

BCA

Business Council of Australia

Submission to Treasury on non- competes and other restraints

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1. Overview

The Business Council of Australia (BCA) represents more than 130 of Australia's leading businesses. Our members cover a range of sectors including manufacturing, infrastructure, information technology, mining, retail, financial services and banking, energy, professional services, transport, health and telecommunications. We work to ensure Australia is economically strong to support a competitive, productive, fair and inclusive society for all Australians. Achieving this requires successful, well-run businesses that create meaningful jobs, and an inclusive work environment which reflects and is accountable to the broader Australian community.

We welcome the opportunity to provide a response to the Competition Review's Issues Paper, titled *Non-competes and other restraints: understanding the impacts on jobs, business and productivity* (**Issues Paper**).

1.1 What are non-competes and why are they necessary?

Non-compete agreements are a mechanism by which employees agree with their employer that they will not work for a competitor/s for a defined period in a defined area, following the end of their employment. Employers use non-compete arrangements to protect their legitimate business interests, such as:

- Confidential information
- Intellectual property
- Customer and client relationships

Non-competes are distinct from other post-employment restrictions. They are used to protect the genuine interests of a business (listed above) from being exploited by former employees who may gain an unfair advantage through the former employment relationship (see Appendix 1). Accordingly, their use is important to many businesses for relevant employees.

Non-compete arrangements may be included in an employment agreement or may be separately agreed as part of a standalone deed or agreement, as part of share plans or bonus arrangements, or otherwise. They only apply for limited time periods and are distinct from other post-employment restraints such as non-solicitation terms and confidential information protections.

Post-contractual restraints can also be used in other commercial contexts, such as sale of business contracts. Non-competes are only enforced by Australian Courts to the extent they are reasonable and not against public policy.

Non-competition clauses play an important role for businesses, to protect their legitimate business interests from misuse and unfair competition in circumstances where other business protection mechanisms have failed or may otherwise be insufficient. They also play an important role when employees have shown they are unwilling to comply with other obligations such as in relation to the protection of confidential and proprietary information and intend to misuse it for their own benefit or that of a third party. Non-competes can also benefit workers by giving employers confidence to invest in their workforce, including training,¹ and may be negotiated in return for higher remuneration or other benefits.

However, the BCA recognises that non-compete agreements are not appropriate in every circumstance. This is also recognised by Australian Courts, which have developed a balanced and nuanced approach to the enforcement of restraints at common law, adaptable to the facts and circumstances of individual cases. Given this balancing act already applied by the Courts, the BCA does not consider that the case for banning or severely restricting non-competes has been made. The BCA notes the protective role played by the Australian Courts, who will not enforce a restraint against mere competition², and who will read down restraint clauses³ to ensure they apply no further than what is reasonably required to protect an employer's legitimate business interests.

¹ United States Government Accountability Office (May 2023), *Noncompete Agreements, Use is widespread to protect business' stated interests, restricts job mobility and may affect wages*, Report to Congressional Requesters.

² *AEI Insurance Group Pty Ltd v Martin* [2023] FCA 914

³ In NSW, or by applying the 'blue pencil' rule outside of NSW.

While research by the e61 Institute has identified that non-compete terms have been used for lower paid workers such as yoga instructors and hair dressers⁴ and the effect of restraint enforcement on some low wage workers is considered in the Issues Paper,⁵ there is little examination in that paper of the disproportionate impact employees of small businesses can have when they leave employment and set up in competition in what may be small and/or suburban markets. This is particularly so if that competition is achieved by use of the customer relationships, client and supplier lists, pricing and marketing plans or other confidential information that the worker only has by virtue of their employment with the small business. Where former workers seek to use proprietary information and relationships from their former employment, non-competes are the only mechanism to effectively restrain such unfair competition. For this reason, the BCA has not supported income thresholds as being a determining factor as to whether non-compete terms should be available or not.

1.2 Do non-competes impact job mobility?

The BCA acknowledges the importance of considering the competition consequences of labour market practices to ensure our settings support long-term economic growth. However, we believe that the evidence to support specific policy changes has not been established at this stage.

Labour mobility is largely impacted by underlying economic conditions and structural factors including an ageing workforce and can also be impacted by other barriers to switching such as access to housing. The evidence presented in the Issues Paper focuses narrowly on post-employment restraints rather than broader factors that are likely to influence labour mobility. For example, labour mobility fell markedly following the recessions in the 1980s and 1990s, and more recently during the Global Financial Crisis (GFC)⁶. Job mobility spiked recently amidst a tight labour market as the economy emerged from the pandemic⁷.

As in other advanced economies, older Australians are increasing their participation in the labour market while younger Australians defer their entry to undertake further education. This bears on overall labour mobility as older Australians tend to switch jobs less than younger Australians, particularly 15–24-year-olds who exhibit significantly higher switching.

