

# Ai GROUP SUBMISSION

Competition Taskforce – The  
Treasury

**Non-competes and other  
Restraints – response to  
Issues Paper**

31 May 2024



## Consultation on non-competes and other restraints

The Australian Industry Group (**Ai Group**) welcomes the opportunity make a submission in response to the [Non-competes and other restraints; understanding the impacts on jobs, business and productivity Issues Paper April 2024 \(Issues Paper\)](#).

Ai Group represents many small, medium and large businesses and organisations, some of which use non-competes and other restraint clauses. Our members tell us they use these clauses in an appropriate and reasonable manner to support productivity, innovation, investments in employees, business continuity and growth, as well as protecting legitimate commercial interests.

Our members also tell us that non-competes and other restraints are highly valuable contracting devices which support innovation, productivity and business success in competitive industries.

While we consider it reasonable and appropriate for the Competition Taskforce to investigate the impact of non-competes and other restraint clauses in employment, any policy changes must be based on relevant and rigorous evidence as business will suffer significant and adverse effects if any decision is made to limit the use of these clauses.

We set out our submission below and provide responses to Discussion Questions 1-14.

### Evidence is lacking

#### Policy change must be evidence-driven

The Australian Bureau of Statistics (**ABS**) in a research paper – [What is Evidence Based Decision Making](#) - states this:

*“Governments are responsible for making policy decisions to improve the quality of life for individuals and the population. Using a scientific approach to investigate all available evidence can lead to policy decisions that are more effective in achieving desired outcomes as decisions are based on accurate and meaningful information.*

*Evidence based decision making requires a systematic and rational approach to researching and analysing available evidence to inform the policy making process. It ‘helps people make well informed decisions about policies, programmes and projects by putting the best available evidence from research at the heart of policy development and implementation.’ (Davies, 2004: 3).*

*Evidence based decisions can produce more effective policy decisions, and as a result, better outcomes for the community. When evidence is not used as a basis for decision making, or the evidence that is used is not an accurate reflection of the ‘real’ needs of the key population/s, the proposals for change are likely to produce ineffective outcomes and may even lead to negative implications for those they are seeking to benefit (Urban Institute, 2003).”*

Relevant to this is consideration of whether variables are related, in a statistical context. A relationship can exist in two ways<sup>1</sup>:

- **“Correlation** is a statistical measure (expressed as a number) that describes the size and direction of a relationship between two or more variables. A correlation between variables, however, does not automatically mean that the change in one variable is the cause of the change in the values of the other variable.
- **Causation** indicates that one event is the result of the occurrence of the other event; i.e. there is a causal relationship between the two events. This is also referred to as cause and effect.”

As stated by the ABS, understanding correlation and causation “allows for policies and programs that aim to bring about a desired outcome to be better targeted”<sup>2</sup>.

We ask government to apply this evidence-based approach to its consultation and note our comments below. No policy change is justified unless the Government can produce empirical evidence which demonstrates causation.

### **The international ‘evidence’ is not relevant**

The Issues Paper states at page 2:

*“[t]here is growing international evidence that restraints of trade – and particularly non-compete clauses – are becoming increasingly prevalent. This evidence also **suggests** that despite benefiting some businesses, restraint of trade clauses are adversely impacting workers, other businesses and broader economic outcomes – through reduced wages growth, job mobility and access to skilled workers. Some countries already regulate non-compete clauses (e.g., Austria, Finland and Germany), while others, including the United States (US) and United Kingdom (UK), are proposing reforms that would restrict or ban their use.” [emphasis added]*

However, the Issues Paper does not provide any analysis of *how* the ‘international evidence’ is relevant to Australia. In the absence of that analysis, the ‘international evidence’ cannot be relied upon by the Government as the basis for future policy changes. Australian laws as they relate to non-compete and other restraint clauses and how that interacts with other employment-related laws is different to that in other jurisdictions.

