

Submission to Treasury

Reform to non-compete clauses and other restraints on workers

Consultation Paper

5 September 2025



Who we are

Master Builders is the nation's peak building and construction industry association, which was federated on a national basis in 1890. Master Builders' members are the Master Builder State and Territory Associations. Over 130 years, the Master Builders network has grown to more than 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association representing all three sectors: residential, commercial, and civil construction.

The Master Builders network also delivers vocational education and training through its network of registered and group training organisations across Australia. This includes trade qualifications in building and carpentry as well as ongoing professional development training.

Membership with Master Builders is a stamp of quality, demonstrating that a builder values high standards of skill, integrity, and responsibility to their clients.

Master Builders' vision is for a profitable and sustainable building and construction industry.

Introduction

On 25 July 2025, the Treasury Department released the Reform to non-compete clauses and other restraints on workers consultation paper ('Consultation Paper').

Master Builders Australia ('Master Builders') takes this opportunity to respond to the Consultation Paper.

The Consultation Paper comes following the Governments pre-election commitment to ban non-compete clauses for employees earning below the high-income threshold in the Fair Work Act, and to close loopholes that allow no-poach and wage-fixing agreements in the Competition and Consumer Act ('CC Act').

It is argued that the reforms are necessary because:

- ▶ There is a growing prevalence of unreasonable non-compete clauses.
- ▶ The current law is failing to protect competition and job mobility.
- ▶ Non-compete clauses are harming workers and the Australian economy.

Notwithstanding these arguments, Master Builders opposes the ban on non-compete clauses.

There is a legitimate argument for reasonable non-compete clauses in employment contracts to protect legitimate business interests, including protecting sensitive information, particularly for smaller businesses who typically have a low number of employees but build high trust relationships with those workers. Removing the ability to rely on these types of clauses, jeopardises those relationships.

Additionally, when a non-compete clause operates to protect legitimate business interests it can support employment and investment in staff. The business has confidence that those workers can be trusted with critical business information without the risk of taking that intellectual property to a competitor.

In addition Master Builders' submissions specifically responds to three aspects of the Consultation Paper.

A ban on non-compete clauses should not apply to independent contractors

The first is the proposition that the ban on non-compete clauses apply to independent contractors.

Master Builders strongly opposes this proposal. Not only would such an approach unduly interfere with legitimate commercial arrangements, but there is also no evidence of their adverse effect on productivity in the economy.

The conflation of an employment relationship with a genuine independent contractor arrangement is concerning and unjustified, as is looking to apply an 'employment lens' over business-to-business relationships.

Independent contracting arrangements are the life-blood of the building and construction industry. These arrangements underpin and facilitate the complex and critical work undertaken by the industry that contributes significantly to the economy. Moves that would serve to undermine these arrangements are opposed and must be resisted.

Competition policy reform must deal with enterprise bargaining agreements

The second is the contradiction between the proposed ban on non-compete clauses on the basis that they are hindering job mobility, competition and productivity in the labour market, and anti-competitive enterprise agreements that remain 'at large'.

This submission argues for the need for amendments to the CC Act in support of the overarching findings of the Consultation Paper and the broader consideration of reforms to national competition policy.

Other reforms must not progress

Finally, Master Builders would observe that the matters dealt with in sections 4,5 and 6 of the Consultation Paper go well beyond the Federal Governments pre-election commitment and deal with complex employment matters.

Consideration of these matters requires a much more in-depth analysis and consideration, for example, a full ban on non-compete clauses across the entire workforce could have significant business implications, as could restrictions on client non-solicitation clauses.

These should be considered in a comprehensive way separately from moves forward on the ban on non-compete clauses.

Further, it is clear that a range of matters cannot be 'determined' at this point due to decisions about other matters not yet finalised. On that basis, these subsequent considerations should not be progressed or consulted on until the first order matters are settled.

Master Builders cautions against any policy decisions in these areas without further consultation and investigation.

General Comments

Independent contractor arrangements

The Consultation Paper canvasses the scope of the application of the ban on non-compete clauses which include the consideration of whether independent contractors should be covered, '*especially where their role and conditions are comparable to an employee*'.

Master Builders opposes the application of the ban on non-compete clause to independent contractors. To expand the proposal beyond the employment relationship not only goes beyond the Governments pre-election commitment but has the potential to undermine legitimate business to business relationships on which the efficient operation of the building and construction industry relies.

It is a core policy position of Master Builders that we support the use of independent contracting as a legitimate and legal method of engagement and oppose measures that seek to undermine or erode its standing as a lawful and acceptable practice.

The entire building and construction industry (BCI) is underpinned by a comprehensive system of relationships between contractors that is inherent in terms of both conventional industry structure and necessary in performing the tasks associated with construction work.

