

Consultation – Reform to non-compete clauses and other restraints on workers

Competition Taskforce – The Treasury

Submission

10 September 2025



Introduction

1. The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide feedback in response to the Consultation Paper on Reform to non-compete clause and other restraints on workers (**Consultation Paper**).
2. Ai Group is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. We are also recognised as a Peak Council in the workplace relations system and operate an incorporated legal practice, Ai Group workplace lawyers. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands, to family-run SMEs as a range of affiliated associations representing discrete sectors. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.
3. An important part of our role is to develop constructive relationships with governments and regulators across the country to provide a voice for employers when legislative and policy issues are being considered.
4. We have ongoing representative engagement with employers of all sizes, through the provision of membership, consulting and training services, with a strong focus on workplace laws. Our workplace lawyers also provide advice to members relating to restraints of trade and, where it is necessary for a member, have the care and conduct of proceedings to enforce restraints of trade. This enables us to understand the key issues being considered in the Consultation Paper and why non-compete and other restraint clauses are so important for our members.
5. It continues to be Ai Group's position that there is no basis for making any change to the law surrounding non-compete and other restraint clauses. These clauses are essential to support business productivity, business innovation, investments by business in employees, business continuity and growth, and the capacity of business to compete on a level playing field both domestically and overseas. Also, businesses must retain the freedom to contract as they choose. Further, legitimate business interests such as trade secrets, confidential information, customer connections and supplier connections can only be adequately protected through the use of non-compete and other restraints. There are no other appropriately balanced options and no relevant or appropriate evidence justifying a policy change.
6. We reiterate our 31 May 2024 submission.
7. Should the Government proceed with the implementation of significant prohibitions on non-compete clauses, it is imperative that this is not a simplistic and heavy-handed blanket ban. A simplistic ban would undoubtedly have a raft of no doubt unintended, but nonetheless entirely foreseeable negative consequences.
8. The inability to protect legitimate business interests, particularly those associated with the protection of confidential and commercially sensitive information, through the kinds of targeted non-compete provisions that courts have repeatedly held to be justifiable, would undoubtedly have a devastating

impact on many businesses. Moreover, members have been clear that it will have a chilling effect on their willingness to innovate or invest, and on their preparedness to devote resources to the training and upskilling of workers. Ultimately, a legislative intervention in a form that represents a radical departure from current common law doctrines has the potential to not only undermine efforts to address our entrenched productivity problems but to take our economy backwards. It would, to put it bluntly, be akin to using a sledgehammer to crack a nut. It would be a reckless and unfair change.

9. A more nuanced approach is warranted and is in the interests of not only industry, but workers, the broader economy and ultimately the community. Consistent with the policy commitment of the Government, there should be exceptions and transitional arrangements. These should reflect the need to adopt a measured and cautious approach to reform.
10. In broad terms, Ai Group contends that identified mischiefs such as unwarranted restrictions on labour movement, the potential misuse of what may be unenforceable restraint of trade provisions, the complexity of the application of the common law in relation to restraints of trade and the significant litigation costs associated with enforcement, could all be addressed through a carefully structured regulatory regime that prohibits inappropriate provisions but also clearly exempts the use of fair and reasonable restrictions.
11. Any such approach should reflect the following broad principles:
 - a) A prohibition of non-compete restraint provisions that is aligned with and codifies, in simple terms, the operation of common law doctrines. This could take the form of a general prohibition against non-compete restraint provisions that do not comply with a “Fair Non-Compete Code”.
 - b) The Fair Non-Compete Code could include additional protections reflecting considerations that commonly arise at common law, if warranted. This could include, for example, default restrictions on the length of any non-compete provisions.
 - c) There should be exceptions that recognise the legitimate need to protect genuine employer interests. This should include an exception for non-compete provisions that are consistent with the Fair Non-Compete Code.
 - d) An efficient, cost-effective, and accessible mechanism that allows parties to clarify whether mutually agreed non-compete provisions fall within specified exceptions.
 - e) A Fair Non-Compete Code Fact Sheet should be prepared and, employers implementing new non-compete provisions, should be required to provide the fact sheet to a relevant employee or potential employee before the agreement is entered into.
 - f) Any prohibition should be limited to post employment restraints for employees below the high-income earner threshold.
 - g) Any prohibition should, consistent with the Government’s policy, apply to arrangements implemented after the commencement of any regulation changes. The prohibitions should not be triggered by any subsequent variation to such contracts and should only commence after a reasonable period of time following the development of any legislative scheme in order to afford industry an adequate opportunity to prepare.

- h) There should be a review of the new scheme, to be implemented not less than two years following its commencement, before any broader changes or implementation of a broader penalty regime is considered.
 - i) Government should implement a wide-ranging education campaign to reinforce the operation of the new scheme. This should leverage the educational functions of the Fair Work Ombudsman, Fair Work Commission and networks of registered employee and employer associations.
12. The Fair Non-Compete Code should be developed in consultation with representatives of industry and workers. At the very least, this should occur through properly conducted National Workplace Relations Consultative Committee (**NWRCC**) and Committee on Industrial Legislation processes (**COIL**).
13. Ai Group's more detailed responses, based on particular themes and issues canvassed through questions in the Consultation Paper, are set out below.