Additionally, even if it was relevant (and we are not persuaded of this), the ‘international evidence’ only “suggests” a link to reduced wages growth, job mobility and access to skilled workers in the relevant overseas jurisdictions. There is no indication of correlation and certainly not any causative link. If there is no statistical relationship, any decision-making on this basis is

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<sup>1</sup> Correlation and causation | Australian Bureau of Statistics (abs.gov.au)

<sup>2</sup> Correlation and causation | Australian Bureau of Statistics (abs.gov.au)

flawed – even in the jurisdictions to which this so-called ‘evidence’ is relevant.

We ask the Government again to adopt a very rigorous approach to decision-making given it is proposing the removal or limitation of use of non-compete and other restraints which are also acknowledged by the Government as being “*of benefit to some businesses.*”

### **The Australian ‘evidence’ cannot be relied on to justify any changes**

We have read with interest the statistics provided by the Australian Bureau of Statistics (ABS) – Restraint Clauses, Australia 2023<sup>3</sup> (**Restraints Data Report**), which was also inserted into Employee Earnings and Hours, Australia – 24 January 2024<sup>4</sup>.

At the outset, it is vital to acknowledge that the data in the Restraints Data Report is of limited relevance and certainly does not form a basis for making policy changes. As noted by the ABS: (emphasis added)

- “As this was the first attempt at collecting such information, and the ABS attempted to minimise reporting effort for businesses through the use of simple questions, the data and insights should be considered **experimental and exploratory.**”<sup>5</sup>
- “It is also important to remember when interpreting this employer-level data that businesses vary in size, and that a percentage of businesses within the Australian labour market **does not necessarily translate into a similar percentage of employees in Australia** (that is, a large employer will account for a higher proportion of employees in Australia than a small employer)<sup>6</sup>”

Additionally, this data does not evidence a relationship, whether correlative or causative, between non-compete and other restraint clauses and adverse changes to job mobility, wages growth or access to skilled workers. On this basis it cannot be relied upon to justify a policy change.

It is also relevant that the data provided by the ABS is not a time series. This means the data cannot show change over time and accordingly cannot be relied on as being evidence demonstrating the asserted increased prevalence of use of these clauses.

On this basis, we do not agree that the ABS Restraints Data Report provides evidence of an increasing prevalence of use of non-compete and other restraint clauses and certainly does not show any level of relationship between the use of these clauses and job mobility, wages growth or access to skilled workers.

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<sup>3</sup> Australian Bureau of Statistics (21 February 2024), Restraint Clauses, Australia, 2023, ABS Website, accessed 15 April 2024.

<sup>4</sup> Australian Bureau of Statistics (May 2023), Employee Earnings and Hours, Australia, ABS Website, accessed 15 April 2024.

<sup>5</sup> Australian Bureau of Statistics (21 February 2024), Restraint Clauses, Australia, 2023, ABS Website, accessed 15 April 2024.

<sup>6</sup> Australian Bureau of Statistics (21 February 2024), Restraint Clauses, Australia, 2023, ABS Website, accessed 15 April 2024.

Consistent with this, we note the statement in the [Australian Government Summary of Treasury-e61 Institute Joint Webinar – Non-compete clauses – prevalence, impact and policy implications](#):

*“... research on non-compete clauses is relatively limited in Australia”*

Also, the so-called empirical analysis in Arup C, Dent C and Howe J (2013) [‘Restraints of Trade: The Legal Practice \[PDF 257 KB\]’](#), *UNSW Law Journal*, 36(1):1–29 only relates to the enforceability of restraint of trade clauses. We note this has little relevance and as acknowledged in this paper:

*“Our study has provided insights into trends in the enforcement of employment restraints of trade in Australia based on court judgments over a period of almost 24 years. However, employment restraints that are the subject of litigation represent only a very small proportion of the restraints entered into between employers and employees. We suggest that there is considerable scope for further research that investigates the effect of employment restraints of trade and the context of their use.”* [emphasis added]

Accordingly, it is our position that government needs to conduct empirical analysis over time to establish whether:

- there is an increase in the use of non-compete clauses and other restraints over time (as currently asserted without basis); and
- there is a correlative and/or causative relationship between non-compete and other restraint clauses and job mobility, wage growth or access to skilled workers.

