



# Who's afraid of a little competition?

ACTU Submission to Treasury Consultation on worker non-compete clauses and other restraints

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## Executive Summary

Non-compete clauses are a brake on the economy and restrict workers from earning a living. They are, quite literally, anti-competitive. They serve only the interests of employers who fear competition, to the detriment of workers and consumers.

Clauses which restrict workers from working elsewhere, or starting their own business after they leave have an overall effect on suppressing wages and reducing innovation. The counter-factual comes in the form of “Silicon Valley” where we have seen decades of technological innovation and numerous “start-ups” amidst a backdrop of a ban on non-compete clauses.

Clauses which restrict employment to a single employer during the employment period are a remnant of an antiquated notion that workers will pledge their fealty to one employer – they do not reflect the reality of part-time, casual and even gig work. More so, they do not reflect the unfortunate reality that many workers, due to low wages and/or insufficient working hours are compelled to find second, third and even fourth jobs. Multiple job holding is today at record highs both in absolute numbers and as a proportion of the labour force.<sup>1</sup>

Agreements between companies that they will fix wages (by capping them) or not hire each others’ staff have no place in our economy. These sweetheart deals between companies and against workers must be banned to the extent they are not already and should attract full regulatory attention – as is the case in other jurisdictions.

Much may be said about the ultimate lack of enforceability of restraint of trade clauses, however the unfortunate reality is that their chilling effect endures despite this. Unfortunately, bullying and intimidation from former employers, or even the very fact of their existence in an employment contract, coupled with informational asymmetries and an imbalance of power means that the chilling effect of such clauses is real, even if they are ultimately unenforceable.

These clauses need to be banned. They are anti-competitive, anti-worker, and a brake on productivity, innovation and our economy.

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<sup>1</sup> ABS Multiple Job Holder, December 2023.

# Introduction

## About the Consultation

Treasury's Competition Review is currently consulting on the use of restraint of trade clauses (<https://treasury.gov.au/consultation/c2024-514668>). The ACTU makes this submission in relation to that consultation.

## About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 36 ACTU affiliates, representing more than 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

## Response to Issues Paper

The Issues Paper poses 19 discussion questions. The ACTU's response to those discussion questions is as follows.

- 1. Does the common law restraint of trade doctrine strike an appropriate balance between the interests of businesses, workers and the wider community? If no, what alternative options are there?**

The common law on contracts and "non-compete" clauses stretches back a long way. The basic principles which have withstood time are as follows:

- Parties will generally be bound by the contract they have made;<sup>2</sup>
- However, a term imposing a restraint of trade will generally be contrary to the public interest and invalid except to the extent that it is reasonably necessary to protect a legitimate business interest.<sup>3</sup>

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<sup>2</sup> *Doherty v Allman* (1878) 3 AC 709

<sup>3</sup> *Nordenfelt v Maxim Nordenfelt Guns and Ammunitions* [1894] A.C. 535; *Herbert Morris Ltd v Saxelby* [1916] AC 688

- Moreover, a court will be less likely to uphold a restraint of trade clause in favour of an employer against an employee than against one business against another.<sup>4</sup>

The public policy intention behind this was expressed by the Privy Council in *Stenhouse* as follows:<sup>5</sup>

The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if this has been acquired in the service of his employer: it is this freedom to use to the full a man's improving ability and talents which lies at the root of the policy of the law regarding this type of restraint. Leaving aside the case of misuse of trade secrets or confidential information (which is separately dealt with by clause 3 of the agreement and which does not arise here), the employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee may have contributed to its creation. For while it may be true that an employee is entitled – and is to be encouraged – to build up his own qualities of skill and experience, it is equally his duty to develop and improve his employer's business for the benefit of his employer. These two obligations interlock during his employment: after its termination they diverge and mark the boundary between what the employee may take with him and what he may legitimately be asked to leave behind to his employers.

The above principles were clarified in *Peck* to mean that a non-compete clause will generally be presumed to be void unless it is:

- reasonable between the parties *and*
- not unreasonable in the public interest.<sup>6</sup>

For this reason, many non-compete clauses are ultimately held to be unenforceable, on the basis that they impose a restraint of trade against the public interest.

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<sup>4</sup> *Just Group Limited v Peck* [2016] VSCA 334 at [32]

<sup>5</sup> *Stenhouse Australia Ltd v Phillips* [1974] AC 391

<sup>6</sup> *Just Group Limited v Peck* [2016] VSCA 334 at [30] – [31]

Certain areas of restraint, such as those dealing with confidential information, and prohibitions on soliciting clients or employees are, however, considered to be separate from the classic restraint and are otherwise valid and enforceable.

