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8 September 2025

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Dear Competition Taskforce,

**Reform to non-compete clauses and other restraints on workers consultation paper
Submissions of the National Retail Association Limited, Union of Employers**

The National Retail Association Limited, Union of Employers (**NRA**) make the following submissions in respect of the Treasury's 'Reform to non-compete clauses and other restraints on workers' consultation paper (**Consultation Paper**).

1. INTRODUCTION

- 1.1. The NRA is a peak industry body which has been representing businesses across the retail and associated sectors for close to 100 years. Retail is one of Australia's largest employers, with over 1.4 million Australians employed in the sector.
- 1.2. The NRA welcomes the opportunity to provide submissions in respect of the Consultation Paper, noting that while important for worker mobility, both non-compete and restraint clauses play a vital role in mitigating the risk of harm that can arise when employees leave a business.
- 1.3. We provide submissions below on a discrete number of questions listed in the Consultation Paper.

2. SECTION 3, QUESTION 4

- 2.1. Question 4 asks: *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?*
- 2.2. The NRA respectfully submits that the operation and enforcement of non-competes and other restraints ought to be maintained in some form, and that restricting enforceable restraints to employees above the high-income threshold does have the potential to create unintended consequences.

- 2.3. The number of employees who are remunerated above the high-income threshold is difficult to assess from available data, however, it is clear that those earning above the high-income threshold are within the top 10% of earners¹.
- 2.4. According to the Consultation Paper², limiting the use of non-competes and other restraints to the number of employees who are remunerated above the high-income threshold results in approximately 9% of all employees potentially being subject to restraints. Such restriction does not account for the fact that employees earning below the high-income threshold may still have access to trade secrets, client details or confidential information whose misuse is detrimental to the business.
- 2.5. Restraints for such employees earning below the high-income threshold have previously been held to be enforceable where their access to confidential information and/or client lists is a legitimate business interest that requires protection³.
- 2.6. Take, for example, a fashion business who employs designers. Those employees may not earn above the high-income threshold, however, the business would have a clear legitimate interest in preventing those employees from leaving and recreating certain designs or colourways with a direct competitor.
- 2.7. Given the above, the NRA recommends that non-competes and other restraints should be limited to employees earning above the high-income threshold, **in addition to** cases where legitimate business interests are demonstrably at risk in relation to employees who, by virtue of their roles and the information they possess, have the ability to harm the business interests upon their departure.

3. SECTION 3, QUESTION 7

- 3.1. Question 7 asks: *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?*
- 3.2. Where a ban on non-compete clauses is breached, the NRA submits that the current civil penalty regime is the most appropriate type of penalty.
- 3.3. The NRA further submits that any penalties should be proportionate to the gravity of the contravention, with higher penalties being reserved for cases where the conduct was systemic or deliberate. A distinction should be drawn between employers who knowingly continue to impose non-compete clauses post-ban and those who make inadvertent errors.

4. SECTION 3, QUESTION 8

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

¹ See, for example, [Australian Bureau of Statistics Employee earnings report](#) from August 2024.

² Treasury, *Reform to non-compete clauses and other restraints on workers Consultation paper*, p.13.

³ See, for example, *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd* (No 8) [2022] FCA 1404.

- 4.2. The NRA submits that in the event the proposal at 2.7 of these submissions is adopted, a limited defence should be available on occasions where an employer reasonably believed a restraint was necessary to protect the legitimate interests of the business.
- 4.3. This mirrors the approach taken at common law. For example, in *Just Group Ltd vs Peck*⁴ the Supreme Court of Victoria held that a restraint clause can only go so far as to protect the legitimate interests of the employer, and cannot extend further than that.

5. SECTION 3, QUESTION 10

- 5.1. Question 10 asks: *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?*
- 5.2. The NRA submits that the Fair Work Ombudsman should continue to play a compliance and educative role. This should include:
 - 5.2.1. Publishing guidance about any ban on non-competes and restraints;
 - 5.2.2. Providing advice on when non-competes and restraints may be lawfully used (if at all);
 - 5.2.3. Providing examples of valid non-compete and restraint clauses; and
 - 5.2.4. Providing tailored advice to small businesses, where it is commonplace to use standardised, or 'boilerplate' contracts of employment, and who are less likely to have access to legal advice regarding the use of restraints.

