

Competition Taskforce

The Treasury

By email to: competitiontaskforce@treasury.gov.au

10 September 2025

Dear Competition Taskforce

Re: Non-competes and other restraints: understanding the impacts on jobs, business and productivity

Thank you for inviting us to answer the list of questions published on 25 July 2025.

About JobWatch

JobWatch Inc (JobWatch) is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.

JobWatch is funded by Victoria Legal Aid, the Victorian State Government, the Victorian Legal Services Board Grants Program, Victoria Law Foundation and the Commonwealth of Australia Attorney General's Department. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).

JobWatch provides the following services:

- a. Tailored information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (TIS);
- b. Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- c. Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
- d. Law reform work aimed at promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 268,000 caller records, with each record usually canvassing multiple workplace problems, including contract negotiation, recovery of wages, discrimination, harassment, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time across State and Federal laws.

JOB WATCH INC (JobWatch)

Most of our callers and clients are not union members and cannot afford to get legal assistance from a private lawyer. To become clients of the legal practice, workers must have an employment law matter that has legal merit and their cases must satisfy the requirements of our funding agreements (which typically focus on client vulnerability and public interest issues).

Case studies

All case studies have been de-identified to maintain confidentiality.

Endorsements

This submission has been endorsed by:

Victorian Aboriginal Legal Service
Westjustice
Darwin Community Legal Service
University of Melbourne Student Union Legal Service
Mackay Regional Community Legal Centre
Caxton Community Legal Centre
Basic Rights Qld
Working Women's Centre Qld
Women's Legal Service NSW
Citizen Centred Justice Legal Clinic
Youth Law Australia
South-East Monash Legal Service
Inner City Legal Centre
Working Women's Centre Australia
Justice Support Community Legal Centre
Working Women's Centre Victoria

JobWatch's responses to the Consultation Questions

We have responded only to selected questions, based on our expertise and the experiences of our callers and clients.

Case study: Lavinia works in the cosmetic/aesthetic industry. Her employer owns multiple clinics across Melbourne. Lavinia is often paid her wages late and consequently she has decided she would like to resign and start her own business. However, her contract prohibits her from competing with her employer in any way for a period of 3 years following a termination of employment and within a large radius of Melbourne.

3.1 Definition of a non-compete clause

1. How should a non-compete clause be defined in the Fair Work Act? Is the US Federal Trade Commission (“FTC”) definition appropriate for an Australian context?

The FTC definition of non-compete clause is as follows:

A term or condition of employment that either prohibits a worker from, penalises a worker for, or functions to prevent a worker from:

- a) Seeking or accepting work with a different person where such work would begin after the conclusion of the employment that includes the term or condition*
- b) Operating a business after the conclusion of the employment that includes the term or condition.*

[The] term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.

Broadly, this definition is appropriate in the Australian context and appears to be aligned with the underlying policy objectives of the Federal Government. However, we raise the following matters for consideration.

First, we recommend that the definition of ‘term or condition of employment’ be expanded to expressly include industrial instruments and individual flexibility agreements, so as to be clear that the prohibition extends to a restraint in one of these documents too.

Second, the FTC definition should be adjusted if the Federal Government ultimately seeks to extend the prohibition on non-competes to certain independent contractor arrangements. This may require the substitution of references to ‘employment’ in the FTC definition to more inclusive phrase such as ‘a term or condition of a contract for the performance of work’. JobWatch would support this.

A third related point is that the consultation question is framed in such a way that it appears to only contemplate inserting the definition of a non-compete clause in the *Fair Work Act 2009* (Cth) (**Fair Work Act**). However, if independent contractors are covered, then it may be necessary and appropriate to insert the relevant definition of a non-compete clause into other statutes, such as the *Independent Contractors Act 2006* (Cth) and/or the *Competition and Consumer Act 2010* (Cth).

Finally, to the extent that any restraints of trade — including non-compete clauses — are not made unlawful under the proposed reforms, we submit that employees should be entitled to fair compensation for the period during which their economic freedom is restricted. We also agree with Dr Iain Ross & Prof Andrew Stewart that limitations on the duration of a restraint should take account of any period of *garden leave*.

