



Treasury's consultation paper on non-competes and other restraints
Response from Herbert Smith Freehills Kramer

A. Introduction

- I. The Employment, Industrial Relations, and Safety Team at Herbert Smith Freehills Kramer (**HSFK**) welcomes the opportunity to provide this submission in response to the Treasury's consultation paper entitled 'Reform to non-compete clauses and other restraints on workers' dated July 2024 (**Consultation Paper**).
- II. This response follows the earlier submissions provided by Herbert Smith Freehills (**HSF**) (as HSFK then was) in response to the issues paper entitled 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity' dated April 2024 (**HSF Issues Paper Submission**).
- III. HSFK is one of the world's leading commercial law firms formed from the recent integration of HSF and Kramer Levin, bringing the best people together across our offices globally. We have a number of specialist practice areas, including market-leading experts in employment and competition, which are active in advising clients on the legal issues arising in connection with restraints of trade. We therefore have a significant perspective on the issues raised by the Consultation Paper and their impact on businesses, employees, and the wider community.
- IV. Drawing on our extensive experience in restraints of trade and in advising a range of clients in relation to this area in Australia and abroad, we make the following submission.
- V. For the avoidance of doubt, HSFK maintains its position in the HSF Issues Paper Submission that the current common law doctrine on restraints of trade already provides a robust framework that adequately protects the interests of businesses, workers, and the wider community. However, as requested by the Consultation Paper, this submission provides comment on the proposed policy details on the premise that legislative reform in this area is forthcoming.

B. Executive Summary

- I. This submission comments on the proposed reforms from an employment law perspective. It does not address proposed reforms to the competition law in respect of no poach or wage-fixing agreements.
- II. In terms of defining a non-compete clause and the scope of the ban, we propose areas where the definition should be clarified and submit that the ban should not extend to other non-employee workers. We also raise concerns with using the high-income threshold as the basis for the scope of the ban and propose a modified version of the income threshold.
- III. As regards enforcement, we support a narrow approach to standing given unique commercial and confidentiality considerations that arise from the nature of litigation pertaining to non-compete clauses, particularly with respect to the evidence typically required to be adduced by an employer that seeks to maintain the validity of a non-compete clause.



- IV. We do not support a penalty regime given our view is that validity of a non-compete clause should be assessed as at termination and this means there is scope for a restraint that would originally have been valid to subsequently become invalid.
- V. In relation to potential reform of other areas, including non-compete clauses for high-income employees, client and co-worker non-solicitation clauses, and restrictions on concurrent employment, our overarching position is that the common law, as it has evolved over time, remains appropriate to determine whether such restrictions are reasonable and necessary on a case-by-case basis. However, to the extent legislative reform is contemplated, we make submissions regarding which aspects could be subject to statutory limitations, and what those limitations should be.

Definition of a non-compete clause

1. How should a non-compete clause be defined in the Fair Work Act? Is the FTC definition appropriate for an Australian context?

1.1 The FTC definition as taken from the Consultation Paper is as follows:¹

A term or condition of employment that either prohibits a worker from, penalises a worker for, or functions to prevent a worker from:

a) Seeking or accepting work with a different person where such work would begin after the conclusion of the employment that includes the term or condition

b) Operating a business after the conclusion of the employment that includes the term or condition.

[The] term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.

1.2 We submit that the FTC definition is appropriate in scope save for three modifications which we suggest as follows.

1.3 First, the phrase “functions to prevent” indicates this clause takes a substance over form approach to banning non-compete clauses. The Consultation Paper notes that this limb is intended to apply narrowly and does not seek to prevent the use of clauses that function to prevent the use of confidential information or solicitation of clients while working for a competing business.² We submit that this legislative intention is unclear on the face of the FTC definition and should be codified. The examples in the Consultation Paper³ of when an employee may be “functionally prevented” from post-employment competition demonstrate that the question is not a clear one to answer and depends on the circumstances, thus introducing a real likelihood of litigation over whether certain terms by their contextual effect should be captured by the ban. To avoid creating a new area of uncertainty and an additional ground for litigation that the ban seeks to reduce, we submit that the definition should be drafted in such a way that it expressly excludes clauses expressly directed towards protecting confidential information and intellectual property, as well as clauses prohibiting the solicitation of clients and co-workers.⁴ Alternatively, consideration could be given to amending this element of the FTC definition to “or which primarily functions to prevent a worker from” or similar, however we consider this would be more ambiguous than an express exclusion.

¹ Consultation Paper, 9.

² Consultation Paper, 9.

³ Consultation Paper, 9.

⁴ See sections 22 and 23 below for our submissions supporting the continued application of client and co-worker non-solicitation clauses.