More specifically on the data presented on labour mobility and non-competes, the BCA is concerned that the analysis does not address whether the use of non-competes materially effects labour mobility.

We note the efforts to date to gather data about the prevalence of post-employment restraints in employment contracts, but the data are of limited scope, only addressing their use in employee arrangements, and do not address the effect or impact of such clauses on the labour market which is essential to assess their impact or otherwise on labour mobility and competition, and productivity more broadly. The absence of robust data on these issues presents a material gap in the evidence-base needed by policymakers to design effective, productivity-enhancing policy. Policymakers should not progress policy change in this area until robust data analysis can be completed.

One way of overcoming these limitations would be for Treasury to commission independent research to better understand the relationship between the prevalence of non-compete clauses and other restraints (noting that e61 has completed some research in this area already), and the behavioural impact of such clauses on employer and employee decision-making. In our view, this research must be done prior to policy options being advanced.

Other Key Recommendations made by the BCA are set out in section 2 of this submission below.

1.3 The lack of a uniform approach overseas

Having regard to developments in other countries, the BCA considers it is important for Australia to first consider its unique industrial and employment relations legislation and structure, the developments in its own common law, current state and commonwealth legislation and its own markets and economy before it adopts approaches used elsewhere, which are necessarily influenced by those other jurisdictions own characteristics and market forces. For example, the BCA considers that Australia should not follow the United States. The regulation of workplace relations in the two nations is markedly different. Further, while the US Federal Trade Commission (FTC) has issued a final rule

⁴ Dan Andrews and Bjorn Jarvis, *The ghosts of employers past: how prevalent are non-compete clauses in Australia?*, e61 Institute, 19 June 2023.

⁵ Issues Paper, page 23

⁶ Reserve Bank of Australia, 2022, *Job Mobility in Australian during the Covid-19 Pandemic*, Bulletin – June 2022, p25, <https://www.rba.gov.au/publications/bulletin/2022/jun/pdf/job-mobility-in-australia-during-the-covid-19-pandemic.pdf> accessed May 2024.

⁷ Ibid at 27.

banning non-competes nationwide in the United States, this rule is being challenged⁸ and therefore the final outcome is still be determined.

Total bans on non-competition agreements in other foreign jurisdictions are relatively rare. Most common law jurisdictions enforce non-competition clauses where the use is limited to protecting legitimate business interests. Some, but not all, comparable jurisdictions in Europe, a handful of US States and one province in Canada, impose some restrictions on non-compete clauses, such as duration limits and/or requirements for compensation to be paid during the restraint period (usually at a rate less than the employee's usual salary during employment), but continue to allow them subject to those restrictions. Because of this, it is even more important that reliable evidence be gained on the likely impact of different regulatory approaches to non-competes in the Australian context before any move is made to further regulate them.

Importantly, any policy options must offer net benefits to the economy and address the substantive drivers of job mobility. To the extent there is a concern about the prevalence of non-compete terms in work contracts or the circumstances in which they are enforceable, this can also be addressed by promoting broad education through coordination of unions, employer and industry groups, and regulators.

⁸ Claims against the FTC have been failed by the Chamber of Commerce of the United States of America (Case No 6:24-cv-00148) and ATS Tree Services LLC (Case No 2:24-cv-1743).

2. Key recommendations

The key recommendations made by the BCA in response to the Issues Paper are:

1. Treasury should commission independent and rigorous research into the prevalence and behavioural effects of non-compete clauses and post-employment restraints to inform policy consideration and reform proposals. It is vital that policy reforms are evidence-based.
2. Government should promote broad education about the limited circumstances and extent to which non-compete terms are enforceable.
3. If it is ultimately demonstrated that a prevalence of inappropriate non-compete terms are, in fact, impacting job mobility, then any proposed regulation directed at non-competition clauses should not encompass other business protection mechanisms that do not unreasonably interfere with job mobility. Examples include confidential information and intellectual property protections, equity claw back arrangements and non-solicitation restrictions.
4. Restraints included in business-to-business contracts, and other commercial agreements (i.e. for the sale of business and partnership agreements) should be excluded from Treasury's review and should not be further regulated.
5. The current exemptions in the *Competition and Consumer Act 2010* for employment conditions and restraints are appropriate and should not be disturbed.
6. The absence of clear and consistent approaches to regulating post-employment restraints in other jurisdictions reinforces the importance of ensuring that policy makers establish a robust evidence base on both the effects of types of post-employment restraints on the economy and the net benefit of altering those arrangements to support the Australian economy.

