

04 September 2025

SUBMISSION TO TREASURY:

Reform to non-compete clauses and other restraints on workers

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Introduction

AREEA welcomes the opportunity to provide feedback on the Government's proposed reforms to ban non-compete clauses and other restraints on workers. We support the Government's stated objectives of boosting productivity, supporting real wages growth and promoting business dynamism.

At the same time, we emphasise the need to balance these aims with protecting the legitimate business interests of employers, ensuring that reforms do not create unintended consequences or unnecessary regulatory complexity.


AREEA represents resource and energy employers across Australia. Our members operate in highly competitive global markets, rely on innovation and significant capital investment, and require the ability to safeguard commercially sensitive information, client relationships and workforce stability.

The proposed reforms are significant and will reshape long-standing employment practices. While we recognise concerns about misuse of restraints on low-income workers, we caution against sweeping changes that unduly restrict employers' capacity to protect their businesses.

AREEA acknowledges that restraint clauses are often used too broadly, including in circumstances where employees have no access to confidential information or commercially sensitive matters. In such cases, there is no legitimate business interest to protect and, under existing law, these restraints are rightly unenforceable. This reflects poor contract practice rather than a genuine policy gap.

For example, AREEA notes the following case law and the common law positions they support:

- Restraints are considered contrary to public policy and void unless they can be shown in the circumstances of a particular case, reasonable: *Amoco Australia v Rocca Bros Motor Engineering (1973)* 133 CLR 288.
- A restraint of trade is prima facie void and the onus rests on the party seeking to enforce it to prove the clause is reasonable and goes no further than necessary to protect a legitimate business interest: *Peters (WA) Ltd v Petersville Ltd (2001)* 205 CLR 126.
- The validity and reasonableness of the restraint is to be determined at the time it is entered: *Portal Software v Bodsworth* [2005] NSWSC 1179.
- The usual grounds of protectable interests are trade secrets, confidential information, goodwill and customer connection: *Cactus Imaging v Peters* (2006) 71 NSWLR 9 at [11].



A targeted education and awareness campaign would provide a more practical and timely solution to address this issue, by assisting employers and employees alike to better understand when restraints are valid and enforceable.

Sweeping legislative change, by contrast, risks being imprecise and may inadvertently remove the ability of employers to rely on carefully drafted restraints where they serve a legitimate and necessary purpose.

Policy intent

AREEA understands the Government's stated intent is to address the inappropriate use of non-compete clauses in lower-paid arrangements, where such provisions can unfairly restrict workers from moving to better paid jobs.

The Minister's recent comments made clear this reform is directed at roles such as childcare, construction and hairdressing, with the proposed ban applying to employees earning below the Fair Work Act's high-income threshold:

"Right now, more than three million Australian workers are covered by these clauses, including childcare workers, construction workers, and hairdressers. The ban on non-compete clauses will apply to workers earning less than the high-income threshold in the Fair Work Act".¹

On this basis, it is unclear why the consultation paper extends well beyond that scope to canvas reforms affecting high-income arrangements, non-solicitation clauses, confidentiality agreements, and no-poach or wage-fixing provisions.

These areas are already subject to established legal principles and regulatory oversight that provide a fair and workable balance. Introducing additional legislative intervention in these settled matters would create unnecessary complexity without clear justification.

AREEA submits that pursuing reforms in these additional areas would go well beyond the Minister's stated policy intent and would create a far more contentious outcome than the targeted measures originally announced.


Non-compete clauses

AREEA recognises that many such clauses are difficult to enforce under Australian law. However, a complete ban risks removing a legitimate tool for protecting sensitive commercial interests, particularly for senior and specialist roles.

We recommend that legislation restrict non-compete clauses only to the extent necessary, for example by applying income thresholds and reasonableness tests, rather than banning them outright.

Any statutory definition should be kept to the lightest touch possible, noting the underlying proposition is flawed. Where an employee is suspended from work and suffers no financial disadvantage for the duration of a restraint, such arrangements should be expressly excluded from the scope of reform.

¹ 'Cracking down on non-compete clauses to boost wages and productivity' Joint media release with Senator the Hon Murray Watt, Minister for Employment and Workplace Relations, Dr Andrew Leigh MP Assistant Minister for Competition, Charities and Treasury, and Treasurer Jim Chalmers: 25 March 2025. <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/cracking-down-non-compete-clauses-boost-wages-and>



There may also be circumstances - for example, protecting client relationships or maintaining workforce stability - where a restraint is reasonable and legitimate. The existing common law provides the necessary flexibility to assess such matters case-by-case and to adapt sensibly over time, in contrast to the rigidity of prescriptive statutory rules.

Non-solicitation clauses

Non-solicitation clauses serve a legitimate business purpose, safeguarding client relationships and workforce continuity without preventing employees from taking up work elsewhere. Courts already scrutinise these provisions under well-settled common law principles to ensure they are reasonable.

Extending the reforms to restrict their use would be unnecessary and disproportionate.

