

# Submission to Treasury on Reform to Worker Restraints Consultation Paper

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## About the submission

This submission is made in response to the Treasury's July 2025 Consultation Paper on *Reform to Non-Compete Clauses and Other Restraints on Workers (Consultation Paper)*. It draws on our expertise and previous research on this issue, together with the views we expressed in an earlier submission.<sup>1</sup>

We commence by amplifying our views on the potential productivity benefits from reforming the law on worker restraints, before addressing a series of issues raised by the Consultation Paper. The 'CP' references in headings are to the relevant sections of the Consultation Paper, while we use the abbreviation 'CQ' for the numbered consultation questions.

In making suggestions about the framing of new legislation, we have opted as far as possible to draw on existing language and concepts from the *Fair Work Act 2009 (FW Act)*, as well as to prefer approaches that will be simpler and easier to understand and apply. Such choices, we believe, can make for more coherent and effective regulation.

The views expressed are ours alone, and not those of any of the organisations with which we are associated.

## Job mobility, productivity and the need for reform

In our May 2024 Submission, we highlighted the unfairness of the rules currently governing contractually agreed restraints on the freedom of workers to work for other employers or

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<sup>1</sup> Iain Ross and Andrew Stewart, Submission to the Competition Taskforce (Treasury) on Post-Termination Worker Restraints, May 2024 (**May 2024 Submission**).

establish businesses that compete with their former employer.<sup>2</sup> Those rules are primarily based on common law principles developed, adjusted and applied by the judiciary, though modified in New South Wales by the *Restraints of Trade Act 1976* (NSW) (**NSW Act**). The common law doctrine of restraint of trade presumes post-employment restraints in particular to be unenforceable. But uncertainty as to when all or part of a particular restraint might be treated as enforceable, exacerbated by the NSW Act, the willingness of judges to uphold restraints drafted in a ‘cascading’ form and the high cost of litigation, operates to encourage compliance with invalid or potentially invalid restrictions.

While strongly reiterating our views about the need for a simpler and fairer set of rules that would make it easier for both workers and employers to understand what restraints are or are not allowed, we take the opportunity here to say more about the economic case for reform.

Non-competes are associated with reduced employee mobility and with changes in the direction of that mobility (ie, towards non-competitors);<sup>3</sup> with consequential negative impacts on wages and productivity. A 2024 e61 research note examined the relationship between job mobility and firm entry rates and the prevalence of employment restraints at an industry level in Australia.<sup>4</sup> The authors found that:

1. Job mobility appears to be lower in industries where the use of restraint clauses is higher.
2. There is a negative correlation between the current prevalence of restraint clauses and the change in firm entry rates over the past 15 years.

Prohibiting or restricting non-competes would enhance employee mobility and knowledge spillovers between firms.

The slowing in Australia’s productivity performance in recent decades has coincided with a decline in job-to-job transitions.<sup>5</sup> Job-to-job transition, sometimes referred to as job switching, occurs when a worker changes jobs without going through a period without paid employment. Andrews and Hansell suggest that the observed decline in productivity-enhancing labour reallocation is holding down overall productivity growth and is consistent

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<sup>2</sup> As in our previous submission, we use the term ‘employer’ broadly to cover both employers in the common law sense and those principals or clients who engage certain types of independent contractor to perform work. The same approach is taken, unless the context demands otherwise, with the term ‘employment’.

<sup>3</sup> Evan P Starr, J J Prescott and Norman Bishara, ‘Noncompete Agreements in the U.S. Labor Force’ (2021) 64 *Journal of Law & Economics* 53.

<sup>4</sup> Jack Buckley, Ewan Rankin and Dan Andrews, ‘The Ties that Bind: Five Facts on Post-Employment Restraints in Australia’, E61 Research Note No 12, 21 February 2024.

