



Non-competes Reform Unit  
Competition and Consumer Policy Division  
Treasury  
Langton Cres  
Parkes ACT 2600

Via email: [CompetitionTaskforce@treasury.gov.au](mailto:CompetitionTaskforce@treasury.gov.au)

To whom it may concern

Thank you for the opportunity to make a submission on the Australian Government's reforms to non-compete clauses and related restraints.

The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy, and affordable dispute resolution services across NSW.

## Understanding the Problem

Improper use of non-compete clauses can stifle competition and innovation by restricting new business formation and preventing small businesses from hiring skilled staff or from utilising the skills of specialists. Nevertheless, caution is required before prohibiting their use below a universal income threshold.

The available evidence does not show that non-competes are as widespread or universally harmful. Their use is often concentrated in highly specialised industries where they serve legitimate functions such as protecting unique business methods and commercially sensitive information that forms the basis of a business's competitive edge. A blanket ban risks undermining these legitimate protections and could have the unintended impact of reducing, rather than enhancing, overall market competitiveness.

The ABS data (2023) shows that while 47 per cent of businesses used *some form* of restraint,<sup>1</sup> only 20 per cent reported using non-compete clauses. The highest concentrations were in Financial and Insurance Services (40 per cent) and Rental, Hiring and Real Estate Services (33 per cent). The July 2025 Treasury Consultation Paper, *Reform to non-compete clauses and other constraints on workers* acknowledges that not all restraints are inappropriate, noting non-disclosure clauses remain essential, and banning all non-solicitation clauses could be too restrictive. Other research cited in the Consultation Paper indicates restraint clauses are rising overall but does not clearly illustrate that non-competes are becoming more widespread.<sup>2</sup>

## Overseas reforms

The Consultation Paper references the United States of America (U.S.) and the United Kingdom (U.K.) as examples where restrictions on non-compete clauses have been proposed. The Government should take a cautious approach when considering overseas examples, as their relevance to Australia's regulatory framework may be limited. In the U.S, the Federal Trade Commission's (FTC) recent

---

<sup>1</sup> ABS (February 2024), [Restraint Clauses, Australia, 2023](#), ABS website, 2024.

<sup>2</sup> P McDonald, A Stewart, D van den Broek & C Kennon, ['Locked In or Left Out: Assessing the Impact of Post-Employment Restraints in Australia'](#), QUT Centre for Decent Work and Industry Report, 2025;

D Andrews, M Brennan & J Buckley, ['The ties that bind: five facts on post-employment restraints in Australia'](#), e61 Institute Research Note, 2024, no. 12.

nationwide ban is currently blocked by a district court injunction. The FTC Chairman is considering whether to continue or abandon the appeal, publicly preferencing the current approach of case-by-case enforcement against specific non-compete abuses.

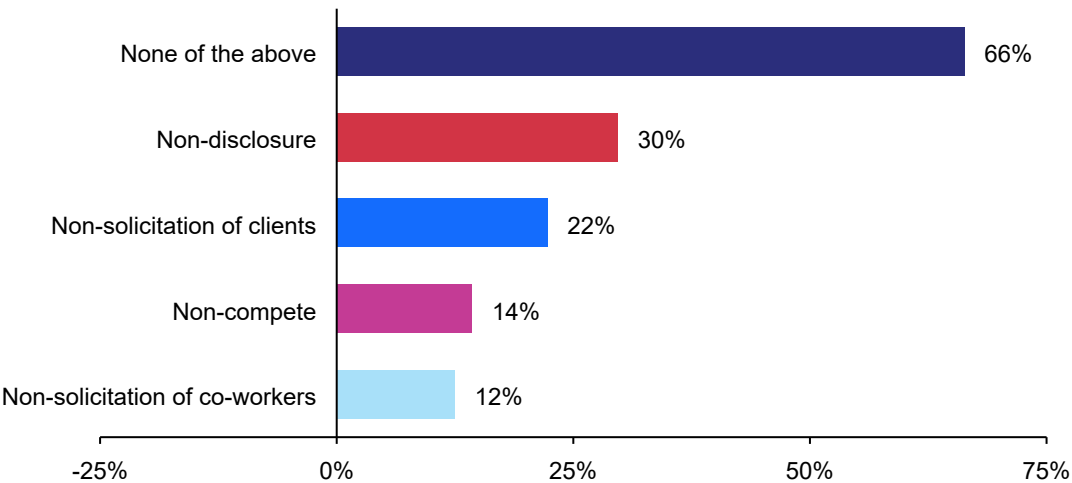
The U.K. has proposed an alternative approach, introducing a maximum three-month time limit on non-compete clauses. This represents a compromise between eliminating non-compete clauses entirely and retaining some protection for business interests. However, the proposal has been on hold since 2023, with key implementation details and timing still undetermined.