Another exception, not of widespread or general application, relates to certain highly specialised occupations (for example, an opera singer, movie star or football player) whose work for a competitor might sometimes be legitimately restrained.<sup>7</sup>

However, the common law on restraint of trade is insufficient in at least two ways:

- Firstly, some restraints of trade, which in our view ought be void, are held up by the courts as being valid. In part this is due to the ability of courts to sever (but not rewrite) a restraint of trade clause; and
- Secondly, the common law doctrine on restraint of trade is, by itself, an insufficient brake on their widespread use. There are complex reasons for this, including the asymmetrical power relationship between employer and worker, as well as the various barriers to court proceedings that most workers have.

Severability – that is the ability for courts to excise invalid parts of a restraint of trade clause whilst retaining such parts as might be valid is one reason that restraint of trade clauses may sometimes be held up as valid by courts. It leads to a practice of drafting cascading clauses which in many cases is itself is dissuasion enough for workers who might otherwise seek alternative employment – many workers faced with a cavernous set of unclear obligations that appear to be drafted in accordance with legal principles simply do not do so for fear of contravening an obligation. A particular extreme example of a cascading restraint of trade clause was considered (and ultimately held to be invalid) in *Austra Tanks v Running*:<sup>8</sup>

If, for some reason which is not obvious to me, one should seek to give a benevolent construction to this malevolent covenant, one might treat it as requiring the examination of all possible combinations of the ingredients, in other words, all possible versions of the covenant, in the search for one that is enforceable. This approach is suggested in the definition of the stipulated time” which which “means separately in respect of each activity specified in paragraph (a) hereof and each product specified in paragraph (b) hereof and each area specified in paragraph (c) (d) or (e) hereof”, each of six alternative times. There are six activities in par (a), fourteen products in par (b) (two alternative

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<sup>7</sup> *Lumley v Wagner* (1852) 64 ER 1209; *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337

<sup>8</sup> [1982] 2 NSWLR 840

design qualifications for each of the seven items listed) and 163 possible combinations of areas in pars (c) (d) and (e). The number of different covenants that could be constructed from the ingredients is therefore  $6 \times 6 \times 14 \times 163$  or 82,152.

Amongst these 82,152 covenants there may well be a large number that would be enforceable. It is inconceivable that there is one and only one.

The legal intricacies of non-competition clauses, and their potential unenforceability is not something that can be readily expected to be known by all workers. This was recently acknowledged by the Fair Work Commission which considered a workers' failure to seek work in their field and thereby mitigate loss of income following a termination, based on their belief as to the validity of a restraint of trade clause. As Colman DP observed:<sup>9</sup>

One wonders why such restraint of trade provisions are so commonly found in the contracts of ordinary workers and whether they really protect any legitimate business interest of the employer, or merely serve to fetter the ability of workers to ply their trade, and to reduce competition for labour and services. Ordinarily, one would expect a person to have applied for jobs in the sector of their expertise as a reasonable step in mitigating loss. However the presence of a non-compete provision in his contract explains Mr Goddard's decision not to do so. Although the provision is most likely unenforceable on the basis that its scope is unreasonable, an ordinary worker cannot be expected to know this, and it is understandable that Mr Goddard would not want to risk embroiling himself in a legal controversy by acting contrary to an express provision in his contract.

**2. Do you think the Restraints of Trade Act 1976 (NSW) strikes the right balance between the interest of businesses, workers and the wider community? Please provide reasons. If not, what alternative options are there?**

The position on restraints of trade in NSW differ in two key materials aspects to the position under the common law:

Common Law	New South Wales
Restraint of trade is presumed to be against public interest and therefore invalid.	Starting point is validity of restraint of trade, except to the extent it is not against public policy.

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<sup>9</sup> *Andrew Goddard v Richtek Melbourne Pty Ltd* [2024] FWC 979 (16 April 2024) at [27]



Clauses may be severed, but the term may not be “read down” to preserve its application. This cannot be done to a point where it affects the certainty of a clause.	Term may be “read down”.
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Under the common law, the operative starting point of a court’s inquiry is that the restraint of trade is contrary to the public interest. The court must then ascertain whether there is a legitimate interest which the clause is directed at protecting. By shifting the starting point to one of accepting the restraint unless it shown to be contrary to the public interest, the NSW legislation sets up a lesser protection for workers than the common law.

