

Submission to the Competition Taskforce Division

Competition Review of Non-Compete Clauses

May 2024

About Marrickville Legal Centre

Marrickville Legal Centre (MLC) has provided legal services to vulnerable and disadvantaged members of its community for over 45 years.

Through our work in the community, we approach our clients with a view of holistic legal provision and a person-centred approach. Our Employment Law Service is often the first port of call for clients with employment related issues. We also provide internal referrals to clients with various needs through our Legal Health Check. MLC remains actively engaged with other legal and non-legal services in the community.

To help improve access to justice, MLC's Employment Law Service launched the Low Bono Legal Service (LBLS) in May 2020, in response to the unprecedented demand for employment law services due to the consequences of the COVID-19 pandemic. The LBLS offers affordable, fixed-fee representation to people experiencing financial distress who cannot engage a private lawyer or access free legal support from Legal Aid or CLCs.

The LBLS is run in partnership with Sparke Helmore Lawyers, a corporate law firm that provides pro bono support to MLC's employment lawyers.¹ The LBLS focuses on providing legal services to the 'missing middle' – low to middle income earners who are ineligible for legal aid but cannot afford private legal fees. The LBLS aims to fill the gap in the legal market and provide access to justice for this cohort.

The LBLS has achieved remarkable outcomes for its clients and for MLC since its inception.

364	\$3.4m	\$324k
clients have received employment related legal advice and representation	of entitlements has been returned to clients	in fees have been raised

All fees raised through the LBLS are reinvested in the service which, in turn, allows MLC to employ additional staff and expand services. The LBLS has also received positive feedback from its clients, who appreciate the quality, affordability, and flexibility of the service.

MLC has a long history of advocating for the rights of employees. The recommendations outlined in this Submission draw on our experiences in the community and from feedback provided by workers we assist.

¹ [Australian Pro Bono Centre | Story 18: Low Bono Employment Law Assistance for the Missing Middle](#)

Friday, 31 May 2024

Competition Taskforce Division
Treasury
Langton Cres
Parkes ACT 2600

By email only: competitiontaskforce@treasury.gov.au

Dear Treasury,

Marrickville Legal Centre (MLC) is pleased to make a submission to the Competition Review of Non-Compete Clauses.

Through our experience of advocating for the rights of employees, MLC draws on this experience to provide feedback and experience from our clients.

We operate an Employment Law Service to assist employees across the Canterbury-Bankstown, Inner West and Sutherland Shire Local Government Areas. The service offers free legal advice, assistance and representation to employees and works to improve employee's rights and how employee's exercise these rights in the workplace.

So far, this financial year, MLC has assisted over 1,100 employees in NSW. We continue to regularly represent employees in the Fair Work Commission and Federal Circuit and Family Court of Australia and provide outreach services to vulnerable clients at various locations within our catchment.

The recommendations outlined in these submissions draw from our experiences in the community.

Yours Sincerely,

A handwritten signature in blue ink, appearing to read 'V. Maroulis', is placed above the typed name.

Vasili Maroulis
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Summary of Recommendations

MLC makes the following recommendations:

Legislative change – non-compete clauses unenforceable in certain circumstances.

- Clauses not enforceable for the following workers:
 - Workers made redundant by their employer;
 - Workers dismissed at the initiative of their employer, other than for engaging in, or preparing to engage in, competition with current employer;
 - Workers with less than five years service;
 - Workers in non-executive positions; and
 - Workers under the age of 25 years old.

Other Recommendations

- Default restrictions on workers impacted by non-compete clauses enshrined in legislation;
- Reverse onus on employers to prove the validity of a non-compete clause prior to enforcing;
- Legislated requirement to provide an Information Sheet on Non-Compete Clauses to workers.

Note: The case studies contained within this submission use pseudonyms to protect the identity of the parties. All case studies describe matters handled by MLC.

Background

In 2023, the Australia Bureau of Statistics and e61 Institute released 'The ghosts of employers' past: how prevalent are non-compete clauses in Australia?'. Key findings from the report include:

- At least one in five Australian workers are subject to non-compete clauses, including many low wage workers who lack bargaining power such as clerical workers and labourers.
- 50% of the workforce bound by some type of post-employment restraint, whether it is a non-compete or clauses that prevent the disclosure of confidential information, solicitation of clients and poaching of co-workers.

While evidence of the impact of restraint of trade clauses is limited, recent evidence from the United States (Starr et al, 2021; US Treasury, 2016, 2022) shows that restraint clauses:

- Have spread to low wage occupations;
- Are rarely a negotiated outcome and are often introduced at the employers initiative;
- Deter employees from accepting roles from a competitor; and
- Restrict mobility and productivity of the economy.

In its present form, the *Restraint of Trade Act 1976* (NSW) creates ambiguity for workers in what constitutes a valid restraint of trade clause. Section 4(1) of the *Restraint of Trade Act 1976* (NSW) provides that a restraint of trade is valid to the extent to which it is not against public policy, whether it is in severable terms or not. Section 4(2) further provides that section 4(1) does not affect the invalidity of a restraint of trade by reason of any other matter other than public policy. Lastly, subsection 4(3) provides the Supreme Court powers to determine the extent to which a restraint of trade clause may be valid. Unfortunately, public policy is not defined within the legislation.