3. Labour mobility in Australia

Job switching plays an important role in supporting economic dynamism in an economy. People switching jobs helps to ensure labour resources have the capacity to move to their most productive use. However, the analysis presented by Treasury does not point to specific drivers of reduced job mobility across the Australian economy beyond a component being driven by an ageing population. The lack of clarity around these drivers is problematic as there is a real risk that any proposed policy prescriptions may fail to address the substantive drivers of reduced mobility.

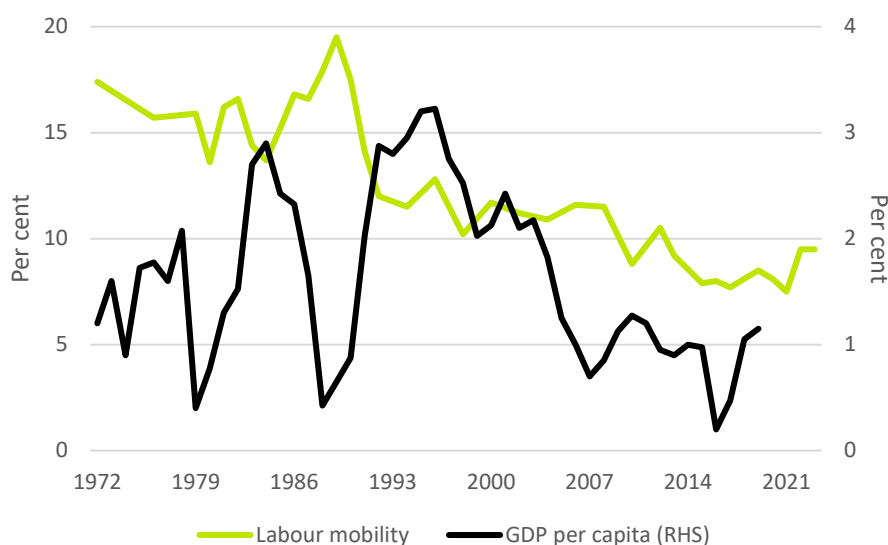
3.1 Economic and structural contributors

Labour mobility has been steadily declining over the past 50 years. In 1989, a peak of around one in five workers had switched jobs in the past year. By 2022, the mobility rate had halved to around one in ten workers.

As noted in recent Reserve Bank Analysis:

The rate of job mobility tends to move with the business cycle, with sharp declines experienced in the recessions of the early 1980s and 1990s and following the global financial crisis (GFC).⁹

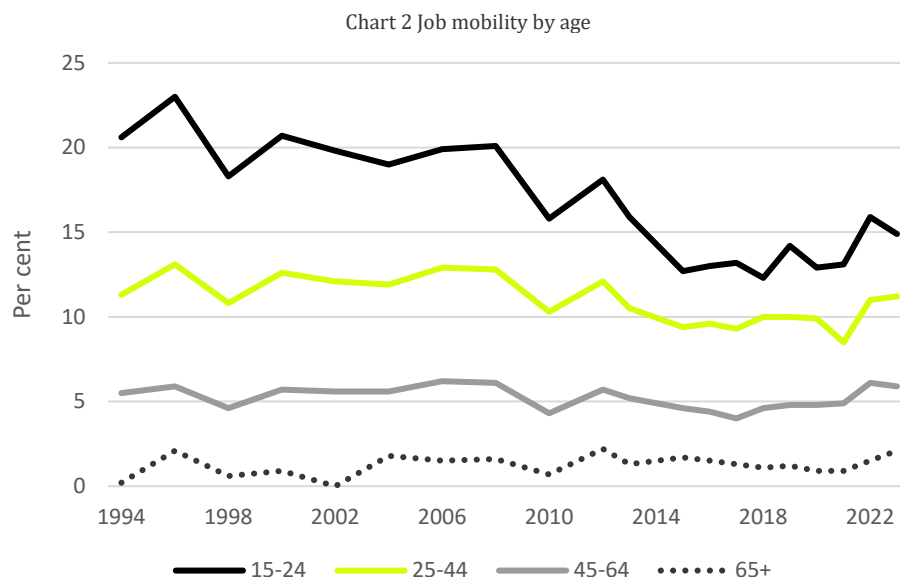
Chart 1 Labour mobility (annual change, per cent) and GDP (four-year rolling average, per cent)



