

# The Australian HR Institute

## Submission to The Treasury

### Non-competes and other restraints: understanding the impacts on jobs, business and productivity

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#### The Australian HR Institute

The Australian HR Institute (AHRI) is the professional body for Human Resources in Australia, with over 17,000 members from Australia and internationally.

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## **1. Summary**

1.1 AHRI believes that non-compete clauses (which prevent an employee from joining a competitor organisation within a period of time), used for the right reasons and applied in the right way, can work for both individuals and employers.

1.2 However, with a large proportion of the workforce in some Australian workplaces covered by non-compete clauses as part of their employment contracts, AHRI supports some tightening of the regulation of non-compete clauses.

1.3. AHRI proposes the introduction of a high-income threshold for non-compete clauses. We believe that a threshold will make it easier for firms to improve workforce skills and productivity through increased job mobility while still protecting the business interests of other firms.

## **2. Background**

2.1 Despite some modest loosening in the labour market over the past year, structural unemployment is low and employment activity remains relatively high in Australia. However, restraints of trade, including the use of non-compete clauses, risk undermining job mobility and therefore employment if they are not applied in the right way.

2.2 According to recent official data, just over a fifth (21%) of businesses use non-compete clauses for at least some of their staff and 68 per cent of these businesses used them for more than three-quarters of their employees<sup>1</sup>.

## **3. The case for tighter regulation**

3.1 Introducing tighter regulation on non-compete clauses makes job matching more efficient and effective because it allows employees greater flexibility to move roles and provides greater access to labour for employers to help fill vacancies and attract better candidates<sup>2</sup>.

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<sup>1</sup> Australian Bureau of Statistics (ABS), 'Restraint Clauses, Australia, 2023', ABS website, 2024.

<sup>2</sup> Z Durrett, O Majeed and J Hambur, 'Overview: Understanding productivity in Australia and the global slowdown', Treasury Round Up, 2022; F Calvino, C Criscuolo, and R Verlhac, 'Declining business dynamism: structural and policy determinants', OECD, 2020

3.2 Despite some modest loosening in the Australian labour market over the past year, Australia is still experiencing a skills shortage. As recent AHRI research shows, recruitment difficulties continue to pose great challenges for employers<sup>3</sup>.

3.3 There is also a need to improve the skills and capability of our workforce to compete in a globalised economy. Reducing restrictions and barriers that impact job mobility, like non-compete clauses, can improve opportunities for the development of new and valuable skills. AHRI believes that a more flexible and less-complex workplace relations system is key to building skills and capability of the Australian workforce, both now and into the future.

#### **4. The case for a high-income threshold**

**4.1 AHRI believes that the use of non-compete clauses should be permitted in all organisations. Soundings from members suggest that such clauses are essential to protecting the employer's business interests. These interests include protecting confidential information, trade secrets, and client relationships.**

4.2 These views were broadly echoed in a poll of 203 AHRI members conducted between 30 May and 6 June. The results show that over half of respondents do not agree with banning non-compete clauses for all workers.

4.3 However, the use of non-compete clauses in employment contracts for all levels of employee does not align with the aim of these clauses to protect the employer's business interests.

4.4 High-income earners typically possess specialised skills or knowledge directly related to their organisation and industry. Non-compete clauses for these employees may be effective in protecting company intellectual property and preventing competitors from gaining an unfair advantage by poaching talent.

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<sup>3</sup> Australian HR Institute. *Australian Quarterly Work Outlook* (June quarter), 2024.

4.5 AHRI believes that it is fair to include such restrictions in employment contracts of high-income earners and therefore suggests that non-compete clauses should be confined to the employment agreements of individuals at or above the high-income threshold (as defined under s.382 of the Fair Work Act 2009).

**4.6 AHRI proposes that that the high-income threshold as defined by the Fair Work Commission (currently \$167,500<sup>4</sup>) would be an appropriate level to set the threshold level for the inclusion of non-compete clauses into employment contracts for all employers.**

4.7 The poll of AHRI members (112 responses) suggests that this policy proposal has broad appeal among HR professionals. Sixty-three per cent of respondents say that they would support restricting non-compete clauses to the FWC's higher income threshold if regulation tightened their use. Just over a quarter (27%) do not support the idea.

4.8 Many lower-income earners may also not fully comprehend the implications of non-compete clauses due to their complexity or lack of legal knowledge. In addition, without the resources to seek legal advice or negotiate their contracts, they may inadvertently agree to terms that disadvantage them in the job market. Non-compete clauses used for the employment contracts of lower-income earners are likely to have an adverse impact on job mobility.

4.9 We also believe that restricting non-compete clauses to high earners would improve productivity. This is because a reduction in the number of such clauses would free up management time to focus on innovation and efficiencies rather than complex legal considerations. Indeed, the enforceability of non-compete clauses in Australia is subject to various legal considerations, including reasonableness, geographical scope and duration.

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<sup>4</sup> This figure does not include commission, superannuation, overtime, incentive-based payments and bonuses. The figure includes wages and the agreed monetary value of non-monetary benefits.

**4.10 AHRI believes that less restrictive approaches such as confidentiality and non-solicitation clauses in employment contracts should remain available to all employers. These clauses could be included in the employment contracts of lower-income earners, as well as higher-income earners. These clauses would impose on employees the obligation to refrain from stealing company information, intellectual property, or enticing clients or colleagues away from the organisation. The use of these clauses should be at the discretion of the employer.**

4.11 In addition, AHRI believes that awareness and understanding of non-compete clauses among employers and employees could be improved by applying clear parameters; possibly supported through greater clarity in legislation or more guidance. Currently, the dominant current common law approach requires significant expertise to navigate because it is so complex. This can prevent employers and employees from coming to a mutually agreeable arrangement without seeking advice.

## **5. Conclusion**

5.1 Overall, AHRI believes that non-compete clauses should be retained for all organisations but restricted to employees earning at or over the high-income threshold as defined by the Fair Work Commission (currently \$167,500) as it strikes a balance between protecting employers' interests and ensuring fair access to employment opportunities for all workers.

5.2 AHRI believes that less restrictive approaches such as confidentiality and non-solicitation clauses in employment contracts should remain available to all employers. These clauses could be included in the employment contracts of lower-income earners, as well as higher-income earners.

***Prepared by:***

***Australian HR Institute (May 2024)***