Without adequate and relevant empirical evidence, government cannot justify making policy changes constraining the use of these clauses given the acknowledged adverse effect on business.

## **Non-compete and other restraints do not adversely impact job mobility, business and productivity in any meaningful way**

### **Many other factors may result in changes to job mobility**

It is also important for government to consider that there are other factors correlated with or causative of changes to job mobility, wage growth and access to skilled workers.

Such outcomes can be caused by but not limited to the following factors:

- housing costs;
- family ties;
- ageing population;
- cyclical and structural demand conditions;
- visa requirements; and

- increased job satisfaction due to a rise in factors such as workplace flexibility.

For example, according to the Department of Employment and Workplace Relations<sup>7</sup>, an increased uptake in ‘workplace flexibility’ increases productivity, job satisfaction and can contribute to a decrease in staff turnover – i.e., a reduction in job mobility. It is relevant that the ABS reports that ‘workplace flexibility’ as having increased from 13% in 2015 to 39% in 2023<sup>8</sup>. Perhaps it is the rise in workplace flexibility which is a driver for the alleged reduction in job mobility? Are people simply happier in their roles?

The relationship between these other factors and job mobility, wage growth and access to skilled workers must be examined closely as potentially being the substantial driver in any reductions in job mobility.

### **Non-compete restraints are by their nature very limited in effect**

It is important to acknowledge that non-compete restraint clauses by their nature are capable of having only a very limited impact on job mobility.

That is because a non-compete restraint operates only to the extent that it restricts movement of an employee to a competitor of their current employer when they leave. The restrictions are limited in duration, geography and scope.

A non-compete restraint is not a blanket prohibition and does not prevent employees moving to other positions outside the scope of the non-compete restraint and within the industry they work in.

### **Well settled law – restraints must be reasonable and in the public interest**

Relevantly also, the law in Australia relating to the enforceability of non-compete clauses is well settled and is not uncertain. This is reflected in the small number of cases which come before the courts.<sup>9</sup>

Also, it is important to remember that a non-compete clause will only be upheld if it is protecting a legitimate and reasonable business interest of the employer. It will not be enforced if its intent is to stifle competition as this is not in the public interest.

In NSW, these clauses are prima facie unenforceable because of the *Restraints of Trade Act 1976* (NSW) (**NSW Restraints Act**), which enables courts to read down clauses to ensure they protect the public interest.

<sup>7</sup> Australian Government, Department of Employment and Workplace Relations – The case for flexible work – accessed 12 April 2024.

<sup>8</sup> Australian Bureau of Statistics (August 2023), Working arrangements, ABS Website, accessed 12 April 2024.

<sup>9</sup> See, for example, Arup C, Dent C and Howe J (2013) ‘Restraints of Trade: The Legal Practice’, *UNSW Law Journal*, 36(1):1–29

Overseas jurisdictions do not have the same approach and their experience is not relevant.

### **“Other restraints” have no impact on job mobility**

The “other restraint” clauses (e.g., non-solicitation and non-disclosure) do not have an inappropriate adverse impact on job mobility, wage growth and access to skilled workers.

A non-solicitation clause does not prevent an ex-employee working for anyone. The clause constrains an ex-employee from actively approaching key staff, clients/customers or suppliers in their new job and only for a limited period.