<sup>5</sup> Dan Andrews and David Hansell, ‘Productivity-Enhancing Labour Reallocation in Australia’ (2021) 97 *Economic Record* 157.

with a rise in adjustment frictions. Non-competes are a source of friction in labour markets, creating a barrier to labour mobility.

International research suggests that job-to-job transitions can increase aggregate productivity by moving workers to more productive firms.<sup>6</sup> In the Australian context Buckley found that the share of job switching that involves workers moving to higher productivity firms has fallen over time, from 54.2 per cent between 2003 to 2006 to 52.8 per cent between 2015 and 2019.<sup>7</sup> Buckley contends that making it easier for workers to switch jobs could boost productivity:

Australian workers currently face a number of barriers when looking to move to a more productive firm. Some of these barriers have gotten worse in recent years. Non-compete clauses (NCCs), for instance, have become more prevalent over the last 15 years and are now a default option in many employment contracts. Removing or limiting the use of NCCs would help remove one source of friction behind the decline in job mobility.<sup>8</sup>

### Definition of a non-compete clause (CP 3.1)

In response to CQ1, we agree that the US Federal Trade Commission (**FTC**) definition of a non-compete clause quoted on p 7 of the Consultation Paper provides a useful starting point. In particular, we agree that it is helpful to cover any agreed post-employment restriction that prohibits, penalises or functions to prevent a relevant type of worker from seeking or accepting work, or establishing another business. While there might be uncertainty as to the scope of the phrase ‘functions to prevent’, any concerns about its breadth could be alleviated by clarifying that it does not cover (for example) confidentiality obligations or commitments not to actively solicit business from former clients. The latter should be the subject of separate regulation, as discussed further below.

However, there are some alterations to the language of the FTC definition we would recommend:

- Rather than speaking of a ‘term or condition of employment’, or a ‘workplace policy’, we suggest drawing on the language of s 356 of the FW Act to speak of a ‘term of a workplace instrument, or an agreement or arrangement (whether written or unwritten)’.
- The type of restriction covered should include one that does not merely prevent a worker from ‘operating a business’, but being *involved* in any kind of business or

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<sup>6</sup> Elias Albagli et al, ‘Productivity Growth and Workers’ Job Transitions: Evidence from Censal Microdata’, Becker Friedman Institute for Economics, University of Chicago, 2021.

<sup>7</sup> Jack Buckley, ‘Productivity in Motion: The Role of Job Switching’, e61 Institute, Micro Note 14, 6 November 2023, Figure A.1, panel A.

<sup>8</sup> Ibid, 2 (citations omitted).

*undertaking*. The term ‘involved’ would cover a wider range of activities, such as providing financial support. The use of the word ‘undertaking’, which appears elsewhere in the FW Act, would ensure coverage of work for, or involvement in, not-for-profit organisations or government agencies.

As to CQ2, there are no specific exceptions we would propose, beyond those already mentioned (that is, ensuring that non-disclosure agreements and permitted forms of non-solicitation restraints are not treated as functioning to prevent further work or business involvement). We would caution, however, against accepting that training repayment agreements (Consultation Paper, p 8) should necessarily be excluded. Where the training concerned has been voluntarily undertaken with an external provider, and the employer has not had the opportunity to secure any return on its investment, it may indeed be reasonable for reimbursement to be sought. But it is also easy, for example, to envisage workers being required as a condition of their employment to agree to ‘repay’ the costs of training provided directly by the employer, as a way of making any resignation too expensive to contemplate. Any exception for training repayment agreements would need to be very tightly circumscribed to prevent such arrangements. The same would apply to arrangements for the clawback of previously paid remuneration.

To meet concerns of that type, it may also be worthwhile to include ‘anti-avoidance’ provisions of the type found, for example, in Division 4 of Part 2-7A of the FW Act. In addition, we recommend mandating an independent review of the new legislation after two years of operation to determine whether the non-compete definition and other provisions are working as intended.