Part A – General comments

What is a restraint of trade clause?

14. A post-termination restraint of trade clause is a clause in an employment contract (or other related document) which prohibits an employee from undertaking certain work-related activities after their employment ends for a limited period and often in a circumscribed geographical area.

What is the purpose of a restraint of trade clause?

15. The purpose of a restraint of trade clause is to protect an employer's legitimate business interests but only to the extent that is reasonable and just to all parties concerned.

What types of restraint clauses are generally used?

16. A restraint of trade clause will generally prohibit a former employee from:
- using the previous employer's confidential information or intellectual property (i.e., commonly referred to as a **non-disclosure clause**);
 - soliciting or dealing with certain clients, customers, suppliers, employees or contractors of their previous employer (i.e., commonly referred to as a **non-solicitation clause**); and
 - working or being involved in the same or similar business which competes with their previous employer (i.e., commonly referred to as a **non-compete clause**).
17. In all Australian jurisdictions (except for New South Wales), a restraint of trade clause is presumed unenforceable unless it is reasonable by reference to the interests of the public (i.e., to trade freely) and the interests of the parties (i.e., employer and employee). In New South Wales, the *Restraints of Trade Act 1976* reverses the presumption that restraint of trade clauses are unenforceable.

What is the proposed non-compete ban?

18. The proposed ban being considered in this consultation is a ban on non-compete clauses, for employees earning less than the high income threshold, that is currently \$183,100.

Why is the non-compete ban entirely inappropriate?

19. The blanket adoption of the proposed non-compete ban is **entirely inappropriate**, including for the following reasons:
- There are **no other adequate forms of protections** of an employer's legitimate proprietary interests in confidential information and trade secrets. Further, non-disclosure clauses and sections 183 and 184 of the *Corporations Act 2001* (Cth) are wholly insufficient in this regard.
 - Non-compete clauses may be essential for many employers to protect other legitimate business interests, such as customer connections and supplier connections.
 - The *Fair Work Act 2009* (Cth) (**Fair Work Act**) is **not an appropriate or effective vehicle** through which to legislate in respect of non-compete clauses. It would create a patchwork of regulation that will not equally cover all jurisdictions, employers or employees, as compared to the common law that is of general application. This could significantly distort competition between those covered and those not covered by the proposed ban.
 - The high-income threshold has **minimal or no correlation** with legitimate proprietary interests such as confidential information and trade secrets or indeed the reasonableness of the non-compete clause.
 - It must be acknowledged that **there is significant and long-standing legal precedent** providing a clear and considered framework for decision-making in relation to enforceability of non-compete clauses.
 - If, as stated in the Consultation Paper, the major concern of stakeholders (being both business and workers) is that "*the enforceability of restraints is often unable to be tested due to the prohibitive and disproportionate costs of litigation*¹" and that this creates a "*chilling effect*²" **the Government should direct itself to reducing these costs or providing an alternate and more accessible enforcement regime**. The proposed ban will not resolve this.
20. We set out more detail in relation to the first four of these reasons below and the remaining are addressed throughout our submissions.

¹ Consultation Paper, page 3

² Consultation Paper, page 3.

A non-compete restraint is essential to protect an employer's confidential information

Not against 'mere competition'

21. In the context of a non-compete clause, it is settled law that an employer is not entitled to be protected against "*mere competition*"³.
22. The purpose of a non-compete clause **is to protect an employer's proprietary information**, which includes trade secrets and confidential information, and goodwill including customer connection, as summarised in by White J. in *DP World Sydney Ltd v Guy* [2016] NSWSC 1072:

"Whether a restraint is reasonable having regard to the interests of the parties depends on two, albeit related, considerations: first, whether the covenantee has a legitimate protectable interest, and secondly, whether the restraint is no more than reasonable for the legitimate protection of that interest. A covenantee is not entitled to be protected against mere competition; the legitimate interests which may be the subject of protection by covenant are in the nature of proprietary subject matter [Vandervell Products v McLeod [1957] RPC 185; Tank Lining Corp v Dunlop Industries Ltd (1982) 40 OR (2d) 219; 140 DLR (3d) 659 at 664], including trade secrets and confidential information, and goodwill including customer connection"⁴. [Emphasis added]

What is confidential information?

23. Confidential information is information or facts that are not in the public domain⁵.
24. 'Trade secrets' are a form of confidential information, being information of a business or commercial nature that has been kept relatively secret. In Australia, 'trade secrets' are not generally a 'term of art.' However, in an employment context a trade secret may be described as the category of confidential information that an employee is not entitled to use or divulge even after the contract has terminated⁶. In this submission, references to confidential information include trade secrets.
25. Confidential information includes knowhow to some extent. However, "*knowhow*" in this context is not simply the development of an employee's skills, or general knowledge of an industry that is part of the personal aptitude of the employee "*which it is against public policy to attempt to sterilise*."⁷ Confidential information is also not merely general knowledge of an employee's business. Confidential information does however include knowhow that is proprietary information, the improper use of which has a significant and adverse effect on the previous employer.
26. The courts have found the following matters relevant in determining what information is '*confidential information*'⁸:
 - The extent to which the information is known outside the business.

