131] A similar approach (relying explicitly on Lord Moulton's comments) has been adopted by

123 Ibid 181–2 [83].
124 Ibid.
125 Felicity Maher, 'Contractual Severance: A Unified Approach' (2018) 45(3) *Australian Bar Review* 260, 282.
126 Ibid 281.
127 *SST Consulting* (n 107) 530 [42] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
128 Although various criticisms of it are mentioned in Heydon (n 13) 309–11.
129 *McFarlane* (n 108).
130 It also provides a far better explanation of both of the cases that Jordan CJ cited to support his approach in *McFarlane* (n 108) 345, namely, *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305 and *Putsman v Taylor* [1927] 1 KB 637.
131 As Grantham and Jensen point out, it might not be necessary to describe the normative considerations applied in the restraint of trade context as 'policy' considerations: Ross Grantham and Darryn Jensen, 'The Proper Role of Policy in Private Law Adjudication' (2018) 68(2) *University of Toronto Law Journal*

the Supreme Court of Canada, which went as far as suggesting that the 'general rule' is that severance is not available in employee cases and that it should only be used 'sparingly'.[132] However, contrary to the suggestion in *Just Group*, the intention of the parties should be of little weight in deciding this issue, since it conflicts with the relevant policy considerations. The whole point of the restraint of trade doctrine is to override the intention reflected in the contract. The relevance of the parties' intention more generally is discussed further below.[133]

This 'genuine attempt' requirement closely resembles section 4(3) of the NSW Act, which gives the court discretion to invalidate (in whole or part) a restraint that reflects 'a manifest failure by a person who created or joined in creating the restraint to attempt to make the restraint a reasonable restraint', even if it operates reasonably in some circumstances (and could therefore be read down under section 4(1)). One might argue that introducing a similar requirement at common law would amount to legislating through the back door. This argument falls away once it is observed that the basis of the New South Wales Law Reform Commission's ('the Commission') recommendation in favour of (what eventually was enacted as) section 4(3) was the statements of Lord Moulton mentioned above.[134] It would therefore not be surprising (or illegitimate) if the common law developed a similar requirement based on those statements.

To prevent the relevant policy considerations being undermined, any 'genuine attempt' requirement (whether in statute or common law) should be applied expansively, certainly more expansively than section 4(3) previously has been. Section 4(3) has never (to our knowledge) been relied on to invalidate a restraint, either in whole or part.[135] This is perhaps because the purpose of the provision has not been fully appreciated. In the only cases in which it has purportedly been applied, the court appears to have regarded it as simply giving the court power to declare its conclusion about the application of section 4(1),[136] which is not the purpose of section 4(3). As the Commission's report makes clear, its purpose is to further reduce the validity of the restraint below the amount provided by section 4(1), making an analogy with the equitable 'clean hands' defence.[137]

The Commission provided several arguments in favour of a narrow application of section 4(3), which would apply equally to any similar common law requirement. These arguments are not convincing. One is that it can have a 'punitive' effect, denying 'the promisee a protection otherwise inoffensive to public policy'.[138]

187, 213–20 <https://doi.org/10.3138/utlj.2017-0069>. We do so simply because this is how they are usually described.

132 *Shafron v KRG Insurance Brokers (Western) Inc* [2009] 1 SCR 157, 173 [35]–[36] (Rothstein J for the Court).

133 See Part III(E).

134 New South Wales Law Reform Commission, *Covenants in Restraint of Trade* (Report No 9, June 1970) [41]–[43] ('*Covenants in Restraint of Trade*').

135 See also *Koops Martin* (n 26) [94] (Brereton J).

136 *Industrial Rollformers Pty Ltd v Ingersoll-Rand (Australia) Ltd* [2001] NSWCA 111, [176]–[191] (Bergin J); *The Property Investors Alliance Pty Ltd v Qi* [2018] NSWSC 977, [38] (Stevenson J); *Vanguard Financial Planners Pty Ltd v Ale* [2018] NSWSC 314, [181] (Black J).

137 *Covenants in Restraint of Trade* (n 134) [43].

138 Ibid [42].

This ignores the fact that it is contrary to public policy for the reasons mentioned earlier to allow an employer to enforce a restraint where they made no attempt to make the restraint reasonable. A second argument is that the mere existence of the requirement will make employers attempt to create reasonable restraints, even if it is not regularly enforced.[139] This is perhaps true, but it depends on the requirement being enforced at least in some cases, which until now it has not been. It is questionable how much attention employers would pay to a dormant statutory provision that is almost half a century old. A third argument is that enforcing the requirement regularly would create difficult borderline disputes.[140] This is true of every rule, and seems especially inconsequential in a context where the relevant policy considerations are so significant.

A final argument is that it might be unfair in some cases to enforce the requirement because of some conduct of the employee, such as the employee voluntarily agreeing to a restraint that they know will not be enforceable.[141] There is arguably no unfairness in this particular example. It is emphatically not the employee's responsibility to ensure that only reasonable restraints are imposed on them. Indeed, the employee is entitled to assume that any restraint is prima facie unenforceable, and that if the employer attempts to enforce it, the onus is on the employer to satisfy a court of its reasonableness. It is therefore perfectly legitimate for an employee to challenge a restraint to which they previously agreed, even without protest. The Commission's arguments therefore do not provide a convincing basis for applying section 4(3) (or any similar requirement for severance at common law) cautiously.

