

5 September 2025

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

By email only: CompetitionTaskforce@treasury.gov.au

Dear Competition Taskforce

Consultation Paper (July 2025) – Reform to non-compete clauses and other restraints on workers

The Employment Rights Legal Service (**ERLS**) welcomes the opportunity to make this submission on the above Consultation Paper regarding non-compete and related clauses in employment contracts (**Consultation Paper**). We consent to this submission being published. All case studies in this submission, names and identifying information have been changed to protect client confidentiality.

About the Employment Rights Legal Service

The Employment Rights Legal Service is a joint initiative of Redfern Legal Centre, Inner City Legal Centre and Kingsford Legal Centre to provide workers across New South Wales with free employment law advice and representation. ERLS aims to address and remove the systemic barriers that prevent access to justice and allow for the exploitation of workers across New South Wales. Since its inception in July 2021, ERLS has assisted almost 3,000 people across New South Wales who have experienced workplace issues.

This submission draws on the experiences of the ERLS partners. ERLS is a statewide employment law service in New South Wales and our responses to the Consultation Paper are drawn from our experience as legal practitioners in that state representing marginalised and low-income workers.

Overview

ERLS strongly supports legislative reform to ban the use of non-compete and other restraint of trade clauses, particularly in relation to low and middle income workers. The right to work and the right of workers to choose their trade, occupation or profession is enshrined in international human rights law. With this as our starting point, restraint of trade clauses should only be considered in very limited circumstances.

We also recommend further reform to restrict other restraint of trade clauses (such as non-solicitation clauses) in employment contracts so that they only operate to the extent that they are reasonable and proportionate.

We address these reforms in more detail in our responses to the discussion questions below.

We have not addressed every discussion question raised in the Consultation Paper in this submission. We have answered the questions that align with ERLS' areas of expertise and experience, being questions from sections 3 to 5 of the Consultation Paper. As ERLS is a free service that exclusively serves low- and middle-income employees, our submissions are confined to questions that relate to these workers.

We also refer to our previous submission on this topic which was submitted to the Competition Taskforce in June 2024.

Discussion Questions

Section 3, discussion questions 1 - 2: Definition of a non-compete clause

Overall, ERLS is of the view that the US Federal Trade Commission definition is appropriate for the Australian context and adequately covers the range of ways in which a non-compete clause may appear in an employment arrangement. The definition should cover the common contractual terms listed in the Consultation Paper.

However, the FTC clause is limited to terms and conditions of employment and will exclude contract workers. As discussed further below, ERLS considers that non-compete clauses should not apply to contract workers who are operating their own business. This could be rectified by changing the phrasing in the definition to employment *or engagement*.

Section 3, discussion questions 3 – 6: Scope of workers affected

Terri's story - non-compete clause applied to worker with family responsibilities

Terri was employed as a beauty therapist and took unpaid parental leave to care for her daughter. While Terri was on leave, she initiated discussions with her employer about returning to work part-time, but the business said that these arrangements would not suit them. During this time, Terri noticed that she had a non-compete clause in her contract that was very broad and said that Terri could not work for any competing business in the same area for years after her employment ended. Terri was reluctant to look for other work even though her employer could not offer her suitable hours. The uncertainty around Terri's future income and ability to work was particularly stressful at a time when she was on unpaid leave and dealing with increased financial and caring responsibilities.

KLC case study. Details changed to protect confidentiality.

Contract workers

ERLS considers that non-compete obligations should not be applied to independent contractors who operate their own business. Although there may be circumstances where an independent contractor may choose to agree to exclusivity for the duration of an engagement, contractors should not be restrained from agreeing to a subsequent engagement or employment arrangement with a competitor. In addition, we note decisions handed down by

the High Court¹ in relation to the distinctions between independent contractors and employees, which have emphasised the significance of being able to work for third parties as an indicator of independent contracting. Non-compete clauses, particularly following the end of an engagement, are inherently contradictory with the concept of genuine independent contracting.

High income threshold

ERLS is a free service with eligibility generally restricted to workers earning well below the high-income threshold (HIT). The vast majority of our clients earn less than \$70,000 per year. However, we would emphasise that income is only one measure of a person's financial position and is temporary in nature. In our practice, we observe that many clients have intersecting vulnerabilities that are not always related to income and that circumstances can change quickly due to a dismissal, illness, caring responsibilities, and other factors.

One consideration of applying the HIT would be that a restraint clause could be upheld even if the worker was only employed for a short period of time. We understand that it is common for companies to terminate senior employees during their probation period (as performance expectations are high) and these employees do not have access to unfair dismissal protections. Depending on their broader financial situation, an employee earning above the HIT for a short period may still have limited capacity to absorb any time spent not working.