- 1.4 Secondly, another presumably inadvertent consequence which we foresee may arise from either the “*penalises*” or “*functions to prevent*” phraseology is that terms of employment which are triggered by a resignation event may be captured merely because employees almost invariably resign for the purpose of, or in order to, take up new employment. For example, it is commonplace in many incentive plans that an employee who gives notice of resignation ceases to be entitled to any deferred incentives that would otherwise vest after the date their employment ceases. There are sensible commercial reasons for this, including because a business may wish to monitor company and individual performance over a longer period post-implementation of certain strategies and reduce incentives for adverse outcomes that may not be apparent in the short-term. An employee who resigns at their own initiative earlier than the vesting date therefore should not be able to use this fact to avoid being subject to the same vesting conditions as other staff. However, on the FTC definition, an employee could argue that because the lapsing of their deferred incentives is a negative financial implication for them if they resign to seek new employment, that it effectively penalises them for, or functions to prevent them from, seeking or accepting new work. To avoid this outcome, we submit it would be appropriate to include an exclusion with respect to terms that are triggered merely by an employee’s resignation, as distinct from preventing them from resigning to seek new employment.
- 1.5 Thirdly, it is unclear whether negotiated settlements would be captured as a “*term or condition of employment*” given their primary purpose in settling disputes and/or regulating the terms of separation. However, this would appear to be the intention based on the indication in the Consultation Paper that “*the ban on non-compete clauses would not be limited to just the contract of employment, but would instead cover the broad employment relationship between the employer and employee, including deeds separate to the employment agreement, and workplace policies (whether written, or oral).*”⁵ We concur that workplace policies should be covered by the ban. However, we submit that arrangements agreed in connection with a person’s cessation of employment should be excluded, and this exclusion should be codified. The voluntary and negotiated nature of separation arrangements render them less vulnerable to the criticism that restraints are imposed on employees unilaterally or with minimal room for negotiation.
- 2. Should any specific kinds of common contractual terms be explicitly included or excluded from this definition?**
- 2.1 See 1.3 and 1.4 above. We submit that contractual terms that are directed towards protecting confidential information and intellectual property, which prohibit employees from soliciting clients or co-workers, or which are triggered merely by a resignation event, should be explicitly excluded from the definition of a non-compete clause.

Scope of workers affected

- 3. Should the ban on non-compete clauses apply to workers who are not employees, such as independent contractors?**
- 3.1 We submit that the ban should be limited to employees and should not apply to other categories of workers such as independent contractors.
- 3.2 First, as the Consultation Paper observes, independent contractors usually negotiate their own fees and working arrangements.⁶ The rationale of bargaining power disparity does not apply equivalently to this category of workers, and services agreements are negotiated commercial agreements subject to the fundamental doctrine of freedom of contract. To the extent the Consultation Paper queries whether the ban should cover

⁵ Consultation Paper, 7–8.

⁶ Consultation Paper, 11.



contractors “where their role and conditions are comparable to an employee”,⁷ the focus in this circumstance should more appropriately be on proper characterisation of the worker’s status by reference to the real substance, practical reality, and true nature of the working relationship, rather than on extending the ban as a starting position.

- 3.3 Secondly, independent contractors can access the unfair contract terms regime—a legislative scheme not available to employees. If a business is including non-compete clauses in their boilerplate language and the clause is, among other things, not reasonably necessary to protect its legitimate interests, a contractor who agreed to the term may have recourse to those protections if the other eligibility criteria are satisfied.
- 3.4 Thirdly, with limited exceptions (such as the unfair contract terms regime discussed above), the *Fair Work Act 2009* (Cth) (**Fair Work Act**) regulates employment relationships, rather than worker relationships more generally. Noting that the ban is proposed to be contained in the Fair Work Act, it is consistent with the broader legislative scheme that it be limited in application to employees.

4. Are there any potential unintended consequences that may arise from a reliance on the high-income threshold in the Fair Work Act? If so, how could they be addressed?

- 4.1 Yes, consistent with the HSF Issues Paper Submission, we submit that the high-income threshold alone is not an appropriate method to dictate the coverage of the ban on non-compete clauses, as it will result in over-coverage.
- 4.2 First, as the Consultation Paper notes, approximately 91% of workers across Australia currently fall below the high-income threshold.⁸ We submit that this is an unduly large portion of the workforce who would be subject to the ban.
- 4.3 Secondly, it may have unintended consequences for senior employees in lower paid sectors. The Consultation Paper asserts that employees earning below the high-income threshold are generally recognised as having less bargaining power and less capacity to absorb loss of income.⁹ However, at least in respect of bargaining power, there are lower-paid sectors (e.g. the not-for-profit sector) where even the most senior leadership are earning below the high-income threshold, but have an abundance of bargaining power, are well-placed to navigate the process of negotiating and contesting a restraint, and are likely to be the individuals that can cause the greatest damage to their former employer if they are allowed to work for a competing business immediately after cessation of their employment.
- 4.4 Thirdly, it does not account for remuneration schemes where the base salary is below the high-income threshold but there is extensive earning potential from discretionary income models, such as incentives. The high-income threshold is based on “earnings” as defined in the Fair Work Act, which concept does not cover discretionary payments such as bonuses and incentives incapable of being determined in advance.¹⁰ However, particularly in some sectors or roles (e.g. the finance sector or sales roles), employees may have a significant portion of their total remuneration potential tied to incentives. They may therefore be better placed to absorb a temporary loss of income than what their “earnings” may reflect.

