



The Pharmacy
Guild of Australia

SUBMISSION TO THE TREASURY

Reform to non-compete clauses and other restraints on workers.

National Secretariat

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05/09/2025

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Introduction

The Pharmacy Guild of Australia (**the Guild**) welcomes this opportunity to provide feedback to the Treasury on the reform to non-compete clauses and other restraints on workers.

About the Pharmacy Guild of Australia

The Guild is the national employer industry association representing owners of community pharmacies — the small and medium businesses serving the pharmaceutical and other healthcare needs of local communities in cities, and regional and remote areas across Australia. Community pharmacies are frontline healthcare services providing a constantly expanding range of professional health services to their local community.

A regulatory environment that supports the growth, success and sustainability of their businesses is critical for the provision of these health services by the owners of Australia's 6,000 community pharmacies.

Many Guild members employ 15 or fewer employees in a pharmacy. These small community businesses account for the direct employment of more than 70,000 full time, part time and casual employees in cities and towns across Australia.

The Guild is a federally registered industrial organisation that develops workplace and business policy and influences public debate on major workplace relations and business issues and advocates for a regulatory environment that supports investment in community pharmacy. We believe a healthy community pharmacy sector means healthier communities.

General Observations

We accept that there is evidence that non-compete clauses have a negative impact on social equity and economic growth e.g. they may discourage worker mobility and may thereby stifle wage growth and the dissemination of productive business practices. However, a focus on those *potentially* negative impacts — which is a principal feature of the Discussion and Consultation Papers — tends to ignore their reasonable and justifiable aims, reasons which can and in some cases do offset those negative impacts and favour allowing non-compete clauses.

Those reasons would include:

1. *Protection of Legitimate Business Interests.* Non-compete clauses are often the only practical way to protect sensitive information, client relationships, and investments in employees. Banning these clauses could lead to unintended consequences, such as increased litigation in other areas (e.g. intellectual property law or claims under the Corporations Act).
2. *Reduced Incentives for Innovation.* Businesses may be less willing to invest in employees, new intellectual property, or innovative business practices if they cannot use non-compete clauses to protect those investments.
3. *Risk of Deferred Compensation Models.* Some employers will likely shift to deferred compensation models to protect their interest — that is deferring the payment of discretionary bonuses until after a post-employment period — which could make employees worse off at least in the short-

term. And if those arrangements are banned then they may simply cease to offer compensation in many instances.

In short, there is a legitimate commercial interest in protecting a business' intellectual property and goodwill, not to mention its investments. These are recognised assets that the business has a right to protect, and the nation has an economic interest in promoting. They must be balanced against the need for labour mobility.

The Guild is especially concerned with the potential for small businesses in the community pharmacy sector (the vast majority of our members) to be disproportionately affected by a ban. Without access to non-compete clauses to protect their interests and without the resources necessary to develop or rely on alternatives¹, small businesses would suffer a competitive disadvantage against large corporate operators in the sector who are better positioned to absorb the costs of alternative protections.

This is particularly troubling given that small businesses are superficially less likely to impose non-compete clauses unless they have specific reasons. That is, their use of the clause is more likely to fall within the categories which are legitimate and justifiable. Furthermore, and conversely, they are less likely to rely on the 'chilling-effect' of empty threats of litigation — one of the chief rationales for introducing a statutory prohibition — as they don't have the resources to engage lawyers and experts to make or follow-through on the threats. As such, they simply are not a party to the sort of power imbalance which is said to be one of the real problems with the current legal framework — i.e. the threat of litigation is enough to discourage a worker from disregarding a non-compete clause, even if it is actually unenforceable and ineffectual.

In addition, while it would appear to be beyond the remit of this enquiry, we note that another area where non-compete type arrangements are not uncommon is upon sale of a business. If AX sells their pharmacy business to BY, there is often a clause in the sales contract which will restrict where BY may work or establish a competing pharmacy. It is critical that this enquiry does not affect those sorts of arrangements. Any change must be limited to banning non-compete arrangements in employment contracts or, perhaps, collusion between employers to establish no-poach arrangements. An impact on the terms of sale and transfer of businesses could have significant flow-on effects on both the sales value and/or the capacity of a purchaser to establish their business. It would be a bridge too far and should be beyond the scope of this enquiry.