Jay's story – financial risk of legal action

Jay worked as a chef and received incentive payments whilst on an annual income of \$70,000. He resigned after experiencing a toxic workplace culture.

After Jay started a new role in a different restaurant, he received a letter from his former employer stating he had breached his contractual obligations by working for a competitor nearby without written consent to do so. The letter referred to the incentive payments he had received, alleging that they were paid in consideration of employees being strictly bound by the restraint of trade clause in the employment contract. The former employer stated Jay must repay his incentive payments in the amount of \$45,000 or else they would pursue legal action.

RLC case study. Details changed to protect client confidentiality.

As the consultation paper notes, determining whether a worker's income falls above the HIT can be complex and requires knowledge of the legal technicalities in this area. ERLS considers that a simplified income test which is based on a person's pre-tax salary (excluding any non-monetary benefits or bonuses) would be more straightforward for both individuals and employers.

The HIT test should be applied at the commencement of the employment agreement, or at the date of any contractual variation if the non-compete clause is inserted at that time. ERLS

¹ *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1

understands that the HIT test is intended to prioritise low to middle income workers who have reduced bargaining power and limited means to seek legal advice when entering into an employment relationship. Accordingly, the HIT test should be applied at the time any non-compete obligation is agreed to, to reflect the employee's financial position at that time. It may also be appropriate to require employers to issue an 'information statement' about the ban if they are including any non-compete or non-solicitation clause in an employment agreement (similar to the Casual Employment Information Statement) which includes information about the HIT and its application.

ERLS does not anticipate any unintended consequences from the application of the ban to all Fair Work instruments.

Section 3, consultation questions 7 - 11: Appropriate penalties, defences, standing, the role of the FWO and the FWC

Penny's story – worker on a visa dismissed to be re-engaged as an independent contractor

Penny was employed as a hairdresser for a year, when she was abruptly dismissed. A few months later, she was re-engaged by the same salon, but as a contractor. Her contract specifically allowed her to provide her services to third parties. Around six months later, the salon informed Penny they no longer had any work for her, as the business was losing money. Accordingly, her contract with them ended. Penny continued to operate as a hairdresser on her own.

Following this, the salon contacted Penny and informed her she was in breach of her contract with them, and she was prevented from working as a hairdresser in all of South Western Sydney, where she lived and where the salon had been based. The salon threatened to commence an investigation into Penny's activities and pursue her for loss they'd suffered as a result of Penny "poaching" their clients.

ICLC case study. Details changed to protect client confidentiality.

Appropriate penalties

ERLS supports the imposition of civil penalties to deter employers from including non-compete clauses in employment contracts. We think that these civil penalties should mirror similar penalty provisions set out in section 539 of the FW Act, for example, the inclusion of pay secrecy clauses in contravention of section 333D of the FW Act, which attracts a penalty of 60 penalty units or 600 penalty units for a 'serious contravention'.

We do not think that there should be any defences available for contraventions of the ban on non-compete clauses. Similarly to the recent rollout of restrictions on fixed-term contracts, transitional arrangements could address any issues with updating existing employment contracts containing non-compete clauses.

ERLS would also support the introduction of additional civil penalties for the threatened or attempted enforcement of a non-complete clause that is subject to the ban. In our practice,

we advise many ERLS clients who are facing potential litigation and have already stopped or resolved to stop the relevant conduct to avoid a dispute. Even if the client later receives advice that prospects of enforcement are low, the client has already acted against their interests simply to prevent the time, stress, and cost associated with potential litigation. The approach to penalties should take into account the ongoing likelihood of threatened enforcement by employers regarding non-compete clauses and serve to prevent and recognise the impact of this on workers.

Standing

ERLS considers that there should be broad standing to commence proceedings for a breach of the ban, and that the parties listed on page 18 of the consultation paper should be empowered to commence these proceedings (in addition to the FWO).

ERLS does not consider that it is necessary to provide prospective employers with standing to commence proceedings for a breach of the ban. A prospective employer could provide an employee with financial support to commence proceedings themselves, which we understand is common in enforcement proceedings where an employee has commenced a new role.

Role of the FWO

ERLS anticipates that the FWO would play a key role in educating employees and employers on the nature of the ban. From an employee perspective, this would involve efforts to educate workers on what a 'non-compete' clause looks like, the importance of reviewing and understanding an employment contract, and the fact that the ban exists and may apply to them. ERLS also envisions that the FWO would collect data about the use of non-compete clauses and the industries in which these clauses are the most prevalent.

ERLS would support the FWO being able to access its full suite of regulatory tools to uphold the ban, including the ability to impose infringement notices, compliance notices, enter into enforceable undertakings, and seek penalties for contraventions. In our practice, we have observed that many employees may not wish to take further action themselves in relation to their entitlements and may not have access to a union. In this instance, the FWO provides a vital avenue for breaches to be reported and for further action to be taken if necessary.