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

In JobWatch's view, *golden handcuffs* clauses and clauses requiring employees to repay training costs if they leave within a certain employment period should be treated in the same way as non-compete clauses, to the extent that such clauses *function to prevent a worker from seeking or accepting* alternative employment or operating a business in competition with the former employer.

Case study: Erica felt pressured to sign a contract before going on maternity leave, whereby she would be forced to repay the employer a percentage of her employer-funded paid parental leave if she did not return to work for at least 12 months following her leave. Erica wants to resign but she says she can't afford to pay back the required amount to the employer.

Case study: Hanna is a migrant worker for whom English is additional language. She is employed in the health and fitness industry. She calls JobWatch because she is concerned about her employment contract, which says that if she resigns within 6 months, she will have to repay the employer the full training costs, but it doesn't quantify those costs.

3.2 Scope of workers affected

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

Yes, JobWatch is of the view that to the extent that independent contractors perform work that resembles employment, they should be covered by the ban on non-compete clauses. We recommend that the ban on non-compete clauses not be limited to *employee-like workers* performing digital platform work or *regulated road transport contractors*. Rather, if the aim of the ban on non-competes is to stimulate productivity, enhance job mobility and lift wages, then a broader definition of *independent contractor* should apply.

The definition of *services contract* in s 5 of the *Independent Contractors Act 2006* (Cth) is a more appropriate starting point. It defines a *services contract* as being a *contract for services* to which an *independent contractor is a party and that relates to the performance of work by the independent contractor*.

Unlike the definition of *services contract* in s 15H of the Fair Work Act, the definition of *services contract* in the *Independent Contractors Act 2006* (Cth) is wider in that it explicitly defines *independent contractor* as *not limited to a natural person*. This is an important definitional extension given that there may be many independent contractors that are parties to a services contract through a shell company, which employs no one else in the business except the one self-employed worker.

If there is a high-income threshold that applies in the context of employment, then to ensure consistency, we believe that a similar monetary threshold should apply to independent contractor arrangements. We acknowledge, however, that there may need to be some adjustment to how

income is calculated or quantified in relation to independent contractors.

Case study: Bill works as an independent contractor in the information media and telecommunications industry. He is concerned about the contract he signed because it prevents him from working for a competitor or working with any clients for certain periods after his contract ends.

- 4. 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?**

See response to Question 5 below.

- 5. At what point in the employment relationship should the high-income threshold be applied to determine whether a non-compete clause is allowable or not, and why? For example, should it be applied at the time the contract for employment is entered into or varied, the time the employment relationship ends, or some other time?**

The common law requires an assessment of a restraint's reasonableness at the time the contract was entered into. However, this assessment would not be appropriate in terms of applying the high-income threshold given that employment contracts can potentially last for several years. Rather, we believe that any income threshold should be applied at the time of termination when the non-compete would ordinarily be triggered.

- 6. Would the application of the ban to all fair work instruments, as defined by the Fair Work Act, have any unintended consequences?**

In line with our response to Question 1, we believe that the definition of a non-compete clause should extend to those included in industrial instruments, as defined by the Fair Work Act. The concerns raised in the Consultation Paper regarding contractual non-competes—particularly their chilling effect on worker mobility—apply with equal, if not greater, force when such clauses are embedded in industrial instruments (even if such clauses may ultimately be unenforceable).

Employees covered by these instruments may be deterred from pursuing other employment opportunities due to the perception—however remote—that breaching a non-compete clause could expose them to civil penalties under the terms of an enterprise agreement or to damages. Even if the actual risk of enforcement is low, the mere presence of such clauses in legally binding instruments may have a disproportionate and unjustified impact on worker behaviour.

We are strongly of the view that non-compete clauses in industrial instruments should be banned and subject to penalties.

3.3 Enforcement

- 7. 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? Please consider the following matters in your feedback:**

- (a) the type of penalty**
- (b) the magnitude of the penalty, and**
- (c) the circumstances in which the penalty should apply.**

For consistency and simplicity, we believe that the ban on non-compete clauses should be treated in a similar way to the ban in the Fair Work Act on pay secrecy terms.

In short, non-compete clauses included in relevant work contracts (i.e. employment contracts and specified independent contractor agreements) should be treated as void and of no effect (similar to s333C of the Fair Work Act).

