

SUBMISSION TO THE COMPETITION COMMISSION INQUIRY INTO NON-COMPETE CLAUSES AND OTHER RESTRAINTS

31 May 2024

Professionals Australia welcomes the opportunity to contribute to the Competition Commission's review into the use and impact of non-compete clauses and other legal restraints on employees.

Professionals Australia is the trading name of The Association of Professional Engineers, Scientists and Managers, Australia which is a registered union. The union is an occupational based union drawn from a broad range of technical professional and /or supervisory and managerial groups such as architects, engineers, IT professionals, mining supervisory and managerial staff, pharmacists, scientists, and veterinarians.

We support the ACTU (Australian Council of Trade Unions) submission in this Inquiry. Our view is that non-compete clauses in employment contracts should be banned.

Why are we making a submission?

Whilst it is accepted that lower paid workers are disadvantaged in contract negotiations with employers, it is less accepted that highly skilled professionals are rarely able to negotiate changes to their contracts. The fact is that there is currently a skills shortage in engineering, but our professional engineer members find themselves faced with employers unwilling to negotiate changes to their contracts. We have members who are cyber-security specialists, an area in which there is a global skills shortage, and they find they cannot negotiate changes to an employment contract. The main negotiation will be around the remuneration and once that is settled, the negotiation ends. We have members who have sought the removal of clauses which they feel are oppressive, including non-compete clauses. The employer has withdrawn the offer of employment rather than discuss the matter any further.

This lack of genuine negotiation of employment contracts occurs during a period of low unemployment and at a time when the labour market is reported as being strong. In these circumstances, there is no basis to believe the market will correct the over-reaches by employers regarding the terms and conditions in employment contracts.

Instead, workers engaged on individual employment contracts rely heavily on legislative protections to regulate the employment relationship in a way which balances fairly the interests of workers, employers, the economy and other broader social interests.

It is our firm view that non-compete clauses are becoming increasingly common in contracts, and we are seeing efforts to cement their place in employment relations. This must be averted via legislative intervention because their effects are overwhelmingly harmful to workers and broader community interests.

What do we base our views on?

Our views are based on the experiences of our members which we are informed about through the contract review service we conduct for members. The contract review service is offered to members whether they will be working as employees, labour hire workers or as independent contractors. Approximately 150 employment contracts were reviewed in 2023 by the national team. The annual review of this number of contracts for engineers, IT professionals and pharmacists, among others, means the national team of senior lawyers conducting this work can discern trends occurring in individual contracts' content. From our vantage point, it is evident that law firms who draft employment contracts for employers play a significant role in the spreading of changes to contractual provisions across various employers.

A typical contract review consultation meeting with a member involves discussing each clause of a proposed contract with them. This takes approximately 45 minutes to an hour. The purpose of the consultation is to assist the member in determining how they will respond to an offer of employment based on the contract setting out the terms and conditions of employment. In broad terms, there will be five areas to consider in making this assessment:

- Any clauses which the member is not sure that they understand;
- Any clauses which are deal-breakers from the member's perspective;
- Any clauses which do not accurately state the legal position (e.g. contrary to legislation and /or applicable industrial awards);
- Any clauses which the member does not like but they would like to know if they are typical or 'standard' contract provisions; and
- Any issues which are not covered that the member is concerned about.

It is true that our members are often skilled in making risk assessments in their professional lives and able to engage in distinguishing between the 'worse case' and 'most likely' scenarios for making such assessments. They find that the contract review



consultations assist them in making those assessments by, for example, deciding what issues they need to ask relevant questions about and/or what legal protections there are outside of the contract upon which they might rely.

There are an exceedingly small number of workers who may have realistic expectations to engage in a lengthy negotiation about their employment negotiation which will be due to a combination of their level of skill, experience and importantly and relevantly to this Inquiry due also to their pre-existing relationship with their prospective employer.

In general, our members have low expectations about engaging in any genuine consultation or negotiation with a prospective employer about the contents of their contract.

Incidence of non-compete, non-solicitation and non-disclosure clauses

Non-compete clauses

The Issues Paper refers to evidence that approximately 22% of Australian workers have a non-compete clause.^[1] Our experience is around 1 in 4 contracts contain non-compete clauses and when a contract contains a non-compete clause, it will nearly always have non-solicitation and non-disclosure clauses as well.

This is a dramatic increase from 15 years ago when staff report that it was a rarity to see a non-compete clause in a member's contract.

These days we see non-compete clauses in contracts offered to workers for whom it is difficult to see what legitimate business interest could need to be protected via a non-compete clause. For example, what is the legitimate business need to include a non-compete clause in a contract for the hire of a new engineering graduate? Why prevent a pharmacist from working within 3kms of any store within the chain of pharmacies in which they were hired?