The New South Wales legislation also allows a restraint of trade clause to be “read down” – that is read in a way that is lesser than drafted but so as to be permissible. This allows a greater number of restraint of trade clauses to be upheld than under the common law (which allows for severance but not reading down).

Accordingly, it is our view that while the current common law position is not ideal, it is superior to the position in NSW legislation which allows for more restraint of trade to be enforced against workers.

Further, the disparity between the sets of provisions, is a contributor to “forum shopping”.<sup>10</sup> For this reason, a uniform position would be preferable.

### **3. Are current approaches suitable for all workers, or only certain types of workers? For example, senior management, low-income workers, or care workers etc?**

The current approaches apply to workers at all classifications, with any differences mainly arising from jurisdictional differences. Whilst we are of the view that the current common law position on restraints of trade, and certainly the position in NSW, should be changed; we do not make a distinction in terms of a workers’ classification, level or remuneration.

Restraints of trade are a drag on the economy and stifle workers at all levels.

Despite being thought of as something only affecting high earning senior employees, data shows that restraints of trade are commonly used for a great range of employees. For example, 26% of

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<sup>10</sup> Arup et. al., 2013, Restraints of Trade: The Legal Practice, *UNSW Law Journal* 36(1), 14-16.

Community and Personal Services Workers, 14% of clerical and administrative workers report having restraint of trade clauses in their contracts:<sup>11</sup> Remarkably, 43% of gig economy workers report having restraint of trade clauses, despite such a notion being fundamentally antithetical to the conception of the gig economy.<sup>12</sup>

Any solution which prohibited or restricted restraints of trade generally but allowed them for a specific cohort – for example, senior employees, highly remunerated employees etc. – would be unsatisfactory on the basis that it:

- Would allow for a loophole whereby employer could, for example, classify a role as being more senior than it in fact is, in order to adopt a restraint of trade clause; and
- Would be unnecessary at any rate, as the relevant and legitimate protections that might be relevant to a senior employee, such as those over confidential information, are capable of protection without a restraint of trade clause.

Moreover, such a position would ignore the negative effects that restraint of trade clauses have on the broader economy. This is particularly the case with more senior or specialised employees who would be locked out of driving innovation if prevented from working for a competitor or starting their own business in the future.

#### **4. Would the policy approaches of other countries be suitable in the Australian context? Please provide reasons.**

In some countries, the right to earn a living through work is constitutionally protected; for example:

- Finland (Article 18);
- Italy (Article 4);
- Norway (Article 11);
- Spain (Article 35)

Recognising this fundamental right – whether constitutionally or in statute – is an important starting point which would have a bearing on subsequent decision-making as to whether a clause in a contract which interferes with a workers' ability to earn a living is acceptable.

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<sup>11</sup> Andrews and Jarvis, *The ghosts of Employer's Past: How Prevalent are Non-Compete Clauses in Australia*, e61 Institute

<sup>12</sup> Andrews and Jarvis, *The ghosts of Employer's Past: How Prevalent are Non-Compete Clauses in Australia*, e61 Institute

California has had a longstanding ban on non-compete clauses. This is attributed to the success of California, “Silicon Valley” in particular, in becoming a hub of technological innovation.<sup>13</sup> During the 1970, the computer industry’s hub in America was considered to be Boston.<sup>14</sup> However, the enforceability of non-compete provisions in that jurisdiction stifled development.<sup>15</sup> In California, on the other hand, several breakthroughs in chip technology took place which have been attributed to the unenforceability of non-compete clauses.<sup>16</sup> For example, the company Intel was formed as the result of several movements and the creation of startups by former employees of existing companies.<sup>17</sup>

The United States as a whole recently moved to ban non-compete clauses (subject to limited exceptions and transitional provisions).<sup>18</sup> The policy rationale underpinning the ban is set out as follows:<sup>19</sup>

‘...research has shown that the use of non-competes by employers tends to negatively affect competition in labor markets, suppressing earnings for workers across the labor force—including even workers not subject to non-competes. This research has also shown that non-competes tend to negatively affect competition in product and service markets, suppressing new business formation and innovation.[31]

...