D Cascading Restraints

The practice of drafting restraints in a 'cascading' form is ubiquitous. The simplest example is a cascading duration. Instead of creating a single restraint with a particular duration, the contract will often create several restraints that are otherwise the same but have successively decreasing durations, for example 24, 12 and 6 months. The purpose of this is to take advantage of severance rules, to allow the employer to attempt to impose a wider restraint without taking the risk of losing the benefit of the restraint entirely. If the contract creates a single restraint of 24 months and that duration turns out to be unreasonable, the restraint is unenforceable and the employer is left with nothing. Even if a lesser duration would have been reasonable, the 'blue pencil' rule prevents the duration from being modified. If the contract instead creates several distinct restraints with cascading durations, any unreasonable restraints can (it is thought) be severed and the remaining restraints enforced. This technique can also be applied to the geographical area or range of activities covered by a restraint.

There is also a second (and somewhat opposing) sense in which restraints can 'cascade'. A contract will often identify multiple activities, areas and durations,

139 Ibid [44].
140 Ibid [42].
141 Ibid [44].

and specify that each combination of these variables takes effect as a separate restraint. For example, the contract might identify two activities, two areas and two durations, for a total of eight restraints. The restraints 'cascade' in the sense that the number of restraints multiplies or expands with each new activity, area or duration that is added, rather than in the sense of cascading downwards (as in the previous example). The purpose of this technique is, again, to maximise the extent to which severance rules can be applied to remove unreasonable parts of the restraint and leave reasonable parts untouched. The cases and commentary do not distinguish these two meanings, with descriptions of 'cascading restraints' often combining elements of both.[142]

In most cases, even if employees challenge particular restraints within the cascading set, they seem to assume the validity of the 'cascade' technique in principle. Some employees (and covenantors in other contexts) have attempted to argue that cascading restraints are unenforceable due to their uncertainty, but without success, since (if drafted correctly) the restraints can be understood as imposing cumulative rather than inconsistent obligations.[143]

The use of cascading restraints has been heavily criticised. Andrew Stewart argues that it 'surely stacks the deck too much in favour of employers', since it gives the employee no clear guidance about the extent to which they are restrained, who is therefore required either to litigate at considerable expense or submit to the widest possible restraint.[144] As a result, he endorsed a blanket rule that all cascading restraints be unenforceable. In his view, 'covenantees should be compelled to be clear' as to the restraint that they are imposing on the covenantor, and that this (and the consequential risk of losing the benefit of the restraint entirely) would simply 'balance the natural advantage that most employers enjoy through superior resources, access to legal advice and the intimidatory effect of the mere presence in a contract of a restraint, valid or not'.[145]

However, a blanket ban on cascading restraints may be problematic, not least because the meaning of the phrase is insufficiently stable. If it applied to restraints that cascade in the first sense mentioned above, it could likely be circumvented, since it is possible to redraft a set of cascading restraints as a non-cascading list.[146] As to restraints that cascade in the second sense, it is not clear precisely what makes them objectionable compared to other restraints, which often also include multiple activities and areas. The law's existing resources arguably provide a better solution.

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142 See Andrew Stewart, 'Drafting and Enforcing Post-Employment Restraints' (1997) 10(2) *Australian Journal of Labour Law* 181, 214–15; *OAMPS Insurance Brokers Ltd v Hanna* [2010] NSWSC 781, [40] (Hammerschlag J); *Findex* (n 115) [49] (Markovic, Banks-Smith and Anderson JJ). As these sources indicate, such restraints are often referred to as 'ladder' or 'step' clauses.

143 See *Hanna* (n 26) 425–9 [7]–[30] (Allsop P).

144 Stewart (n 142) 218.

145 Ibid.

146 Consider the example of a cascading restraint that Stewart (n 142) 215 refers to, which appeared in *JQAT Pty Ltd v Storm* [1987] 2 Qd R 162. The geographical area of the restraint was (i) Queensland and (ii) New South Wales. This part of the restraint does not cascade at all; it is just a list of areas. The same applied to the range of activities covered by the restraint. With some creativity, the same technique could be applied to its duration.

It has been accepted in several cases that cascading restraints will not be enforced if they do not amount 'to a genuine attempt to define the covenantee's need for protection'.[147] This has been treated as a requirement of contractual certainty,[148] but the preferable interpretation is that it is a distinct, policy-based limitation on the availability of severance in the context of cascading restraints, which is how it was conceived in the cases originally setting out the requirement.[149] If the unreasonable restraints in a cascading set cannot be severed, the employer cannot rely on any of them, and the technique will fail. As mentioned earlier, this 'genuine attempt' requirement was said in *Just Group* to be a requirement of severance generally; in doing so, the court drew on the specific line of cases dealing with cascading restraints.

The existing rules of severance (or section 4(3) in NSW) can therefore adequately address any perceived problems with cascading restraints.[150] On this approach, if a cascading set of restraints does not reflect a genuine attempt to impose a reasonable restraint on the employee, then the lesser restraints will not be enforceable. Although Stewart argues that section 4(3) (and therefore any similar common law severance requirement) would fail to adequately address the problem,[151] his argument is premised on a narrow or cautious application of that provision, which we earlier argued against.