## **Scope of workers affected (CP 3.2)**

### **Workers other than employees**

To answer CQ3, we remain of the view that independent contractors personally performing work should have the same protection as employees against non-compete clauses and other restraints. Besides the examples given in both our May 2024 Submission and the Consultation Paper (pp 11–12) of protections being extended to such workers under the FW Act, we also note that many of the ‘general protections’ in Part 3-1 of that statute are specifically extended to contractors, not just employees. Australian Bureau of Statistics (ABS) data reveal that more than a quarter (27%) of contractors cannot work for more than one employer at a time.<sup>9</sup> For such workers, a restriction on being able to shift to a different employer is likely to have the same practical and economic significance as for an employee. That in turn suggests that extending protections against restraints to contractors engaged under services contracts (as defined in s 15H of the FW Act) offers scope for the same type

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<sup>9</sup> ABS, *Working Arrangements, August 2024*, ABS, Canberra, 2024.

of improvements in mobility, remuneration, innovation and productivity that have been identified in relation to employees.

In theory, protection could also be extended to any other type of ‘worker’, as broadly defined in s 7 of the *Work Health and Safety Act 2011* (Cth). But in the absence of any evidence of restraints being imposed on the likes of volunteers or students undertaking unpaid vocational placements, we see no reason at this stage to take that step.

### Applying the high income threshold

CQ4 asks about ‘potential unintended consequences that may arise from a reliance on the high-income threshold in the Fair Work Act’ in identifying the workers for whom non-compete clauses should be banned. There are no such consequences that we can envisage, but there *are* certain choices that will need to be made about which version of the threshold is adopted., in relation to what count as earnings, and how to treat part-time employment.

For the purpose of the high income threshold for employees, the concept of earnings is determined by the rules in s 332 and reg 3.05 of the *Fair Work Regulations 2009*. Given that there is a substantial body of case law on those provisions,<sup>10</sup> we believe it would be simplest to draw on them for the purpose of the new prohibition. But if, as we have recommended, above, the prohibition is also to apply to independent contractors, modifications will need to be made to s 332 and reg 3.05. At present, provisions such as s 536ND of the FW Act refer to the concept of contractors having an ‘annual rate of earnings’. But there is no definition of ‘earnings’ for this purpose. Nor does one appear in s 15C, which defines the term ‘contractor high income threshold’, or in regulations made under that provision. Section 332 cannot apply because it is specifically limited to employees. That omission would need to be addressed if contractors were brought within the new prohibition. It would also need to be clarified whether the rate in question was for earnings from the employer seeking to benefit from the relevant non-compete clause, or for earnings from *all* of the relevant contractor’s clients. The former would be much easier to determine.

The second issue to be addressed is whether the income threshold should be prorated in the case of part-time employees, so that for example the prohibition would not apply to an employee working two days a week if their earnings exceeded 40% of the prescribed threshold. The FW Act currently takes different approaches to this issue in different contexts. The prorating approach is used, for example, in relation to the availability of ‘high income guarantees’ (s 329(2)) and the high income exception to the restrictions on employment for a fixed or contingent term (s 333F(2)–(3)). But it is *not* used when determining whether an award/agreement free employee can bring an unfair dismissal

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<sup>10</sup> See Andrew Stewart et al, *Creighton & Stewart’s Labour Law*, 7th ed, Federation Press, Sydney, 2025 (**Creighton & Stewart**), paras [13.63], [23.42]–[23.43].

claim (s 382(b)(iii)).<sup>11</sup> In our opinion, the new prohibition would operate in a simpler and more predictable fashion if the unfair dismissal approach were taken and the threshold was not prorated.

As to the time at which the threshold should be applied (CQ5), we consider that the simplest and most effective approach would be to exempt a term only if the worker's annual rate of earnings exceed the prescribed threshold as at (a) the date the relevant term is agreed, *and* (b) any subsequent date on which any variation to the rate of earnings takes effect. The second part is necessary to ensure that an employer cannot evade the prohibition by initially engaging a worker at a pay rate exceeding the threshold, then reducing their earnings. If an employer wished to reduce the pay of a worker with a non-compete clause, they would need to vary or replace the contract to delete the clause if the new earnings rate was below the threshold.