Workers came forward to recount how—by blocking them from taking a better job or starting their own business, and subjecting them to threats and litigation from their employers—non-competes derailed their careers, destroyed their finances, and upended their lives.[33]

Yet despite the mounting empirical and qualitative evidence confirming these harms and the efforts of many States to ban them, non-competes remain prevalent in the U.S. economy.’

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<sup>13</sup> Reuters, 25 April 2024, ‘Silicon Valley models value of noncompete ban’ <https://www.reuters.com/legal/litigation/silicon-valley-models-value-noncompete-ban-2024-04-24/>

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Federal Trade Commission, ‘FTC Announces Rule Banning NonCompetes, <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>

<sup>19</sup> Non-Compete Rule, <https://www.federalregister.gov/documents/2024/05/07/2024-09171/non-compete-clause-rule>

The US Federal Trade Commission estimates that the ban on non-compete clauses will have the following effects:<sup>20</sup>

- New business formation will grow by 2.7%, creating over 8,500 new businesses each year.
- American workers' earnings will increase by \$400-\$488 billion over the next decade, with workers' earnings rising an estimated \$524 a year on average.
- Health care costs will be reduced by \$74-\$194 billion over the next decade in reduced spending on physician services.
- Innovation will increase, with an average estimated increase of 17,000-29,000 more patents each year over the next decade.

US law designates entering into or enforcing (or attempts thereof) a non-compete clause, as well as representing that a worker (with limited exceptions) is covered by a non-compete clause as an "unfair method of competition".<sup>21</sup>

#### **5. Are there other experiences or relevant policy options (legislative or non-legislative) that the Competition Review should be aware of?**

*The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* inserted new provisions into *the Fair Work Act 2009 (Cth)* which ensured that workers had a right to discuss their wages and conditions with one another. Clearly, the subject matter of this is different to that of restraints of trade, however this is an instructive example of a mechanism that could be adopted. This is because pay secrecy was commonly achieved by employers through the use of terms in employment contracts – similarly to restraint of trade.

The Pay Secrecy provisions in the FW Act have 3 components:

1. A right for workers to discuss their pay and conditions (s 333B);
2. A provision to the effect that a pay secrecy term in a fair work instrument or an employment contract has no effect, to the extent it is inconsistent with the right above (333C).

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<sup>20</sup> Federal Trade Commission, 'Non-Compete Fact Sheet', [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Non-Compete-Fact-Sheet.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Non-Compete-Fact-Sheet.pdf)

<sup>21</sup> Non-Compete Rule, <https://www.federalregister.gov/documents/2024/05/07/2024-09171/non-compete-clause-rule>

3. A prohibition on an employer entering into a contract or written agreement that is inconsistent with the right above.

This solution is straightforward, effective and instructive. In particular, the mechanisms described in points 2 and 3 above could be adopted with respect to restraints of trade, with similar effect. This would see restraints of trade addressed in two important ways:

1. A worker would not be bound by a restraint of trade, even if there was one in their contract or a fair work instrument; and
2. A civil remedy provision, similar to that which applies to pay secrecy, would also be available if an employer adopted a restraint of trade clause in an employment contract.

Ensuring that workers are not bound by restraints of trade, even if entered into in a contract, would protect those workers interests and allow for greater mobility between jobs. However, an additional policy lever is also required to ensure that the use of restraints of trade is disincentivised. A simple provision that restraints of trade are void would assist some workers, but only to the extent that there is generally awareness of this. The widespread use of restraints of trade despite their lack of strong legal foundation suggests that some employers could still seek to adopt them and rely on them, even if they weren't enforceable. This is in part because of the asymmetry in the employment relationship and the chilling effect that restraints of trade have – an employer seeking to enforce a restraint of trade doesn't need to have it enforced in court, oftentimes a letter from their lawyers to the worker is sufficient.

For this reason, as the pay secrecy provisions recognise, a further brake on the usage of restraints of trade is required. An outright prohibition, and the availability of civil penalties would, in our submission, appropriately ensure that employers do not seek to adopt restraint of trade clauses to shackle workers.

We are of the view that the mechanism outlined above could be applied with great effect to the issue of restraint of trade clauses. Further, it is our submission that the solution we have outlined above should properly sit within the FW Act. Restraints of trade are an employment issue. Whilst there is an obvious trade related dimension, they primarily arise in the course of employment. It is therefore sensible to locate provisions relating to restraints of trade in the FW Act for (at least) two reasons:

1. The scope of the FW Act is targeted at regulating work, including that of employees.
2. The FW Act is the piece of legislation that employers and workers will be most familiar with in terms of regulating the working relationship – a provision located in a different piece of legislation may escape their attention and therefore be of lesser utility.