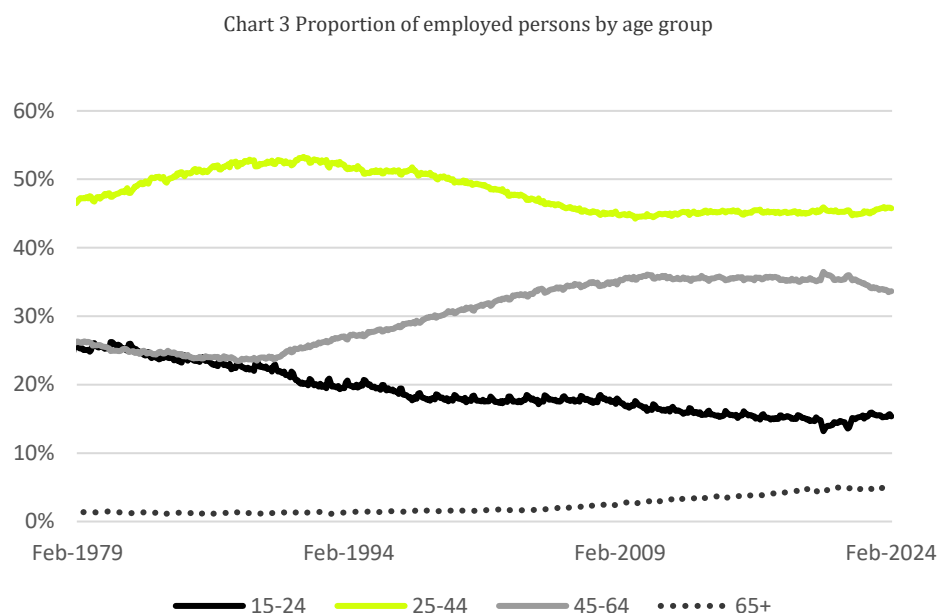
Source: ABS

Structural factors will also affect the long-term trend in job mobility - for example, as young people increase their participation in higher education and older Australians remain in the workforce longer (with lower relative participation rates)¹⁰. BCA analysis of ABS job mobility data finds that over half the total decline in job mobility since 1994 is accounted for by an ageing population.

⁹ Reserve Bank of Australia, 2022, *Job Mobility in Australian during the Covid-19 Pandemic*, Bulletin – June 2022, p25, <https://www.rba.gov.au/publications/bulletin/2022/jun/pdf/job-mobility-in-australia-during-the-covid-19-pandemic.pdf> accessed May 2024.
¹⁰ Productivity Commission 2023, 5-year Productivity Inquiry: A more productive labour market, Vol. 7, Inquiry Report no. 100, Canberra, p9.



Source: ABS



Source: ABS

The Productivity Commission has also indicated that other structural factors including housing availability may have increased barriers to labour mobility by preventing workers taking up employment opportunities.¹¹

3.2 Post-employment restraints and labour mobility

On post-employment restraints, the Issues Paper makes apparent that there is limited Australian data about the prevalence, characteristics and effect of the use of post-employment restraints, including on labour mobility, and that even references to international studies on the effect of these mechanisms are largely limited to the United States and are contested¹².

¹¹ Ibid.

¹² For example, the Issues Paper highlighted the that findings of studies pointing to long-term benefits attached to making non-compete clauses unenforceable is contested – see page 21.

Given the absence of detailed analysis about the mechanisms driving the decline in job mobility in Australia, there is a danger in jumping to post-termination restraints as materially limiting mobility.

In addition, there are a range of other policy measures that could be deployed to support increased job mobility. For example, e61 Institute has identified other policies that could improve job mobility and wages including streamlining occupational licensing, addressing housing mobility (which is linked to job mobility) by, for example reforms to stamp duty, and fostering entrepreneurship. The Institute also noted that increasing flexibility within Australia's industrial relations settings could reduce friction in the labour market as more rigid settings may reduce the benefits of employees switching jobs¹³. For example, 34 per cent of Australians' pay is set by an award and a further 23 per cent of Australians have their pay determined by a collective agreement¹⁴.

Further caution should be exercised when interpreting feedback from Treasury's 'Worker' and 'Employer' questionnaire as part of the consultation as any aggregation of feedback will be compromised by self-selection bias and lack of checks and balances around questionnaire submission¹⁵. Data obtained through this process will not be representative and will be of limited analytical value. One way of overcoming these limitations would be for Treasury to commission independent research to better understand the prevalence of non-compete clauses and other restraints (noting that e61 has undertaken some research in this area), and the behavioural impact of such clauses on employer and employee decision-making.

Recommendation

1. Treasury should commission independent and rigorous research into the prevalence and behaviour effect of non-compete clauses and post-employment restraints to inform policy consideration and reform proposals. It is vital that policy reforms are evidence-based.

In addition to overcoming the limitations of the 'Worker' and 'Employer' Questionnaires, a methodologically rigorous survey would provide a strong baseline to understand the effect of post-employment restraints on the labour market.

¹³ Wong, A. 2024, Climbing the wage ladder: linking job mobility and wages, e61 Research Note 11, <https://e61.in/wp-content/uploads/2024/02/Climbing-the-wage-ladder-Linking-job-mobility-and-wages.pdf>, p6.