This ensures:

- ▶ the labour force experiences high levels of utilisation;
- ▶ construction costs are not inflated due to delay or damages claims;
- ▶ delivery of much needed personal and public infrastructure (and the entire every day-built environment) is achieved in a productive way; and
- ▶ boosts levels of employment, innovation and entrepreneurship that flow from a high concentration of SME and family businesses.

There are currently over 262,000 independent contractors engaged in the building and construction industry alone, representing around twenty percent of the total number within all sectors of the economy. It is clear that this form of engagement is vital to the ongoing and future successes and economic output of the BCI.

There are a number of identified reasons for the prevalence of independent contracting in the BCI as follows:

- ▶ the production process on construction projects comprises a diverse range of tasks. Many workers are only required at one point on a project. Production therefore tends to be carried out by a collection of subcontractors working under the supervision of a head contractor;
- ▶ demand for housing and commercial buildings is sensitive to the economic cycle. As demand is uncertain, the environment encourages the use of contract labour;
- ▶ fluctuations in employment mean workers enter from other industries during periods of high labour demand; and
- ▶ The building and construction industry is historically cyclical and demand for both employees and contractors varies.

The contracting model which underpins the BCI arises from the way in which work is performed.

In general terms, building and construction work conventionally involves a client engaging a building contractor that will act as a 'project manager'. The building contractor uses sub-contractor companies to perform particular tasks at different stages of construction.

Sub-contractors often specialise in specific phases of construction work and it is common for them to also engage sub-contractors who are specialists in specific types of work. For example, a contractor may engage a sub-contractor to undertake the internal fit-out stage of a construction project. That sub-contractor may require the services of further sub contractors who undertake specific aspects of the fit-out, such as joinery or air conditioning.

The key points to note are:

- ▶ a builder or head contractor may utilise dozens of different sub-contractors or sub sub-contractors over the life of a project;
- ▶ those sub-contractors can be all operating on the same site at the same time;
- ▶ sub-contractors may be working on numerous sites at any one time, often for different head contractors;
- ▶ the work performed by sub-contractors is often technical and specialised, involving practices, activities and equipment that are unique and distinct from other forms of construction work;
- ▶ the use of sub-contractors at a particular time is dependent upon the particular phase of construction and is therefore dependent upon factors that are fluid and beyond the control of a builder/head contractor; and
- ▶ the work performed by specialised sub-contractors is often of a type that requires specialised tasks not necessarily known to the sector more broadly.

Application of unfair contract terms jurisdiction

Finally, it is arguable that the recently introduced unfair contracts jurisdiction of the Fair Work Commission (FWC) would capture such clauses in certain circumstances.

Notably, these powers replicate and expand certain elements of the existing Independent Contractors Act 2006 but also broaden the scope of what represents an “unfair contract term”.

The FWC can make an order in relation to a services contract if satisfied that the services contract includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters.

The FWC must take into account the fairness between the parties concerned in deciding whether to make an order under these new changes, and the kind of order to make.

In determining whether a term of a services contract is an unfair contract term, the FWC may take into account the following matters:

- ▶ the relative bargaining power of the parties to the services contract;
- ▶ whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties;
- ▶ whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract;
- ▶ whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract;
- ▶ whether the services contract as a whole provides for a total remuneration for performing work that is:
 - ▶ less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or
 - ▶ less than employees performing the same or similar work would receive; and
- ▶ any other matter the FWC considers relevant.

The remedies available by order of the FWC may include orders that:

- ▶ sets aside all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter; or
- ▶ amend or vary all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter.

Applications can be made by a person who is party to a services contract, or an organisation that represents the industrial interests of a person who is party to a services contract.

Concerns with respect to the operation of non-complete clauses in service contracts may be capable of being captured by this jurisdiction.

Role of competition and consumer law

Master Builders supports the **removal** of the exemption of employment related matters from the application of Part IV of the CC Act. As noted in the Consultation Paper this exclusion has historically been based on the notion that labour is a different market to other goods and services and should be regulated discretely.

The Consultation Paper also points out that

'the perverse outcome from this is that this may allow businesses to collude with each other on employment matters outside of the collective bargaining regime in Australia'

At the same time, free enterprise and improved productivity essentially depends on effective competition in all markets, including the employment market.

It would seem utterly absurd that a Consultation Paper, borne out a desire to enhance competition in the labour market and, that has found that the prevalence of non-compete clauses are preventing competition and job mobility and *'are harming workers and the Australian economy'* does not address the systemic and obvious impact of the CFMEU tactics whereby contractors can either acquiesce or cooperate with the union to suppress competition and even fix prices.