**6. What considerations lead businesses to include client non-solicitation in employment contracts? Are there alternative protections available?**

We are not directly aware of the state-of-mind that leads employers to seek to constrain the future activities of their workers.

At any rate, there are a number of alternative protections available to employers. Chief amongst which is simply being a good employer. Workers are less likely to leave an employer who pays well, recognises and values their staff and provides opportunities for innovation and growth. Even if an employer cannot deliver this, there are sufficient protections available – which would not be disturbed by a limit on restraint of trade clauses – for:

1. Confidential information;
2. Sensitive commercial information;
3. Intellectual property; and
4. Other interests that an employer would legitimately seek to protect.

**7. Is the impact on clients appropriately considered? Is this more acute in certain sectors, for example the care sector? Please provide reasons.**

A number of examples from the care sector are given below. These examples highlight the absurdity of non-compete clauses. They are used against ordinary, non-senior, workers by mid to large employers who simply want to intimidate their way out of any sort of competition. It is not with care recipients best interests in mind that clauses like this are drafted. Rather, they are drafted with the aim of protecting the interests of employers who would seek to restrain their staff and suppress wages growth.

**8. What considerations lead businesses to include co-worker non-solicitation in employment contracts? Are there alternative protections available?**

Again, we are not directly aware of the motivations of employers. However, we are of the view that clauses which prohibit non-solicitation of co-workers are undesirable in ways similar to restraints of trade. Non-solicitation clauses effectively restrain job mobility just like restraint of trade clauses themselves. The simplest way for employers to ensure that their workers aren't solicited by former colleagues or other companies is to simply be competitive.

**9. Is the impact of co-worker non-solicitation clauses more acute for start-ups/new firm creation or in areas with skills shortages in Australia?**

**10. What considerations drive businesses to include non-disclosure clauses in employment contracts? Are there alternative protections, such as s183 of Corporations Act 2001 available?**

We are of the view that *the Corporations Act 2001 (Cth)* s 183 provides adequate protections for the improper use of information gained during employment.

### 11. How do non-disclosure agreements impact worker mobility?

The use of non-compete clauses has increased (both in Australian and overseas) in recent years to the point where about one-in-five Australian workers are covered by a non-compete - and it's no longer just highly paid executives or special categories of workers that are covered by them.<sup>22</sup> A survey by the e61 Institute found that around half of the Australian workforce was subject to a restraint of trade of some kind, with 22% of workers being subject to a non-compete.<sup>23</sup> The survey also found that non-compete clauses: 'now apply to outward facing customer roles – childcare workers, yoga instructors and IVF specialists – in addition to senior roles in law, finance and business services'.<sup>24</sup>

'The existing law and practice in respect of the use of non-competes in Australia is manifestly unfair and contrary to the public interest. In most cases the parties to a non-compete cannot be certain of enforceability without a judicial determination and such uncertainty weighs more heavily on employees than employers. For many employees the mere threat of litigation is enough to secure compliance, irrespective of the enforceability of the non-compete. Further, the research literature suggests that non-competes are associated with the reduced employee mobility, with consequential negative impacts on wages and productivity.'<sup>25</sup>

It is difficult to empirically quantify the precise effect on restraining trade that these clauses have. This is due to the "*in terrorem*" effect of them, whereby, as the court observed in *Rita Personnel Services v Kot*:<sup>26</sup>

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<sup>22</sup> ANU Tax and Transfer Policy Institute, March 2024, 'Non-compete clauses in employment contracts: The case for regulatory response'. TTPI - Working Paper 4/2024

[https://taxpolicy.crawford.anu.edu.au/sites/default/files/publication/taxstudies\\_crawford\\_anu\\_edu\\_au/2024-03/complete\\_wp\\_i\\_ross\\_mar\\_2024.pdf](https://taxpolicy.crawford.anu.edu.au/sites/default/files/publication/taxstudies_crawford_anu_edu_au/2024-03/complete_wp_i_ross_mar_2024.pdf), 1 ;

<sup>23</sup> Andrew and Jarvis, 2023, e61 institute, The ghosts of employers' past: how prevalent are non-compete clauses in Australia?', <https://e61.in/the-ghosts-of-employers-past-how-prevalent-are-non-compete-clauses-in-australia/>