⁷ Consultation Paper, 10.

⁸ Consultation Paper, 13.

⁹ Consultation Paper, 12.

¹⁰ Fair Work Act, s 332.



- 4.5 In our submission to the initial phase of consultation on restraints, we suggested a staggered income-based threshold where the ban would not apply to employees receiving a total remuneration above \$150,000 per annum.¹¹
- 4.6 However, if the Government intends to rely on the high-income threshold figure, we submit that it should be modified as it applies to this ban, such that the threshold is calculated using “full rate of pay” as defined in s 18 of the Fair Work Act. Discretionary portions could be calculated using a prescribed period, e.g. the amounts received in the preceding 12-month period prior to cessation of the employment.¹² While this does not solve the problem identified in 4.3 above in respect of low-paid sectors, the use of this definition more accurately recognises the amount of compensation earned by employees during their employment.
- 5. At what point in the employment relationship should the high-income threshold be applied to determine whether a non-compete clause is allowable or not, and why?**
- For example, should it be applied at the time the contract for employment is entered into or varied, the time the employment relationship ends, or some other time?**
- 5.1 We submit that the income threshold, whether that is the high-income threshold or otherwise, should be applied at the time the employment ends, consistent with the unfair dismissal regime.
- 5.2 This timing better accounts for changes in remuneration over the relationship and better recognises the actual status of an employee after the entirety of their service to the employer. Conversely, at the time of entering into a contract for employment, the employee has yet to gain the specific knowledge, information, or build relationships of value that restraints exist and endeavour to protect.
- 5.3 While the Consultation Paper notes that the threshold is applied at the commencement of the relationship for restrictions on fixed or maximum term contracts, those restrictions are grounded in a different rationale that renders them distinguishable from restrictions on non-compete clauses. Banning the former seeks to promote certainty and stability of employment. It also makes sense that the legality of a fixed-term contract, including taking into account whether the income threshold exception applies, should be determined at the point of entry into the contract. In contrast, banning the latter seeks to facilitate mobility, which is only a consideration when the employment ends. Further, determining the length of a fixed or maximum term contract is not dependent on conduct that occurs during the course of employment, while the opposite is true for restraints, as discussed at 5.2 above.
- 6. Would the application of the ban to all fair work instruments, as defined by the Fair Work Act, have any unintended consequences?**
- 6.1 If a ban is to be introduced, we support its application to all fair work instruments in the interests of clarity and consistency. However, the Government should consider how this ban may apply to Individual Flexibility Arrangements (IFAs). If the legislative scheme is drafted as a provision in the Fair Work Act with broad-ranging application, an unintended consequence of extending the ban to all fair work instruments may be that it removes an ability for non-compete clauses to be addressed in IFAs. In contrast, if fair work instruments were to contain a model clause that reflects the prohibition, and this model

¹¹ HSF Issues Paper Submission, 3–4.

¹² See also 5.1 – 5.3 below, where we submit the threshold should be determined at the end of the employment relationship.



clause was a negotiable matter, then this would resolve this potential unintended consequence.

Enforcement

7. What is the appropriate penalty for breaches of the ban on non-compete clauses? Are the existing penalties in the Fair Work Act for other contraventions appropriate?

Please consider the following matters in your feedback: (a) the type of penalty, (b) the magnitude of the penalty, and (c) the circumstances in which the penalty should apply.

- 7.1 We submit that a cause of action alleging a breach of the ban on non-compete clauses should only be able to be brought at or after the time of termination. This aligns with our submissions above at 5.1 to 5.3 regarding why the income threshold is most appropriately assessed at such time.
- 7.2 If the cause of action could arise earlier, in circumstances where the current proposal is that the threshold will change annually, a non-compete clause could be valid at the time it is entered into, but become invalid due to a subsequent increase in the high-income threshold. This issue could be resolved if coverage by the ban was determined by a fixed threshold (see above at 4.5), rather than a threshold that is automatically indexed.
- 7.3 As for the appropriate penalty that may be applicable for a breach assessed at termination, we submit that it is not appropriate to penalise breaches of the ban on non-compete clauses beyond rendering them void and unenforceable.
- 7.4 If, contrary to our submission, a penalty regime is to be imposed, then we submit it would be appropriate to align the penalty regime to that applicable for breaches of the prohibition on pay secrecy terms and the restrictions on fixed or maximum term contracts. That is, the applicable section is a civil remedy provision, the contravention of which attracts a penalty of 60 penalty units or 600 penalty units for a serious contravention.¹³
- 7.5 As for circumstances in which the penalty should apply, we submit that it should be an objective determination of whether the contract or policy in fact contains a clause in breach of the ban, subject to the defence of reasonable belief that the person is a contractor (see 8.1 – 8.2 below).