The review needs balance. It must recognise that while there may be problems, there is also a legitimate role for non-compete clauses. The challenge for the review is to tailor any regulation so that it does not prevent those legitimate uses, balancing both the interests of the worker and the interests of business so as not to 'throw the baby out with the bath water'.

Responses to Discussion Questions

3.1 Definition of a non-compete clause

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

The ban should be limited to employment and should not extend to contractors or other 'workers'; see below at 3.2. As such, the definition needs to use appropriate language e.g. 'employee' rather

¹ e.g. reliance on trade secrets or confidentiality agreements, financial incentives, training and return of service requirements.

than ‘worker’. A general ban on any clauses which penalise (etc) a former employee for “operating a business” is too broad when there may be legitimate reasons for a ban e.g. a restriction on “operating a business” which uses the intellectual property rights of the former employer would be legitimate, irrespective of the outcome of this review.

Also, note that limiting it to restrictions on accepting a role which commences “after the conclusion of employment” with the subject business makes it relatively easy to avoid.

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

Obviously, terms which protect confidentiality, privacy and intellectual property rights, and prevent the uses of proprietary information should not be affected by any ban. Additionally, disclosure of access to intangibles (e.g. ICT) and other assets should not be included. Finally (although hopefully beyond the remit of this enquiry) as noted above in our general comments, the ban must not extend to sale of business situations.

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?*

No. A change which extends beyond ‘employees’ to ‘contractors’ — which is a notoriously vague and malleable term — would have impact on a range of commercial arrangements which are not subject to the same sort (if any) of power imbalances upon which this review is apparently premised. Businesses and contractors should be able to freely bargain and if that bargain includes terms which limit competing and are not subject to existing trade practice and common law restrictions, then they should not be affected by the outcome of this enquiry.

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?*

Yes. The high-income threshold is a blunt instrument, which does not really tell us anything about the employer or the employee or the nature of the industry. The underpinning rationale for applying the high-income threshold has not been adequately specified.

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?*

It depends why the enquiry has decided that the high-income threshold should be the test. If it is to assess the sophistication of the employee for the purpose of managing any adverse consequences, then the ‘application point’ should be when the consequences would be felt, i.e. the time the clause is (notionally) enlivened. If it is for another reason, e.g. because it is felt that by earning a ‘high income’ the employee is adequately compensated for the risk and consequences of the clause, then the ‘application point’ should be at the time of dismissal.

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

No comment.

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.

There should be no penalty. The law should simply abrogate or annul the clause so that it has no operation. There has been a stratospheric increase in complexity in workplace relations law over recent years and, as such, any further changes should strive for simplicity. This change will add to that complexity. Determining when and how the ban applies — which could depend on shifting factors, such as the employee's earnings or hours— means that accidentally including a banned clause is a very real prospect. Given that there will be limited negative impact on the employee or benefit to the employer if the employment contract includes an unenforceable clause — there is no justification for imposing a penalty. If a penalty is to be imposed, then it should only apply in the case of multiple, knowing infractions. And given the impact is minimal, the penalty should also be minimal

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

Defences should be available for contraventions of the ban on non-compete clauses in the circumstances given above i.e. size of employer, income of employee, how static and visible the employee's income level, the conduct of the employer (did they discuss it with employee? did they attempt to enforce it? were they aware of the ban and that it applied?) and the conduct of the employee (how gracious were they in their exit, what attempts have been made to limit the impact), and considering if there any actual loss suffered by the (former) employee. Similarly, if a penalty is to be imposed, these factors should also be taken into account in determining the size of the penalty (i.e. amount of the fine).

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

The only body with the standing to commence proceedings for a breach of the clause should be the Fair Work Ombudsman (FWO) as an apolitical, publicly funded agency which is established to enforce compliance with workplace laws. That is their statutory function and why they are funded. While the individual of their union should be able to rely on the ban to defeat any attempt by a former employer to enforce it and/or refer matters to the FWO, they should not have power to conduct enforcement action. In addition to facilitating unmeritorious or vexatious proceedings, it would risk the misuse of the ban — i.e. where the threat of proceedings may be used as leverage to gain an unrelated benefit.