### **Non-compete clauses in fair work instruments**

For the reasons we set out in our May 2024 Submission, we remain of the view that all forms of post-employment restraint, including those dealing with the non-disclosure of information, should be prohibited from inclusion in any fair work instrument, as well as in a collective agreement entered into under Part 3A-4 of the FW Act. As presently advised, we see no adverse consequences to taking that step (CQ6).

## **Enforcement (CP 3.3)**

### **Penalties**

In terms of appropriate penalties for breaches of the ban on non-compete clauses (CQ7), or for any other prohibitions on post-employment restraints, we believe that they should be the same as for pay secrecy clauses created in breach of s 333D of the FW Act, as set out in item 10B in the Table in s 539(2). This would mean civil penalties of up to (currently) \$99,000 for a corporation, \$19,800 for an individual, or ten times those amounts for a 'serious contravention', as defined in s 557A. We see no reason for any further uplift in those maximum penalties, or for criminal penalties to be imposed.

### **Defences**

In relation to possible defences (CQ8), we see no reason to allow an employer to escape liability for breaching the non-compete clause prohibition by arguing that they reasonably believed the clause in question to be valid. There is strict liability for breaching equivalent prohibitions in the FW Act, such as those relating to pay secrecy clauses (s 333D), or fixed or

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<sup>11</sup> See Creighton & Stewart, para [23.41].

contingent term contracts (s 333E). The defence provided in s 357(2), concerning misrepresentation as to employment status, is justified only because there is such inherent uncertainty in determining whether a worker has been engaged as an employee or an independent contractor. If the new prohibition and any exemptions to it are well drafted, there should be no reason for a similar defence.

### **Commencing proceedings**

In determining who should be eligible to commence proceedings (CQ9), we see no reason not to once again adopt the same approach as for pay secrecy clauses. As per item 10B in the Table in s 539(2), that would mean giving standing to at least an employee, a prospective employee, an employee organisation entitled to represent the interests of an affected employee or prospective employee, and an inspector. However, if the prohibition were extended to independent contractors, as we have recommended, a more appropriate formulation would be to follow item 11 in the Table, concerning various breaches of the general protections, and accord standing to a person affected by the contravention, an industrial association entitled to represent the interests of such a person, and an inspector.

### **Fair Work Ombudsman**

In response to CQ10 and CQ11, we would expect the Fair Work Ombudsman (**FWO**) to have the same role in promoting compliance with the new provisions as it does for any other part of the FW Act. The FWO could be expected to produce educational materials and offer advisory services without the need for any specific direction. And given the breadth of compliance tools available to it under the legislation, including for example the capacity to accept enforceable undertakings (s 715), we cannot at present see any need for more tailored remedies.

### **Fair Work Commission**

CQ12 and CQ13 ask about a possible role for the Fair Work Commission (**FWC**) in relation to disputes about a possible breach of the new prohibition on non-compete clauses. The tribunal has no comparable role in relation to the provisions concerning pay secrecy, although it does (under s 333L of the FW Act) in relation to the rules on fixed or contingent term contracts. The matters in dispute in the present context seem unlikely to be ones within the tribunal's expertise, except perhaps in determining the quantum of a worker's earnings for the purpose of applying the high income threshold. As under s 333L, the FWC could only adjudicate on any breach if both the applicant and respondent consented to it exercising a power of 'private arbitration'.<sup>12</sup> We do not see a strong case for creating such a role for the FWC, in the absence of any capacity to regulate post-employment restraints

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<sup>12</sup> See Creighton & Stewart, para [5.44].

through awards, or of any mechanism for matters before the Federal Court or Federal Circuit and Family Court to be referred to the tribunal for conciliation. But if one were to be created, it could usefully be modelled on s 333L.