E Acknowledgements

As well as requiring employees to agree to onerous restraints, employers frequently require them to make various acknowledgements in their employment contract about the restraints. To put it neutrally, their purpose is to increase the likelihood of the restraints being held reasonable or complied with voluntarily.

The most common acknowledgement is that the restraints are reasonable and necessary to protect the employer's legitimate interests. Various subsidiary acknowledgements are often included, such as that the employee will receive confidential information or form a connection with customers, that the restraint protects a legitimate interest, that the employer entered the contract in reliance on the employee agreeing to the restraints, that the consideration received by the employee is commensurate to the restraints, that the employee has obtained or had an opportunity to obtain legal advice about the restraints, that the employee intends the restraints to operate to the maximum possible extent, that each restraint

147 *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd* (1987) 17 FCR 505, 522–3 (Spender J) ('*Lloyd's Ships*'); *Sear v Invocare Australia Pty Ltd* [2007] WASC 30, [40]–[46] (Le Miere J); *Workpac Pty Ltd v Steel Cap Recruitment Pty Ltd* (2008) 176 IR 464, 472–3 [37]–[45] (Templeman J); *Habitat 1* (n 106) 77 [147] (Banks-Smith J). The existence of any such requirement was left open in *Hanna* (n 26) 426–7 [17] (Allsop P).

148 See, eg, *Bulk Frozen Foods Pty Ltd v Excell* (2014) 24 Tas R 471, 475–8 [5]–[13] (Blow CJ).

149 See *Lloyd's Ships* (n 147) 522–3 (Spender J).

150 Others have suggested that the rules of severance are one possible way of dealing with cascading restraints, although for different reasons than we have given: see David Cabrelli and Louise Floyd, 'New Light through Old Windows: Restraint of Trade in English, Scottish, and Australian Employment Laws (2010) 26(2) *International Journal of Comparative Labour Law and Industrial Relations* 167, 175 <https://doi.org/10.54648/IJCL2010011>. They suggest several other bases on which cascading restraints might be held unenforceable, although in our view the severance rules are the most convincing.

151 Stewart (n 142) 218.

is a separate covenant, that any unreasonable part of a restraint is severable (or even modifiable) by the court, or that damages are an inadequate remedy for their breach. Sometimes all (or nearly all) of these acknowledgements are included.[152] They do not exhaust the possibilities.

Heydon suggests that such acknowledgements are 'of very little assistance' in deciding whether a restraint is reasonable.[153] There are certainly cases consistent with this view, with some courts ignoring any acknowledgements entirely. In *Just Group*, for example, the employment contract contained extensive acknowledgements of the employer's legitimate interests and the reasonableness of the restraints, and a clause permitting any unreasonable part to be severed and any unreasonable area or duration to be modified.[154] The Court still held that the restraint was unreasonable and that the unreasonable parts were not severable, without referring to these provisions at all,[155] despite the employer relying on them in its submissions.[156] More generally, we are not aware of any case (in the present context) that has held that a contractual severance provision can expand the availability of severance beyond what the common law allows.[157]

This is a sound approach to contractual acknowledgements. The employer can often insert them into the contract at no cost, regardless of whether the acknowledgement has any basis in reality whatsoever. They should therefore generally make no difference to the reasonableness of any restraint. This is supported by the dim view recently taken in *Stubbings v Jams 2 Pty Ltd* (in a different context) of the certificates of legal and financial advice, which a majority of the High Court described as 'window dressing'.[158]

However, some courts have attributed somewhat more weight to such acknowledgements, and to the fact of the employee's agreement to a restraint more generally. In *Habitat 1 Pty Ltd v Formby*, it was suggested that 'the court has held on numerous occasions that an acknowledgement that a restraint is reasonable is a matter to which weight should be given in deciding whether or not the restraint is reasonable', given that 'the parties are taken to have knowledge of the relevant industry and are in a better position than the court to assess what amounts to reasonable protection'.[159] In *Seven Network (Operations) Ltd v Warburton [No 2]*, an acknowledgement of reasonableness was even described on the facts as 'possibly the most important single factor in determining whether the restraint period was reasonable at the time it was entered into'.[160] Although the Court in *Woolworths Ltd v Olson* accepted that 'a contractual consensus cannot be regarded as conclusive … even where … there is a contractual admission as to reasonableness', it nevertheless argued that '[t]he court gives considerable weight

152 See, eg, *Qantas Airways Ltd v Rorlach* [2021] NSWCA 48.
153 Heydon (n 13) 186.
154 See *Just Group Appeal* (n 21) 428–9 [6], 430 [9] (Beach and Ferguson JJ and Riordan AJA).
155 See ibid 443–50 [43]–[57].
156 Ibid 434 [16], 435 [18].
157 See also *Emeco* (n 22) 463 [215] (Edelman J).
158 (2022) 399 ALR 409, 420 [49] (Kiefel CJ, Keane and Gleeson JJ).
159 *Habitat 1* (n 106) 66 [76] (Banks-Smith J).
160 (2011) 206 IR 450, 471 [70] (Pembroke J).

to what parties have negotiated and embodied in their contracts'.[161] As support for this proposition, the Court relied on similar comments by Walsh J in *Queensland Co-operative Milling Association v Pamag Pty Ltd*.[162]

