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Competition Taskforce  
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3 September 2025

Dear Sir/Madam

**Re: Reform to non-compete clauses and other restraints on workers**

The Council of Small Business Organisations Australia (COSBOA) welcomes the opportunity to provide feedback on the Government's proposed reforms to non-compete clauses and related employment restraints.

**Background**

Small businesses are the backbone of the Australian economy **representing 97% of Australian businesses** and employing over 5 million people. Unlike large corporations, small businesses typically operate with limited resources and cannot afford extensive legal advice on complex employment contracts with diversified client portfolios. Small businesses operate in a fundamentally different competitive environment where individual client relationships, employee expertise, and confidential business information represent disproportionately valuable assets. They depend on direct, trust-based relationships with a limited client base for their success.

Small businesses have a heavy **client relationship dependency** typically serving 10-50 clients compared to hundreds or thousands for larger enterprises. The departure of a single employee with 20-30% of client relationships can threaten business viability as mentioned above, eliminate years of relationship-building investment, and potentially destroy the owner's livelihood.

Small businesses are exposed to **training investment vulnerability** as they invest 2-5 times more per employee in training relative to revenue than large corporations. When employees depart with clients immediately after completing expensive industry training or certification, small businesses face double financial impact—lost training investment plus lost revenue streams. They therefore rely on straightforward contractual arrangements rather than complex legal frameworks.

Small businesses also experience a **competitive disadvantage** without adequate protections. Where large corporations can absorb client departures, afford extensive

legal advice, and rebuild relationships through substantial marketing budgets, small businesses require targeted contractual protections to compete fairly in markets where relationship-based competition is fundamental.

#### *The Critical Distinction: Non-Compete vs Non-Solicitation*

COSBOA emphasises that there is a fundamental distinction between non-compete clauses and non-solicitation arrangements that must be preserved in any reform:

**Non-compete clauses** broadly restrict where employees can work, often preventing them from using general skills and experience gained during employment.

**Non-solicitation clauses** specifically protect business investments in client relationships and confidential information whilst preserving worker mobility to compete fairly. COSBOA notes that non-solicitation clauses are used to protect the small businesses from staff members and clients being poached. Non-solicitation clauses can frequently be seen in the finance, hairdressing and allied healthcare settings however the use of these clauses is justifiably common.

In addition, small businesses often use **non-disclosure clauses** in employment contracts even where protections such as s183 of the *Corporations Act 2001* are available because it provides tailored protection for the business whilst also clearly notifying an employee of their obligations. Some small businesses may use standard template employment contracts, and some small businesses use tailored templates which identify and stipulate the type of confidential information an employee may be privy to and remind them of their obligation to keep this information confidential.

#### **COSBOA General Responses**

##### *Qualified Support for Proposed Ban with Essential Protections*

COSBOA appreciates the Government's intent of the proposed reforms but emphasises the critical need to balance worker mobility and fair competition with the legitimate interests of small businesses in protecting their investments, confidential information, and client relationships.

COSBOA provides **qualified support** for the proposed ban on non-compete clauses for low- and middle-income workers, recognising that these broad restrictions can unnecessarily limit worker mobility and wage growth. However, this support is strictly conditional on maintaining strong, unambiguous protections for small businesses' ability to use well-drafted confidentiality and non-solicitation clauses. Further, the proposed ban should be limited in scope to low and middle-income employees and should not extend to independent contracting arrangements.

##### *Opposition to Non-Solicitation Restrictions*

While supporting reasonable limits on non-compete clauses, COSBOA strongly opposes any legislative restrictions on non-solicitation clauses for the reasons mentioned above.

For small businesses, non-solicitation clauses ensure competition occurs through service quality and innovation rather than client-poaching based on inside information (fair competition maintenance). In addition, we consider the existing common law framework adequately balances employee rights with business interests without additional legislative interference (regulatory proportionality)

#### *Government Support Required for Transition*

COSBOA requests government funding to provide education, template development of appropriate contractual clauses, and transition support to enable small businesses to comply effectively whilst still maintaining necessary protections for their legitimate interests.

Small businesses face unique challenges. These reforms must recognise these realities whilst promoting fair competition and worker mobility. COSBOA is keen to play an active role supporting small business in this measure and requests government funding to assist with education and transition support as it does through its existing Small Business PEAK portal. This would allow small businesses to be educated, increase awareness and acceptance and reduce non-compliance.