### **Limited statutory exemptions (CP 3.3)**

There are no particular exemptions to the ban on non-compete clauses that we wish to propose (CQ14).

### **Transitional arrangements (CP 3.4)**

On the assumption that the relevant legislation is passed in 2026, with a commencement date 12 months later in 2027, we believe that would be ample time for employers to adjust their contracting practices. We propose that from the date of commencement, offending terms should be declared to have no effect, even if contained in agreements or understandings made before the commencement (CQ16). But employers should only be subject to penalties for agreeing to an offending term as from the date of commencement. Such an approach, combined with a 12-month lead time, should obviate the need for any 'grace period' (CQ15).

### **Non-compete clauses for high-income employees (CP 4.1)**

As the Consultation Paper notes on p 22, there are potential economic effects from restricting the use of non-compete clauses even for higher paid workers. We remain of the view, as expressed in our May 2024 Submission, that if non-competes are not to be prohibited altogether, a time limit should be imposed, and the employer should be required to provide compensation for the period of the restraint (CQ1). These requirements would be in addition to, and not substitution for, the need to meet the common law test of validity, which requires a legitimate interest for the restraint and a scope that is reasonably commensurate with the protection of that interest.

As previously argued, we believe that a six month limit on duration would be appropriate (CQ3), noting that an employer needing protection for sensitive information or client connections could still seek to protect those through appropriately drafted non-disclosure or non-solicitation provisions. As proposed on p 26 of the Consultation Paper, the maximum permissible duration should be calculated from the date at which notice of the end of the employment is given.

As for the quantum of mandatory compensation (CQ2), we continue to think that a minimum of 50% of the worker's annual rate of earnings would strike an appropriate balance. This could be measured by reference to the worker's annual rate of earnings with



the employer as at the date of the termination of their employment, with a requirement for the compensation to be paid at the employer's election either at the start of the restraint period or at monthly intervals during it. Provision could be made for an employer to have the right to claw back any mandatory compensation in respect of a period during which the worker can be shown to have breached their non-compete obligations.

If the restraint commenced before the end of the employment, such as during a notice period, the worker would be entitled prior to termination to receive any higher rate prescribed by their contract or by any applicable legislation or workplace instrument. In practice, national system employees would generally be entitled to the full amount of their ordinary earnings during any pre-termination period, regardless of whether working or being sent home on garden leave. But the 50% compensation minimum could still have to work to do in the case, for example, of contractors with no automatic entitlement to being paid while their engagement is winding down.

## **Non-solicitation clauses for clients and co-workers (CP 4.2)**

### **Client non-solicitation clauses**

For the reasons given in our May 2024 Submission, we support the idea of prohibiting the use of client non-solicitation clauses for any duration exceeding three months, in relation to workers with annual earnings below the high income threshold (CQ4). It is imperative this step be taken, in order to prevent employers from negotiating or imposing overly broad or onerous solicitation restraints in order to dissuade a lower-paid worker from seeking alternative employment. For such workers, non-solicitation clauses should only be exempted if they are for three months or less, and if limited to the *active* solicitation of clients with which the worker had previously had personal contact. Advertising for work, if not targeted specifically at a relevant client, should be deemed not to constitute active solicitation. So should agreeing to accept work from a client who has not been the subject of any active solicitation.

In relation to higher paid workers, we see no reason to impose similar restrictions. But as with lower paid workers, non-solicitation clauses could only be valid and enforceable if meeting the common law test of being reasonably necessary to protect a legitimate interest.

### **Co-worker non-solicitation clauses**

We remain strongly of the view, as expressed in our May 2024 Submission, that clauses restricting the solicitation of co-workers should be banned outright, whether in relation to lower paid or higher paid workers (CQ5). This would not preclude employers from being able to take action where a worker unlawfully induces a former co-worker to breach their

contractual obligations, for example by resigning without giving proper notice or by disclosing confidential information.