However, Walsh J's comments were only intended to apply in situations where 'the parties have not been on unequal bargaining terms'.[163] Many other cases have also referred to the importance of the employee's relative bargaining position. In *Cadgroup Australia Pty Ltd v Snowball*, for example, while accepting that 'where the parties have equal bargaining power, it will often be reasonable to regard them as the best judges' of whether a restraint is reasonable, Black J said that this consideration has 'less weight where an employee is offered a contract of employment in standard form, specifying a lengthy restraint, and has little real prospect of negotiating the contract, and his or her only alternative to giving a required restraint may be to decline employment'.[164] The significance of bargaining power in determining reasonableness between the parties was also recognised recently by the UK Supreme Court.[165] If relative bargaining power determines the weight of the agreement or any acknowledgements, it follows that they should generally have little or no weight, given that, as the Supreme Court observed in *Egon Zehnder*, 'most' employees have little or no bargaining power.[166]

However, it is arguable that such acknowledgements, and the more general fact of the employee's agreement to a restraint, should have little weight even where the parties' relative bargaining power is similar. This is because, as argued earlier,[167] it is simply not the employee's responsibility to ensure that any contractual restraint is reasonable. This is entirely a matter for the employer, who has the onus of demonstrating its reasonableness. An employee is always perfectly entitled to agree to a restraint and later challenge its reasonableness, and their agreement to the restraint cannot be treated to any extent as an indication that the employee regards the restraint as reasonable.

F Trade Secrets

As mentioned in Part II, an employer is entitled to protect their confidential information by imposing post-employment restraints. There is some uncertainty in the case law about whether any confidential information can be protected, or only confidential information that is a 'trade secret'. The second option would significantly narrow the situations where non-compete restraints can be imposed.

In a well-known passage in *Faccenda Chicken Ltd v Fowler* ('*Faccenda Chicken*'), Goulding J divided information received by an employee into three categories, namely, non-confidential information, confidential information that

161 [2004] NSWCA 372, [39] (Mason P).
162 (1973) 133 CLR 260, 268.
163 Ibid.
164 *Cadgroup* (n 21) [27]. See also *Veda Advantage (Australia) Pty Ltd v de Beer* [2016] NSWSC 37, [66] (Black J) ('*Veda Advantage*').
165 *Harcus Sinclair* (n 61) 1302–3 [84] (Lords Briggs, Hamblen and Burrows JJSC).
166 *Egon Zehnder* (n 117) 181 [82] (Lord Wilson JSC).
167 See Part III(C).

'becomes part of his own skill and knowledge', and 'specific trade secrets'.[168] At general law, the employee can use the first and second categories post-employment, but not the third; the third category is received subject to an equitable duty of confidence (or similar implied term). However, according to Goulding J, the second category can be validly protected by a contractual restraint, including a non-compete restraint.[169] On this view, the employer has a legitimate interest in protecting all confidential information, not merely trade secrets.

This view was rejected on appeal. Neill LJ (giving the judgment of the Court) held that a restraint cannot be imposed to protect information 'unless it can be regarded as a trade secret or the equivalent of a trade secret' in the sense that it is 'of such a highly confidential nature as to require the same protection as a trade secret'.[170] In doing so, Neill LJ referred to *Herbert Morris*, in which Lord Atkinson described the employer's relevant interest as being 'in his trade secrets … such as secret processes of manufacture which may be of vast value'.[171] Lord Parker also suggested that a restraint can only be imposed on the basis of (in addition to customer connection) the employee's 'acquaintance with his employer's trade secrets'.[172] Neill LJ also referred to *Printers and Fishers Ltd v Holloway*, in which Cross J stated that the court 'will enforce a covenant reasonably necessary to protect trade secrets'.[173]

Neill LJ's approach was explicitly rejected by a majority of the New South Wales Court of Appeal in *Wright v Gasweld Pty Ltd* ('*Wright*'),[174] on the basis that confidential information can be protected by a contractual restraint, even if it is not otherwise protected by an equitable duty of confidence.[175] Other cases have followed *Wright* on this point.[176] While the approach in *Wright* is certainly dominant, some cases adhere to the view that a restraint can only be imposed to protect information that is a trade secret or equivalent.[177] This disagreement is more apparent than real, as we discuss below, but to the extent that there is disagreement, the latter cases are preferable, and should be followed. Perhaps controversially, it is also arguable that *Wright* is perfectly consistent with these cases, and with Neill LJ's approach, when properly understood.

The main cause of the apparent disagreement is ambiguity in both the phrases 'trade secret' and 'confidential information'. The former is used in at least two

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168 [1984] ICR 589, 598–600.
169 Ibid 599.
170 *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 137 ('*Faccenda Chicken Appeal*').
171 *Herbert Morris* (n 9) 702.
172 Ibid 709.
173 [1965] 1 WLR 1, 6.
174 (1991) 22 NSWLR 317 ('*Wright*').
175 Ibid 335 (Kirby P), 340–1 (Samuels JA).
176 *Cactus Imaging* (n 28) 14 [12] (Brereton J); *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, 181 [140] (Campbell JA) ('*Del Casale*'); *Zomojo Pty Ltd v Hurd [No 2]* (2012) 299 ALR 621, 673 [179] (Gordon J); *Baker and McAuliffe Holdings Pty Ltd v Carey* [2018] FCA 1972, [81] (Markovic J); *ASPL Pty Ltd v Rajakaruna* [2019] WASC 269, [90] (Smith J); *Dundoen Interlocutory Application* (n 86) [106] (Henry J).
177 *GBAR* (n 64) 339 [106] (Bradley J); *Hotwork* (n 64) [81]–[82] (Henry J); *NOVA Employment Ltd v Hira* [2021] NSWSC 1337, [23]–[24] (Rein J).