8. Should there be any defences available to contraventions of the ban on non-compete clauses? If so, in what circumstances?

- 8.1 The Consultation Paper notes that one of the defences available under the Fair Work Act is that applicable to the civil remedy provision of sham contracting, where an employer will not be held in contravention if they did not know and was not reckless as to whether the contract was an employment contract rather than a contract for services.¹⁴
- 8.2 Given our submissions at 3.1 – 3.4 above that the ban should not extend to independent contractors, we submit that the same defence should apply to the ban on non-compete clauses. We submit that this remains consistent with the rationale for introducing the ban, particularly in respect of the concern around bargaining power—where the negotiations were such that the employer had a basis to genuinely believe the worker was a contractor, it is likely that the person had greater bargaining power and freedom to negotiate their terms and conditions of engagement.

¹³ *Fair Work Act 2009* (Cth), ss 333D, 333E, 539.

¹⁴ *Fair Work Act 2009* (Cth), s 357(2); Consultation Paper, 17.



- 8.3 Depending on whether modifications or exceptions are introduced to the FTC definition which adequately address our concerns at 1.3 and 1.4 regarding the ambiguous scope of “*functions to prevent*”, it may also be appropriate to have a defence available which recognises that provided the relevant term functions to achieve a primary purpose which is other than to prevent the employee from seeking new employment, that the mere inclusion of such term will not amount to a contravention, even if it may otherwise have such a practical effect.

9. Which parties should be able to commence proceedings for a breach of the ban on non-compete clauses and why?

- 9.1 We submit that standing should be limited to affected individuals (see our submissions at 10.1 – 10.3 below about the enforcement role of the Fair Work Ombudsman).
- 9.2 To the extent there is a breach of a fair work instrument, employee organisations will retain their existing right to bring proceedings in respect of such breach. Otherwise, in respect of non-compete clauses in employment contracts or documents governing the employment relationship other than fair work instruments, we submit it would be inappropriate for employee organisations to have standing. Non-compete clauses inherently relate to matters of commercial sensitivity. Defence of these matters may, depending on the approach taken by the claimant and the matters which an employer is required to respond to, involve revealing to the court confidential information such as customer connections, industry research, or details of products. This information would not otherwise be shared with third parties, and it may be problematic if an employee organisation were to represent different employees employed by different businesses in the same industry. These same considerations do not arise in respect of enforcement of other bans in the Fair Work Act, such as breaches of the prohibition on pay secrecy terms.
- 9.3 We further submit that businesses that intend to hire an employee bound by a non-compete clause should not have standing, whether or not there is a signed contract between that prospective employer and the employee.
- 9.4 First, while they have an interest in the resolution of the dispute and there is a cost imposed on them as a result of the restraint, they would not yet have suffered any quantifiable loss—it is not possible to ascertain with any clarity the financial benefit that an employee could bring if they were allowed to commence employment with the prospective employer.
- 9.5 Secondly, there is a risk of abuse or unfairness where established businesses capable of bearing the financial and time cost of litigation may occupy the resources of smaller businesses or start-ups. This also raises confidentiality concerns for similar reasons outlined at 9.2 above in that in defending the matter, the former employer may be forced to disclose confidential information that it would not otherwise be required to disclose to a competitor. Although the *Harman* undertaking provides some protection from misuse, the fact of the matter remains that it creates a risk of breach which may not be identified until a much later point in time.
- 9.6 Thirdly, prospective employers have existing means to support prospective employees in disputes regarding restraints without needing to themselves have standing. For example, they may enter into an agreement with the prospective employee to indemnify their legal costs.
- 10. What role should the Fair Work Ombudsman have in relation to the ban on non-compete clauses? Are there particular areas where employees and employers may need assistance to understand and implement any proposed ban on non-compete clauses?**