**Feedback from small business**

*Nature and degree of use*

In August 2025, the Commission surveyed NSW small businesses on their use of restraint clauses and views on proposed reforms. Survey feedback illustrates that the majority of respondents do not utilise any restraint clauses and of those who do, non-disclosure is the most common followed by non-solicitation of clients (see Chart 1).

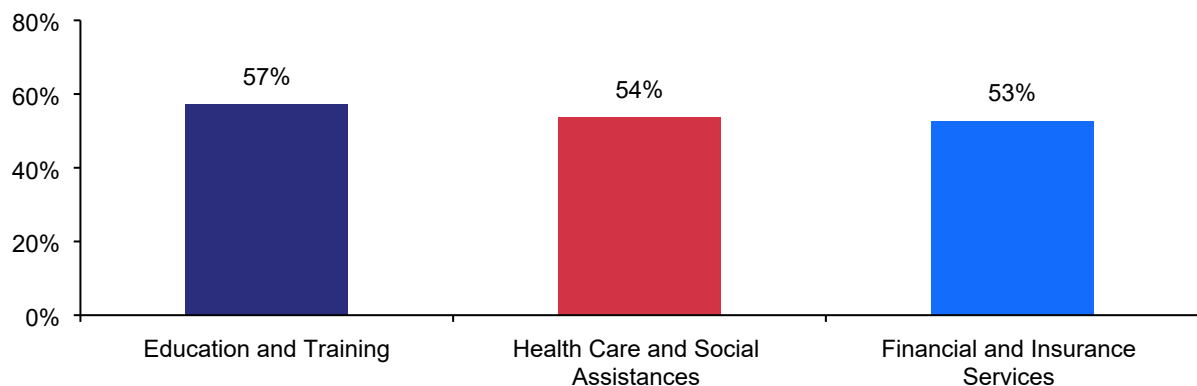
**Chart 1: Use of restrain clauses**  
*Are any of the following conditions included in the employment contracts of employees in your business? Please select all that apply. (n=377)*



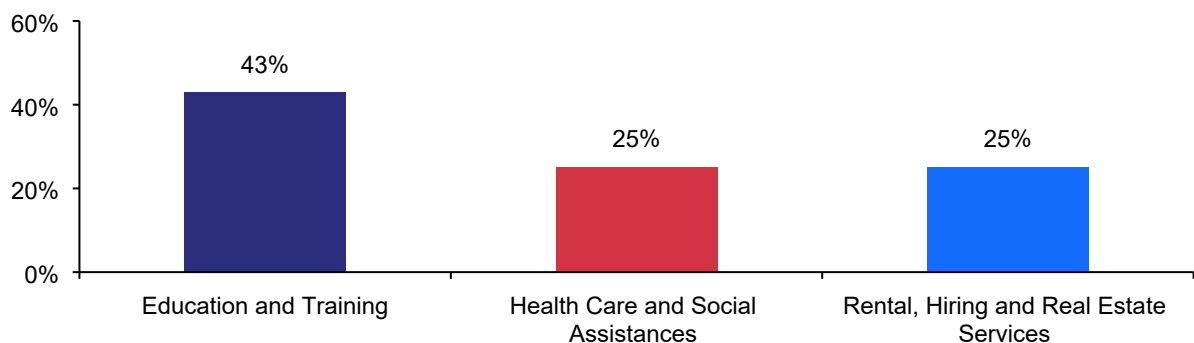
Survey feedback highlighted that restraint clauses, especially non-compete requirements, were most concentrated in the industries of Education and Training, and Health Care and Social Assistances and Financial and Insurance Services (see Chart 2 (a) and (b)).

These findings suggest that restraint clauses are not used as abundantly as anticipated, and that non-compete clauses are largely confined to industries where protecting intellectual property, goodwill and client bases are legitimate business concerns.