Further, inclusion of non-compete clauses in a contract of employment, written policy or industrial instrument should attract a penalty (similar to s333D of the Fair Work Act).

The serious contravention provisions set out in s557A of the Fair Work Act should apply to knowing or reckless contraventions of this ban on non-compete clauses (e.g. where an employer deliberately inserts or retains non-compete clauses after being informed or becoming aware that such clauses are prohibited).

This would mean that a serious contravention of the ban on non-compete clauses would attract a maximum penalty of 600 penalty units, or otherwise, 60 penalty units.

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

It may be appropriate to include a defence that mirrors, to some extent, the defence which is available in relation to sham arrangements. For example, it may be appropriate to give an employer (or principal contractor), who has included a non-compete clause in a relevant work contract, a defence if they reasonably believed that:

- i. the clause was not a *non-compete clause*, as defined in the Fair Work Act; or
- ii. the employee (the subject of the non-compete) was above the high-income threshold (e.g. the employer erroneously included a component of their remuneration that should have been excluded).

9. Which parties should be able to commence proceedings for a breach of the ban on non-compete clauses and why?

Effective enforcement of the prohibition on non-compete clauses is necessary for the ban's effectiveness. In this regard, we believe it is not just appropriate, but essential, that various parties have standing to commence proceedings for breach of the ban on non-compete clauses.

In addition to Fair Work Inspectors, the relevant employee/independent contractor and/or their industrial representative, we believe that community legal centres, including JobWatch and all the centres and working women's centres that endorse these submissions, should be authorised to initiate enforcement action, including civil penalty litigation.

We also believe that businesses seeking to hire an employee bound by a non-compete clause have standing to enforce the ban via litigation or otherwise. This is because businesses' inability to hire their preferred candidate constrains their productive capacity.

10. 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?

It is appropriate that the Fair Work Ombudsman (**FWO**) should provide education and assistance to employers and employees about non-compete clauses; and enforce compliance with the Fair Work Act (including by way of compliance notices requiring employers to remove non-compete clauses from work contracts, policies and industrial instruments, entering into enforceable undertakings and litigating matters in court). The FWO will also no doubt continue to refer vulnerable or low-paid workers to community legal centres for legal advice, in appropriate circumstances.

11. Are there any specific remedies that should be available to persons impacted by potential non-compliance with the ban? What role would the Fair Work Ombudsman have to enforce breaches of the ban, and would new compliance tools be necessary?

Yes, we are of the view that there should be clear and accessible remedies available to individuals impacted by non-compliance with a ban on non-compete clauses. These remedies should include:

- i. **Declaratory relief**, so that workers can seek a formal declaration that a non-compete clause was void and unenforceable under the ban.
- ii. **Compensation and civil penalties**, so that workers can recover where they have suffered loss (e.g. lost employment opportunity, income reduction, or delay in obtaining new work because of a prohibited non-compete clause), and they can claim civil penalties even in the absence of proving loss.
- iii. **Reinstatement or other equitable remedies**, so that workers who may have been dismissed or otherwise penalised for refusing to comply with a prohibited non-compete clause (including a golden handcuffs clause or a clause requiring the repayment of training expenses etc) have access to reinstatement or alternative equitable relief.

As stated above, the FWO should play a central role in enforcement. To ensure effective enforcement, the FWO could (and arguably should) audit employers for the use of banned clauses.

12. Should the Fair Work Commission have a role in resolving disputes that arise from the ban on non-compete clauses?

Yes, the Fair Work Commission (**FWC**) should have a clearly defined role in resolving disputes that arise from the application of a ban on non-compete clauses. Among other things, the FWC would be well-placed to:

- i. Provide early dispute resolution while a worker is still an employee/worker;
- ii. Make binding determinations or declarations about whether a clause constitutes a prohibited non-compete clause under the legislation;

- iii. Hear applications from employees or unions seeking to remove or invalidate non-compliant terms from enterprise agreements or employment contracts;
- iv. Deal with disputes regarding the interpretation or application of the ban where parties disagree on whether a clause falls within scope.