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?*

The provision of education and guidance to employers and employees on the nature and extent of the ban is obviously a role of the FWO. If there is to be an enforcement component, then issuing a notice to correct non-compliant arrangements, and potentially issuing penalty notices where there are egregious (repeated, etc) breaches — e.g. engaging with employers who are seeking to enforce banned arrangements. As noted above, if there is to be scope for prosecutions then the FWO and only the FWO should have the power to institute those proceedings. The Ombudsman should not, however, be entitled to act for a party (i.e. employees) in legal action which seeks to enforce a non-compete-type clause (although they may play an amicus curia type role).

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?*

See above, generally. A (former) employee should be able to rely on the clause if the (former) employer has sought to enforce a banned clause. There may also be scope for a (former) employee to claim compensation, when they can demonstrate that they have suffered a loss because of a mistaken belief they were subject to a non-compete clause — due to their former employer's intentional (and knowingly verboten) conduct. That, however, should be the limit. Aside from notifying the FWO of potentially non-compliant arrangements, there should be no capacity in which any other person who was 'impacted' — such as a subsequent employer, clients, unions — to rely on the ban.

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

There is potentially a role for the Commission in moderating disagreements or mediating disputes about the scope and enforceability of the clauses. However, litigation (enforcing non-compete type clauses and/or relying on the ban to defeat them) is a curial process and solely within the purview of the judiciary.

13. *What additional powers, if any, would the Fair Work Commission require to deal with disputes it may be permitted to hear about non-compete clauses?*

None. The Commission does not deal with enforcement (either of a statutory restriction or of contract terms). Unless the new regime has a place for modern awards or enterprise agreements — i.e. unless the Commission can make award terms which deal with non-competes — then it has no role to play.

That said, one way to approach this issue may be to build a capacity to manage and control the use of non-compete clauses into the modern award and enterprise bargaining system. That is, it may be appropriate to allow the Commission to consider the permissibility and use of non-compete clauses within the context of a particular business or employee cohort; i.e. consider how they may operate and/or may be limited on an industry-by-industry basis. This would have the dual benefit of building the arrangements into the enterprise bargaining system, where employers and employees could negotiate on their use and extent — offsetting them against other benefits to the employers and employees — with the BOOT giving the Commission ultimate oversight, allowing it to decide

whether or not the arrangement is suitable and consistent with the broader industry (i.e. modern award) arrangements.

3.4 Limited statutory exemptions

14. *Are there any exemptions to the non-compete ban that are justified on strong public policy or national interest grounds? How should any such exemptions be applied (e.g. permanent, temporary, by application etc)?*

As noted above, small business should be exempted from the ban, and the ban should be limited to an employment (i.e. not sale of business) context

Also, any ban needs to make it clear that a business can and should be able to enforce/rely on confidentiality, privacy, intellectual property laws to safeguard proprietary information and innovations developed by employees during their tenure. Other more narrowly tailored clauses should be allowed e.g. which focus on specific risks, such as protecting trade secrets or other legitimate business interests, while minimizing harm to worker mobility and competition.

A restriction on the use of non-competes could also be limited to occasions where the employee does not ‘voluntarily’ resign i.e. the ban would only prevent a business from relying on the clause if it dismisses the worker. Amongst other things, that would limit the likelihood of a loss of income due to the non-compete clause i.e. because the (former) employee has elected to resign and therefore elected to lose the source of income. Such a compromise would strike a balance between protecting (former) employee interests and responding to the legitimate business needs of employers.

3.5 Transitional arrangements

15. *What transitional arrangements are required to support workers, and business compliance with the ban?*

As discussed above, this is dependent on the nature of the ban, but in general it should only be prospective; i.e. introduce a ban on the clauses in employment contracts going forward, rather than banning existing clauses. This would focus the ban on future conduct, which is the most appropriate application considering the intent of the changes as set out in the consultation paper. A flat ban from “Day One” would create anxiety and confusion amongst employers, especially small business, given the (steadily) increasing compliance complexity, and would raise the risk of inadvertent non-compliance. It would also prevent businesses from adjusting their employment and business models to accommodate the new arrangement and limit the commercial loss.