6. SECTION 3, QUESTIONS 15 & 16

- 6.1. Questions 15 and 16 ask: *What transitional arrangements are required to support workers, and business compliance with the ban? How should the ban apply to non-compete clauses contained in existing contracts after commencement?*
- 6.2. The NRA submits that in consideration of how the ban applies to existing contracts of employment, a staged approach is to be preferred.
- 6.3. In a similar manner to the approach taken in the ban on pay secrecy clauses, the NRA submits the following would be appropriate:
 - 6.3.1. An initial prohibition on including non-competes or restraints in new contracts of employment; and
 - 6.3.2. A transitional period of at least 12 months to allow employers to inform relevant employees that any non-compete or restraint clauses contained in their contracts of employment are not enforceable, but that the other terms and conditions of employment remain the same.

⁴ *Just Group Ltd v Peck* [2016], VSCA 334.

7. SECTION 4, QUESTION 2 & 3

- 7.1. Questions 2 and 3 ask: *If mandatory compensation were adopted what should be the minimum compensation required? If a duration limit were imposed, what would be the most appropriate maximum duration?*
- 7.2. The NRA respectfully submits that mandatory compensation for those subject to non-compete or restraint clauses is not appropriate for employees above the high-income threshold. These employees are already in the top 9% of earners, as outlined above, and are compensated through salary packages that reflect their employment obligations, including restraints.
- 7.3. Further, additional compensation would impose an undue burden on small businesses and skew competition in favour of large corporations.
- 7.4. If a duration limit were to be imposed for non-compete clauses, the maximum should be 12 months. This is consistent with common law principles. Numerous decisions have upheld a 12-month restraint to be legitimate and proportionate to protect legitimate business interests⁵.
- 7.5. A 12-month maximum also reflects that the use and enforceability of non-competes and restraints are highly dependent on the fact-circumstance. A longer restraint may be necessary in cases where the risk of a high degree of damage or harm arises, depending on:
- 7.5.1. The position of the ex-employee in the previous organisation and their proposed position in the new organisation;
 - 7.5.2. The likelihood of damage or harm eventuating due to the ex-employee's conduct;
 - 7.5.3. The particular interests that the non-compete or restraint seeks to protect (i.e. confidential information, client lists, etc.);
 - 7.5.4. The geographical area and time frame of the restraint; and
 - 7.5.5. The nature of the industry.

8. SECTION 4, QUESTION 8

- 8.1. Question 8 asks: *Should businesses be required to specify the legitimate interests to be protected by a restraint clause?*
- 8.2. The NRA submits that the requirement to specify the legitimate interests to be protected in the restraint clause imposes an unreasonable burden on employers, and should not be adopted.
- 8.3. Both business interests and employee roles naturally evolve over time, and requiring rigid drafting would necessitate continual contract variation as an employee's role and influence grows. This creates an undue and unnecessary burden on employers, and may result in a contract containing outdated interests that have since expanded, or ceased to be relevant.

⁵ See, for example, *AEI Insurance Group Pty Ltd v Martin (No 4)* [2024] FCA 1110.

9. SECTION 5, QUESTION 1

- 9.1. Question 1 asks: *Are there any other considerations or potential unintended consequences if restraints on concurrent employment were to be regulated beyond the common law?*
- 9.2. The NRA submits that regulation of restraints on concurrent employment, beyond the current common law, is unnecessary, and should not be included in the scope of proposed reforms.
- 9.3. During consultation with NRA members, many noted that employment restraints are only used where an employee's secondary employment creates a conflict of interest or otherwise hinders the employee from performing their primary duties.
- 9.4. Take, for example, a business that invests heavily in specialised training in sales and merchandising techniques of a niche product. In this case it may be legitimately protecting a business need for the employer to require permission before the employee undertakes similar work with a competitor.

10. CONCLUSION

- 10.1. In summary, the NRA respectfully recommends a nuanced approach is taken towards the regulation of non-competes and other restraints.
- 10.2. Legitimately used, non-competes and restraints act to prevent conduct by ex-employees that may otherwise result in harm to the business. This potential harm must be balanced carefully with factors such as labour market mobility and costs for the end customer.
- 10.3. The NRA thanks the Treasury for the opportunity to make submissions in response to the Consultation Paper on non-compete clauses and other restraints. Any further queries regarding these submissions can be directed to the undersigned.

Yours sincerely,



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