#### **Conclusion**

COSBOA understands the Government's objectives to increase worker mobility and wage growth, reduce anti-competitive practices in labour markets, improve productivity through better labour allocation and provide clarity and certainty in employment law. However, these objectives must be achieved without undermining legitimate small business interests or creating disproportionate compliance burdens. COSBOA is unable to support legislation that impacts a small business's ability to protect their clients, data, intellectual property, or matters pertaining to sensitive confidentiality.

COSBOA's submission reflects a carefully considered position that supports the Government's broader policy objectives whilst protecting the legitimate interests of Australian small businesses. COSBOA sets out in **Annexure A** its responses to the specific questions asked in the Consultation paper.

COSBOA urges Treasury to adopt these recommendations to ensure that labour market reforms strengthen rather than weaken the small business sector that employs millions of Australians and drives economic innovation across the nation. We welcome any further consultation.

Yours sincerely,



Matthew Addison

**Chair**

**Council of Small Business Organisations of Australia**

## **ANNEXURE A – Detailed Responses to Consultation Questions**

### **Section 3: The ban on non-compete clauses for low- and middle-income workers**

#### *3.1 Definition of a non-compete clause*

Question 1: How should a non-compete clause be defined in the Fair Work Act? Is the FTC definition appropriate for an Australian context?

COSBOA considers that a definition that captures clauses that "prohibit" direct non-compete contractual clauses is appropriate in the context of workers seeking employment or operating a business post-employment. However, we are concerned that definitions borrowed from US jurisprudence may have unintended and broad consequence and consider that the broadening of definition to include the terms "penalise," or "function to prevent" are not appropriate and should warrant further drafting consideration. We emphasize that the "functions to prevent" element must be carefully defined to avoid capturing legitimate confidentiality and non-solicitation clauses.

COSBOA recommends:

- Clear distinction between restrictions on competition and restrictions on misuse of confidential information.
- Simple, plain-English guidance for small business owners to understand compliance obligations.
- Clear and unambiguous messaging that any prohibition of non-compete clauses does not affect the validity of non-solicitation, confidentiality or other similar clauses that protect the legitimate interest of a small business.

Question 2: Should any specific kinds of common contractual terms be explicitly included or excluded from this definition?

COSBOA strongly advocates for explicit exclusions for the following kinds of common contractual terms:

- Confidentiality clauses protecting genuinely confidential information
- Non-solicitation clauses meeting reasonable duration and scope criteria
- Non-disclosure agreements for trade secrets and proprietary information
- Training repayment agreements for reasonable and specific investments
- Notice periods and gardening leave where employees are paid either in a lump sum or over a defined period.

### 3.2 Scope of workers affected

Question 3: Should the ban on non-compete clauses apply to workers who are not employees, such as independent contractors?

COSBOA sees that independent contractors should be specifically excluded from the provisions of any legislation. Genuine independent contracting arrangements are commercial in nature and governed by the *Independent Contractors Act 2006 (Cth)*.

Small businesses often rely on specialist contractors for specific skills and need clarity on when contractor relationships require restraint protections, while avoiding additional compliance burdens for genuine commercial relationships. In many industries, there are specific rationales as to why exclusive contracting arrangements are appropriate and necessary.

Question 4: Are there any potential unintended consequences that may arise from a reliance on the high-income threshold in the Fair Work Act?

COSBOA recommends alignment with the high-income threshold as defined in section 333(1) of the *Fair Work Act* as it provides relatively simple guidance on threshold calculation and is aligned to current practices

Question 5: At what point in the employment relationship should the high-income threshold be applied?

COSBOA recommends assessment at the time of contract formation or variation, as this provides greater certainty for both parties, allows proper planning of employment terms as well as reflecting the actual bargaining power at the time of agreement.

Question 6: Would the application of the ban to all fair work instruments have any unintended consequences?

COSBOA supports inclusion of a ban applying on all fair work instruments post-implementation for simplicity, with clear 'grandfathering' arrangements for existing enterprise agreements containing non-compete clauses until when renewed, replaced or terminated.

### 3.3 Enforcement

Question 7: What is the appropriate penalty for breaches of the ban on non-compete clauses?