Every single one of the previous Royal Commissions of Inquiry into the building and construction industry have found examples of industry participants engaged in conduct leading to contraventions of the boycott and cartel provisions of the Competition and Consumer law.

Industrial coercion creates an environment within which criminal and anti-competitive behaviours ripple throughout the industry. The result is that emerging small-to-medium sized competitors are excluded from the market when faced with union dictated pattern enterprise bargaining agreements which are unaffordable at their economy of scale. For companies that meet union demands, the inflated costs of union pattern agreements make it impossible for them to compete, unless they are protected from competition by the union.

The prevalence of pattern bargaining and the inclusion of terms in enterprise bargaining agreements that restrict or prevent the engagement of different forms of labour are fundamentally at odds with principles of competition. They drive up costs and reduce productivity.

While a line remains between these complex areas ignoring their interplay continues to have consequences.

For example, on the issue of secondary boycotts, section 45DD of the CC Act states that if conduct relates to employment matters, a person's activity is not deemed to fall under the illegal secondary boycotting provisions. Whilst this might exempt legitimate strike activity, it should not cover or enable aggressive picketing that prevents material suppliers entering or leaving premises or subcontractors entering site.

In the Interim Report of the Royal Commission into Trade Union Corruption and Governance, Commissioner Heydon observed that:

'The current secondary boycott provisions in the CC Act were ineffective to deter illegal secondary boycotts by trade unions.'

Commissioner Heydon was specifically referring to allegations surrounding alleged 'black banning' of building products manufacturer Boral by the CFMEU. Whilst the ACCC issued, ultimately successful Federal Court proceedings, their intervention was belated and well after the conduct had occurred impacting the supply of product to the market.

Ten years ago, the Harper Competition Review also identified the *'conflict between the purposes of the CCA, as reflected in sections 45E and 45EA, and the industrial conduct permitted under the Fair Work Act.'*¹ Noting that it was *'desirable that the apparent conflict between the objective of sections 45E and 45EA and the operation of the Fair Work Act be resolved. The Panel favours competition over*

¹ Competition Policy Review Final Report Pg 393

restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour if they choose.'²

The Review recommended that:

*'...sections 45E and 45EA should be amended so that they expressly apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.'*³

Master Builders continues to support the application of ss. 45E and 45EA to awards and enterprise agreements. Such reform would address significant issues that have arisen as a result of CFMEU pattern enterprise agreements applying unnecessary and damaging restrictions on the engagement of subcontractors. The narrow interpretation of these provisions in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 has encouraged restrictive clauses in pattern CFMEU enterprise agreements to proliferate, leading to increased costs across the industry and an inappropriate usage of such clauses as a 'right of veto' on the engagement of subcontractors.

Add to this that the current enterprise bargaining framework under the Fair Work Act fails to support productivity, flexibility and efficiency gains.

Historically productivity improvements or considerations of productivity were always an expected feature of enterprise bargaining, as highlighted by the AIRC:

'In our view the essence of enterprise bargaining designed to achieve increased efficiency and productivity also requires the parties to demonstrate that they have considered a broad agenda in their enterprise negotiations. We do not intend that that agenda be limited only to matters directly related to normal award prescriptions. It should cover the whole range of matters that ultimately determine an enterprise's efficiency, productivity and continuing competitiveness. These could involve such things as:

- ▶ *short and long term plans for the enterprise including plans for future investment, product or service development, restructuring and greater emphasis on the needs requirements of suppliers and needs of customers;*
- ▶ *the current and future operational needs of the enterprise including requirements for improved performance in relation to quality, cost, delivery reliability and cycle time; and*
- ▶ *the needs of employees including skills development, job satisfaction and improved employment opportunities.'*⁴

Allowing industry participants to compete on merit would drive competition and support industry innovation and remove a key driver of corrupt and criminal behaviour.

Master Builders strongly encourages Treasury, under the banner of the current Competition Review to consider amendments to the Competition and Consumer law to target and prohibit clearly anti-competitive conduct occurring within an industrial relations context.

² Competition Policy Review Final Report Pg 393

³ Competition Policy Review Final Report Pg 396

⁴ Review of Wage Fixing Principles, 25 October 1993 (Print K9700).

Response to consultation questions

3. The ban on non-compete clauses for low- and middle-income workers

3.1 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?*

As noted above, Master Builders has concern with the proposed definition, particularly if it is to apply to independent contractors as it could place legitimate business interests at risk in forms not titled 'non-compete' but through other contractual mechanisms used to protect legitimate business interests.

2. *Should any specific kinds of common contractual terms be explicitly included or excluded from this definition?*

No comment

3.2 Scope of workers affected

3. *Should the ban on non-compete clauses apply to workers who are not employees, such as independent contractors?*

As set out above, Master Builders opposes the application of the ban on non-compete clauses to independent contractors.