different ways, to refer either to commercial information that is subject to an equitable duty of confidence,[178] or to any confidential (commercial) information.[179] As this implies, any ambiguity in the phrase 'confidential information' is also likely to infect 'trade secret'. In one sense, which appears in the context of breach of confidence, information is 'confidential' if it is not 'public property and public knowledge'.[180] Whether information is confidential in this sense depends only on how widely known or available the information is, and in particular (in commercial contexts) whether it is known by competitors of the employer.[181] In another sense, however, information is only 'confidential' if it is not publicly available *and* meets some higher threshold. It is not entirely clear what the threshold actually is, but courts have identified 'factors' for determining whether it is met. In *Wright*, Kirby P referred to the skill or effort used to acquire the information, the difficulty of replicating it, the measures taken to protect it, and the seniority of the employees it is shared with.[182] Several other factors were mentioned by Hodgson JA in *Del Casale v Artedomus (Aust) Pty Ltd*, including the value of the information.[183]

Which of these meanings did Neill LJ intend? In suggesting that information must be a 'trade secret' or equivalent to be capable of protection, he did not mean that the information must be subject to an equitable duty of confidence,[184] contrary to the interpretation in *Wright*. Neill LJ identified several factors that are relevant to whether an equitable duty of confidence arises,[185] and made the present argument in elaborating one of those factors, namely, the nature of the information.[186] In his view, while it is necessary for an equitable duty of confidence to arise that the information be a trade secret or equivalent, it is not sufficient; other factors are relevant.

Rather, Neill LJ indicated that information is equivalent to a trade secret if it is 'highly confidential'.[187] It is not entirely clear which sense of 'confidential' he was using, but he was likely using the second,[188] given his reference to *Herbert Morris* to support his argument. In *Herbert Morris*, the court made it clear that, to be validly protected by a contractual restraint, it is not sufficient that information is confidential in the sense of being not publicly known. Lord Parker rejected the argument that any information about the employer's 'method of carrying on their business' that is 'peculiar' to it and 'unknown to other firms' can be protected by

178 *Wright* (n 174) 333 (Kirby P); *Del Casale* (n 176) 159–60 [38] (Hodgson JA).
179 Gordon Hughes (ed), *Dean's Law of Trade Secrets and Privacy* (Thomson Reuters, 3rd ed, 2018) 359–60 [40.6750].
180 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413, 415 (Lord Greene MR).
181 *Del Casale* (n 176) 160 [39] (Hodgson JA).
182 *Wright* (n 174) 334.
183 *Del Casale* (n 176) 160 [40].
184 See also *Balston Ltd v Headline Filters Ltd* [1987] FSR 330, 347–8 (Scott J).
185 Technically he was discussing whether a duty of confidence arises as an implied term of the contract, but this implied term is sometimes treated as coextensive with the equitable duty: see, eg, *Del Casale* (n 176) 158–9 [34]–[35] (Hodgson JA).
186 See *Faccenda Chicken Appeal* (n 170) 137–8.
187 Ibid.
188 Contrary to the suggestion in Hughes (n 179) 359–60 [40.6750].

a contractual restraint, since some of that information 'can hardly be regarded as a trade secret'.[189] He also argued that a contractual restraint cannot prevent 'the use of the personal skill and knowledge acquired by the employee in his employer's business'.[190] This is inconsistent with Goulding J's exposition, which allows the employee to be restrained by contract from using such personal skill and knowledge.

Therefore, to the extent that *Herbert Morris* is authoritative, Neill LJ's decision in the *Faccenda Chicken* appeal was correct. The criticisms of it are arguably based on a misunderstanding of his use of the phrases 'trade secret' and 'confidential'.[191] His argument is that, to be protected by a contractual restraint, information must meet the higher standard of confidentiality mentioned above. Although the information need not be subject to an equitable duty of confidence, it is not sufficient that it falls into Goulding J's second category. This in fact is perfectly consistent with the decision of Kirby P in *Wright*, who clearly accepted a requirement that the information reach the higher threshold of confidentiality.[192] Gleeson CJ (in the minority) also appeared to accept such a requirement.[193] To the extent that later decisions and commentary have taken *Wright* to have decided that any information that is not publicly available can be protected,[194] they are incorrect. The range of information that can support a valid non-compete restraint is therefore significantly more limited than often thought.