Fair Work Commission

Generally, we support the involvement of the Fair Work Commission in potential disputes that may arise in relation to the scope of the ban and any exceptions. The Fair Work Commission is a quicker and less formal avenue for our clients. ERLS considers that individual workers are more likely to commence proceedings for breach of the ban if there is a dispute resolution option at the Commission. For example, the ability to apply to the Commission for a conciliation prior to going to Court would assist ERLS clients. Consideration must be given to how this process would interact with other legal avenues for civil penalties which are outside the Commission's jurisdiction.

Section 3, consultation question 14: Limited statutory exemptions

ERLS is not aware of any exemptions that would be justified by strong public policy or national interest grounds, other than those already addressed by existing legislation. To the extent that any exemptions are applied, ERLS would support these being granted by application only and only for a duration of time that is supported by such grounds.

As previously submitted, many of our clients do not understand the laws surrounding non-compete obligations and they may comply with these clauses regardless of their potential enforceability. Any statutory exemptions to the ban are likely to cause confusion around the scope of the ban and make it more difficult to maintain clear and consistent messaging to the community.

Section 3, consultation questions 15 and 16: Transitional arrangements

ERLS supports the introduction of penalty provisions after a transitional period of 6 months after the commencement of the relevant legislation. From this date (**Effective Date**), all contracts entered into which contain a non-compete clause would be in breach of the ban and subject to applicable penalties. For existing contracts which contain a non-complete clause, penalties should be applied in the event that the contract is varied on or after the Effective Date. This approach recognises that in most cases, employee consent is required to vary a contract.

ERLS considers that non-compete clauses which are subject to the ban should be void from the commencement of the relevant legislation, regardless of whether they are in an existing employment contract. It is inconsistent with the purpose of the reforms to allow the enforcement of restraints after these laws come into effect.

For completeness, we do not think that the ban should apply retroactively to previous employment arrangements that have ended.

Section 4, consultation question 4: Client non-solicitation clauses

Generally, it is our experience that non-solicitation clauses are often drafted in ways that are overly broad, complex, unsuitable and generally unfair to workers. Unnecessarily broad non-solicitation clauses, particularly for low-income workers, are likely to operate in a similarly

Meena's story – worker with family responsibilities

Meena came to KLC for advice. She had a career as a hairdresser in a major metropolitan city. She left her job when she went on parental leave for the birth of her first child. Months later she started her own business in a location close to her home and childcare. Her former employer sent her a letter threatening legal action based on a broad restraint of trade clause in her employment contract.

Like most KLC clients, when Meena signed her employment contract she could not afford a lawyer to review it. She did not have the bargaining power to negotiate any changes to the contract before she signed it.

In response to the employer's threatening letter, Meena scaled back her business to work less hours. She stopped promoting her business and stopped working with several valued clients. She was very stressed about her situation when she came for advice.

KLC case study. Details changed to protect client confidentiality.

restrictive way as they will deter these workers from carrying out a range of business activities that are unlikely to be captured by a non-solicitation clause.

Client non-solicitation clauses

ERLS only advises workers. We do not advise on the impact of non-compete clauses from the perspective of clients or customers. However, we have observed that in some cases there is a strong and important relationship between a worker and a customer which holds greater value than the relationship between the business that employed the worker and that customer. We frequently hear of workers who are approached after leaving their previous workplace by customers who would prefer to continue their relationship with the individual worker, particularly in the healthcare and disability support sector. In some geographic areas, people needing health and disability support do not have many options for providers. We believe that in these cases, the importance of continuing the relationship between the worker and their client takes precedence over the relationship between the worker and the business.

Ajit's story — an international student working in the disability support sector

Ajit was working casually for a disability support service provider, who outsourced workers to different care facilities. After a series of roster changes left him being unable to work for the provider, he resigned and was later offered a job at a particular care facility he had previously worked at.

When his former employer found out, they sent him numerous letters of demand, claiming he had breached his employment contract, specifically a non-compete clause that prohibited Ajit from working for the care facilities he'd been outsourced to. This particular clause required Ajit to pay back 20% of what a full-time employee would have earned in wages over the same period Ajit had been employed, despite the fact that Ajit had only been a casual employee and had worked nowhere near a full-time employee's hours.

This caused Ajit a great deal of stress, as the demands from his former employer became substantially more harassing.

ICLC case study. Details changed to protect client confidentiality.

Client non-solicitation clauses are often included in contracts without consideration of the type of relationship involved. Full-time and some part-time workers are employed in a different way to casual workers and independent contractors, and their obligations with respect to competition and solicitation of customers should not be the same.