³ *DP World Sydney Ltd v Guy* [2016] NSWSC 1072 at [29].

⁴ Tullett Prebon Australia Pty Ltd v Purcell at [47], quoted in DP at [29]

⁵ Finkelstein, R et al, *LexisNexis Australian Legal Dictionary*, 2nd edition, Lexis Nexis Butterworths Australia 2016 at page 325, referring to *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415.

⁶ Caenegem, W, *Intellectual and Industrial Property Law*, 2nd edition, Butterworths 2015 at [11.11]

⁷ *DP World Sydney Ltd v Guy* [2016] NSWSC 1072 at [48]

⁸ *Mense & Ampere Electrical Manufacturing Co Pty Ltd v Milenkovic* [1973] VR 784 at 796-8.

- The extent to which the trade secret was known by employees and others involved in the plaintiff's business.
- The extent of measures taken by the plaintiff to guard the secrecy of the information.
- The value of the information to the plaintiff and to their competitors.
- The amount of effort or money expended by the plaintiff in developing the information.

27. The following matters have also been found relevant⁹:

- The fact that skill and effort were expended to acquire the information.
- The fact that the information is jealously guarded by the employer, is not made readily to employees and could not, without considerable effort and/or risk be acquired by others.
- The fact that it was plainly made known to the employee that the material was regarded by the employer as confidential.
- The fact that the usages and practices of the industry support the assertion of confidentiality.
- The fact that the employee in question has been permitted to share the information only by reason of his or her seniority or high responsibility with the employer's organisation.

28. The question as to whether the information is confidential and whether the employee had access to it on that basis will be a question of fact. It will depend on several factors, including the type of information and also the particular industry or individual business.

The disclosure of confidential information may cause irreparable harm

29. What is undeniable is that a disclosure of confidential information may cause irreparable harm to an employer. In *DP World Sydney Ltd v Guy* [2016] NSWSC 1072, White J. summarised this adverse impact as follows:

"59. On the balance of convenience, or to put it another way, the balance of the risk of doing an injustice, the case heavily favours DPW [i.e., the previous employer]. It could suffer irreparable harm if its confidential information were disclosed to Patrick [i.e., the new employer and competitor], either wittingly or unwittingly. For example, if information about its costs, budgets, contract expiry dates, contract negotiations, revenues or budgets were disclosed." [Emphasis added].

30. We understand from our members that this set of circumstances is very common.

31. It is therefore very important that Treasury takes a balanced approach that acknowledges the potentially devastating and certainly disproportionate impact that an inability to protect confidential information would have on employers relative to the limited impact a restraint have on the exiting employee. Industry is understandably anxious about the potential for an undue and blunt regulatory response to be implemented that fails to acknowledge that these restraints provide a fair, reasonable and just outcome for all, including for both employers and employees.

⁹ *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317 at 334.

Non-compete clauses are the only appropriate vehicle to protect confidential information

32. The courts have recognised that non-disclosure clauses are not adequate to protect confidential information and have, accordingly, upheld non-compete clauses as an entirely appropriate vehicle through which to protect an employer's proprietary interest in confidential information.
33. This is primarily because it is:
 - difficult to prove a breach of a non-disclosure clause (or an equitable breach of confidence); and
 - the remedies are inadequate.
34. The difficulty of proof was recognised by White J. in *DP World Sydney Ltd v Guy* [2016] NSWSC 1072, in which his Honour stated that:

*"a restraint for a limited period against a former employee working for a competitor may be justified on the grounds that such a restraint is necessary to protect trade secrets, or confidential information. **This is because of the difficulty of proving a breach of an obligation not to disclose or use such confidential information.**" [emphasis added]¹⁰*

35. For example, if an employer alleges an employee has breached a non-disclosure clause, an employee may simply say that they have not retained any confidential material or that they do not recall the details. It may be difficult or indeed impossible for an employer to prove otherwise.¹¹
36. Further, the courts have recognised that an employee will be unlikely to adequately restrain themselves *in practice* from using their previous employer's confidential information, even if they do not intend to do so. This was acknowledged in the following paragraphs in a judgment of White J, *DP World Sydney Ltd v Guy* [2016] NSWSC 1072:

*"49. The clause is not invalid, and it would not be proper to refuse injunctive relief, because Mr Guy does not now have the documents which contain the specific information and of which he says he does not recall the details. The words of Megaw LJ in *The Littlewoods Organisation Ltd v Harris* are apposite. His Lordship said (at 1038-1039):*

