

The Recruitment, Consulting and Staffing Association (RCSA)

Submission to the Treasury Issues on Paper on Non-Compete Clauses and Other Restraints

May 2024

Introduction

The Recruitment, Consulting and Staffing Association (RCSA) welcomes the opportunity to provide comment to the Department of Treasury and Finance's *Competition Taskforce* responding to the *Issues Paper on Non-Compete Clauses and Other Restraints*.

RCSA will confine its input here to brief directional and high-level observations in response to this document. As Association members of the Australian Chamber of Commerce and Industry (ACCI), we have contributed to the development of ACCI's more detailed response to the document and endorse the Chamber's submission as reflective of RCSA's more detailed position on issues raised in the paper.

In addition, we were pleased to provide access for the taskforce to RCSA and its members directly through a consultation session and information gathering process during the development of the issues paper and in response to some of the questions it raised. In addition, we were pleased to promote the Taskforce's survey to members directly and encourage them to respond.

As the peak industry body representing the staffing and recruitment sector in Australia and New Zealand, we strongly advocate for the retention of the current construction, as developed by the courts, with respect to non-compete and non-solicitation clauses. These clauses exist as they currently stand in market to protect legitimate business interests, and RCSA does not believe their current form serves to stifle labour mobility or reduce productivity.

RCSA represents over 1000 corporate and individual members who source, place, and manage permanent and temporary workforces across almost every industry in the country, supporting both private and public organisations with their professional, skills and labour demands.

Role of Clauses

The recruitment and staffing industry is a crucial part of Australia's employment landscape, directly employing over 650,000 people nationwide, and facilitating pathways to employment for many more. Labour mobility is essential for a robust economy, facilitating efficient resource allocation and enabling more productive companies to expand, thereby benefiting the broader economy. Non-compete and non-solicitation clauses serve several legitimate purposes, such as protecting a business's investment in confidential information. Policymakers should aim to balance protecting legitimate business interests with promoting labour mobility.

We are concerned the *Issues Paper* conflates considerations in Australia with behaviours and circumstances in other countries, which serves to exaggerate the reality of the Australian experience when it comes to non-competes.

Many Australian businesses use non-compete and non-solicitation clauses reasonably to safeguard legitimate business interests, as recognised by common law. Notably, some clauses, like those applied to a lash technician, are likely unenforceable under common law. Such unenforceable, ambit claims are often included in agreements but would not be upheld by the courts- as has been seen when said cases are tried.

The judicial system enforces non-compete and non-solicitation clauses only when they protect a business's legitimate interests and are reasonably necessary to do so. Clauses exceeding these limits are unenforceable and routinely invalidated by the courts. Therefore, codifying existing legal parameters is a sensible policy approach. It aligns with the measured way courts currently enforce these clauses and would provide greater certainty for both employers and employees regarding their use and enforceability. Clear legislation would allow employees to understand their rights and restrictions easily.

Codification of non-compete and non-solicitation clauses based on current common law principles would benefit both employees and employers by ensuring greater certainty and fairness in their application. Such clauses can protect businesses from unfair practices while allowing employees to pursue new opportunities within clearly defined and reasonable boundaries.

In the recruitment and staffing industry, which is highly competitive and does not have a clear and defined tertiary education pathway, non-competes are used to protect substantial investment in in-house training and development of highly skilled recruitment professionals. Any moves to remove them as a protection mechanism would risk that sustainability of that investment into the future.

Demand for labour in Sydney and Melbourne markets is set to grow rapidly, supported by several major infrastructure projects committed by federal and state governments. This is in addition to major projects already underway in residential and commercial building and renewable energy. Many of these projects are already constrained by not being able to attract the people that they need. The recruitment industry's capacity to service demand from Australian business is more important than ever in this environment but the ability for the sector to effectively support this need is contingent on being able to fill its own vacancies.

Summary

RCSA appreciates the opportunity to contribute and have an input in the consultation and discussions posited by Treasury regarding restraints of trade and non-complete clauses. RCSA supports the Australian Chamber of Commerce and Industry (ACCI)'s submission, and reemphasis support for the use of these clauses in market to protect legitimate business interests and in 'common sense' contractual agreements. RCSA do not content these clauses are having a practical impact on job mobility in the market as common law does not allow for unenforceable restraints to be upheld.

RCSA welcomes the opportunity to work with the Government beyond this submission to further explore and consider the issues outlined in this document.

About RCSA

RCSA is the peak body for the recruitment and staffing industry in Australia and New Zealand.

RCSA promotes and facilitates professional practice within the recruitment and staffing industry. It sets the benchmark for industry standards through representation, education, research and business advisory support to our member organisations and accredited professionals who are bound by the Australian Competition and Consumer Commission (ACCC) authorised RCSA Code for Professional Conduct.

RCSA is also a proud member of the World Employment Confederation (WEC), the voice of the recruitment and staffing industry across 50 countries, and the Australian Chamber of Commerce and Industry (ACCI).