In any event, as noted above, the former employer relying on this clause must demonstrate the existence of a commercial interest requiring protection. The cases have consistently held that such an interest will exist where the employee has become the human face of the business in its dealings with customers or with its staff. The business has a proprietary interest in these relationships and it is not for the departing employee to then seek to use that as his/her own property (see *Cactus Imaging Pty Limited v Peters* [2006] NSWSC 717 and *John Fairfax Publications Pty Limited v Birt* [2006] NSWSC 995). The Government ought to be very cautious about adopting laws that might have the consequence of adversely affecting the legitimate proprietary interests of business.

A non-disclosure or confidentiality clause also simply limits an ex-employee from using confidential and proprietary information of their ex-employer and only for the period during which it remains confidential. It similarly does not prevent an ex-employee working for anyone so it in no way affects job mobility. The clause is not a blanket restriction and is responsive to the type of information and the nature of the industry and business – some information will remain confidential for only a very limited period – especially in fast-moving industries such as the technological sector. A non-disclosure or confidentiality clause is not a restraint of trade.

Consistent with this, we observe that Table 1 – International regulation of non-compete clauses in the Issues Paper does not identify any international regulatory responses regarding these other types of clauses. We note also that the Issues Paper acknowledges that there is limited empirical evidence on the impacts of these types of clauses.

For these reasons, there is absolutely no basis for any government intervention in relation to “other restraints”

### **Non-competes and other restraints are a valuable contracting device**

It is Ai Group’s position that non-compete clauses and other restraint clauses are a highly valuable contracting device for both employers and employees.

The clauses act as an incentive to employers to invest in employees and, relatedly, in innovation activities as follows:

- they encourage employers to share valuable information with their employees who are subject to a restraint – for example:
  - costs and pricing rates, including the cost of production or pricing margins;
  - client specific pricing, including the application of discounts or rebates;
  - a client’s purchasing history;
  - the terms of agreement with clients;
  - the strengths and weaknesses of products;
  - tendering and procurement strategies to win business;
  - strategic plans and marketing strategies; and
  - commercially sensitive information, including trade secrets;
- they encourage employers to invest in training for employees that may be industry specific. Providing this training will often involve a significant investment of time and financial resources from employers. Other employers in the relevant industry will often recognise the value of this training and seek to hire from such employers, rather than provide training themselves. In light of this, employers are more likely to invest in providing this training if employees are subject to a restraint if they leave employment with the employer; and
- they encourage employers to invest in innovation activities for the benefits of the economy and employees (e.g., such as new products being developed by the employer for release into the market, an analysis of product strength/weaknesses and other commercially sensitive information) as they are more confident of retaining employees that have the skills and experience to implement the results of that investment.

There is no basis for constraining the use of such clauses.

## **Removing or constraining the ability to have non-compete and other restraints will adversely impact our members**

There are significant downsides to removing or limiting the ability of businesses to rely on non-compete and other restraints in their contracting arrangements with their employees, including but not limited to the following:

- it may detract from productivity or innovation because more workers leave their current employer and go to a competitor or to set up a competing business;
- it may decrease profits because of the loss of trade secrets, client lists and other confidential information where the worker joins a competitor or sets up a competing business during the window in which an employer would otherwise be protected by a non-compete clause – this may lead to a consequential uplift in prices for consumers;



- it may result in businesses reducing their investment in innovation activities;
- it may result in businesses restricting the sharing of information within the organisation;
- it may discourage businesses from providing good quality training to their employees because there will be no protection against that employee taking those new skills to a competitor. This will in turn have negative flow on effects for the skills available in industry;
- it may drive a loss in investor confidence, particularly in start-ups – where the investors are unwilling to take the risk that employees use the business as a launch pad for their own ventures or join with competitors to do so;
- it may potentially shift jobs overseas to jurisdictions where non-compete clauses can be enforced;
- it may increase litigation in other areas such as intellectual property and trade secrets, where businesses try to protect their interests using other legitimate means;
- it may increase the use of longer notice periods and indirect restraints such as shareholders' agreements, options schemes and long-term incentive plans (instead of higher 'base rates');
- it may drive a potential shift to different contractual arrangements; and
- it may impact the use of non-compete clauses in wider contract law - for example, where it is part of a commercial arrangement such as a sale of business or the relevant employee has an ownership interest in the business.