- 10.1 From the perspective of enforcement, we submit that the Fair Work Ombudsman (**FWO**) should have a limited role in practice. Per its *Compliance and Enforcement Policy*, the FWO prioritises its investigative resources into “*allegations of contraventions that are serious, significant and/or systemic in nature, or where it would otherwise serve the public interest*”. In determining how to prioritise its resources, it will consider factors such as whether the allegations of non-compliance are isolated events and whether they are more appropriately resolved between the parties.¹⁵
- 10.2 Allegations of non-compliance as regards non-compete clauses are more akin to private contractual disputes, rather than issues with system-wide effect that would justify the expenditure of taxpayer funds. We note the FWO analogously does not have standing to bring enforcement proceedings in relation to the unfair dismissal jurisdiction with respect to an individual employee.
- 10.3 However, the FWO would likely have an important role from an educational perspective, particularly leading up to introduction of the ban and in the early stages of implementation. For example, it is expected that the FWO will, as it does with other aspects of the Fair Work Act, publish resources regarding matters such as when a clause may fall foul of the ban by virtue of “functioning” to prevent mobility, or how to calculate the income threshold (particularly if the threshold is calculated differently from the method for unfair dismissal, as we submit should be the case at 4.6 above).
- 11. Are there any specific remedies that should be available to persons impacted by potential non-compliance with the ban? What role would the Fair Work Ombudsman have to enforce breaches of the ban, and would new compliance tools be necessary?**
- 11.1 We consider that appropriate remedies for an employee impacted by non-compliance with the ban are those already available pursuant to the courts’ broad-ranging jurisdiction to make any orders it considers appropriate.¹⁶ These include: a declaration that the employer has contravened the relevant provision, a declaration that the offending clause is void and unenforceable, and compensation orders for loss suffered (e.g. loss of income due to being unable to commence with a new employer). We do not consider that any specific remedies are required for other persons more generally impacted by the non-compliance, such as the prospective new employer. As noted above in 9.4 in relation to our submission that they should not have standing, they have yet to suffer any quantifiable loss.
- 11.2 We submit that the FWO should not play an enforcement role: see 10.1 – 10.3 above.
- 12. Should the Fair Work Commission have a role in resolving disputes that arise from the ban on non-compete clauses?**
- 12.1 In our view, disputes arising from the ban on non-compete clauses will be more appropriately retained within the domain of Chapter 3 courts who have traditionally heard disputes regarding enforceability of restraints of trade, and who possess the judicial power necessary for enforcement (typically in the form of an injunction) if a restraint is upheld. In relation to proceedings arising from the Fair Work Act, the courts would be the Federal Court of Australia and the Federal Circuit and Family Court of Australia (Division 2) (**Courts**).
- 12.2 It is in the interests of efficiency that all aspects and stages of the dispute may be determined in a singular forum, including potential jurisdictional questions about whether an employee is captured by the ban, the substantive issue of non-compliance, as well as

¹⁵ Fair Work Ombudsman, [Compliance and Enforcement Policy](#), updated April 2025, 6.

¹⁶ *Fair Work Act 2009* (Cth), s 545(1).



the issuing and enforcement of any remedies (e.g. injunctions). This is particularly as disputes concerning alleged breaches of non-compete clauses are typically urgent in nature due to the irreversible harm that may otherwise be suffered by the enforcing entity the longer the breach persists.

- 12.3 Alternative dispute resolution mechanisms are also available and encouraged, and it would remain a matter dealt with in a no costs jurisdiction.¹⁷

13. What additional powers, if any, would the Fair Work Commission require to deal with disputes it may be permitted to hear about non-compete clauses?

- 13.1 See 12.1 – 12.3 above. The powers that the FWC would require to effectively deal with disputes arising from this prohibition are judicial in nature, and therefore constitutionally not able to be conferred upon the FWC.

Limited statutory exemptions

14. Are there any exemptions to the non-compete ban that are justified on strong public policy or national interest grounds? How should any such exemptions be applied (e.g. permanent, temporary, by application etc)?

- 14.1 We have not identified any additional specific exemptions that are justified as a matter of general application due to public policy or national interest grounds.

- 14.2 However, we submit that it would be appropriate to establish a regime for temporary exemptions on application, such as that available under anti-discrimination legislation. In our view, the application must be made by consent between an employer and employee, must identify public policy or national interest grounds justifying the exemption, and must specify geographical, role, and/or remuneration parameters for the exemption. It would be subject to review and revocation and may be renewed on further application by consent.

Transitional arrangements

15. What transitional arrangements are required to support workers, and business compliance with the ban?

- 15.1 If, contrary to our submission at 7.3, a civil penalty regime is introduced, we submit that it would be appropriate to have the same transitional arrangements that existed when the prohibition on pay secrecy terms was introduced, as referenced in the Consultation Paper.¹⁸

- 15.2 That is, there would be a delay between the relevant amending legislation receiving Royal Assent and the provisions containing the ban taking effect, and a further six-month grace period before civil penalties could be imposed. This staggered approach allows employers time to update their contracts and practices before employees may commence a claim and/or employers may incur potential civil liability.

16. How should the ban apply to non-compete clauses contained in existing contracts after commencement?

- 16.1 We submit that the approach to existing contracts should be the same as that taken in respect of the prohibition on pay secrecy terms, save for a variation as outlined below.

- 16.2 Under the pay secrecy regime, any non-compliant clauses in existing contracts would be grandfathered and continue to lawfully operate for so long as the contract remains unchanged. However, if the contract is varied, the prohibition would apply from the date of any variation. This approach is appropriate in the non-compete context, save that we

¹⁷ *Fair Work Act 2009* (Cth), s 570.