Non-disclosure agreements (NDAs)

Non-disclosure agreements serve a clear and legitimate function in protecting sensitive business information and intellectual property. They are fundamentally different from non-compete provisions as they do not prevent workers from changing jobs. For certainty, NDAs should be explicitly excluded from the scope of reform.

No-poach and wage-fixing agreements

While no-poach and wage-fixing arrangements have attracted attention overseas, there is little evidence of them being a feature of Australian labour markets. Additional regulation in this area would add complexity without clear benefit.

The Competition and Consumer Act should also be clarified to remove any overlap with the employment relationship and industrial relations matters, including the activities of industrial organisations.

Multiple job restrictions

Restrictions on secondary employment can be necessary to manage safety risks, fatigue and conflicts of interest.

AREEA opposes a blanket prohibition and recommends that employers retain the ability to apply restrictions where they are objectively justified.


High-income earners

The consultation paper suggests reforms may extend to high-income earners. AREEA strongly cautions against this.

Senior executives and highly skilled professionals frequently have access to commercially sensitive information, trade secrets and strategic business knowledge. Employers must retain legitimate contractual mechanisms to protect these interests.

High-income earners should remain subject to the established common law principles that balance freedom of movement with the protection of legitimate business interests.

For these reasons AREEA firmly recommends that any statutory ban on non-compete clauses be confined to employees earning below the Fair Work Act high-income threshold.



Notwithstanding the above, AREEA's position is that employees earning below the high-income threshold should not be automatically excluded from the potential application of non-compete clauses.

A high-income threshold is not always an appropriate proxy for determining whether a non-compete clause is justified. Access to confidential information and commercial strategy does not neatly align with levels of remuneration.

There will be employees earning above the threshold for whom non-competes are unnecessary, and others below the threshold whose roles justify such protections.

The appropriate test is therefore not salary alone, but the nature of the role and the information to which the employee is exposed. Existing common law already provides a well-developed framework to assess reasonableness on a case-by-case basis.

Transitional arrangements

AREEA supports the Government's proposal for reforms to apply prospectively from 2027, allowing businesses sufficient time to review and adjust contractual arrangements. Transitional provisions should clearly address the status of existing contracts, provide adequate lead-in periods for renegotiation, and avoid retrospective penalties.

The Fair Work Ombudsman will have an important role in supporting implementation, including through education, guidance material and model contract templates. A strong emphasis on education and assistance for both employers and employees will be critical, given they are the parties directly affected by the reforms.

Transitional arrangements should also incorporate either a two-year sunset provision or, at minimum, a formal review after two years to ensure the reforms are operating as intended.

Penalties and defences

AREEA does not support the introduction of penalties in this area. As with the Fair Work Commission's (FWC) stop-bullying jurisdiction, the focus should be on addressing conduct, not on creating a revenue-raising mechanism.

Where a restraint clause is found to be unenforceable, that should be the end of the matter, with the employee free to enter the labour market without fear of the restraint being applied.

The appropriate approach is for the FWC to have a quick and practical power to intervene and confirm whether a clause is enforceable. This provides certainty for both parties and avoids unnecessary litigation.

Employers should be able to rely on the defence that they are acting to protect legitimate business interests, regardless of whether the employee falls above or below the high-income threshold. The key questions should be whether a restraint is appropriate at all, and if so, whether it is proportionate to the interest it seeks to protect.

If an employer can demonstrate a good-faith belief that legitimate business interests are at stake, this should constitute a complete defence. In some cases, a clause may still be disproportionate to that interest and require closer scrutiny. However, the threshold question must always be

enforceability: if the clause is unenforceable, the employee is free to move; if enforceable, then the clause serves its proper purpose.

The mischief these reforms aim to address is freedom of movement in the labour market. The focus should remain squarely on enforceability and proportionality, not the pursuit of penalties for poorly drafted clauses.

Other requirements for valid restraint clauses

Where a restraint is challenged, cascading duration periods and geographic scopes can assist in identifying a fair and reasonable outcome. The established “blue pencil test”, which allows a court to strike out excessive elements while preserving the reasonable core of a clause, should continue to apply.

Clarity and specificity in drafting are critical. Well-drafted provisions are more easily understood by all parties and less likely to be contested.

The common law framework has evolved to balance the interests of employers and employees appropriately and remains the most effective means of assessing restraint clauses.

Conclusion

AREEA supports reforms that improve labour mobility and wages while preserving Australia’s competitiveness. To strike this balance, we recommend:

- Non-compete clauses be limited but not subject to an outright ban;
- Non-solicitation clauses and NDAs remain legitimate and enforceable;
- Proposals on no-poach and wage-fixing agreements be reconsidered, given their limited relevance in Australia;
- Employers retain the ability to restrict secondary employment where objectively justified;
- High-income earners continue to be governed by established common law principles rather than new statutory bans; and
- Penalties not be introduced, with the FWC instead providing quick, practical determinations on enforceability.

AREEA looks forward to engaging with Government to ensure the final reforms protect both employees and employers and deliver the intended economic benefits without creating unnecessary regulatory burden.

Yours sincerely,



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