COSBOA emphasises that penalties must be proportionate and consider small business capacity. The principles of the Small Business Wage Compliance Code can be applied where unintentional errors are not penalised for small businesses. Higher penalties for deliberate, systemic breaches should apply.

In general, COSBOA supports the approach adopted in the Small Business Wage Compliance Code as this would seem a practical and reasonable approach.

#### Question 8: Should there be any defences available to contraventions of the ban?

COSBOA considers that essential defences for small businesses include:

- **Reasonable belief defence:** Good faith belief that threshold calculations were correct, reliance on professional advice, genuine uncertainty about a correct worker classification.
- **Prompt rectification defence:** Immediate correction upon becoming aware of breach, cooperation with enforcement authorities, cessation of ongoing enforcement of invalid clauses.
- **Transitional provisions:** For existing contracts entered before reform implementation.

#### Question 9: Which parties should be able to commence proceedings for a breach of the ban?

COSBOA supports a balanced approach where:

- affected employees have standing as primary applicants.
- the Fair Work Ombudsman (FWO) has standing, where necessary, in the public interest; and
- Unions and Employer Associations have standing in their representative capacity.

However, COSBOA considers that competing businesses should not have standing due to risk of vexatious claims and third parties, without direct interest should be excluded from commencing proceedings. Customers or clients should not be involved in employment matters.

Small business operations would be particularly disrupted by vexatious claims from competitors, and this possibility should be specifically excluded in the draft Bill.

#### Question 10 to 11: What role should the Fair Work Ombudsman have?

As it does now, the FWO should have both an educational and support role by developing simple, practical guidance to understand the nuances of differences between the different types of restraints of trades and those which are prohibited and those which are acceptable.

The provision of appropriate contractual templates and examples of compliant contractual clauses would be particularly helpful as well as threshold calculations guidance and alternative protection mechanism advice.

The FWO could play a useful role in conducting general education campaigns. This could include subsidised legal advice or advisory services for small businesses unsure about how to comply with any new legislation.

COSBOA considers that in any initial phases, the FWO's role should be educative and not punitive. Further consultation should be undertaken regarding any enforcement role and the significance of penalties.



A risk-based approach should be adopted which priorities deliberate breaches and whilst delivering proportionate responses for breaches by small business.

**Question 12 to 13: Should the Fair Work Commission have a role to play in resolving disputes?**

Yes, however, the Fair Work Commission should not need any additional powers. We emphasize however for a simpler dispute resolution service that small businesses could use where non-solicitation/confidentiality clauses breached. Small business currently perceives that non-compete clauses act as deterrent to the potential loss of intellectual property and confidential information.

We note that ASBFEO has proposed creating a Federal Small Business and Codes List within the [Federal Circuit and Family Court of Australia](#) to provide a more accessible and affordable dispute resolution mechanism for small businesses with unfair contract terms, moving away from the higher cost of a formal legal process.

### *3.4 Limited statutory exemptions*

**Question 14: Are there any exemptions to the non-compete ban justified on strong public policy or national interest grounds?**

COSBOA supports limited exemptions for:

- National security and defence contractors, particularly businesses working on classified government projects.
- Professional regulatory requirements where professional bodies mandate certain restrictions.
- Franchise relationships to protect franchisors' business models and territorial arrangements.

These exemptions must be reasonable and should be applied through permanent exemptions for ongoing structural needs with an inbuilt regular review mechanism to prevent abuse.

### *3.5 Transitional arrangements*

**Question 15: What transitional arrangements are required?**

Transitional arrangements should ensure a minimum 12-month grace period before penalties apply. Longer grace periods should be provided for businesses with fewer than 50 full-time equivalent employees and there should be clear communication of timeline and requirements.

Significant education and support should be provided per the suggestions provided in response to Question 10 above.

**Question 16: How should the ban apply to non-compete clauses contained in existing contracts?**

COSBOA recommends implementing a ‘grandfathering’ approach where:

- Existing non-compete clauses become unenforceable immediately upon commencement after a suitable grace period as recommended in this paper.
- No requirement to renegotiate existing contracts exists by virtue of the legislation coming into effect
- Small business employers must not be compelled to advise affected employees of changes in enforceability, rather, employees can rely on education and awareness programs organised by the FWO, employer body or peak industry association.
- No retrospective penalties exist for pre-commencement contracts.