16. *How should the ban apply to non-compete clauses contained in existing contracts after commencement?*

No effect on existing arrangements. See above.

4.1 Non-compete clauses for high-income employees

1. *What approach for employees earning above the high-income threshold best strikes the balance between the public interest in competition, productivity, job mobility and the protection of legitimate business interests?*

High-income earners should still be amenable to confidentiality agreements, non-solicitation clauses, repayment/return-of-service agreements.

2. *If mandatory compensation were adopted what should be the minimum compensation required?*

Compensation should be assessed like damages i.e. determined on the actual loss (if any) suffered by the employee but mitigated by the conduct/culpability of all parties and the circumstances generally.

3. *If a duration limit were imposed, what would be the most appropriate maximum duration?*

This would depend on the nature of the ban, but it could be referable to length of service of the employee e.g. a shorter duration for very brief employment, longer time frames for reasonable length of employment. There also arises a potential for the minimum duration to shorten again for employees with longer periods of employment i.e. recognising the employer has had a return on their investment in the employee.

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).*

These clauses prevent former employees from compromising the business' 'goodwill' which is a legitimate asset; perhaps the only aspect of the business which will appreciate in a small business context. If this is compromised, then it impacts not just the short-term viability of the business and its feasibility, but the long-term investment value of the business and so, ultimately, would discourage establishing and running a business in the first place. Contrary to the desired outcome of this enquiry, over the long term it would have a negative impact on productivity.

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?*

N.A

4.3 Other requirements for valid restraint clauses

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

The Guild's view is completely dependent on the nature of the ban. We have given above what we think are the shortcomings of any ban. It follows that 'cascading' arrangements which mitigate the impact of the ban and allow employer to avoid some or all of those problems should be allowed.

7. *Should severability of other parts of restraint clauses be limited in other ways?*

See response to 6 above.

8. *Should businesses be required to specify the legitimate interests to be protected by a restraint clause?*

The Guild is of the opinion that the above suggestion seems reasonable as a way to at least require the business to think through the clause and its reasons for imposing it, as opposed to adopting it a standard term of employment contracts and/or in a 'knee jerk' fashion.

9. *Should client relationships or workforce stability ever be justified for a non-compete clause of the same duration when a more targeted non-solicitation clause could apply?*

Perhaps not “when a more targeted non-solicitation clause could apply”. However, it is easy to conceive of circumstances where a non-solicitation clause would be inadequate to reasonably protect client relationships or workforce stability. In a healthcare or consulting context, where client relationships are built on personal trust and expertise, a non-compete clause might be necessary to protect the business. While those situations may be less likely to arise in the regular or ordinary course of the business/employment relationship, rather than a blanket prohibition on ‘client relationships’ and ‘workforce stability’ as a rationale for non-compete clauses, the employer could be obliged to explain on a case-by-case basis why a targeted non-solicitation is inadequate in the context. This, perhaps, is best achieved by a rebuttable presumption that the non-compete in those circumstances is unenforceable.

10. *Should other aspects of the existing common law doctrine be clarified or amended?*

No comment.

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?*

The Discussion Paper does not articulate a problem with ‘restraints on concurrent employment’ in any detail or explain what the new laws would seek to accomplish. However, the concern *appears* to be that they may go further than just preventing forms of ‘secondary’ employment which conflict or compromise the relationship with the employer or value which the worker brings to the business.

Assuming that is the concern, then legislation need go no further than codifying existing common law requirements i.e. to avoid creating additional burden or having unintended consequences. That said, any new laws must carefully avoid compromising the employees existing duties of fidelity, good faith and confidentiality.

2. *If there were to be restrictions on these restraints, how should they be implemented?*

Again, the ban should simply prevent the employer from relying on any (purported) restraints — as is the current position under the common law — rather than imposing positive obligations or penalties for contravention.

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?*

N.A.

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?*

N.A.

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?*

N.A.