Allowing the FWC to play this role would offer a low-cost, accessible, and informal alternative to litigation through the courts. This is especially important for self-represented and lower-paid workers who may lack the resources to pursue legal remedies.

Consideration will need to be given to the fact that in many cases, by the time a dispute arises in relation to a non-compete clause, the worker may no longer be employed and therefore may be ineligible to access the FWC's dispute resolution processes.

4.2 Non-solicitation clauses for clients and co-workers

4. Should the use of client non-solicitation clauses be restricted? If so, what sorts of restrictions are appropriate (e.g. duration, type of activity, and scope of clients).

5. When, if ever, should it be legitimate for business to use co-worker non-solicitation clauses? If these clauses can be legitimate, what restrictions would be appropriate to impose on their use?

Even though non-solicitation clauses do not directly interfere with the employment rights of the person subject to them, they work against the interests of employees more broadly by reducing mobility and access to opportunities. However, we recognise that employers may have legitimate interests in some circumstances (e.g. where investments have been made in workforce stability). Therefore, rather than an outright ban, we endorse the use of statutory time limits on such clauses, in addition to the existing common law test of reasonableness. Restrictions on the use of confidential information, including about clients, should continue to be governed by the common law.

Case study: Ivy works as a disability support worker. She has numerous grievances with her current employer, particularly regarding her entitlements, and she would like to change jobs. One of her employer's clients has offered her a job but Ivy is afraid to accept it because there is a clause in her contract that prohibits her from working with any of the clients for a period of time after the end of her employment.

5. Restraints on concurrent employment

- 1. Are there any other considerations or potential unintended consequences if restraints on concurrent employment were to be regulated beyond the common law?**
- 2. If there were to be restrictions on these restraints, how should they be implemented?**

JobWatch submits that restraints on concurrent employment should also be prohibited, where there is no apparent breach of the implied duty of fidelity. Even where there may be direct competition between employers, that alone should not prevent the employee from holding two or

more jobs concurrently as their position may not give rise to any conflict of interest, especially when the worker is employed in a relatively junior, part-time or casual role.

JobWatch receives a significant number of calls from workers with concerns about prohibitions on concurrent employment. In our view, these kinds of restraints not only undermine employee mobility and bargaining power, but they also have broader negative effects on labour market dynamism and economic productivity. These restraints should also be banned. Employers concerned about issues such as the use or disclosure of confidential information or conflicts of interest would still be able to rely on the common law.

Case study: Jenna has two different jobs in the aged care industry. She is employed on a part-time basis for one job and on a casual basis for the other. She calls JobWatch in an agitated state because her employer from the first job has recently discovered about her casual job and is not happy about it.

Case study: Rita is a junior employee employed by two different supermarkets to work on the cash registers. She was recently told by one employer that she is not allowed to hold two jobs simultaneously.

Case study: David recently started a new job as a 1st year apprentice. He is concerned about the employment contract he has been given to sign because it requires him to work for his employer for the full 4 years of the apprenticeship and prohibits him from moving to another company during this time.

6. No-poach and wage-fixing agreements

- 1. What civil penalty should apply to businesses that have no-poach and wage-fixing agreements in breach of the ban? Should criminal penalties also apply, in line with the cartel provisions in Part IV of the Competition and Consumer Act?**
- 2. Should there be exemptions to the proposed ban on no-poach agreements? If yes, on what grounds? What restrictions should apply to their use?**
- 3. Should there be exemptions to the proposed ban on wage-fixing agreements? If yes, on what grounds? What restrictions should apply to their use?**

JobWatch submits that no-poach and wage-fixing agreements should be treated in the same way as other cartel provisions under the CCA, including the relevant penalties. We receive numerous calls from employees who are unjustly unable to work, usually in a labour-hire context, because of no-poach agreements to which they are not a party and for which they are not compensated. These employees currently have no legal redress.

Thank you for taking the time to consider our submission. Please do not hesitate to contact the writer by email on gabriellem@jobwatch.org.au if you have any queries.

Yours sincerely,



Gabrielle Marchetti
Principal Lawyer
Job Watch Inc

*The writer wishes to acknowledge the generous assistance of A/Prof Tess Hardy, Melbourne Law School, and the valuable contributions of John O'Hagan

Submission endorsed by:



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