¹⁴ Department of Employment and Workplace Relations, 2023, Federal Enterprise Bargaining Report, December Quarter 2023, p15.

¹⁵ For example, it appears that multiple responses to the questionnaire may be made by the same individual or organisation.

4. The role played by post-employment restraints

4.1 Protection of legitimate business interest from unfair and unethical competition

There are legitimate business interests which employers seek to protect with post-employment restraints. These interests need to be considered in the context of instances when employees and former employees do not do the right thing. While most employees endeavour to comply with the reasonable contractual obligations they have agreed to as part of their employment, some do not. It is against these employees that employers need to implement reasonable protections to safeguard their business-critical information, property and business relationships. It is seldom clear at the outset where this protection will be required, which is one reason why restraints can be included in a significant proportion of employment contracts.

While there are no fixed classes of interest that an employer can seek to protect,¹⁶ legitimate interests recognised by the Australian Courts include:

- Trade secrets, confidential information (CI) and intellectual property (IP)
- Customer and client relationships and connections
- Supplier and trading agreements, relationships and connections
- Staff connections and investments / Interest in a stable workforce
- Goodwill (although this is more prevalent in commercial contracts than employment agreements)

A summary of the types of contractual restraints used to protect these interests by some employers, is set out at **Appendix 1** to this paper.

As can be seen from the table at Appendix 1, there are limited mechanisms available to employers to protect these interests. This is why the restraint doctrine has developed in Australian common law. The Courts have recognised that non-competes are sometimes the only effective mechanism to protect legitimate business interests such as CI.¹⁷ In the case of *Littlewoods Organisation Ltd v Harris*,¹⁸ Lord Denning MR of the English Court of Appeal stated:

"It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade but experience 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 practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period."

Further, unlike non-compete clauses, CI restrictions are not a restraint in the sense that they prevent a worker from gaining alternative employment or commencing a new business. They typically only restrain an employee from misusing an employer's proprietary confidential information (not otherwise in the public domain). They should be excluded from consideration under this paper. Similarly, time-limited non-poach and non-solicit obligations do not impact job mobility. They simply prevent a former employee from defined activities in relation to their employers' trade and staff connections for a defined period and often in restricted areas.

The Courts already provide a safeguard to ensure that restraints are enforced no further than necessary to protect the legitimate interests of the employer. Courts will not enforce a restraint against mere competition.¹⁹ Not only must a party that is seeking to enforce a restraint be able to show that the restraint is directed to the protection of a legitimate business interest of that party, it must also be able to show that the restraint is reasonable as to duration and extent.

¹⁶ *Seven Network (Operations) Ltd v Warburton (No 2)* [2011] NSWSC 386; 206 IR 450

¹⁷ Sappideen, C et al, *Macken's Law of Employment* (8th ed. 2016) Lawbook Co, [4.370].

¹⁸ *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472

¹⁹ *AEI Insurance Group Pty Ltd v Martin* [2023] FCA 914

This considered balancing role adapted to the particular facts and circumstances of individual cases, and carefully applied by the Courts, supports the position that existing regulation in this area is sufficient.

Further, while the Issues Paper reports a high prevalence of contracts containing non-compete or other restraint terms (which includes simple CI protections), empirical studies show that the number of employment-based restraint of trade cases declined between 2007 to 2012 (being the most recent years reviewed) compared to previous years.²⁰

Accordingly, the BCA's position is that a more appropriate response to the increased inclusion of non-competes in contracts, is for education for both business and employees, to understand the very limited circumstances and extent to which non-compete restraints are, in fact, enforceable. This can be addressed by promoting broad education through coordination of unions, employer and industry groups, and regulators.

Recommendation

2. Government should promote broad education about the limited circumstances and extent to which non-compete terms are enforceable.

This could be done through coordination of unions, employer and industry groups and regulators.

4.2 The employment relationship has special features

Employers have many express and implied duties of care to their workers. For this reason, the common law has long recognised a series of implied and equitable duties in the employment relationship that impact on the appropriateness of restraints both during and after employment, which are not considered in appropriate detail in the Issues Paper, but which should be considered by the Competition Review.

Employment relationships are not purely commercial in nature. Employees are often placed in positions of trust and confidence. These include employers trusting employees at many levels within an organisation to:

- Handle cash transactions.
- Look after and develop customers and clients.
- Work in safety critical environments.
- Protect and develop the reputation and public standing of a business.
- Ensure public safety while engaging in business activities.
- Deal with vulnerable members of the public.
- Develop and deal in sensitive trade secrets and the development of business-critical inventions, formulas, codes, and other IP.

