



Competition Taskforce Division  
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Dear Taskforce members,

**Reform to non-compete clauses and other restraints on workers**

The Australian Society of Authors (**ASA**) is grateful for the opportunity to make a submission to this consultation.

Since 1963, the ASA has been the national peak body, professional association and voice of Australia's writers and illustrators. We have 4,200 members drawn from every sector of the writing and illustrating world, including: novelists, non-fiction writers, biographers, illustrators, academics, comic artists, scientists, historians, graphic novelists, educational writers, children's writers, crime writers, science-fiction writers, romance writers, journalists, poets and more.

In this submission, a reference to an "author" is intended to also include illustrators as they are the authors of their artistic works.

Given that the workers we represent are typically sole traders, this submission will be confined to comments about non-compete clauses as they apply to independent contractors. Vital context for this submission is that the average author has very low bargaining power with the companies imposing restraint of trade restrictions upon them, due to the scarcity of alternative opportunities to earn an income from writing, as well as the low remuneration offered to authors relative to the profits generated by their work. Therefore, in our view, there is no policy rationale to justify restraint of trade or non-compete clauses for authors.



### **Discussion Paper question 3: *Should a ban on non-compete clauses apply to workers who are not employees, such as independent contractors?***

As independent contractors, authors are treated by the law as competitive businesses that can engage in arm's length negotiations. However, the reality is that authors have little power to negotiate, cannot set their own rates of pay, do not receive sick leave or annual leave, and lack access to guaranteed superannuation. In short, authors are vulnerable and, in the main, live financially insecure lives.

The latest Macquarie University Author Income Survey has found that the vast majority of authors are entirely unable to earn a living from their creative practice with an average annual income of only \$18,200.<sup>1</sup>

The ASA has long been concerned about authors' lack of bargaining power in negotiating contracts for their work. As a general observation, authors are unable to negotiate substantial changes to contractual terms with publishers beyond the edges.

Our submission is that a ban on non-compete clauses should apply to independent contractors, such as authors, who are subject to non-compete and options clauses in their publishing contracts.

#### **Non-compete clauses**

In publishing agreements, a non-compete clause is a clause that prevents authors from publishing any future work which is similar to, or might compete with, their current work without their publisher's permission. In our view, these clauses are unnecessary to protect the business interests of publishers and can unfairly impede authors from making a living.

We support the Government prohibiting non-competes clauses in contracts with low-paid freelancers for the following reasons:

1. The only compensation paid to authors that is **guaranteed** under publishing contracts is the advance which is typically low, and regularly not offered at all. Royalties are unpredictable and based on sales. According to research by Macquarie University, the average advance earned by Australian authors is \$4,100 in a year.<sup>2</sup> There simply isn't sufficient remuneration on offer to justify any restraint.

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<sup>1</sup> Creative Australia, [2022 National Survey of Australian Book Authors](#)

<sup>2</sup> Creative Australia, [2022 National Survey of Australian Book Authors](#)



2. Non-competes are notoriously vague. Although terms can vary across contracts, typically authors are required to warrant that they will not publish, write or become involved in any work of a similar nature, containing the same or similar characters or themes that is likely to compete or likely to lessen its sales for themselves and their licencees. Publishers rarely limit the non-compete by time or geographic territory. It is very difficult for authors to know the parameters of such restraints and their vagueness can cause stress and uncertainty for authors.
3. Unless non-competes are very short-lived, they may restrain authors' abilities to earn a living, particularly for genre fiction writers (where all their works arguably compete with each other), specialist non-fiction writers (where they are an expert in a niche area and may want to publish multiple books on the same subject matter) or illustrators commissioned specifically for their unique style.
4. Non-compete clauses are 'one way'. Authors are not permitted to go to another publisher with a 'competing work' but the publisher is not committed to any further support of the author. Nor does the publisher offer a reciprocal promise not to publish a work with a third party that is similar, or likely to compete in the same market, or that has the potential to reduce sales of the author's work.
5. Authors might have a range of valid reasons for moving to another publisher, including that their genre of writing might change - and be more suitable for a different publisher's list.
6. Non-competes are rarely actually enforced by publishers, and are, in all likelihood, unenforceable. However, authors often lack the resources or desire to get into a legal battle with their publishers and are very unlikely to sue. Therefore, these clauses have a chilling effect on author decision-making despite the fact they are probably not enforceable. If the Government introduced a ban on non-competes, authors would be empowered to simply reject such clauses as unlawful.

### **Option clauses**

7. An option clause allows a publisher to have the first right of refusal over an author's next manuscript and is usually drafted such that authors cannot negotiate with any other publisher unless they have firstly followed a set procedure with their current publisher. These clauses are intended to lock authors into working with one publisher



but, again, operate 'one-way' as publishers do not promise authors they will publish them again.

8. These clauses are similarly onerous on authors who wish to work with a range of publishers or who write across categories and genres meaning that their next work may be more suitable for a different publisher's list. If both the author and publisher enjoy a good working relationship they will naturally enter into future contracts; option clauses are not necessary to make this happen.

In short, we do not support any restriction on an authors' ability to freely contract with numerous publishers to optimise their ability to earn a living, given their overwhelming financial instability and precarity.

If we can be of any assistance or provide further information, please do not hesitate to contact us.

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