These are significant adverse effects and not in the best interests of our members.

We set out below our responses to the Discussion Questions.

## Discussion questions

**Question 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.**

Yes.

The starting position at common law is that a restraint of trade is void for offending public policy. The common law position on restraint of trade is based on a presumption that restraints are against the public interest due to their limitation on the right to trade freely.

However, a post-employment restraint of trade may be enforceable where it is reasonable by reference to the interests of the public and the interests of the parties. In the context of the

employment relationship, a post-employment restraint of trade has been considered reasonable to the extent that it provides no more than adequate protection for the employer. A restraint that goes further than what is required is against public policy, as deprivation of the freedom to trade is against the public interest.

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

Yes.

In all Australian jurisdictions (except for New South Wales), a restraint of trade clause is presumed unenforceable unless it is reasonable by reference to the interests of the public (i.e., to trade freely) and the interests of the parties (i.e., employer and employee).

In New South Wales, the NSW Restraints Act reverses the presumption that restraint of trade clauses are unenforceable. These clauses will be valid as long as they are not against public policy and the court is able to read down (i.e., amend) an unreasonable restraint to make it reasonable – including if it is a cascading clause. But the Act also makes it clear that where it is shown that there was a manifest failure by the party who created the clause to make the restraint a reasonable restraint, no such reading down can occur and the restraint is invalid. A suitable balance is thus struck.

**Question 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?**

Yes.

Current approaches are suitable for all employees. We do not accept the assertion that these clauses are being used inappropriately and note our comments above regarding the need for more analysis to ensure decisions on this issue are evidence-based.

We note that a restraint of trade is enforceable only to the extent that it is reasonably necessary to protect the employer's legitimate proprietary business interests. This approach ensures that only legitimate business interests are capable of being protected. This is also balanced against the employee's and the public's interests. In relation to the employee, the context of the relationship, including seniority and role type is directly relevant to the analysis.

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

No.

The international experience relates to jurisdictions which are different from our own and therefore their experience is not relevant. Additionally, even if it was relevant (which it is not), the

international evidence is ‘*suggestive*’ only of a link in those other countries, which is an inadequate basis for any decision-making on this issue, even in those jurisdictions. As discussed above, we expect the Government to use an evidence-based policy approach and the flagged approaches taken in other countries are not consistent with this.

Despite the overseas experience not being relevant to Australian circumstances, we review and comment on the alternatives below.

### Compensation

If compensation for a restraint clause is required, this may cause any number of adverse effects for our members, including the following:

- it may create a financial burden for employers;
- it may disadvantage smaller employers who may not be in a financial position to provide compensation for the non-compete clause;
- employers may consequently rely on other contractual measures during employment, including gardening leave. Such measures are more restrictive than non-compete post-termination restraints due to the additional overlay of contractual and fiduciary obligations that apply during employment;
- it may increase the extent to which non-compete clauses are enforced through the courts, which would defeat the stated policy objectives; and
- it may provide the opportunity for an ex-employee to receive compensation even if they did not work for a competitor but instead worked for a new employer outside the scope of the clause.

### Complete ban

If non-compete and other restraints were banned, this may cause any number of adverse effects for our members, including the following:

- employers may be forced to rely on other protections, including under intellectual property law and the equitable law of confidence, which are more costly and which do not provide adequate protection regarding relationships with clients and suppliers;
- employers may need to protect their interests in other ways, for example, by using other allowable restraints, longer notice periods and gardening leave, confidentiality clauses (if permitted) and indirect restraints such as deferred benefits;
- employers may amend deferred compensation and benefits so that employees who leave and join a competitor firm lose those benefits;