*"It is, I think clear from the judgment of Cross J in the case to which Lord Denning MR has already referred, *Printers and Finishers Ltd v Holloway* ([1964] 3 All ER 731 at 736, [1965] 1 WLR 1 at 6), that **it is appropriate that a covenant, restricting an employee from full freedom of taking other employment when he leaves his existing employment, should be included in the contract of employment where there is a real danger that the employee will in the course of that employment have access to and gain information about matters which could fairly be regarded as trade secrets; and that applies even though the information may be carried in his head and even though (perhaps, particularly though) it may be extremely difficult for the employee himself, being an honest and scrupulous man, to realise that what he is passing on to his new employers is matter which ought to be treated as confidential to his old employers.** I observe that Cross J ([1964] 3 All ER 731 at 736, [1965] 1 WLR 1 at 6) in his observations on this matter said:*

¹⁰ *DP World Sydney Ltd v Guy* [2016] NSWSC 1072 at [30].

¹¹ *DP World Sydney Ltd v Guy* [2016] NSWSC 1072 at [49]

'... I do not think that any man of average intelligence and honesty would think that there was anything improper in his putting his memory of particular features of his late employer's plant at the disposal of his new employer. The law will defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary man.'

*As I understand it, Cross J, with all the authority which is to be attributed to a judgment of his, indicated that, **even though in such a case it would not be right to attempt to enforce a covenant against the disclosure of confidential information, it is nevertheless appropriate that there should be protection in the form of a covenant limiting the employee's scope of employment for a period.***"

.....

*"63. As identified in the reasons in *The Littlewoods Organisation Ltd v Harris*, as has been frequently applied in this State, **the justification for the restraint by an employee against taking up employment with a competitor is not to protect the employer from competition. Its justification is that such a restraint is necessary, or may be necessary, depending on the circumstances and the length of the restraint, in order to protect the employer from either a witting or an unwitting disclosure of such confidential information, having regard to the difficulties that an employer faces in attempting to identify or prove any such breach.***

[Emphasis added]

37. For the same reasons and as set out above, giving an undertaking to not use confidential information is also wholly inadequate¹².
38. For example, in *DP World Sydney Ltd v Guy* [2016] NSWSC 1072, the employee had provided undertakings that did not restrict him working for a competitor, which included:
 - Undertaking not to solicit or accept an approach from any one of 16 customers and two suppliers, who were identified by name.
 - Undertaking not interfere with the relationship between any company in the employer's group and any of its customers, suppliers, group employees or contractors.
 - Not to participate in any quarterly review meetings with his new employer.
39. However, White J tellingly finds as follows:

*"62. The giving of those undertakings, at least so far as they were intended to preserve the confidentiality of DPW's confidential information and trade secrets, **does not meet the need for restraint on employment by a competitor.***

*63. As identified in the reasons in *The Littlewoods Organisation Ltd v Harris*, as has been frequently applied in this State, **the justification for the restraint by an employee against taking up employment with a competitor is not to protect the employer from competition. Its justification is that such a restraint is necessary, or may be necessary, depending on the circumstances and the***

¹² *DP World Sydney Ltd v Guy* [2016] NSWSC 1072 at [62] – [63].

length of the restraint, in order to protect the employer from either a witting or an unwitting disclosure of such confidential information, having regard to the difficulties that an employer faces in attempting to identify or prove any such breach.

[Emphasis added]

40. Similarly, J. D Heydon in the seminal text, *The Restraint of Trade Doctrine* also acknowledges the uncertainty of protection a non-disclosure gives and that this “*is one important reason why employers seek [non-compete] covenants and courts uphold them*”¹³.
41. The lack of suitable remedy is also relevant. According to J. D. Heydon:
 - The money remedies do not give satisfactory protection because of the following reasons:
 - There is some doubt about quantum for the purposes of awarding an amount by way of equitable damages and it only operates with respect of past wrongs, offering no certain guarantee that there will be no repetition of them.¹⁴
 - There are significant factual difficulties in calculating an account of profits as it is difficult to prove the profits are *wholly* due to the information or the actual market value of the information. The amount recovered will depend on the “*the defendant’s state of mind ... , what the current market price was, what the plaintiff lost, what the reasonable value of the information was, and what profit the defendant actually made.*”¹⁵
 - The other main remedy is an injunction against future breaches, that may be coupled with an order for a defendant who has taken documents or plans, or had copies of them made, to deliver them up together with any devices manufactured as a result of the breach. There are significant problems with this as a remedy in the context of ‘confidential information’, where it may lay against an innocent defendant and it is unclear how long an injunction should last after public disclosure of the information¹⁶.
42. For all these reasons, section 183 of the *Corporations Act 2001* (Cth) is also wholly inadequate to protect an employee’s legitimate proprietary interest in its confidential information and trade secrets. We note in this respect the comments made by Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal in relation to this provision in *Creighton & Stewart’s Labour Law*¹⁷:

“Although broadly worded, this provision and its predecessors have generally been interpreted to reflect rather than extend the established common law principles as to misuse of information. In practice, then, they add little to a case brought against an employee or ex-employee, except perhaps in the breadth of monetary remedies available.”