MLC frequently advises clients who are intimidated and inhibited in seeking new employment by non-compete clauses within employment contracts. The common experience observed by MLC is where a worker's employer assert that the non-compete clauses (whether written or unwritten) are enforceable to protect the business interests of the business, often reinforced by the threat of escalation to the Supreme Court to determine the validity of the clause if the worker risks 'breaching' their contract.

Given the inherent power imbalance between worker and employer, the threat of legal action often deters a worker from testing the validity of a restraint of trade or non-compete clause, and often results in the worker deciding they have no choice but observing and complying with the clause.

Case Study 1

Amanda was employed as a receptionist at a medical services group for approximately 1.5 years. Amanda was provided an employment contract that contained a restraint clause restricting her from working for a period of 2 years within a 7km radius of each of the practice groups locations across the Greater Sydney region. Further, the employment contract included a 1 year warranty that she would not induce/attempt to contact clients and a warranty in perpetuity to not divulge or make use of the employer's confidential database. Amanda received notice of dismissal on the basis of alleged breaches of the employers database, and a letter of demand threatening to sue Amanda for breach of the employment contract in the sum of \$59,000.00.*

Marrickville Legal Centre advised Amanda on the validity of the clauses in the employment contract and given the low-level role as receptionist, the length of the restraint being 2 years, and the geographic reach of the restraint, nearly 460km around Sydney, that it would be deemed unenforceable in its current state.

Case Study 2

Five clients attended Marrickville Legal Centre on a Friday afternoon, shortly after being served with Supreme Court of New South Wales proceedings commenced by their former employer, seeking an urgent injunction based on an alleged breach of restraint clauses. The proceedings were listed for the following Tuesday. One of the five clients had a good command of the English language, with all clients being from a culturally and linguistically diverse background. Two of the clients could not speak, read or write English, yet the contract the former employer was seeking to rely on to enforce the restraint was in English.

Marrickville Legal Centre represented the five clients, and while defending the Supreme Court proceedings, identified significant underpayment of wages owed to each client. At the time of the proceedings being commenced, each of the clients had obtained new employment. Marrickville Legal Centre was able to negotiate a resolution of the proceedings, whereby, the clients were not restrained under the restraint clauses, and they were paid their owed entitlements.

Presumption that restraints are not enforceable in New South Wales

MLC submits that the *Restraint of Trade Act 1976* (NSW) ought to be amended to ensure there is a presumption that non-compete clauses are invalid. Further, there ought to be a reverse onus on employers to demonstrate that a non-compete clause should be enforceable, only for certain types of employees.

Primarily, MLC submits that the following workers ought to have the express benefit of the presumption of invalidity:

- Workers made redundant by their employer (after ANY paid redundancy period has expired);
- Workers dismissed at the initiative of their employer other than workers dismissed for engaging in, or preparing to engage in, competition with current employer;
- Workers with less than five years service, or less than 2 years residence in Australia;
- Workers in non-executive positions; and
- Workers under the age of 25 years old.

Other Recommendations

Alternatively, MLC proposes a reverse onus apply as follows:

- Applying a default provision either restricting its application (i.e. to maximum of 3 months, limit of 10km in a CBD and 20-50km in regions); and
- Requiring an employer to establish public interest / reasonable in all circumstances to enforce any variation in contract / agreements AND mandating that employer provides prescribed information statement to a worker at least 48 hours before signing.

MLC suggests adopting the limits on fixed term contracts in the new s333E(ff) of the *Fair Work Act 2009* (Cth) as a model for non-compete clauses. By ensuring that the reverse onus applies to all employees with salaries below the Higher Income Limit set each year for unfair dismissal claims by the Fair Work Commission.

Such a provision is intended to exclude any verbal or unexplained non-compete clauses being enforced by employers.

Further, MLC recommends that any prescribed Information Statement should be in a form approved by both the Fair Work Ombudsman and the Australian Competition and Consumer Commission and be required to be provided to (and signed by) any prospective or current employee offered an employment contract, or agreement, which incorporates or requires compliance with a non-compete clause. Lastly, MLC suggests that any provisions requiring a statement on non-compete clauses to be provided to a worker carry civil penalties for failure to comply.

Case Study 3

Bert was employed as a casual machinery operator at a commercial cleaning company for about 4 months. Some time after commencing employment, Bert* was provided an employment contract that contained a non-compete clause restricting him from accepting any offer of work or 'engaging with' or working for any client or competitor of the employer for a period for 6 months after his employment ended. The non-compete clause did not provide a geographical limit to the restrictions. Bert* refused to sign the employment contract due to a number of concerns he had with the provisions contained within the contract. Shortly thereafter, Bert's* employment ended with the employer. The employer took steps to ensure that Bert* was aware of his continuing obligations under the non-compete clause after he left the workplace. Bert* was concerned about the application of the non-compete clause as he had never signed the contract. Marrickville Legal Centre advised Bert* that the clause in the unsigned contract, given his low-level casual role and the unlimited geographical reach of the clause was void.*