G Duration

In contrast to its area and scope, the cases provide little firm guidance about when the duration of a non-compete restraint will be reasonable. This is partly because the courts' opinion on this point seems to have substantially shifted over time, in the direction of shortening the duration that is considered reasonable. In 1912, the High Court upheld a non-compete restraint of unlimited duration against an articled clerk,[195] and a 10-year restraint two years later.[196] The House of Lords also upheld a temporally unlimited restraint against a managing law clerk in *Fitch v Dewes*.[197]

These restraints, or anything close to them, would never be enforced today.[198] Some explain this shift as the law giving 'greater recognition to the public interest in ensuring competition',[199] but it could also be explained as the law giving greater recognition to the interests of employees. Either way, older cases are not a reliable

189 *Herbert Morris* (n 9) 711–12.
190 Ibid 710.
191 Interestingly, Campbell JA suggested that Neill LJ made the same error in interpreting Goulding J: see *Del Casale* (n 176) 181–2 [140]–[141].
192 *Wright* (n 174) 334–5.
193 Ibid 326, 328–9.
194 See, eg, Hughes (n 179) 359–60 [40.6750].
195 *Hamilton v Lethbridge* (1912) 14 CLR 236.
196 *Brightman* (n 41).
197 [1921] AC 158.
198 See Jackson (n 13) 44: 'A lifelong restraint … is not perceived as within the range of drafting possibilities for lawyers in contemporary Australian legal practice'.
199 See *Stacks Taree* (n 45) [53] (McDougall J).

guide to the reasonableness of a restraint's duration today. It is therefore significant that most of the examples that Heydon cites in his otherwise valuable discussion of this issue are over a century old,[200] with the most recent being decided in 1970.[201]

Courts have formulated general tests for determining whether the duration of a restraint is reasonable, depending on which interest it protects. For restraints that protect customer connection, at least two different tests have been mentioned. One is the time it takes for the employee's connection with customers to be severed or otherwise end, and another is the time for a replacement employee to establish a new connection. Some cases apply the former test,[202] and others the latter.[203] Some suggest that either test can be relevant, depending on the circumstances.[204] These approaches can be reconciled by accepting the first test, while also recognising that establishing a new connection can sever a previous connection.[205] For restraints that protect confidential information, on the other hand, it is relevant to consider, among other things, 'how long the information is likely to remain current and of commercial advantage'.[206] Although all of these considerations are important, none can represent an exclusive test, since they only focus on the interests of the employer. As mentioned in Part III(A), it is also necessary to consider the effect of the restraint on the employee.

As several recent cases point out, although post-employment restraints take effect at the end of the period of employment under the contract, the time for which the employee can be restrained from competing effectively begins to run from the end of their actual employment (ie, when the employee stops working as a matter of fact).[207] It is therefore not possible to impose a long notice period (during which the employee is placed on garden leave),[208] or a long fixed employment term (which continues even after the employee resigns),[209] to artificially increase the duration of the restraint.

When deciding the reasonableness of a particular restraint, general statements of principle are helpful, but in the end are not sufficient on their own to determine the outcome; courts recognise that a judgment must be formed on a 'broad and

200 See Heydon (n 13) 183–6.

201 Ibid 184 n 180.

202 See the cases discussed in *Stacks Taree* (n 45) [66]–[74] (McDougall J).

203 *Koops Martin* (n 26) [88] (Brereton J).

204 *Hanna* (n 26) 433–4 [43]–[45] (Allsop P); *Hotwork* (n 64) [91]–[92] (Henry J).

205 See *NE Perry Pty Ltd v Judge* (2002) 84 SASR 86, 91 [28]–[31] (Doyle CJ), 96–7 [63]–[64] (Bleby J), 103–4 [101] (Besanko J).

206 *Cactus Imaging* (n 28) 20 [36] (Brereton J).

207 *Tullett Prebon* (n 32) 430–3 [54]–[65] (Brereton J); *DP World* (n 65) [18], [53] (White J); *Employsure Ltd v McMurchy* [2021] NSWSC 1179, [269], [384] (Sackar J) ('*McMurchy Trial*'). There is a question of whether the length of time between the end of actual employment and the contractual employment period is relevant to the reasonableness of the restraint or is merely a discretionary factor in deciding the duration of an injunction, given that it is not known what that length of time will be (if any) at the time of entering the contract: see *Label Manufacturers Australia Pty Ltd v Chatzopoulos* [2022] NSWSC 1059, [122], [130] (Parker J) ('*Label Manufacturers*').

208 See *Harden* (n 65) [112], [481]–[496] (Sackar J). The concept of 'garden leave' is discussed in Jackson (n 13) 84–90, although the premise of his discussion seems to be that, contrary to the proposition in the text, garden leave can be used to extend the period of restraint.

209 See *BGC Partners* (n 65) 332–4 [96]–[112] (Stevenson J).

common sense view'.[210] This obviously contributes to a lack of certainty and transparency, which (as mentioned earlier) is likely to the advantage of employers. The only way to reduce this uncertainty is therefore to consider how courts have actually applied the reasonableness standard in particular cases. To this end, we identified all decisions since 1 July 2016 (until 22 February 2023) at the Supreme or Federal Court level or above, in which the court made a final (as opposed to interlocutory) determination about the reasonableness of the duration of an employee non-compete restraint.[211] Our findings were:

Table 1: Reasonableness of duration of non-compete restraints by number of months

Duration of restraint (months)	Number of restraints	Number reasonable	Number unreasonable	Percentage reasonable (%)
24	5	0	5	0
12	10	5	5	50
9	1	0	1	0
6	7	6	1	87.5

To emphasise, this only shows how often the *duration* of a non-compete restraint is regarded as reasonable, not how often such restraints are enforced in general. While the data includes every case in which a restraint was upheld, it excludes cases in which the restraint was held invalid for reasons other than its duration, such as those where the employer had no legitimate interest, or where other elements of the restraint were too wide. The actual rate of enforcement of non-compete restraints is necessarily lower than the above numbers. The results also exclude interlocutory decisions (which amount to a majority of the total cases) given that such decisions do not involve the court reaching a conclusion about the reasonableness of a restraint, only whether there is an arguable or prima facie case that it is reasonable.

