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To whom it may concern,

AIMA Australia Submission Australia Treasury Consultation - Reform to non-competes and other restraints on workers consultation paper

The Alternative Investment Management Association (AIMA) welcomes the opportunity to provide comments to the Australia Treasury Consultation - Reform to non-competes and other restraints on workers consultation paper.

General Position

- **Support for Status Quo:** We urge maintaining the current legal framework for non-compete clauses, particularly for high-income employees. This approach encourages employers to invest in their workforce by sharing valuable information and connections, which enhances productivity and benefits both employees and the Australian economy.
- **Risk of Disincentivising Investment:** Altering the status quo could disincentivise crucial investment in Australia, particularly in the financial services sector, and harm productivity rather than enhance it.
- **Global Competitiveness Concerns:** Restrictions on non-compete clauses could make Australia less attractive as a destination for global investment in human capital, especially compared to financial hubs like Singapore and Hong Kong. This reform could lead to Australia becoming a center for low-productivity work that does not require significant investment in human capital.

Issues with the Paper as a Whole

- **Inapplicability of U.S. Data:** The Consultation Paper relies heavily on data from the United States, which is problematic due to significant differences in employment laws and economic conditions. The U.S. employment-at-will doctrine contrasts sharply with Australia's employment protections, making American experiences less applicable. Additionally, recent legislative changes in states like Florida (i.e. introduction of 4-year non-compete clauses) highlight varied approaches to non-competes within the U.S., further complicating direct comparisons.

Impact on Investment and Productivity

- **Disincentive for Investment:** Altering the status quo for high-income earners could disincentivise crucial investment in Australia, particularly in the financial services sector, and harm productivity rather than enhance it. Employers invest in employees to gain returns through increased productivity, but if employees can easily

leave for competitors after receiving training and confidential information, this investment becomes a detriment to the original business.

- **Global Competitiveness:** Restrictions on non-compete clauses (especially for high-income employees) could make Australia less attractive as a destination for global investment in human capital, especially compared to financial hubs like Singapore and Hong Kong. This reform could lead to Australia becoming a center for low-productivity work that does not require significant investment in human capital.

3.2 – Scope of Workers Affected

- **High-Income Threshold Application:** We propose that the high-income threshold should consider the employee's **total** average income over the three years immediately preceding the termination of employment, including bonuses and commissions. This approach acknowledges that high-income employees, particularly in financial services, often earn significant portions of their income from variable bonuses and commissions. Averaging income over three years provides greater certainty and fairness for both employers and employees, especially if penalties are considered. Also, such highly paid employees are well-placed to negotiate their contract terms and are often availed of confidential information.

3.3 Enforcement

- **Opposition to Penalties:** Imposing penalties on employers for using non-competes is counterproductive. It is sufficient to mandate and publicise that non-compete clauses are unenforceable. Penalties would create a cause of action where the conduct does no harm, given the clause's lack of legal effect. Allowing third parties to seek penalties could encourage bounty hunting in Australian courts by profit-seeking entities.

3.5 Transitional Arrangements

- **Need for Transition Period:** Successful implementation of changes depends on accommodating the difficulties employers will face in transitioning to the new regime. Existing contracts with non-compete clauses should be preserved, as they were agreed upon with the understanding of their validity, reflected in employee remuneration. Nullifying these agreements is fundamentally unjust, and a significant transition period is necessary for employers to update contracts and adapt remuneration structures.

4.1 Non-Compete Clauses for High-Income Employees

- **Balance of Interests:** We believe the current approach strikes the right balance between public interest in investment, competition, productivity, job mobility, and protection of legitimate business interests. Non-competes incentivise employers to invest in their employees, providing returns through increased productivity. Courts have long recognised that non-disclosure agreements alone are insufficient to protect employers' interests, as proving breaches can be challenging and may require revealing confidential information.
- **Compensation for Restraints:** If changes occur, compensating ex-employees for the restraint period based on their base salary is the fairest and simplest option. This approach aligns with practices in other jurisdictions, such as Germany.
- **Duration Limits:** A blanket duration limit is unsuitable due to the wide variety of circumstances in which restraints apply. The reasonableness of a restraint's duration should be assessed on a case-by-case basis, considering factors like the employee's role and the confidential information they hold. Common restraints are up to two years, with some high-income employees agreeing to up to four years.

4.1 Non-Solicitation Clauses for Clients and Co-Workers

- **Legitimacy and Protection:** Co-worker non-solicitation clauses protect legitimate business interests without limiting job mobility. These clauses allow employees to leave and work at competing firms, including those where former colleagues are employed, without impairing their freedom to choose their workplace. The proposed reform could unfairly enable competitors to poach valuable employees, using confidential information to "insider trade" on staff, which should be protected through non-solicitation clauses.

For further details, don't hesitate to contact me.

Kind regards,

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About AIMA

AIMA is the world's largest membership association for alternative investment managers. Its membership has more firms, managing more assets than any other industry body, and through our 10 offices located around the world, we serve over 2,000 members in 60 different countries. AIMA's mission, which includes that of its private credit affiliate, the Alternative Credit Council (ACC), is to ensure that our industry of hedge funds, private market funds and digital asset funds is always best positioned for success. Success in our industry is defined by its contribution to capital formation, economic growth, and positive outcomes for investors while being able to operate efficiently within appropriate and proportionate regulatory frameworks. AIMA's many peer groups, events, educational sessions, and publications, available exclusively to members, enable firms to actively refine their business practices, policies, and processes to secure their place in that success. For further information, please visit AIMA's website, www.aima.org.

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