Given the level of trust and faith placed in employees to act in the best interests of their employers (in return for the pay and benefits they receive), it is appropriate that employees be prevented from abusing this trust during employment and that, where they agree, defined protections be entered into for an appropriate and defined period following employment. This is to ensure the trust placed in employees (for which they are compensated) to act as the human face of a business, to deal in a business' trade secrets and proprietary information and to develop relationships with suppliers, clients, and other trade connections is not misused for personal benefit and as a windfall for competitors.

Restraints of trade including non-competition terms, should not be considered outside the context of other equitable and implied duties pertaining to employees which provide justification for those terms. These duties include duties:

- of fidelity and loyalty and good faith;²¹
- of confidence;

²⁰ Chia, Hui and Ramsay, Ian, *Employment Restraints of Trade: An Empirical Study of Australian Court Judgments* (December 20, 2016). Australian Journal of Labour Law, Vol. 29, No. 3, pp. 283-304, 2016, Available at SSRN: <https://ssrn.com/abstract=2887821>

²¹ *Robb v Green* [1895] 2 QB 315

- against soliciting customers, establishing or working for a competing business during employment
- to account for property; and
- to answer questions in relation to the employment.

Among other things, these duties distinguish employment from other commercial relationships, and justify restraints against acting in competition during and after employment.²²

Questions 13 and 14 in the Issues Paper ask when an employee should be restrained from competing with their employer *during* employment. They are provided with the case study in Box 5 which looks at the case of a casual eyebrow technician who sets up a side business in competition with her casual employer during that employment, and is directed to cease and desist doing so.

It is misguided to suggest that the employer's direction to its employee to cease acting in direct competition with its business during employment is or could be inappropriate. This is because such a suggestion fails to consider the important reasons justifying a restraint during employment including preventing conflicts of interest and the employee's duties of fidelity, loyalty, good faith and confidence referenced above.

The example used in the Issues Paper at Box 5 would constitute a clear breach of a number of these duties, quite apart from any express contractual term against competing during employment. The employer in this circumstance could have no confidence in the employee to direct business to its enterprise rather than her own even during paid working hours, or that the employee would not use its client lists, processes, formulas or marketing plans to further her own interest at its expense. It may be appropriate for part time or casual workers to take up secondary employment, however employers should not be stopped from preventing their employees working for direct competitors during employment.

It would be interesting to consider how the circumstances in Box 5 might apply to an Australian public service (APS) employee, who set up a business in conflict with their APS employment. As it currently stands, it would likely breach a number of obligations in the APS Code of Conduct and would not be acceptable to the Government as an employer. For example, the APS Code of Conduct²³ requires APS employees to:

- b. take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and
- c. disclose details of any material personal interest of the employee in connection with the employee's APS employment.

It also prevents them from improperly using inside information or the employee's duties, status, power or authority:

- d. to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or
- e. to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.

The BCA does not consider these obligations are inappropriate or misplaced, but rather they are used to highlight the many reasons why employees of both public and private sector employers should not be permitted to compete with their employers during employment. It would be worthwhile considering how any limitation on employers being able to prevent competition during employment would also impact on the public service.

4.3 Benefits for the economy and workers

Finally, non competes can also benefit workers by giving employers confidence to invest in their workforce, including in training,²⁴ and may be negotiated in return for higher remuneration or other benefits, including shares and other incentive or retention payments. There is an economic benefit to the development of human capital via the investment in training and development. Non-compete restraints may also foster innovation and development, by ensuring firms reap the benefits of their own investment in research and development and that it will be protected from unfair use and 'free-riding' by competitors. This investment is important to economic growth and can also contribute to wage growth via productivity improvements. As noted above, non-compete restraints are the sole effective mechanism to protect

²² Sappideen, C et al, *Macken's Law of Employment* (8th ed. 2016) Lawbook Co, chapter 5.

²³ *Public Service Act 1999* (Cth), s 13.

²⁴ United States Government Accountability Office (May 2023), *Noncompete Agreements, Use is widespread to protect business' stated interests, restricts job mobility and may affect wages*, Report to Congressional Requesters.

trade secrets and confidential information when an employee has demonstrated an unwillingness to comply with other statutory and contractual mechanisms to protect the misuse of CI, IP or other proprietary interests belonging to their employer. They also play a role in preventing anti-competitive behaviour such as the sharing of competitively sensitive information between rivals²⁵ alongside other forms of restraints which can also protect the personal data of clients and consumers.²⁶

These are important economic and business benefits which should not be overlooked when considering the economic impacts of non-compete restraints.