<sup>24</sup> Andrew and Jarvis, 2023, e61 institute, The ghosts of employers' past: how prevalent are non-compete clauses in Australia?', <https://e61.in/the-ghosts-of-employers-past-how-prevalent-are-non-compete-clauses-in-australia/>

<sup>25</sup> ANU Tax and Transfer Policy Institute, March 2024, 'Non-compete clauses in employment contracts: The case for regulatory response'. TTPI - Working Paper 4/2024

[https://taxpolicy.crawford.anu.edu.au/sites/default/files/publication/taxstudies\\_crawford\\_anu\\_edu\\_au/2024-03/complete\\_wp\\_i\\_ross\\_mar\\_2024.pdf](https://taxpolicy.crawford.anu.edu.au/sites/default/files/publication/taxstudies_crawford_anu_edu_au/2024-03/complete_wp_i_ross_mar_2024.pdf), 1 ;

<sup>26</sup> 229 Ga. 314, 191 S.E.2d 79

For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction.

However, recent ABS data showed that amongst employers surveyed on their use of restraint of trade clauses: 'Non-disclosure clauses were the most common restraint clause, used by 45.3% of Australian businesses in 2023. The next most common was the Non-solicitation of clients (25.4%), followed by Non-compete (20.8%) and Non-solicitation of co-workers (18.0%)'.<sup>27</sup> Most employers who reported using any restraint of trade clauses also reported using those clauses across all or a majority of their workforce.<sup>28</sup>

As the above figures indicate, there are numerous examples of workers' being bullied out of seeking better employment opportunities because of restraint of trade clauses. We include a few of these actual examples, provided to us by our affiliates in this submission. We note, however, that due to substantive and practical limitations on the anti-victimisations laws that ought protect workers, we have had to de-identify these examples.

#### *Example 1*

A process worker in the textile manufacturing industry, is subject to restraint of trade clauses in their employment contract. They are not a highly paid or senior worker and are paid slightly above the modern award rates. Their contract prevents them from soliciting any client of the business or from engaging in a rival business after the employment ends. The restraint is written in the cascading form and applies for up to 12 months post-employment up to 50 kms from the defined area.

#### *Example 2*

A worker in the disability support sector has a restraint of trade in their contract. The restraint prohibits solicitation of customers or *potential customers*, or the assistance thereof, for a period of up to 12 months. The working reality of the disability care industry is that this rules out working for a competitor, as well as self-employment (which can be a common mode of engagement) in the industry that the worker is trained in. That the restraint is expressed to cover

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<sup>27</sup> <https://www.abs.gov.au/articles/restraint-clauses-australia-2023>

<sup>28</sup> <https://www.abs.gov.au/articles/restraint-clauses-australia-2023>



potential as well as actual customers travels well beyond non-solicitation of existing customers and effectively rules out all forms of work in the industry.

#### *Example 3*

Another disability care worker has a restraint that prevents them starting their own business or even working for a competing business after the employment relationship ends. Perhaps most shockingly, the restraint clause has a liquidated damages provision that provides for the payment, by the employee, of twice the value of any client lost after their departure.

#### *Example 4*

A third employee in the care sector has a restraint clause which locks them out of work for 2 years within 100kms of the employer. It is almost impossible to imagine how a professional worker would maintain their livelihood post-employment and comply with a clause like this.

#### *Example 5*

One employee, who worked in a warehouse, had a non-compete clause preventing them from working for “any competitor”. Warehousing is a reasonably broad category of employers to exclude a worker from working from, and it could be difficult for the worker to identify which company may or may not be considered a competitor. Moreover, the worker was a warehouse operator, meaning that while it was likely they would need to continue to work in warehousing in the future to earn a living, it was far less likely that they would, at any rate, be in a position to conduct poaching of existing clients anyway.

#### *Example 6*

An insurance broker in regional Australia left their employment. They had both local and national clients. Following their departure, which was for various reasons including poor treatment, bullying and harassment, their former employer made several disparaging comments about the broker to the brokers former clients. The broker had a geographically defined restraint of trade clause operative for 12 months following their departure. Notwithstanding the question as to whether or not that clause was enforceable, the broker acted in accordance with it – they didn’t attempt to poach their former clients and even explained that they were under a restraint when former clients contacted them out of the blue.