- employers may tighten controls on information sharing within the organisation and if it is a multi-national organisation, the organisation may move certain jobs/functions outside Australia to jurisdictions where non-compete and other restraint clauses can be enforced;
- investors may lose confidence, particularly in start-ups, when a significant upfront investment is required;
- employers may have a lower appetite for investing time and financial resources in providing training to employees;
- it may shift litigation to other areas such as intellectual property and trade secrets as businesses inevitably seek to protect their legitimate business interests;
- it may trigger business failures if a business is no longer competitive due to the exit of staff, clients or confidential information;
- it may lead to restructuring away from employment relationships and make work less secure;
- employers may tighten the sharing of confidential information which will compromise training and the potential for innovation by employees;
- employers may lose clients with their business consequently becoming unstable;
- an employer's workplace may become unstable with employees leaving;
- it may create a more challenging investment climate;
- it may lower recruitment levels due to the increased potential that a business may fail; and
- it may decrease the likelihood that businesses will take on research and development tasks and commercialise those operations.

### Transparency

If disclosure or transparency requirements were implemented this would add a layer of red tape for employers.

Also, transparency will likely have a limited impact given that for a restraint clause to be effectively enforceable it must already be clearly set out in writing, usually in the employment contract.

### Statutory limits on periods

Implementing a statutory limit on the duration of a restraint is unhelpful given that existing law provides necessary flexibility where exceptional cases may require a longer period.

Additionally, it may result in these unintended effects which are inconsistent with the stated policy objectives:

- employers extending restraint periods to the maximum permissible extent in response; and
- employers using the statutory limit as a default leading to longer periods than otherwise may have been the case.

A statutory time limit may also have the significant adverse effect whereby employers are unable to adequately protect their commercially sensitive trade secrets and other legitimate business interests as a maximum limit would not allow for exceptional cases in the way that the existing common law does.

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

No.

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

A non-solicit restraint clause does not constrain an employee's ability to work for anyone else. It does not unreasonably impact on job mobility.

A non-solicit clause simply prohibits an ex-employee from soliciting certain clients, customers, suppliers, employees or other staff often within a restricted area and for a limited period.

A non-solicit restraint clause may be utilised by employers in the following circumstances:

- **in relation to customer connections**, where the nature of the employer's business is heavily reliant on customer connections, and the former employee had control of those connections – for example:
  - the ex-employee is in a position to gain the trust and confidence of clients;
  - the relationship between the ex-employee and the client is such that there is a real possibility that, should the employee leave the employer's business, he or she may take the client with them;
  - the ex-employee is the "human face" of the employer;
  - the ex-employee represented the employer in its dealings with customers;
  - the ex-employee was promoted publicly as being associated with the employer;
  - the ex-employee developed close and productive relationships with the employer's

clients; and

- the ex-employee had sufficient knowledge, influence and control over the employer's clients;
- **in relation to supplier connections**, where suppliers and the cost of purchases from them are important to a business's profitability and competitiveness – for example, supplier connections may be crucial to a removal and relocation business; and
- **in relation to other employees of the employer**, to support a stable workforce on the basis that employees make a significant contribution to a profit, make a business more attractive to a purchaser and are an intangible benefit giving business value and are part of the business's goodwill.

There are no acceptable alternative protections.

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

A non-solicitation clause has only a very limited or negligible impact on clients of an employer.

Accordingly, the impact on clients is appropriately considered (and is negligible and is not more acute in any sector).

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

As set out above, a business may include a co-worker non-solicitation clause in an employment contract to support a stable workforce.

A stable workforce is a legitimate consideration for businesses because employees make a significant contribution to profit, make a business more attractive to a purchaser (i.e., as compared to a workforce that is unstable, poorly trained and disrupted) and are an intangible benefit giving business value and are part of the business's goodwill.

A further consideration in support of having the capacity to use restraints against poaching employees of a former employer relates to the confidential information that a former employee may have obtained about the nature of the employee's work or terms of employment.