Non-solicitation clauses

The Issues Paper refers to the e61 Institute research showing around 16% of workers have non-solicitation of client clauses in their contracts with evidence suggesting that these are more common in financial services and real estate sectors^[2]. Our experience indicates that, not surprisingly, consultancy services have a very high incidence of non-solicitation of clients' clauses in their employees' contracts.



Our observations are that the trend is for non-solicitation clauses to apply to both former clients and former colleagues with the exception being to limit to one or the other.

However, we would like to highlight that in the labour hire situation a worker may be hired by an employment agency on a casual or temporary basis to work for a specific employer. Their contract with the employment agency will contain a client non-solicitation clause which prevents the worker from gaining more secure and/or longer-term employment.

Non-disclosure clauses

Our estimate is that non-disclosure provisions in contracts relating to post-employment are appearing in around 50-60% of our members' contracts currently. This appears to be an increase compared to previous years. Could this be due to some of the commentary made during the Inquiry that confidential information protections in common law and in the Corporations Law may be adequate safeguards to protect legitimate business interests? This is not clear.

Definitions of confidential information often include references to financial information. With the abolition of pay secrecy provisions, we have seen one or two contracts which refer directly to a person's own remuneration being exempted from the non-disclosure of confidential information requirement. We have also seen a small number of contracts using the expression 'to the extent permitted by law' to denote that there may be legal limits on the non-disclosure requirement but without specifying what those legal limits might be. Most non-disclosure clauses do not contain any wording which might alert a worker to there being any limits on the prohibition of 'confidential information' as defined in the contract from being disclosed. There are legal limits on the non-disclosure of confidential information such as whistleblowing or when a worker needs to disclose certain information to obtain independent legal advice on a workplace matter.

The commonplace use of ambiguous or non-specific wording in employment contracts indicates the vital importance of legislation which expresses clearly what employers are prohibited from demanding in employment contracts.

Myth #1 Contracts with non-compete clauses adequately compensate the worker

Professionals Australia has not come across a contract which specifically pays an employee for the period of their post-employment non-compete restraint.



We have noted that many contracts which contain non-compete clauses include wording to the effect that the remuneration under the contract compensates the employee for the post employment non-compete provisions. This suggests the employee is accepting the non-compete provision on that basis.

However, it is difficult to see how the annual remuneration under a contract could adequately compensate someone for a 6 or 12 month or longer period unless it provides an annual remuneration which is well above the average pay.

Fifteen years ago, it was not uncommon for a contract with a non-compete clause to contain a longer period of notice of three months. This reflected the fact that the employee may have their employment terminated: the longer period of notice was intended to assist them in those circumstances.

When we have examined contracts offered to electrical engineer members and reviewed the annual remuneration paid to those with non-compete clauses against those without non-compete clauses, we have found no discernible additional premium in the remuneration being offered to those required to accept a contract with a non-compete clause.

Myth #2 non-compete clauses are not that much of a problem because they are unenforceable

Workers find non-compete clauses threatening.

Including such clauses in contracts, at a minimum, generates uncertainty over whether the employer will act against the worker if they leave and commence working with another business in their industry.

IT professionals often work in the IT industry in large multinationals which perform many different types of functions. The IT professional who works in a specific area of the business can find themselves faced with a contract containing a non-compete clause which purports to prohibit them from working with a competitor to their employer in an area unrelated to where they are currently working. Such clauses show no regard for the interests of employees in broadening and developing their skills nor the wider social and economic interest in having workers with broad skills.



Similarly, many engineers traditionally work in specific industries for the duration of their career e.g. electrical engineers work in the electrical power industry, civil engineers in the construction industry, the range of engineers who work in the rail industry, etc. To impose non-compete provisions on workers effectively prevents those workers from working in the industry in which their skills and knowledge are the most relevant. There are broader economic costs to industry when experienced workers are excluded from working within it.

It is also concerning that when an employer terminates a worker during their probation period or due to redundancy, they do not waive their non-compete clauses. This lack of regard for the interests of workers during these difficult times is symptomatic of the over-reach of employer power which non-compete clauses represent.

Unfortunately, our members have also experienced what can only be characterized as a vindictive use of these types of provisions to harass workers who leave their employment.

Finally, we are starting to see our members having to 'warrant' in contracts with prospective employers that they are not subject to any legal limitations impacting on them working with the prospective employer. This development has the potential to stifle labour market mobility even further.

Conclusion

The continued use of non-compete clauses serves only a very narrowly construed employer interest. Professionals Australia and its members are deeply concerned that unnecessary limitations are being placed on workers to pursue better pay and conditions and their careers due to these clauses. There is also a fundamental question of the liberty of a person to agree to work for an employer which does not restrict their future options about for whom they will work.

National Office
Workplace Advice and Support



^[1] Competition Review, Issues Paper - Non-competes and other restraints: understanding the impacts on jobs, business and productivity, April 2024 at p.8

^[2] *ibid*