A non-solicitation clause may be unreasonable if it is applied to workers who work on the understanding that they may engage in work for multiple businesses or clients, such as:

- Casual workers;
- Part time workers;
- Independent contractors; and

- Gig economy workers (however described in their contract).

ERLS considers that a ban on non-solicitation clauses would be appropriate for the above categories of workers. The government should also consider extending the ban to industries that involve personal care (including hairdressing or beauty services), health care, allied health care and/or disability support.

Yang's story - low income contractor impacted by non-solicitation clause

Yang worked as a cleaner and was earning less than \$50K a year. He was on a visa and had few connections in Australia. He was asked to sign a subcontracting agreement engaging him on a non-exclusive basis with a broad non-solicitation clause. The non-solicitation clause applied to his entire engagement and would continue to apply after his agreement came to an end. Yang was concerned about the consequences of breaching this clause and felt that he could not use the small number of contacts he had in the cleaning industry to find more work.

KLC case study. Details have been changed to protect client confidentiality.

For other workers, restrictions should be introduced on the nature and scope of non-solicitation clauses. In our view, limiting these clauses to 'active solicitation' scenarios could strike an effective balance between companies, clients and workers. Workers would be able to maintain key customer relationships without using their previous employment to obtain any competitive advantage. Notwithstanding this, we anticipate the meaning of 'active solicitation' may still lead to confusion for some workers about the scope of their obligations. Because of this and the other issues we have outlined above regarding drafting practices, ERLS would support a duration limit on non-solicitation clauses for no more than 6 months.

Aahan's story - worker in sham contract arrangement prevented from gig economy work post-employment

Aahan* is temporary visa holder who was working in the care industry. His employer pressured him to sign a contract in English and did not provide a Hindi translation as Aahan requested. This contract contained a very broad restraint clause for 12 months.

Aahan was employed as a casual, however his employer treated him as a contractor. After being employed for 18 months, his employer terminated Aahan's employment. They did not pay Aahan either notice or gardening leave.

Aahan began looking for other work using an online platform connecting him directly with clients. His former employer contacted Aahan in writing and provided a warning that he could not work for a competitor for twelve months or they would bring a claim regarding the restraint clause.

RLC case study. Details have been changed to protect client confidentiality.

Section 4, consultation question 10: Other aspects of the common law doctrine

As set out in the Consultation Paper, the common law position is that post-employment restraints are *prima facie* void on the basis that they are contrary to public interest. To enforce a post-employment restraint, the employer must prove that the proposed restraint only goes so far as reasonably necessary to protect a legitimate business interest. In NSW, existing legislation permits the Court to ‘read down’ a non-compete clause to make it reasonable and enforceable.

If a total ban is not enacted, we support the introduction of a statutory test to clarify the common law doctrine and ensure it adequately balances the interests of businesses, workers and the wider community. At present, although the Court may consider broader interests in weighing up the reasonableness of a restraint clause, the focus of the doctrine is on the legitimate business interests of the employer wanting to enforce a restraint of trade clause. It does not require equal weight to be given to the interests of workers, which include but are not limited to:

- The internationally recognised right to work;
- Fairness and equality in bargaining in employment contexts;
- The financial and material needs of workers to be able to sustain themselves and their families;
- The ability to benefit from experience and client relationships that have been developed over time; and
- For some workers, the ability to work in particular locations or conditions to accommodate their needs due to factors such as pregnancy, caring responsibilities and/or disability.

Many of these interests are shared by the wider community. The current doctrine also fails to require weight to be given to the interests of circulation of labour for other businesses (i.e. prospective employers) or for the economy as a whole. In general, the common law is inherently less accessible for our clients and requires more effort to research and understand compared to legislation.

A greater balance could be achieved through legislative reform which requires the Court to consider various factors, including the above interests of workers and the community, in determining whether a non-compete clause should be enforced. A legislative test would have the additional benefits of providing more certainty to all stakeholders and providing workers with greater confidence that their interests will be considered by the Court.

Section 5, consultation questions 1 and 2: Concurrent employment restraints

In our experience, most non-compete clauses relate to the post-employment period and employers deal with outside work during employment through secondary employment clauses that require employees to seek approval for any additional work performed.

We think that restraints on concurrent employment should not apply to part-time workers and casual workers as concurrent work is often needed for these kinds of workers to earn an adequate income. We do not have the same reservations regarding secondary employment restraints for full-time workers as we do not think it has the same effect on their ability to earn a livable wage.

Please let us know if you have any questions about this submission. You can reach us at legal@unsw.edu.au.

Yours faithfully,

KINGSFORD LEGAL CENTRE on behalf of the Employment Rights Legal Service (**ERLS**)



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