¹³ Heydon, J. D, “The Restraint of Trade Doctrine”, 4 ed, 2018, page 116.

¹⁴ Heydon, J. D, “The Restraint of Trade Doctrine”, 4 ed, 2018, page 116 and 119.

¹⁵ Heydon, J. D, “The Restraint of Trade Doctrine”, 4 ed, 2018, page 117.

¹⁶ Heydon, J. D, “The Restraint of Trade Doctrine”, 4 ed, 2018, page 117-119.

¹⁷ Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton & Stewart’s Labour Law*, 7ed, 2025. See also the cases referred to in support in footnotes 212 and 213.

A non-compete may be necessary to protect customer and supplier connections

43. As noted above, non-compete restraints may also be necessary in circumstances involving customer or supplier connections, even where there is no 'confidential information' to be protected.

Customer Connections

44. Customer connections may be a legitimate interest for a business to protect where the nature of the employer's business is heavily reliant on customer connections, and the former employee had control of those connections¹⁸.
45. Customers, for the purposes of this interest, include both people and businesses that acquire goods or services from the employer, or suppliers of goods and services to the employer¹⁹.
46. The justification for imposing a post-employment restraint on a former employee to protect an employer's customer connections was stated by Latham CJ in *Lindner v Murdock's Garage* (1950) 83 CLR 628; [1950] HCA 48 as follows at [10]:

*"Where an employee is in a position which brings him into close and personal contact with the customers of a business in such a way that he may establish **personal relations with them of such a character that if he leaves his employment he may be able to take away from his former employer some of his customers and thereby substantially affect the proprietary interest of that employer in the goodwill of his business**, a covenant preventing him from accepting employment in a position in which he would be able to use to his own advantage and to the disadvantage of his former employer the knowledge of and intimacy with the customers which he obtained in the course of his employment should, in the absence of some other element which makes it invalid, be held to be valid. Reference has already been made to the right of an employer to protect his "trade connection" - a right recognised in cases in which covenants were held to be invalid because they went beyond what was reasonably necessary to protect such a connection."*

47. In *Pearson v HRX Holdings Pty Ltd*²⁰, the court similarly stated:²¹ "[i]t is well established that an employer's customer connection is a legitimate business interest which can support a reasonable restraint of trade where the employee in question controls the employer's connections" and "that interest would not be adequately protected by the non-solicitation provisions if Mr Pearson were subsequently to take up employment with a firm to which HRX's customers might be disposed to bring new business without even discussing the move with him."
48. Examples of circumstances that might lead to a customer connection interest that may be protectable (even in the absence of confidential information) may be where the former employee²²:

¹⁸ *Pearson v HRX Holdings Pty Ltd* [2012] FCAFC 111

¹⁹ *A Buckle & Son Pty Ltd v McAllister* (1986) 4 NSWLR 426 at page 432; also see *Dargan Financial Pty Ltd v Isaac* in relation to a mortgage broker who had relationships with both borrowers and credit providers.

²⁰ (2012) 205 FCR 187

²¹ [46] and [58]

²² For example, *Lindner v Murdock's Garage* [1950] HCA 48; *Pearson v HRX Holdings Pty Ltd*; *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717; *Miles v Genesys Wealth Advisers Ltd* (2009) 201 IR 1; [2009] NSWCA 25; *Jardin v Metcash Ltd* (2011) 214 IR 448; [2011] NSWCA 409

- Was the human face of the employer.
 - Represented the employer in its dealings with customers.
 - Was publicly promoted and associated with the employer.
 - Developed close and productive relationships with clients of the employer.
 - Had sufficient knowledge, influence and control over clients of the employer.
49. When establishing a customer connection, the employee's role and position description will be an important consideration.

Supplier connections

50. Suppliers, and the cost of purchases from them, are important to a business's profitability and competitiveness²³.
51. Therefore, supplier agreements or connections may also be a legitimate interest for a business to protect subject to the nature of the employer's business and the responsibilities of an employee's role²⁴.
52. That will be the case even if there is no confidential information to protect.

The Fair Work Act can only impose a patchwork prohibition

53. It is trite to say that under the Australian Constitution, the Commonwealth Parliament does not have an unfettered power to legislate with respect to every issue. Instead, the Parliament can only enact laws on certain subjects, most of which are set out in sections 51 and 52 of the Constitution.
54. The Consultation Paper states that:
- "The ban on non-compete clauses for employees earning below the high-income threshold will be implemented through amendments to the Fair Work Act, given its application to workplaces, and the relationship between employers and employees²⁵".*
55. However, it is not clear to us that the Government is capable through the Fair Work Act of implementing a proposed ban on non-competes that will apply **to every worker and employer in Australia**, unless each State and Territory agree to them doing so.
56. We note the Consultation Paper acknowledges that implementation through the Fair Work Act will create patchwork coverage as follows:

The coverage of the Fair Work Act is complex, and it does not include all employees in Australia. This is because the constitutional authority of the Fair Work Act is derived from multiple heads of power, including the corporations power as defined in section 51(xx) of the Australian Constitution

²³ *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717 at [52]

²⁴ For example, *Grace Worldwide (Australia) Pty Ltd v Alves* [2017] NSWSC 1296 where an operation managers of a local and international removal and relocation services business had valuable information about key supplierse.