¹⁸ Consultation Paper, 21.



submit a mere change in remuneration (without any other change in terms) should not lead to the lapsing of the grandfathered term.

- 16.3 This approach allows recognition that the existing restraint would have been accounted for in the employee's existing terms (including negotiated benefits), and therefore it would be unfair for it to suddenly cease application without an adjustment in other terms. At the same time, the carve-out for remuneration increases encourages employers to continue conducting routine remuneration reviews.

Non-compete clauses for high-income employees

17. What approach for employees earning above the high-income threshold best strikes the balance between the public interest in competition, productivity, job mobility and the protection of legitimate business interests?

- 17.1 For employees earning above the relevant income threshold, we submit that the current common law approach best accounts for the complexity involved in balancing the individual employee's interests, the employer's legitimate business interests, and the wider public interest in competition, productivity, and job mobility. This is particularly given the high percentage of workers covered by the high-income threshold in Australia as discussed above in 4.2.
- 17.2 As such, our starting position is that no change to the status quo is needed for this cohort. Non-compete clauses should remain a matter governed by freedom of contract between parties, noting that employees in this cohort are more likely to have greater seniority, bargaining power, and access to commercially sensitive information requiring protection.
- 17.3 For the same reason, if this cohort were to be regulated, we submit that a full ban is inappropriate and limits on compensation and duration better strike the balance required.
- 17.4 Should employees above the high-income threshold be brought within the scope of the ban, we consider there should remain an alternative threshold by which persons above a certain seniority, at minimum, are excluded. For instance, those who are "senior managers" or "officers" for the purposes of the *Corporations Act 2001* (Cth) could be excluded.
- 17.5 As a further alternative, consideration could be given to adopting a similar coverage to the unfair dismissal jurisdiction, which applies if an employee is below the high-income threshold or covered by an award or enterprise agreement. We consider this to be more appropriate than a blanket inclusion of all persons above the income threshold within the remit of the non-compete ban.

18. If mandatory compensation were adopted what should be the minimum compensation required?

- 18.1 Consistent with the HSF Issues Paper Submission, as a starting position our view is that a mandatory compensation regime should only apply to employees above a certain income level, which we had proposed be an amount below the high-income threshold.
- 18.2 However, assuming that mandatory compensation was to be adopted for all employees, we submit that the minimum compensation should be a percentage of the employee's base salary that they would have earned during the restrained period.¹⁹ The Consultation Paper notes that of the 11 jurisdictions identified by Treasury with statutory minimum compensation, 8 have set it within the range of 40 to 60%.
- 18.3 In the absence of data on how these thresholds have impacted the use of restraints in the relevant jurisdictions, we do not comment on the appropriate percentage save to say that

¹⁹ HSF Issues Paper Submission, 4.



we consider it should be well below 100%, including in recognition of the financial burden this will impose on businesses (particularly small businesses) and the fact that non-compete clauses do not entirely prevent employees from earning income. Rather, in the common law context, they are only enforceable where reasonably necessary to protect a legitimate business interest—generally working for a competitor in a similar position to that with their previous employer.

18.4 In any case, this compensation should be calculated on base salary (or equivalent) only and should not include bonuses or other additional or discretionary remuneration which is generally a reward for performance during employment. In advancing this submission, we have considered the interplay between the following objectives:

- mitigating financial disadvantage that may be suffered due to enforcement of the non-compete clause;
- discouraging unreasonable enforcement of restraints by businesses;
- ensuring it remains financially affordable for businesses, particularly smaller businesses, to protect their legitimate business interests;
- avoiding a situation where employees are dis-incentivised from actively seeking alternate employment, which may have a perverse effect on the goal of encouraging mobility and maximising productivity potential; and
- avoiding providing employees with a windfall.

18.5 To the extent that any payments are made in lieu of notice of termination and these are in excess of the statutory minimum entitlement to notice, these should reduce the amount payable as compensation for the restraint by an amount equivalent to the excess notice. This is appropriate in circumstances where persons earning above the income threshold often have notice periods that are far in excess of the minimum required under statute and, as a commercial and contractual matter, employers should be able to stipulate what this additional notice is in compensation for.

18.6 In respect of whether employers should be able to remove a non-compete clause where they consider it is no longer necessary, we submit that such a removal mechanism is appropriate subject to a minimum notice period being given of the removal, or a lesser period of notice by consent. This is to avoid a situation where late notice leaves the employee with an unintended gap in employment but no monetary compensation for the same.

19. If a duration limit were imposed, what would be the most appropriate maximum duration?

19.1 In circumstances where any legislative regulation of non-compete clauses in respect of high-income employees is not intended to displace the common law requirements for a valid restraint,²⁰ including that a restraint will only be enforceable to the extent it is reasonably necessary to protect the employer's legitimate business interests, we submit that there should not be a duration limit imposed.

19.2 However, to the extent it is determined to implement one, we submit that 24 months would be an appropriate statutory maximum duration, based on historically what we have observed to be the typical upper limit of what the Courts have found to be enforceable.