**Chart 2 (a): Top 3 industries with employment restrictions**  
(n=377)



**Chart 2 (b): Top 3 industries with non-compete clauses**  
(n=377)



#### *Small business perspective on potential reforms*

The majority of respondents (64 per cent) indicated that a ban on non-compete clauses for employees would negatively impact on their operations and competitiveness or at least create challenges that would require careful strategies to manage. Support was greater for a ban on employees outside the high-income threshold in the *Fair Work Act* with only 12 per cent in support of a ban on higher earners. A further 40 per cent said they needed more information before deciding whether income-based restrictions would be appropriate.<sup>3</sup>

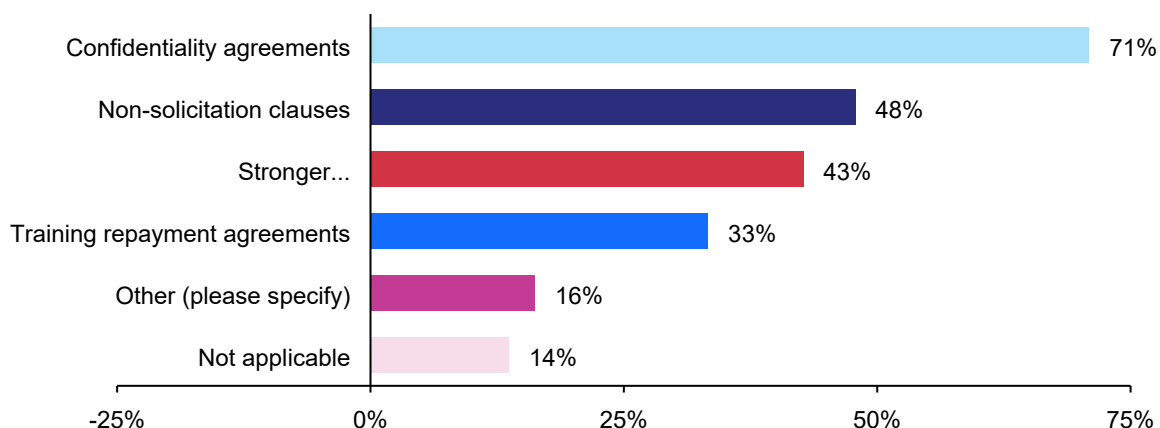
If a ban were introduced for employees outside the high-income threshold, respondents indicated they would adopt alternative measures to protect sensitive information, such as confidentiality agreements, stronger onboarding and offboarding processes, and repayment agreements for training (see Chart 3).

---

<sup>3</sup> n=129

**Chart 3: Alternative measures**

*If non-compete clauses are banned for low and middle income workers, what alternative measures would your business consider? (n=117)*



While most businesses opposed an outright ban, there was stronger support for reform through the introduction of time limits on non-compete clauses. Only 20 per cent believed no time limit should apply, suggesting that respondents see value in retaining such clauses, provided the restraint period is reasonable.<sup>4</sup>

When asked about industry-based exemptions, the majority (56 per cent) opposed applying different rules for specific sectors. Nonetheless, some businesses suggested targeted carve-outs, for example, exemptions for small businesses with fewer than 20 employees, or for industries not listed on the Australian Governments Core Skills Occupations List for skilled migration.<sup>5</sup>

The issue of compensation also resulted in diverse perspectives. If reforms permitted non-compete clauses only where employers compensated affected employees, 45 per cent of businesses indicated this would significantly or somewhat reduce their willingness to use such clauses. In contrast, 10 per cent stated it would make no difference and that they would still consider using them even with compensation obligations. A further 34 per cent were unsure whether it would influence their decision.<sup>6</sup>

Finally, respondents expressed strong concern about extending the ban to other forms of restraint. Sixty two per cent said prohibiting non-solicitation of clients would negatively impact their business, while 58 per cent said banning non-solicitation of co-workers would undermine workforce stability.<sup>7</sup>

#### *General small business feedback*

Respondents were invited to provide further feedback about the proposed reforms to non-compete or non-solicitation clauses from a small business perspective. A summary of feedback is provided below:

- **Employee trust and relationships** – Many respondents were concerned reforms would weaken trust between employers and staff. Without restraints there was apprehension trade secrets could be taken advantage of pushing small businesses to hire only family or close associates, worsening resourcing pressures.
- **Protection of intellectual property and business knowledge** – Clauses were seen as vital to safeguarding goodwill and knowledge built through risk-taking and investment. Removing them

<sup>4</sup> Same respondent base as footnote 3

<sup>5</sup> Same respondent base as footnote 3

<sup>6</sup> n=117

<sup>7</sup> Same respondent base as footnote 6

may discourage staff training and professional development, or even force businesses to downsize.