The mere fact that a restraint of a particular duration was reasonable (or otherwise) in one case does not mean that the same conclusion will automatically apply to a restraint of the same duration in another case. This kind of reasoning is not permissible, given that the relevant considerations are highly fact specific.[212]

210 *Stenhouse* (n 75) 402 (Lord Wilberforce for the Court).

211 We performed a full-text search in Lexis Advance for the relevant period using the query '"restraint of trade" and employ!' and filtered out the cases that, on our interpretation, did not involve a final determination of the reasonableness of a post-employment non-compete restraint. A list of the cases we included in the results (and the durations of the restraints considered in each case) can be found in the Appendix. In some cases, the court made a determination about multiple employees or multiple durations for the same employee (eg, holding that 24 months was unreasonable but 12 months was reasonable), which is why the total number of restraints in the sample is slightly higher than the number of cases.

212 See *Stacks Taree* (n 45) [54] (McDougall J); *Wallis* (n 23) 671 [63] (Warren CJ and Davies AJA). See also *Australian Timber Supplies Pty Ltd v Welsh* [2021] QSC 266, [29] (Freeburn J).

The results nevertheless indicate, unsurprisingly, that longer durations are more likely to be unreasonable. All 24-month restraints were held unreasonable in the period under discussion. Interestingly, there were several cases in which the employer did not even attempt to enforce such a restraint despite it being included in the employment contract. In one case involving cascading restraints of 36, 24 and 12 months, the employer did not attempt to enforce the 36 and 24-month restraints,[213] after the judge indicated at the interlocutory stage that they were likely unreasonable.[214] In another case, the employer did not even attempt to argue at the interlocutory stage that a 24-month restraint was reasonable.[215]

Some recent cases have nevertheless upheld 24-month (or longer) non-compete restraints.[216] One example is *Pearson*.[217] In that case, the employee was the chief operating officer of a human resources business. In upholding the restraint, the Court pointed to the employee's central role in business development.[218] The employee would also continue to be paid his salary for 21 months of the restraint period,[219] and upon entering the contract was issued with shares in the employer at no cost.[220] There was also no inequality of bargaining power in negotiations about the restraints; if anything, the employee had the upper hand given his reputation within the industry.[221] The employer generally renewed its contracts with clients every two to three years, meaning that the restraint would give the employer an opportunity to renew them once without the employee's influence intervening.[222]

Pearson should be regarded as the outer limit of what is enforceable. In the more recent case of *Harden v Willis Australia Group Services Pty Ltd* ('*Harden*'),[223] involving the President (Asia Pacific) of a reinsurance broker, a 24-month restraint was held to be unreasonable.[224] Sackar J relied on the fact that the employee was not paid for the second 12 months of the restraint, that it would only take 12 months to find a replacement, that contracts with clients were renewed annually, that the confidential information obtained by the employee was of a kind that he would be unlikely to remember and was updated regularly, and that the employee was 'entitled … to work in a stimulating and remunerative employment'.[225]

Twelve-month restraints had a better, but still relatively modest chance (50%) of being enforced during the relevant period. Further, nearly all the cases upholding such restraints involved senior employees, who in general are more likely to

213 See *Dundoen Trial* (n 26) [33] (Sackar J).
214 See *Dundoen Interlocutory Application* (n 86) [116]–[118] (Henry J).
215 See *Hotwork* (n 64) [93] (Henry J).
216 In addition to the case discussed in the text, see *Miles* (n 86), upholding a 30-month restraint.
217 *Pearson* (n 22).
218 Ibid 202 [59], 203 [62] (Keane CJ, Foster and Griffiths JJ).
219 Ibid 203 [63].
220 Ibid. Selling the shares potentially reduced the salary payable during the restraint period.
221 Ibid.
222 Ibid 190 [12], 203 [65].
223 *Harden* (n 65).
224 Technically the employee was either suspended or on garden leave for 12 months and then subject to a 12 month post-employment restraint, but the Court effectively treated this as a 24-month restraint: see ibid [110]–[113], [483] (Sackar J).
225 See ibid [483]–[495].

possess significant confidential information, form connections with significant clients, and receive substantial benefits under their employment contract, all of which point in favour of reasonableness.[226] In these cases, the employees' roles included General Manager (Business Development),[227] founder, director and substantial shareholder,[228] and director and substantial shareholder.[229] In another case, the employee (previously a National Manager) reported to two General Managers and had substantial responsibilities for business development.[230]

Nevertheless, 12-month restraints were not necessarily enforced even against such senior employees,[231] and in no case was a full 12-month restraint upheld against a non-senior employee (ie, who has no significant management or strategic responsibilities). Although a 12-month restraint was enforced against a rent roll manager (a non-senior employee), this was not a typical non-compete restraint, since the employee was only restrained from working for her relatives (who also operated in and were well-known in the local area), rather than all competitors.[232]