²⁵ Consultation paper, page 10

(the Constitution), and referrals of power from the states under section 51(xxxvii) of the Constitution.

*As a result, the Fair Work Act and its associated laws (collectively known as the 'national workplace relations system', or the 'Fair Work system'), cover **most Australian** workplaces and most employees (including full-time, part-time and casual employees). In May 2025, there were an estimated 10,720,800 employees covered by the Fair Work system (**85.9 per cent of all employees**). Figure 2 provides an overview of employees covered by the Fair Work system.*

[emphasis added]

57. The Consultation Paper then refers us to the summary set out on the Fair Work Commission site that can be accessed here: [Who Australia's national workplace relations system covers | Fair Work Commission](#). This high-level summary confirms that the Fair Work Act cannot address the identified issue, and we again emphasise that the common law on restraints of trade applies to all workers and organisations in Australia, irrespective of the State or Territory that they live in.
58. It would in our view be entirely unacceptable to insert the proposed ban into the Fair Work Act if it does not apply to every employer and employee equally in Australia. This would create uncertainty, complexity and unfairness where some businesses will have adequate protection of their legitimate proprietary interests in confidential information and trade secrets (or customer/supplier connections) through lawful restraints of trade and some will not. Businesses who cannot use non-competes will be at a significant competitive disadvantage, both within Australia and internationally.
59. We note also that in many jurisdictions State and Territory government entities and their employees are not covered by the Fair Work Act. That is also the case to some extent for Federal Government employees. We ask the Treasury to consider the extent of non-competes that might be used in the public sector – we assume they will be similarly affected by this prohibition. To do otherwise would be create significant distortions in labour market mobility between the public and private sector.

Part B - Alternative approach

60. It continues to be Ai Group's position that there is no basis for making any change to the law surrounding non-compete and other restraint clauses.
61. However, if the Treasury was to recommend changes, we ask it to consider the following 'principled' approach. This would go part way towards addressing the "chilling effect" of litigation costs on employers who are lawfully entitled to protect their legitimate proprietary interests, including in their confidential information, trade secrets, and customer/supplier connections.
62. If Government proceeded with a ban, whether in accordance with our suggested approach or not, it would be appropriate for further consultation with industry, an exposure draft to be issued and further intermediate consultation to take place, so we can provide comments on specific proposed changes.
63. The following table summarises Ai Group's proposed alternative 'principled' approach:

Proposed 'principled' approach

Non- compete clause is prohibited unless it is exempt

Prohibition

A term or condition in an employment contract or fair work instrument relating to the employer that expressly prohibits the employee from being employed or engaged by another person or operating a business after termination of the employment is prohibited unless it is exempt.

Exemption

The prohibition will not apply to a term or condition if:

- the employee's maximum annual rate of earnings at the time when they agree to the term or condition is more than the high income threshold; or
- the term or condition complies with the 'Fair Non-Compete Code' and
- the Employer has provided the employee with a copy of the Fair Non-Compete Code

Fair Non- Compete Code

A Fair Non-Compete Code will require the following to be satisfied:

1. The term and condition places no greater restriction on an employee or former employee than is necessary to protect a legitimate business interest of the particular employer. This may include the protection of confidential information such as trade secret secrets, pricing information and customer or supplier connections.

2. The term or condition being not unfair to the employee having regard to:

- whether remuneration or other financial compensation is paid to the employee in consideration for the employee agreeing to the term and condition;
- whether the term or condition unreasonably interferes with the employee's prospects to obtain comparable work within a reasonable period of time;
- the relative bargaining power of the employee;
- the extent to which the employee had the opportunity to seek advice from a legal representative or an industrial organisation prior to agreeing to the term or condition;
- the extent to which the term or condition creates a foreseeable adverse and material impact on the employer's profitability, innovation, productivity or viability;
- any other relevant matter.

3. The duration of the term or condition being no more than 6 months, unless a longer duration is necessary to protect the employer's legitimate business interest and the reason for this has been communicated to the employee.