Further, non-compete terms included in business-to-business contracts and other commercial agreements (such as those for the sale of a business and partnership agreements) should be excluded from Treasury's review and should not be subject to further regulation. In commercial contexts, restraints are crucial for the transfer and protection of goodwill in business transactions. The importance of this protection to give confidence to purchasers in sale of business transactions is recognised overseas where even when the use of non-competes are restricted, such terms in business sale agreements are carved out from regulation. As an example, this is the case in the US, UK (proposed) and Ontario.

4.4 Wage fixing and non-poach agreements

The Issues Paper also canvasses no-poach and wage-fixing agreements between businesses, which limit hiring competition between employers. However, the Issues Paper while highlighting the potential impact of these arrangements on job prospects for workers, notes that it is "*difficult to estimate the prevalence of either no-poach or wage fixing agreements in the economy...*". No evidence that wage fixing agreements between businesses are used in Australia is cited. No evidence of non-poach agreements is cited outside of franchise contracts and a single NSW Supreme Court decision. Due to this lack of evidence and the reasons set out in this submission, namely the high percentage of retail and fast-food workers who have their wages regulated by modern awards and enterprise agreements, the BCA does not consider the examples given of non-poach agreements between Australian fast-food franchises are likely to be an impediment to wage growth or productivity. Accordingly, the BCA considers there is insufficient evidence to support that the current exemptions in the *Competition and Consumer Act 2010* for employment conditions and restraints are inappropriate and that they require amendment.

²⁵ *Business Roundtable comment to the FTC on the NPRM to Ban Non-Competes* (17 April 2023)

²⁶ See for example *Show Pony Group Pty Ltd v Black Swallow Boutique Pty Ltd & Ors* (NSDF1984/2016) where the third respondent consented to a permanent restraint from disclosing a client contact list belonging to her former employer. In that case, the third respondent was alleged to have exfiltrated her employer's 306,000 strong customer database before resigning and using it for the benefit of another business: Australian Financial Review, *Showpo settles data 'theft' allegations against Black Swallow for \$60,000* (18 April 2017).

Recommendations

3. **Regulation directed at non-competition clauses should not encompass other business protection mechanisms that do not unreasonably interfere with job mobility, such as confidential information protection and non-solicitation restrictions.**

These provisions operate to restrict 'free-riding' and unfair competition, where a former employee/s or worker/s misuses their employer's property, customer, client, trade or staff connections which they have only obtained by virtue of their employment.

4. This submission and the Issues Paper are focused predominantly on restraints used in the employment relationship. **Restraints included in business-to-business contracts, and other commercial agreements (i.e. for the sale of business and partnership agreements) should be excluded from Treasury's review and should not be further regulated.** Restraints in the commercial context are essential to the transfer and protection of good will in sale of business transactions.
5. The Issues Paper does not cite any evidence that wage fixing agreements between businesses are used in Australia. No evidence of non-poach agreements is cited outside of franchise contracts and a single NSW Supreme Court decision. Due to this lack of evidence and the reasons set out in this submission, namely the high percentage of retail and fast-food workers who have their wages regulated by modern awards and enterprise agreements, the BCA does not consider the examples given of non-poach agreements between Australian fast food franchises are likely to be an impediment to wage growth or productivity. **Accordingly, the BCA considers the current exemptions in the *Competition and Consumer Act 2010* for employment conditions and restraints are appropriate and should not be disturbed.**

5. There is no uniform approach to regulating the use of post-employment restraints internationally

There is no common approach to regulation of post-employment restraints overseas. In the BCA's analysis, there are more foreign jurisdictions that enforce non-competition terms that protect legitimate business interests than those who regulate them under statute. Total bans on non-competes are comparatively rare. Prior to the FTC Rule, most US states allowed enforcement of reasonable non-compete terms.

Examples of approaches or proposed approaches taken in other jurisdictions:

- **Limits on duration:** One approach taken by other nations is to regulate an outer limit on how long non-compete restraints can be enforced post-employment. As can be seen from Table 1 in the Issues Paper, where these duration limits are in place, they can be for lengthy periods which would often be unenforceable in Australia in any event, such as 12 months in Austria and Finland and up to two years in Germany and Spain. Setting a duration cap could also have the unintended consequence of the cap being adopted as the standard duration for non-competes by employers, Courts and the public, rather than a proper consideration of what is reasonable in the circumstances of an individual case.
- **Specific compensation:** Regulation of non-competes also takes the form of requirements for compensation during the restricted period in certain circumstances. Where employees are required to be compensated for the post-employment restraint period, the minimum set is not higher than 50 per cent of earnings in any jurisdiction identified by Treasury.
- **Limits on professions or type of employee covered:** Some overseas nations restrict the use of non-competes for certain professions or for employees earning below specified remuneration thresholds. In the US, Colorado has a carve out from its non-compete ban for highly compensated employees (earning above \$112,500 in 2023), a similar approach was proposed in New York, and Massachusetts bans non-compete clauses but only for healthcare workers, social workers, broadcast industry workers and lawyers. In Spain, non-competes can last for two years for technicians, but only up to 6 months for other workers. The State of Ontario in Canada bans employment non-competes, but not for executives.