19.3 In relation to whether any period of 'gardening leave' should reduce the maximum restraint period, we acknowledge that this is the usual approach taken under the common law. However, we do not consider it necessary for any maximum duration defined in the legislation to incorporate a reduction for gardening leave. Rather, the period (if any) of

²⁰ Consultation Paper, 24–26.



gardening leave should simply be one of various factors taken into consideration by the court in determining a reasonable restraint period, with the statutory maximum duration to constitute a cap on this.

Non-solicitation clauses for clients and co-workers

20. Should the use of client non-solicitation clauses be restricted? If so, what sorts of restrictions are appropriate (e.g. duration, type of activity, and scope of clients).

20.1 As a starting position, we consider that the common law appropriately addresses the use and enforcement of non-solicitation clauses, and therefore we submit that it is unnecessary to restrict their use by way of statutory limitations.

20.2 However, if reform is to be introduced in this area, we submit that the following restrictions would be adequate to address the concerns raised in the Consultation Paper regarding the potential impact on third parties:

- a temporal restriction on the restraint period of 24 months maximum, akin to the proposal above in respect of non-compete clauses;
- as is suggested in the Consultation Paper,²¹ excluding restrictions on passive dealings with former clients; and/or
- a scope restriction, such that non-solicitation clauses may only capture solicitation of clients with whom the restrained employee has personally dealt with in the 12 months prior to the end of their employment or about whom they had access to confidential information.

20.3 Further, it should be expressly clarified that nothing in the regulation of client non-solicitation clauses displaces or affects existing common law duties to the company or statutory duties under sections 182 and 183 of the *Corporations Act 2001* (Cth).

21. When, if ever, should it be legitimate for business to use co-worker non-solicitation clauses? If these clauses can be legitimate, what restrictions would be appropriate to impose on their use?

21.1 Our position in respect of co-worker non-solicitation clauses is akin to our position regarding client non-solicitation clauses. As a starting position, we consider that statutory limitations are not necessary given the existing common law regime.

21.2 However, if reform were to be introduced in this area, we consider that the restrictions referred to in 20.2 would be appropriate with the necessary modifications to reflect the co-worker context, being a maximum restraint period of 24 months, limitation to active solicitation rather than general recruitment or public hiring, and/or limitation to co-workers with whom the employee has personally dealt with in the 12 months prior to the end of their employment or about whom they had access to confidential information.

Other requirements for valid restraint clauses

22. Should restraints with cascading duration periods and geographic extents be allowed?

22.1 We submit that there must be a mechanism to allow flexibility in restraints to recognise the way that employment relationships develop over time.

22.2 As noted in our submission at 5.2 above that the income threshold should most appropriately be applied at the end of the employment, it is difficult to accurately assess the future necessity and scope of a restraint at the time of entry into the employment

²¹ Consultation Paper, 30.



contract. The employee has yet to be in possession of any valuable confidential information or goodwill that restraints endeavour to protect as a legitimate business interest. An employer is also not able to determine how long an employment relationship will last, nor what knowledge, information, or relationships the employee will gain and build over the course of their employment.

22.3 The flexibility may be achieved in different ways—by cascading duration periods and geographic extents that may be “blue-pencilled”, or alternatively, by conferring courts the power to modify the application of restraints, as allowed under the *Restraints of Trade Act 1976* (NSW). We submit that the latter is preferable. It allows for a more tailored approach focused on actual breaches (rather than imaginary or potential breaches) and draws upon the extensive body of jurisprudence that has evolved over time regarding necessity and reasonableness of restraints.

22.4 In relation to the suggestion in the Consultation Paper in respect of the “one-shot” rule that employers would be able to update the clause as the employment relationship evolves,²² we submit that this is theoretically true but impractical and unduly onerous in circumstances where relationships evolve fluidly and do not necessarily feature marked increases or decreases of knowledge or client relationships. Such updates would also necessarily take the form of variations to the contract of employment, which would lead to an increase in the need for both employer and employee to continuously review, negotiate and vary the employment contract, along with the associated legal costs and time of doing so.

23. Should severability of other parts of restraint clauses be limited in other ways?

23.1 No, we submit that there must be a mechanism for severing unenforceable parts of a restraint: see 22.1 – 22.4 above.

24. Should businesses be required to specify the legitimate interests to be protected by a restraint clause?

24.1 Given the inherent uncertainty at the commencement of the employment relationship regarding the precise matters which will require protection as discussed above at 5.2 and 22.2, we submit that this should not be required as it is prone to modification as the employment relationship progresses.

24.2 If it is proposed as a requirement, we submit that it should be limited to specification of interests at a general level only (e.g. the protection of interests “including but not limited to client relationships or goodwill”). Given the way that matters to be protected will fluctuate as the employment relationship develops, it would be impractical to require employers to specify the interests in any further detail and update this on a frequent basis or else risk lack of coverage if the employee suddenly departs.