	4. The term or condition is either consistent with, or not unduly contrary to, the public interest.
Jurisdiction	<p>In relation to a contract of employment:</p> <ul style="list-style-type: none"> • Jurisdiction should be conferred on the Federal Court or the Federal Circuit and Family Court of Australia/Magistrates' Court (and be able to be dealt with as small claims proceedings) to: <ul style="list-style-type: none"> ○ make an order declaring that the term or condition is or is not compliant with the Fair Non-Compete Code'; and ○ either: <ul style="list-style-type: none"> ▪ set aside all or part of that term or condition; or ▪ amend or vary the term or condition as necessary to address the non-compliance. • The following persons may apply for a declaration: an employee, a prospective employee, an employer or prospective employer who would be a party to the instrument containing a term, a registered employee or employer organisation or a Peak Council as contemplated under the Fair Work Act 2009. • A lawyer who is an employee or a delegate of registered industrial association or Peak Council should be permitted to appear in any proceedings without the need to seek permission (comparable to the provision of <u>section 596(3)-(4) of the Fair Work Act</u>). <p>In relation to a fair work instrument:</p> <ul style="list-style-type: none"> • Any prohibited non-compete term or condition contained in a Fair Work Instrument made after commencement of the scheme is of no effect if inconsistent with the Fair Non-Compete Code. • In respect of an enterprise agreement or workplace determination, the Fair Work Commission must at the time it makes the instrument identify whether it contains any non-compete term or condition and whether that term or condition is compliant with the Fair Non-Compete Code. • If the Fair Work Commission decides that a proposed term or condition is not compliant with the Fair Non-Compete Code, it may, after seeking the views of the employer, any bargaining representative and employees, amend the term or condition to the extent necessary to bring it into conformity with the Fair Non-Compete code.
Penalty	<p>No penalty should apply</p> <p>Alternatively, penalties should only apply if either:</p>

	<p>a) A prohibited non-compete provision is implemented in circumstances where a copy of the Fair Non-Compete Information Statement has not been provided to the employee.</p> <p>b) An employer seeks to utilise a term that has been found by a court to be inconsistent with the Fair Non-Compete Code</p>
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Part C - Specific questions and responses

3. The ban on non-compete clauses for low and middle income workers

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?

2. Should any specific kinds of contractual terms be explicitly included or excluded?

64. The US Federal Trade Commission (**FTC**) defines a non-compete clause 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."

65. We do not agree that the Fair Work Act should regulate non-compete clauses.
66. If a definition is to be included in the Fair Work Act, the FTC definition is not appropriate for that purpose as it operates too broadly, including because it is likely to extend to a broader set of restraints in addition to non-competes if not “well-drafted²⁶” For example, non-solicitation clauses.
67. We note in this respect the example given in Box 4 of the Consultation Paper that is replicated below. As a consequence of the “functional” application of this definition, an employer who would at common law be most likely to be recognised as having the greatest legitimate proprietary interest given the value of the client and supplier contracts and who would likely be irreparably damaged by a breach, is the employer that is not only prohibited from using a non-compete clause but which by virtue of the FTC clause, will not even be able to rely on the lesser protection of that provided through a non-solicitation clause. This seems like a perverse outcome and indicates that Treasury has failed to properly consider all stakeholder perspectives, most specifically, that of the business which will have its business irreparably harmed in this case.

Box 4: Functions to prevent future employment

Whether a clause functions to prevent future employment would depend on the circumstances. It is intended to apply narrowly, and thus it would generally be clear whether a clause functioned to prevent employment, rather than merely preventing the use of confidential information or solicitation of clients while working for a competing business.

Example where a clause may function to prevent

An employee works in a customer management and sales role in a highly specialised market, supplying sustainment for an Australian Defence Force weapons project. The employee has a clause that purports to restrict them from roles which involve soliciting or working with officials in the Department of Defence or Defence Force for one year post-employment.

Since the employee’s role within the business is to manage their relationship with Defence officials, this restriction functionally prevents the employee from working within their profession at all. The employee would be unable to start a competing business or work for a competing business that sold equipment to Defence. As a result, the clause may function to prevent their future employment and would be considered a non-compete clause.

Example where a clause does not function to prevent

An employee is introduced by their employer to a specific group of international suppliers that the employer has identified as providing high-quality components after years of research and trial and error. Given the large number of potential suppliers of similar components, it is assumed that the identity of these specific suppliers may be confidential. The employee agrees to not solicit or work with these identified suppliers for 2 years post-employment.

Although high-quality suppliers in the specific industry may be very important, the employee only knows the identity of these suppliers from their employer and is not restricted from starting a new business or working for a competitor, including from conducting their own research to identify other high-quality suppliers. As a result, it is less likely that the employee is functionally prevented from post-employment within that industry.

²⁶ See page 9 of the Consultation Paper: “In general, targeted and well-drafted non-disclosure and non-solicitation clauses would not be captured in this definition, as outlined in the examples below.”

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?

68. No.

69. We note that contractors already have protection against 'unfair contract' terms, either through the new unfair contracts or regulated workers' jurisdiction in the Fair Work Commission (under the Fair Work Act) or under the *Independent Contractor Act 2006*.

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?

70. Yes.

71. The high-income threshold (and contractor high income threshold) in the Fair Work Act is currently **\$183,100 per annum**, which is approximately **\$3,521 per week** or **92.66 per hour**, based on a 38 hour week. The HIT is the wrong threshold for several reasons, including those set out below.