Most foreign jurisdictions we have reviewed recognise that non-competes have a role to play in protecting legitimate business interests from misuse by former employees. Businesses are entitled to this protection.

The BCA notes that the United States has been referenced frequently in both the Issues Paper and the general discourse around the use of post-employment restraints, and in particular non-compete clauses noting the FTC's recent decision to ban non-competes in the United States, notwithstanding that the ruling is presently subject to legal challenge.

Apart from an outright ban on non-competes which the BCA does not support, and which would deprive business of reasonable protection of their legitimate business interests, the regulatory approaches outlined above do not address the concerns raised in the Issues Paper as to the purported chilling effect of non-compete terms on worker behaviour. Rather than selective adoption of regulatory options implemented overseas and subject to further research providing an appropriate evidentiary basis for regulation, the BCA recommends that the government consider the provision of further education to workers about the limited circumstances in which non-compete terms are enforceable.

This option would better address the concerns raised in the Issues Paper regarding the chilling impact of the inclusion of non-compete terms in employment contracts on job mobility in Australia and assist to constrain the non-selective use of these clauses in standard form employment agreements.

Recommendation

6. The absence of clear and consistent approach to regulating post-employment restraints in other jurisdictions reinforces the **importance of ensuring that policy makers establish a robust evidence base** on both the effects of types of post-employment restraints on the economy and the net benefit of altering those arrangements to support the Australian economy.

Appendix 1

Different types of post-employment restraints

| Type of post-employment restraint | Interests protected | Impact on worker subject to restraint | What alternatives, if any, are available to an employer | Why alternatives are insufficient or can fail |
|-----------------------------------|--|--|---|---|
| Non-compete clause | Potentially all of the interests described in the table rows below where an employee has demonstrated a willingness to breach other contractual or equitable obligations | Prevents the worker commencing employment or having an interest in certain defined competing businesses during a specified period and in a specified geographical area | Other options include reliance on other forms of restraints, the equitable duty of confidence, contractual protections for confidential information, intellectual property and general obligations in the employment contract and <i>Corporations Act 2001</i> (Cth). | Where an employee has breached their employment contract or indicated that they will (i.e. by downloading or otherwise improperly taking or retaining CI/IP, or by taking steps to solicit clients or staff) and where damages won't compensate the employer for the worker's breach. |
| Non-solicitation clause | Customer, client, supplier and trade connections | Worker can commence new employment/interest in competing business but cannot solicit the employer's customers/clients/suppliers for a specified period and in a specified geographical area. | Restricting an employee's access to building relationships with their suppliers, customers, clients during their employment. Attempting to physically/digitally secure access to client, customer, supplier lists and proprietary information during the employment. | No effective alternatives available. |
| Non-poach clause | Stable workforce, investment in staff training and development | Worker can commence new employment/interest in competing business but cannot poach the employer's workforce for a specified period and in a specified geographical area. | None with respect to former employees. For current employees, employers can use various retention mechanisms to attempt to incentivise staff not to leave. | No effective alternatives available with respect to former employees. |

| | | | | |
|---|---|---|---|---|
| Confidential information protections | Confidential and proprietary information, usually clearly defined. | Worker can commence new employment/interest in competing business but cannot retain, copy, disclose or use confidential information belonging to their former employer. | Restricting an employee's access to CI. Attempting to physically/digitally secure access to CI, to prevent its download, storage or other dissemination from the employer's systems. | <p>Once CI is disclosed/disseminated it is effectively impossible to "put the genie back in the bottle". Damages are often an inadequate remedy for the disclosure of CI and trade secrets. The economic value of trade secrets and CI is often inextricably linked with its secrecy. The value of the trade secret is diminished or destroyed once another person or entity gains unauthorised access to it.</p> <p>In the absence of a non-compete, if an individual has taken or refused to return CI on termination of their employment and it is very difficult to ascertain what an employee has done with that information post-employment or to stop it being misused.</p> <p>It can be difficult for individuals themselves to ascertain what part of their knowledge is CI/proprietary information (and therefore shouldn't be used post-employment) and what is their general skill and knowledge or otherwise in the public domain.</p> |
| Intellectual property protection | IP including designs, inventions, formulas, patents, copyright, moral rights, trademarks etc. | Worker can commence new employment/interest in competing business but cannot use, or assert ownership over or interest in IP belonging to their former employer. | Where available, registering ownership over IP. | No effective alternatives available with respect to former employees. |

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