25. Should client relationships or workforce stability ever be justified for a non-compete clause of the same duration when a more targeted non-solicitation clause could apply?

25.1 Yes, we submit that there are justifications for imposing and enforcing a non-compete clause rather than, or in addition to, a non-solicitation clause for the equivalent period.

25.2 First, it cannot be presumed that a targeted non-solicitation clause achieves the same degree of protection. To be reasonably necessary for the protection of legitimate business interests, it must be drafted with a level of specificity, but this same specificity

²² Consultation Paper, 34.



also results in greater ability to circumvent the restriction without falling foul of the contractual clause.

- 25.3 Secondly, there is a risk of former employees inadvertently breaching non-solicitation restrictions when performing a new role, including as confidential information known to the employee cannot become ‘unknown’, and goodwill attributed to them continues to subsist. A non-compete clause is therefore a more guaranteed mechanism to control these exposures and ensure compliance.
- 25.4 Thirdly, in our experience it is markedly more difficult as an evidentiary matter for a business to enforce compliance with a non-solicitation clause as compared to a non-compete clause. This is because the nature of the evidence required to prove any breach of a non-solicitation clause almost invariably includes evidence of the direct communications (i.e. solicitation) between the offending employee and their target. This is information almost exclusively known to the offending employee and the solicited employee or client, neither of whom would be predisposed to proactively disclose these matters to the former employer. Rather, the former employer becomes entirely reliant on any evidence which it may be able to gather from systems to which it has access (e.g. via work email), and usually offending employees would take steps to avoid creating such evidence. In contrast, non-competes are more straightforward for protecting these interests.

26. Should other aspects of the existing common law doctrine be clarified or amended?

- 26.1 We submit that provision could be made in respect of the existing common law doctrine:
- to clarify that reasonableness of a restraint is to be assessed at the end of the employment, rather than at the point of entry or amendment of the contract, for the reasons discussed at 5.2 and 22.2 above; and
 - to codify on a nationwide basis a power for courts to enforce restraints to the extent they are reasonable (including with necessary modifications), in line with the *Restraints of Trade Act 1976* (NSW).
- 26.2 Otherwise, we consider that the common law doctrine is robust and well-developed to consider the various factors involved in assessing a post-employment restraint of trade.

Restraints on concurrent employment

27. Are there any other considerations or potential unintended consequences if restraints on concurrent employment were to be regulated beyond the common law?

- 27.1 In respect of full-time employees, we agree with the general consensus referred to in the Consultation Paper that banning restraints on concurrent employment in respect of full-time employees would likely be unreasonable.²³
- 27.2 In respect of part-time or casual employees, we submit that the reasonableness of concurrent restraints is a matter appropriately determined by the common law rather than legislative regulation.
- 27.3 First, the reasonableness assessment for these workers must consider a myriad of factual matters, including the nature of the work performed, whether they have access to commercially sensitive information, and their remuneration (which, for casuals, is often adjusted to reflect the temporary nature of their role). Further, employees may be engaged on a part-time or casual basis for various reasons, and it is not necessarily the case that they need to rely on multiple jobs to supplement their income. In contrast,

²³ Consultation Paper, 36.



certain employees may work part-time or casual *because* they do not need to work full-time to support their living. Employees may also fluctuate between full-time, part-time, or even casual employment during the course of their employment with the same employer. The existing common law regime is well-placed to recognise this flexibility and allow for a fact-specific case-by-case determination. Legislative regulation beyond the common law may be inflexible and have the unintended consequence of prohibiting restraints that are necessary for the protection of legitimate business interests.

27.4 Secondly, attempting to draft the restraint in a way that sufficiently accounts for the factual complexity discussed above may result in more litigation. The Consultation Paper proposes one option as limiting “*restrictions on concurrent employment to circumstances where the secondary employment would conflict with the proper performance of the employee’s duties in their primary job, or otherwise present a conflict of interest*”.²⁴ However, whether a restraint creates such conflict is a factual matter that requires consideration of the factors mentioned in 27.3 above. It is our view that codifying this test does not introduce greater certainty, and instead merely becomes another matter requiring judicial determination.

27.5 Thirdly, in respect of the “chilling effect” that may be caused by employees not fully understanding what constitutes full discharge of their common law and equitable duties,²⁵ this deficiency can be mitigated in ways other than by statutory regulation of restrictions on concurrent employment. For example, it could be addressed in the Fair Work Information Statement and Casual Employment Information Statement or other FWO educational resources.

28. If there were to be restrictions on these restraints, how should they be implemented?

28.1 Our position as discussed at 27.1 – 27.5 above is that these restraints should be left as a matter for the common law.

Yours sincerely

Herbert Smith Freehills Kramer

5 September 2025

²⁴ Consultation Paper, 37.

²⁵ Consultation Paper, 36–37.