Through acquaintances, the broker became aware that their former employer wasn't putting their best foot forward in terms of client retention during the restraint period – for example, they inflated one business's premium by about 30%, despite a net saving being available. The former employer also didn't maintain a staff presence in the regional location. At around the time the restraint period ended, the broker established their own business. They soon received a letter from a solicitor, on behalf of their former employer. The letter accused the broker of contacting and speaking to former clients who had taken their business "elsewhere". The letter alleged that the employee had breached their duties under the employment contract, as well as their duties under the *Corporations Act* and committed the tort of injurious falsehood. It drew short of alleging a breach of the Constitution. Not only did the letter demand that the broker confirm that they will cease contacting any clients (despite the restraint period having ended), on threat of commencing proceedings in 14 days without further notice, it also demanded payment of sum of damages calculated to be \$40,000.

Luckily, on this occasion, the broker was able to respond to the solicitor stating that they had the support of their union to defend against this. They never heard back.

This is a particularly egregious example of the heavy-handed enforcement tactics that some employers will use to intimidate their former employers out of legitimately competing with them. It's also a somewhat galling example of the bully-boy tactics that some law firms will employ to service the interests of those employer. For the employers and the solicitors doing their bidding, it is the legal equivalent of a fishing strategy:

1. There is no real downside to the employer or law firm, aside from some loss of humanity;
2. Their upside is twofold:
  - a. Either the worker will stop plying their trade and the former employer will continue to enjoy their monopoly; or
  - b. The employer will feel threatened enough to pay the outrageously calculated (or perhaps uncalculated) damages, earning a swift pay day for the former employer and the solicitor.

An example like this also cannot be neatly be viewed through an employee versus business paradigm. In this example, the only business that stood to profit were the former employer if they maintained an unchallenged monopoly and the law firm who gets their fees. The worker who loses the ability to ply their trade loses out, but so do the other businesses in the area who rely on the particular services – as we have seen in this example, the employer's primary interest appeared to be in maintaining their ability to price-gouge when providing services to small businesses that rely on them.

## 12. How do non-disclosure agreements impact the creation of new businesses?

### 13. When is it appropriate for workers to be restrained during employment?

In *Buckenara v Hawthorn Football Club* [1988] VR 39 Crocket J observed that courts would generally be slow to find that a non-compete clause that operated during employment but not afterwards was not reasonable:

‘So long as you are in our employ you shall not work for anybody else’ is in no way unreasonable’

Similarly, in *Curro v Beyond Productions* (1993) 30 NSWLR 337 the court granted an injunction restraining Curro from working for a competitor during the life of a contract.

However, the above two cases (a football player and a television presenter) arise regarding a special category of workers recognised by courts. At any rate, the employment market has changed to such an extent that most workers no longer ought be restrained from working elsewhere, even during the course of their employment.

With respect to full-time employees we are of the view that a test of reasonableness should apply to the use of restraint of trade clauses in employment. Such a test could include indicia such as: the nature, seniority and remuneration of the employee, and the nature of the industry in which they work. Restraints during employment should only be applicable to related positions in the same industry.

### 14. Is it appropriate for part-time, casual and gig workers to be bound by a restraint of trade clause?

It is our view that it would never be appropriate for a part-time, casual or gig economy workers to be bound by a non-compete clause. In our submission it is wholly inappropriate for an employer to demand undivided loyalty whilst only paying for a portion of a person’s working time. It is also entirely disingenuous for platform operators to seek to restrain workers from working for a competitor whilst simultaneously denying that an employment, or for that matter any working, relationship exists.

Many part-time, casual and gig economy workers must inevitably work multiple jobs in order to make ends meet. Clauses which restrain them from doing so should not be permitted.

### 15. Should there be a role for no-poach and wage-fixing agreements in certain circumstances...

If employers want to fix wages as a group or even across an industry there are perfectly acceptable ways of doing this through multi-employer bargaining. This is an open and transparent means of setting wages for multiple employers and contains appropriate safeguards in the form of collective input from the workforce. Covert arrangements between employers, especially those that seek to limit wage increases, on the other hand, should have no role to play. This means that such agreements should be prohibited, and appropriately sanctioned through the use of penalties.

Whether between unrelated, co-operating or related companies two propositions are undeniable with respect to non-poach and wage fixing arrangements:

1. Employers are the sole beneficiaries of the arrangements;
2. Workers bear all of the downside of the arrangements.

The one-sided nature of wage-fixing and non-poach agreements sees them operate as an unfair limitation on competition that distorts wage markets. By contrast, a group of workers in an industry refusing to work for less than a given wage rate above the prescribed statutory minimum would likely be considered to be engaging in unprotected industrial action, secondary boycotts or some other such form of contravention of industrial laws.