A non-disclosure clause can assist but does not provide enough protection on its own. It has been acknowledged by the courts that it is difficult to prove a breach of a confidential information clause and the more appropriate protection is through a non-solicit clause.

**Question 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.**

From the perspective of the employee – there is no unreasonable adverse impact.

However, the need for this type of restraint is very acute from the perspective of a start-up business or a business which is finding it difficult to attract skilled employees. Losing more than one staff member due to an ex-employee's solicitation will inevitably have a significant and adverse effect on the former employer's business survival which may lead to it being shut down and the shedding of remaining staff. Significantly also, removing the ability to have a non-solicit restraint would substantially erode the attractiveness of investing in a start-up or new business as there is a higher chance that investment may be lost due to staff movement. This would have broader impacts, including a consequential reduction in productivity and innovation across the economy.

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

A non-disclosure/confidentiality clause is not a restraint of trade.

An employer will include a non-disclosure/confidentiality clause in an employment contract to ensure that an employee does not use or disclose a business's confidential information, trade secrets or know-how which the employee obtained during the course of employment.

Confidential information in this context includes information of a proprietary nature, for example it may include:

- New products being developed by the employer for release into the market;
- Costs and pricing rates, including the cost of production or pricing margins;
- Client specific pricing, including the application of discounts or rebates;
- A client's purchasing history;
- The terms of agreement with clients;
- The strengths and weaknesses of products;
- Tendering and procurement strategies to win business;
- Strategic plans and marketing strategies; and
- Commercially sensitive information.

In relation to s.183 of the *Corporations Act 2001* (Cth) (**Corporations Act**), the operation of that provision turns on whether "improper use" has been made of the relevant information. It is clear from the authorities that "improper use" is not judged by reference to some standard set out in

the Corporations Act itself, but depends upon the protection equity or the common law will afford to the use of certain information (see *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172 at [60]). Consequently, where the protection afforded by equity or the common law is abridged by legislation, s.183 will be deprived of effect.

**Question 11 – How do non-disclosure agreements impact worker mobility?**

Non-disclosure/confidentiality clauses do not impact worker mobility.

A worker can work with another employer of their choice, provided they comply with any relevant confidentiality obligations.

**Question 12 – How do non-disclosure agreements impact the creation of new businesses?**

Non-disclosure agreements do not impact the creation of new business if the new business is not unlawfully using another business's confidential information.

It would be entirely inappropriate to remove the capacity of an existing employer to protect its proprietary interest in its confidential information. To do so would have significant and adverse impacts, up to and including business shutdown.

**Question 13 – When is it appropriate for workers to be restrained during employment?**

It is fundamental to the employment relationship that the employee acts with good faith towards the employer, including through behaving in a manner consistent with the employee's implied duties of confidence and fidelity. As part of these duties an employee must act in the employer's best interests, including by not disclosing confidential information or competing with their employer's business or by putting themselves in a position where their interests conflict with the employer's.

The matters set out above reflect legal principles of long-standing which are utterly foundational to the concept of employment in our jurisprudence. Viewed from the perspective of common sense, they are also unimpeachable.

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

Our response to question 13 above applies equally in relation to part-time and casual employees.

The extent to which a restraint might apply may depend on the employee's role, exposure to clients/suppliers/staff and what is reasonable in the circumstances. Some casual employees work for more than one employer.

We do not express a view on gig workers as they are not employees, and this consultation is focused on restraints in the context of an employment relationship.



## Concluding remarks

It is Ai Group's position that there is no basis for making any change to the law surrounding non-compete and other restraint clauses.

These clauses are essential to support business productivity, business innovation, investments by business in employees and business continuity and growth. Also, businesses must retain the freedom to contract as they choose.

There is no relevant or appropriate evidence which would justify a policy change.

We respectfully ask the Inquiry to acknowledge the ongoing need for non-compete and other restraints clauses in these circumstances.

## ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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