## **Section 4: Other reforms to employee restraints of trade**

### *4.1 Non-compete clauses for high-income employees*

**Question 1, 2 and 3: What approach best strikes the balance for high-income employees?**

COSBOA does not recommend further changes in this area for high income employees for the following reasons:

- High-income employees possess substantially greater bargaining power than their lower-income counterparts, enabling them to negotiate fair terms and challenge unreasonable restrictions.
- Certain specialised roles genuinely require protection of sensitive information, strategic plans, and client relationships that cannot be adequately safeguarded through confidentiality clauses alone.
- Small businesses compete with larger corporations that have greater resources to attract talent; removing all restraint options could create significant competitive disadvantages for smaller enterprises.
- Over regulation will add to confusion in the business marketplace.

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

**Question 4: Should the use of client non-solicitation clauses be restricted?**

COSBOA strongly opposes restrictions on client non-solicitation clauses for the reasons specified in the previous answer.

If restrictions were to be imposed however (which COSBOA opposes), the maximum acceptable parameters would be:

- Duration: Maximum 12 months for direct client relationships, 6 months for indirect client relationships.
- Scope: Limited to any client with whom employees had direct contact within the previous 12 months.



- Activity definition: Active solicitation only, excluding passive acceptance of client-initiated contact.

**Question 5: When should it be legitimate for businesses to use co-worker non-solicitation clauses?**

COSBOA maintains that co-worker non-solicitation clauses serve legitimate small business interests and should not be restricted beyond current common law protections.

Legitimate small business interests have been covered above, but relate to team stability protection, training investment protection, specialist skill retention and operational continuity.

The proportional impact of staff loss on small businesses justifies these protections as mentioned throughout our submission.

**4.3 Other requirements for valid restraint clauses**

**Question 6: Should restraints with cascading duration periods and geographic extents be allowed?**

COSBOA opposes cascading clauses as they create uncertainty for both parties and are confusing and unfair in that the business is clearly willing to accept a less broad restriction.

Valid restraints should use clear, targeted drafting and require a single, specific duration and geographic scope. If included, cascading clauses should be read down to the lowest common denominator.

**Question 7: Should severability of other parts of restraint clauses be limited?**

COSBOA supports limited severability with clear rules that allow severability for clearly separate obligations but prohibit severability for interconnected cascading provisions and prevent artificial separation of single restrictions.

**Question 8: Should businesses be required to specify legitimate interests to be protected?**

COSBOA does not support requiring businesses to specify legitimate interests as this provides for over regulation and complication.

**Question 9: Should client relationships or workforce stability ever be justified for a non-compete clause when a more targeted non-solicitation clause could apply?**

COSBOA generally believes non-solicitation clauses are a legitimate avenue for protection of a small business. This is particularly critical in client relationship-dependent businesses where employee departure with clients would eliminate business opportunity and severely impact the operational viability of the small business.

## **Section 5: Restraints on concurrent employment**

**Question 1: Are there any unintended consequences if restraints on concurrent employment were regulated beyond common law?**

COSBOA opposes regulation of concurrent employment restraints as this would stifle legitimate employer interests and critical business functions that are particularly vital for small business operations.

Potential unintended consequences of additional regulation include increased legal complexity, reduced employment flexibility, weakened confidentiality protection.

**Question 2: How should restrictions be implemented?**

COSBOA does not support blanket restrictions on concurrent employment restraints for small businesses. The existing common law framework adequately balances employee rights with legitimate business interests.

Our preferred approach is to maintain common law governance with enhanced guidance on reasonableness tests, ensuring small businesses can protect legitimate interests while preventing overly broad restrictions on employee freedom.

## **Section 6: No-poach and wage-fixing agreements**

**Question 1: What penalties should apply to no-poach and wage-fixing agreements?**

Small businesses should be exempt from any proposed penalty regime, and the principles of the Small Business Wage Compliance Code should apply.

**Question 2: Should there be exemptions to the proposed ban on no-poach agreements?**

Possible exemptions for a proposed ban on no-poach agreements for practices with a public benefit include:

- Short-term collaborations or joint ventures where transparent and in public interest.
- Labour hire arrangements, if properly documented.

**Question 3: Should there be exemptions to wage-fixing agreements?**

No exemptions should be considered given the anti-competitive risk.