**16. Are there alternative mechanisms available to businesses to reduce staff turnover costs without relying on an agreement between competitors?**

It is open to any employer who wants to compete on products and services instead of wages to do one of two things:

1. Collectively bargain a multi-enterprise agreement with common, agreed (as between employees and employers) and transparent wage rates;
2. Incentivise staff retention and loyalty through good wages and conditions;

**17. Should any regulation of no-poach and wage-fixing agreements that harm workers be considered under competition law as an agreement between businesses (for example reconsidering the current exemption), or under an industrial relations framework?**

We are of the view that non-poach and wage-fixing prohibitions should be contained in the IR framework (i.e. FW Act). However, this does not prevent their also being addressed in parallel in competition law.

**18. Should franchisors be required to disclose the use of no-poach or wage-fixing agreements with franchisees?**

Primarily, our answer to this is that there should be a prohibition on no-poach and wage-fixing agreements with franchisees. In the alternative, such arrangements should at least be disclosed.

### 19. Are there lessons Australia can learn from the regulatory and enforcement approach of no-poach and wage-fixing agreements in other countries.

Certain countries take a particularly dim view of wage fixing and non-poach agreements.

For example:

1. In 2016, the US Department of Justice Antitrust Division and the Federal Trade Commission issued the *Antitrust Guidance for Human Resources Professionals*, signalling that they would take strong enforcement action against corporations engaging in wage-fixing or anti-poaching agreements. The communication stated:<sup>29</sup>

An individual likely is breaking the antitrust laws if he or she:

- agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements), or
- agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called "no poaching" agreements).

...

Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws.

...

Going forward, the DOJ intends to proceed criminally against naked wagefixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each others' employees. And if that investigation uncovers a naked wage-fixing or

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<sup>29</sup> <https://www.justice.gov/atr/file/903511/download>

nopoaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.

2. Canada in 2023 issued *Enforcement Guidelines in wage-fixing and non-poaching agreements*.<sup>30</sup> That made clear that Canada's Competition Bureau took the view that the wage-fixing and non-competition agreements breached the *Competition Act*. Notably, these provisions are criminal provisions.<sup>31</sup> The Enforcement Guidelines stated:

Paragraph 45(1.1)(a) [of the *Competition Act*] prohibits agreements between unaffiliated employers:

- to fix, maintain, decrease or controlFootnote16 salaries;
- to fix, maintain, decrease or control wages; and
- to fix, maintain, decreaseFootnote17 or control terms and conditions of employment, where "terms and conditions" include the responsibilities, benefits and policies associated with a job. This may include job descriptions, allowances such as per diem and mileage reimbursements, non-monetary compensation, working hours, location and non-compete clauses, or other directives that may restrict an individual's job opportunities. The Bureau's enforcement generally is limited to those "terms and conditions" that could affect a person's decision to enter into or remain in an employment contract.

3. In 2023, the European Commission issued a communication, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, which clearly showed its view that wage-fixing and non-poach agreements offended the Article 101 of the *Treaty on the Functioning of the European Union* (one of the foundational documents of the EU), which is concerned with internal trade. The communication outlined (at para 279) the Commission's view that such agreements were 'buyer-cartels'.

It is submitted that these examples are instructive, and demonstrate that other jurisdictions:

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<sup>30</sup> 'Enforcement Guidelines on wage-fixing and no poaching agreements' <https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements>

<sup>31</sup> Norton Rose Fulbright, [https://www.nortonrosefulbright.com/en-au/knowledge/publications/ae773684/no-poach-no-problem-competition-bureau-releases-enforcement-guidelines-for-wage-fixing#:~:text=The%20new%20wage%2Dfixing%20and.wage%2Dfixing%E2%80%9D%20agreements\)%3B%20or](https://www.nortonrosefulbright.com/en-au/knowledge/publications/ae773684/no-poach-no-problem-competition-bureau-releases-enforcement-guidelines-for-wage-fixing#:~:text=The%20new%20wage%2Dfixing%20and.wage%2Dfixing%E2%80%9D%20agreements)%3B%20or)

- a) Are confident that they have laws in place which prohibit wage-fixing and non-poaching arrangements; and
- b) Have regulators that are prepared to enforce these provisions, having confirmed the same.

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