## **Other requirements for valid restraint clauses (CP 4.3)**

### **Removing ‘cascading’ clauses**

We reiterate our view, as expressed in the May 2024 Submission, that the use of cascading restraints should be prohibited (CQ6). Either of the ‘one-shot’ options discussed on pp 33–34 of the Consultation Paper could feasibly be adopted. But a drawback of each of them is that they would do nothing to dissuade those drafting restraints from replacing cascading clauses with a multiplicity of individual restraints, directed at different activities.

Accordingly, we reiterate our suggestion that an employer should not be permitted to enforce a post-termination restraint if *any* invalid restraint is imposed on the same worker, whether in the same contract or a different one.

In relation to other limits on severability (CQ7), we propose that the FW Act specifically express an intent to exclude the operation of the *Restraints of Trade Act 1976* (NSW) in relation to all work relationships covered by the new federal provisions. The NSW Act would still be able to operate in relation to other types of restraints, such as in partnership agreements or contracts for the sale of a business.

### **Requirement to specify the legitimate business interest**

In response to CQ8, we agree that for non-prohibited restraints, employers should be required to specify the interest they are seeking to protect, and confined to invoking that interest in seeking to defend the validity of the restraint under the common law.

By contrast, if non-compete clauses are still to be permitted for higher paid workers, we do not see merit in a rule that would assess whether a ‘more targeted’ non-solicitation clause would suffice to protect the employer’s interests (CQ9). This would simply introduce an additional level of uncertainty as to the validity of non-compete clauses. If the ‘more targeted’ approach were to be adopted for restraints based on protecting client relationships, it is unclear why the same should not apply in relation to restraints based on protecting confidential information: that is, to displace non-compete clauses in favour of more targeted non-disclosure obligations. If the reasoning behind this proposal is accepted, it would make sense simply to ban non-compete clauses outright.

### **Other clarifications or amendments to the common law**

There are two further changes to the common law that we would propose (CQ10).

The first is one that we raised in our May 2024 Submission in relation to proceedings by an employer seeking an interlocutory injunction to restrain a worker from breaching a restraint pending a full trial of the employer's claim for redress. Employers should be required in this situation to show a *likelihood* of being able at trial to establish the validity of the restraint. The court should also be obliged to take into account the public interest in the promotion of competition and the interests of affected employees in deciding whether the balance of convenience favours the grant of injunctive relief.

The second is to adopt a clear rule that an otherwise valid restraint cannot be enforced by an employer that has wrongfully terminated or otherwise repudiated the relevant employment or services contract. While on one view this is already the case at common law, at least in the absence of any express agreement to the contrary, there are mixed authorities on this point.<sup>13</sup> It would be useful to clarify the law on this point and to prevent employers from expressly reserving the right to enforce post-employment restraints even when in breach of their own commitments.

### **Restraints on concurrent employment (CP 5.2)**

We agree that as a matter of principle, there should be limits to the capacity of employers to restrain permanent part-time or casual employees from simultaneously working elsewhere. However, we are not aware of any evidence suggesting that in practice employers are routinely seeking to impose and enforce restraints in this situation. We suggest that the government commission research to explore this issue further before determining whether statutory regulation is warranted. If there is anecdotal evidence of problems in particular industries or occupations, the research in question could be targeted to those sectors.

### **No-poach and wage-fixing agreements: exemptions (CP 6.3)**

The only point we would make about the proposal to ban no-poach and wage fixing agreements between employers, which we support, concerns the possibility of granting exemptions (CQ2) for arrangements in sectors such as professional sports. We suggest that consideration be given to imposing, as a condition of such exemptions, that the agreement in question be the subject of collective bargaining with one or more industrial associations representing the interests of the affected workers.

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<sup>13</sup> See Creighton & Stewart, para [17.45].