Finally, in the 6-month category, all but one of the cases in which the restraint was held reasonable (again) involved senior employees,[233] and in three of them, the court clearly regarded six months as the maximum reasonable duration,[234] indicating that such restraints would have likely been unenforceable against less senior employees. Although the restraint was slightly longer, this is consistent with *McMurchy v Employsure Pty Ltd*, in which the court referred explicitly to the employee's 'relatively low-level position' in deciding that a 9-month restraint was unreasonable.[235]

Overall, several conclusions can be drawn from these cases. The first is that 6-month restraints (or longer) are likely not enforceable against non-senior employees. Since the cases did not involve any restraints shorter than six months, it is difficult to say what duration (if any) would be reasonable for such employees. The second is that 6-month restraints are likely to be enforceable against senior employees. Whether a 12-month restraint is enforceable depends more on the

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226 The relevance of the employee's seniority is discussed further in *JMB* (n 21) [67]–[73] (Parker J).

227 *International Cleaning* (n 65).

228 *Habitat 1* (n 106).

229 *Agha v Devine Real Estate Concord Pty Ltd* [2021] NSWCA 29.

230 *LCR Group Pty Ltd v Bell* [2016] QSC 130.

231 *Just Group Ltd v Peck* [2016] VSC 614, [50] (McDonald J); *Grace Worldwide (Australia) Pty Ltd v Alves* [2017] NSWSC 1296, [106] (Slattery J) ('*Grace Worldwide*'); *McMurchy v Employsure Pty Ltd* [2022] NSWCA 201, [70] (Gleeson JA) ('*McMurchy Appeal*'); *Label Manufacturers* (n 207) [144] (Parker J).

232 *Dundoen Trial* (n 26) [154] (Sackar J).

233 *Veda Advantage* (n 164) [70] (Black J); *BGC Partners* (n 65) [112] (Stevenson J); *Grace Worldwide* (n 231) [106] (Slattery J); *McMurchy Appeal* (n 231) [70] (Gleeson JA); *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd [No 8]* [2022] FCA 1404, [1184]–[1189] (Beach J). In *BGC Partners*, the Court was deciding the appropriate length of an injunction rather than the reasonableness of the restraint, but was dealing with effectively the same issue. In *Directed Electronics*, the Court also held a 6-month restraint to be reasonable against a non-senior employee, but on the (unconventional) interpretation that the restraints only prevented the employees from working in positions that involved soliciting the previous employer's customers: see at [1184].

234 *Grace Worldwide* (n 231) [99] (Slattery J); *McMurchy Trial* (n 207) [384] (Sackar J); *BGC Partners* (n 65) 333–4 [112] (Stevenson J).

235 *McMurchy Appeal* (n 231) [148] (Gleeson JA).

facts, with courts enforcing them against senior employees about as often as not. Finally, 24-month restraints will be unenforceable, even against senior employees, unless an extremely high bar is met. In *Pearson*, the employee was very senior and received substantial benefits under his employment contract, including the payment of his salary during most of the restraint period. Unless these conditions are met, it appears unlikely that the restraint will be enforceable.

IV CONCLUSION

This article addresses some of the continuing legal issues in relation to post-employment non-compete restraints and provides additional guidance about when they should be considered reasonable. The result of many of these arguments is in the direction of constraining the enforcement of non-compete restraints, including by narrowing the scope of the employer's legitimate interests, negating the employer's ability to have the employee ratify the reasonableness of the restraint, and limiting the enforcement of restraints (under either the NSW Act or common law severance rules) that are partly unreasonable, or which appear alongside unreasonable (often cascading) restraints.

Non-compete restraints can cause significant harm to employees. The most important argument of this article is that these effects are and should be relevant in deciding the reasonableness of non-compete restraints. Other jurisdictions, taking this point to its logical conclusion, have gone as far as to prohibit non-compete restraints entirely. Whether Australia should follow is an important question. The significance of the competing interests at stake suggests that it should be answered sooner rather than later.

APPENDIX

Table 1: Cases Including Duration of Restraints

Case	**Duration of restraint (months)**
Agha v Devine Real Estate Concord Pty Ltd [2021] NSWCA 29	12
BGC Partners Australia (Pty) Ltd v Hickey (2016) 259 IR 318	6
Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd [No 8] [2022] FCA 1404	6, 6
Dundoen Pty Ltd v Richard Wills (Real Estate) Pty Ltd [2020] NSWSC 1534	12
GBAR (Australia) Pty Ltd v Brown (2020) 293 IR 322	24
Grace Worldwide (Australia) Pty Ltd v Alves [2017] NSWSC 1296	12, 6
Habitat 1 Pty Ltd v Formby [No 2] (2017) 275 IR 49	24, 12
Harden v Willis Australia Group Services Pty Ltd [2021] NSWSC 939	24
International Cleaning Services (Australia) Pty Ltd v Dmytrenko [2020] SASC 222	12
Just Group Ltd v Peck [2016] VSC 614	12
Label Manufacturers Australia Pty Ltd v Chatzopoulos [2022] NSWSC 1059	24, 12
LCR Group Pty Ltd v Bell [2016] QSC 130	12
McMurchy v Employsure Pty Ltd [2022] NSWCA 201	12, 6, 12, 9
Popham Holdings Pty Ltd v Franklin [2016] VSC 597	24
Veda Advantage (Australia) Pty Ltd v de Beer [2016] NSWSC 37	6