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?*
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?*

The complexity of this matter is demonstrated by the need for examples in the Consultation Paper of who would and would not be captured by the ban with respect to the calculation of the high income threshold.

In light of this, any compliance and enforcement approach must make room for mistakes in the application of the threshold.

The most sensible test time would be at the time the employment relationship ends. That is the time when businesses would legitimately be looking to protect their interests and the most appropriate point to consider the income of the employee.

To that end, consideration must be given to an exemption from the ban to allow the inclusion of non-compete clause in employment contracts which are only enlivened when the employee is earning above the high-income threshold.

6. *Would the application of the ban to all fair work instruments, as defined by the Fair Work Act, have any unintended consequences?*

Master Builders would observe the contradictory nature of what is proposed.

On the one hand, the Consultation Paper is proposing that a ban on non-compete clause apply fair work instruments including enterprise bargaining agreements. Interestingly the Consultation Paper observes that:

- ▶ Non-compete clauses are not 'unlawful terms' for the purposes of section 194 of the Fair Work Act.
- ▶ It may not be clear whether non-compete clauses are 'permitted matters' given the arrangements generally deal with existing employment arrangements.

On the other hand, it is presumed that the application of the ban in this context is advanced on the same basis as the prohibition generally i.e. that non-compete clauses are harming workers and their use is 'failing to protect competition and job mobility', yet clauses in enterprise bargaining agreements that stifle competition remain permitted.

For example, provisions that:

- ▶ Give unions the right of veto of the selection and use of subcontractors.
- ▶ Require that all subcontractors are engaged on terms no less favourable than the terms of the Head Contractor.
- ▶ Specify or dictate the use of a particular training and workplace support services.
- ▶ Mandate that employers pay contributions into a particular worker benefit funds and take out specific insurances, with revenue from such funds consequentially flowing (directly or indirectly) to the union and/or other third party.

All represent a handbrake on productivity yet remain 'at large'.

3.3 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.*

Penalties should not apply in these circumstances.

Where such a clause is included in an employment contract, the provision will be void and have no effect, rendering the prohibition effective without the need for a punitive approach.

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

Yes, as noted above if an employer has calculated the income of the employee as over the high income threshold, but was mistaken in that belief they should be able to defend on that basis.

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

Parties to commence proceedings should be limited to the parties to the relevant employment contract.

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?*

The primary role of the FWO in relation to this issue is on education and assistance in understanding rights and responsibilities in relation to the ban.

Should there be a compliance and enforcement framework it is expected that the FWO would have the general suite of enforcement and compliance powers it has in respect of other breaches of the Fair Work Act.

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?*
12. *Should the Fair Work Commission have a role in resolving disputes that arise from the ban on non-compete clauses?*
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?*

In addition to the matters outlined in the Consultation Paper disputes may arise in relation to the calculation of the high-income threshold and therefore the permissibility (or otherwise) of a non-compete clause.

3.4 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)?*

The current common law exceptions should apply including:

- ▶ A legitimate business interest.
- ▶ Proportionate measures for a time-limited duration.

3.5 Transitional arrangements

15. *What transitional arrangements are required to support workers, and business compliance with the ban?*
16. *How should the ban apply to non-compete clauses contained in existing contracts after commencement?*

Master Builders sees value in adopting the approach taken to the adoption of reforms to pay secrecy clauses. However, given the potential impact of the ban, a longer 'grace period' of 12 months is recommended.

4. Other reforms to employee restraints of trade

4.1 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?*
18. *If mandatory compensation were adopted what should be the minimum compensation required?*
19. *If a duration limit were imposed, what would be the most appropriate maximum duration?*

No comment

4.2 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).*
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?*

No comment

4.3 Other requirements for valid restraint clauses

22. *Should restraints with cascading duration periods and geographic extents be allowed?*
23. *Should severability of other parts of restraint clauses be limited in other ways?*
24. *Should businesses be required to specify the legitimate interests to be protected by a restraint clause?*
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?*
26. *Should other aspects of the existing common law doctrine be clarified or amended?*

No comment

5. 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?*
28. *If there were to be restrictions on these restraints, how should they be implemented?*

No comment

6. No-poach and wage-fixing agreements

29. *What civil penalty should apply to businesses that have no-poach and wage-fixing agreements in breach of the ban? Should criminal penalties also apply, in line with the cartel provisions in Part IV of the Competition and Consumer Act?*

30. *Should there be exemptions to the proposed ban on no-poach agreements? If yes, on what grounds? What restrictions should apply to their use?*
31. *Should there be exemptions to the proposed ban on wage-fixing agreements? If yes, on what grounds? What restrictions should apply to their use?*

No comment