- **Risk of poaching** – Respondents shared cases where ex-employees set up rival firms, lured staff away, and caused significant financial harm. Some argued restraints should be strengthened, not removed.
- **Financial impacts** – Businesses reported revenue losses of up to 50 per cent when restraints were not in place. Others highlighted unfair costs of training employees only for them to become competitors. A common sentiment was the reforms don't adequately consider the risks and costs of starting and sustaining a small business.
- **Fairness for small business** – Many respondents felt the push to remove non-compete clauses was disingenuous and fundamentally unfair. Allowing employees to take hard-earned knowledge and opportunities without cost would expose small businesses to significant risks. This would further give larger firms with greater resources an advantage in enticing staff across to their businesses. Proposals for mandatory compensation were also seen as unworkable for small businesses.
- **Support for reforms** – A minority welcomed the ban, saying non-competes harm a fair labour market and are often exploited by big businesses to hold back competition. Some small businesses felt they were flexible enough to adapt, provided non-disclosure agreements remain unaffected.

## **Benefits and potential harms from prohibiting of non-competes**

### *Potential benefits*

As non-compete clauses are designed to restrict workers from starting new businesses within the industry and geographical market they are experienced in, it is accepted that non-competes prevent new business formation. Restricting their use will drive small business creation as entrepreneurial employees will be free to compete against their former employer. Non-competes also prevent small businesses from hiring the right talent which can act to prevent growth and innovation in their businesses, often because small businesses could not afford to undertake legal proceedings or even to meet the legal costs of determining whether a non-compete with a perspective employee was unenforceable.

The existence of non-competes may also favour established and larger businesses as workers with non-competes find it more advantageous to change employment with these competitors as they have the resources to protect them in case of legal challenges, meaning small businesses are disadvantaged in hiring.

### *Possible harm*

The main concern with banning non-compete clauses for employees outside the high-income threshold is that it would make it easier for larger and more established firms to hire away staff from small competitors and start-ups. Non-competes can also provide smaller independent businesses with some protection against dominant consolidators who have the resources to attract and absorb their workforce.

NSW Courts have commented on the fact that confidentiality clauses alone are often inadequate to prevent disclosure of confidential information. It is difficult to draw the line between what is confidential and what is general knowledge, and even harder to prove a breach when employees can simply rely on information they remember rather than documents. Going down the path of legal proceedings can force a business to subpoena former clients, damaging its reputation in the process. For these reasons, non-compete clauses are often the only practical way for a small business to safeguard its investment in training, client relationships, and intellectual property.

Banning non-competes for employees outside the high-income threshold could also affect access to finance. Investors and lenders may be reluctant to provide capital if a business cannot protect its proprietary information, contracts, or workforce against larger competitors. This could result in venture capital being more concentrated in larger firms.

There are also risks for government procurement. Larger firms could quickly poach skilled or security-cleared staff from small suppliers, undermining their ability to deliver projects and potentially driving them out of business.

## **Further considerations**

### *Small business impact assessment*

The proposed ban seeks to frame the problem from the *average* effects of non-competes. The problem with this approach is positioning agreements that are themselves fair and pro-competitive with similar agreements in other contexts that are unfair and anti-competitive. By focusing on the average effect, the proposed reforms arbitrarily capture in its dragnet perfectly fair and pro-competitive non-compete agreements.

The second issue with focusing on averages is that it misses critical details. There are likely knowledge intensive industries or roles for which the pro-competitive benefits associated with non-compete agreements cannot be achieved by other means.

The Commission encourages consideration of the reforms through the lens of how various reform features impact smaller firms who fairly use these contract terms to protect business interests. An assessment should also include a distributional analysis to identify whether particular industry sectors (such as education and training, health services, or professional services) would be more heavily affected. This could be achieved through preparation of a Small Business Impact Statement (SBIS) to accompany any recommended changes, as described in the Commission's *Rightsizing regulation report*.

### *Use of mediation service in restraint clause disputes*

Finally, it is worth noting that most non-compete clauses are already difficult to enforce under current law. To address the perception that these clauses have a *chilling effect* on employees considering establishing a business or joining a competitor, the Commission's readily available mediation services could be utilised. The Commission's mediation services are available to any small business within NSW as a cost-effective way to resolve commercial disputes. This would allow quick resolution of disputes balancing the interests of employees and employers without the need to go to court.

Thank you for the opportunity to make a submission. If you require further information, please contact my Executive Officer at either [commission@smallbusiness.nsw.gov.au](mailto:commission@smallbusiness.nsw.gov.au) or (02) 9372 8767.

Yours sincerely



Catherine Ellis  
**Acting Commissioner**  
**NSW Small Business Commission**

10/09/2025