

# **SUBMISSION**

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

**Comments by The Pharmacy Guild of Australia to The Treasury**

Due: 31 May 2024

## ABOUT THE GUILD

The Pharmacy Guild of Australia (the '**Guild**') is the national employer industry association representing owners of community pharmacies - which are small and medium businesses in cities, regional and remote areas across Australia. Community pharmacies are frontline health services and provide an ever-expanding range of professional health services to their local community.

Critical for the provision of these health services by the owners of Australia's 6,000 community pharmacies is a regulatory environment that supports the growth, success, and sustainability of their businesses.

Many Guild members employ fewer than 15 employees in a pharmacy. These small community businesses account for the direct employment of more than 70,000 full time, part time and casual employees in cities and towns Australia wide.

As a federally registered industrial organisation, the Guild develops workplace and business policy and shapes public debate on major workplace relations and business issues and advocates for a regulatory environment that supports investment in community pharmacy. We believe a healthy pharmacy sector means healthier communities.

## GUILD RESPONSE

The Guild acknowledges the Treasury's definition of non-compete and other restraint of trade clauses within the issues paper being:

*"Non-compete clauses are a type of restraint of trade clause that seek to restrict a worker (both employees and independent contractors) from working for a competitor or establishing a competing business, typically within a geographic area and for a time period after the worker ceases employment. Non-compete clauses can be distinguished from other types of restraint of trade clauses, such as client or co-worker non-solicitation and non-disclosure clauses. These other clauses can restrict what a worker can do with relationships built during employment, or how they can use confidential information learned on the job."*

Nevertheless, the Guild is concerned that the Treasury's definition within the issues paper has made the practical impact of the clauses more severe than is the actual case at the employment level within organisations.

Restraint of trade clauses are most commonly found in contracts of employment where an employer needs certainty to protect a business' legitimate interests, such as confidential information and/or its customers and connections and/or for the sale of a business to restrict competition.

In Australia, restraint of trade is a common law doctrine (with the exception of New South Wales where restraint of trade is governed by the Restraints of Trade Act 1976 (NSW)), which

prevents a party from restricting another party's ability to engage in trade or employment unless it is able to demonstrate the restraint is reasonable in the interest of the parties and the public.

All restraint of trade clauses are void unless they are reasonable in the interests of the parties or the public. In assessing reasonableness, the court will firstly consider whether there is a legitimate interest that needs protection, and then assess whether or not the restraint does no more than is necessary to protect the interest. If the restraint goes beyond what is necessary, it will not be considered reasonable. The onus is on the party applying to impose the restraint to demonstrate that the restraint is reasonable to protect its legitimate interest. While the party being restrained can argue the restraint is unreasonable in the public interest.

The court will determine whether the application is reasonable as defined by case law including criteria set that has been developed by the courts to assess an application. This approach was set by the High Court of Australia in *Buckley v Tutty* (1971) 125 CLR 353 at 380.

The Guild acknowledges that there is an increasing interest in understanding potential factors that may prevent employees from changing employers, due to the general decline in job mobility. It is reported that 46.9% of Australian businesses have used at least one type of restraint clause.<sup>1</sup> Whereas the ABS data indicates 1% of Australian businesses stating that a potential employee had declined an employment offer because of a non-compete clause, it cannot be determined with certainty that restraint clauses have a strong effect on job mobility or wages.

Large businesses (those with 1,000 employees or more) are reported to have the highest use of non-compete clauses, while small businesses had the lowest use of the same.<sup>2</sup> With the majority of businesses in Australia falling into the small business category, this also provides evidence that restraint clauses are not affecting job mobility. Only 5.1% of businesses indicated that they had taken action or threatened to enforce a restraint clause (not necessarily a non-compete clause).<sup>3</sup> The Guild is of the opinion that not enforcing a restraint clause may lead to more of a negative effect on a business through loss of confidential information, client connections or influence, or a stable workforce, rather than on the employee and their future employment prospects.<sup>4</sup>

The Guild acknowledges that a business cannot prevent an employee from earning a living through unreasonably imposing a restriction unless there is a legitimate business interest to protect. The Guild suggests that non-compete clauses and other restraints be implemented dependent not only on an employee's incentive to disclose confidential information but also upon an employee's position and their possible influence on clients.<sup>5</sup> This includes determining the employee's role within a business. For example, a non-compete clause within a pharmacist's contract due to the nature of their interactions and influence with clients would be enforceable and protect business interests. However not including the same restraint clause for a pharmacy assistant within the same business, whose interaction may be considered to be more superficial and where a blanket application of non-compete clause would in fact affect job mobility.<sup>6</sup>

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<sup>1</sup> Restraint Clauses, Australia, 2023 | Australian Bureau of Statistics (abs.gov.au)

<sup>2</sup> Restraint Clauses, Australia, 2023 | Australian Bureau of Statistics (abs.gov.au)

<sup>3</sup> Restraint Clauses, Australia, 2023 | Australian Bureau of Statistics (abs.gov.au)

<sup>4</sup> <https://lawpath.com.au/blog/5-things-to-know-non-compete-clause>

<sup>5</sup> <https://lawpath.com.au/blog/5-things-to-know-non-compete-clause>

<sup>6</sup> <https://www.afr.com/policy/economy/chalmers-flags-crackdown-on-restraint-clauses-20240221-p5f6q5>