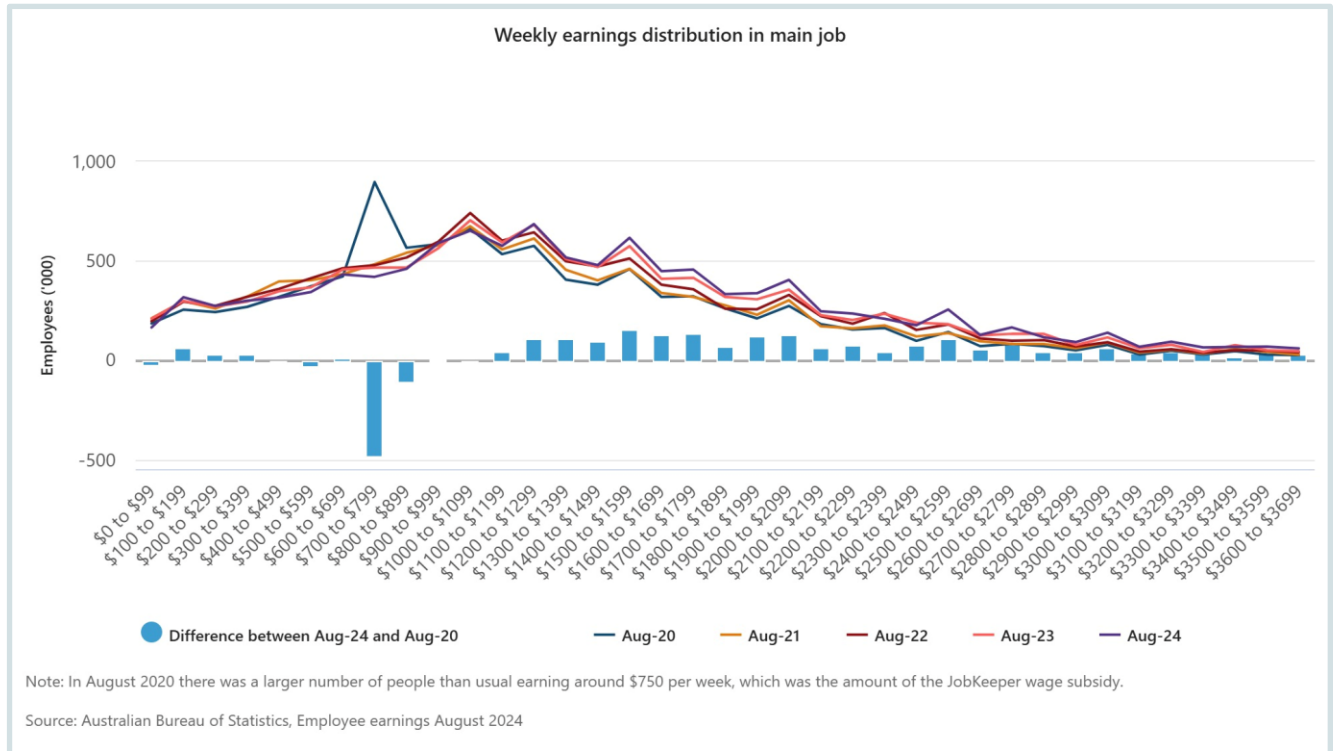
72. If, despite our position, the Treasury recommended the use of the HIT as a threshold, it is important that it is applied in a manner that reflects the following principles:

- It is pro-rated, so that it is applied equivalently to part-time employees and employees who are required to only work part of a year.
- It is based on all earnings and not limited to the base rate of pay, including wages, agreed money value of non-monetary benefits, commissions, incentive-based payments and bonuses, overtime, superannuation.
- It should be determined at the point that the employee's contract of employment terminates.

The HIT is too high

73. Firstly, if the HIT was applied it would mean that the large majority of workers would be permitted to use the confidential and trade secrets of their previous employer without restriction and in a manner that would cause their previous employer irreparable harm.

74. For example, based on the Australian Bureau of Statistics (**ABS**) weekly earnings, no more than **1% of employees** could have non-compete clauses in their contracts (see [graph](#) and [table](#) below). That is because only about 1% of people earn above the HIT.



Weekly earnings distribution in main job - August 2024

	Numbers of employees ('000)	Percentage of total earnings
\$0 to \$199	485.5	4.26
\$200 to \$399	576.2	5.06
\$400 to \$599	661.0	5.80
\$600 to \$799	853.9	7.49
\$800 to \$999	1,051.8	9.23
\$1000 to \$1199	1,229.1	10.79
\$1200 to \$1399	1,204.9	10.57
\$1400 to \$1599	1,097.3	9.63
\$1600 to \$1799	907.8	7.97
\$1800 to \$1999	673.3	5.91
\$2000 to \$2199	654.0	5.74
\$2200 to \$2399	447.4	3.93
\$2400 to \$2599	435.3	3.82
\$2600 to \$2799	296.8	2.60
\$2800 to \$2999	211.4	1.86
\$3000 to \$3199	210.8	1.85
\$3200 to \$3399	162.1	1.42
\$3400 to \$3599 (HIT - \$3521 per week)	140.0	1.23
\$3600 to \$3799 (HIT - \$3521 per week)	96.3	0.85
Total earnings	11,394.9	

Source: Australian Bureau of Statistics, Employee earnings August 2024²⁷

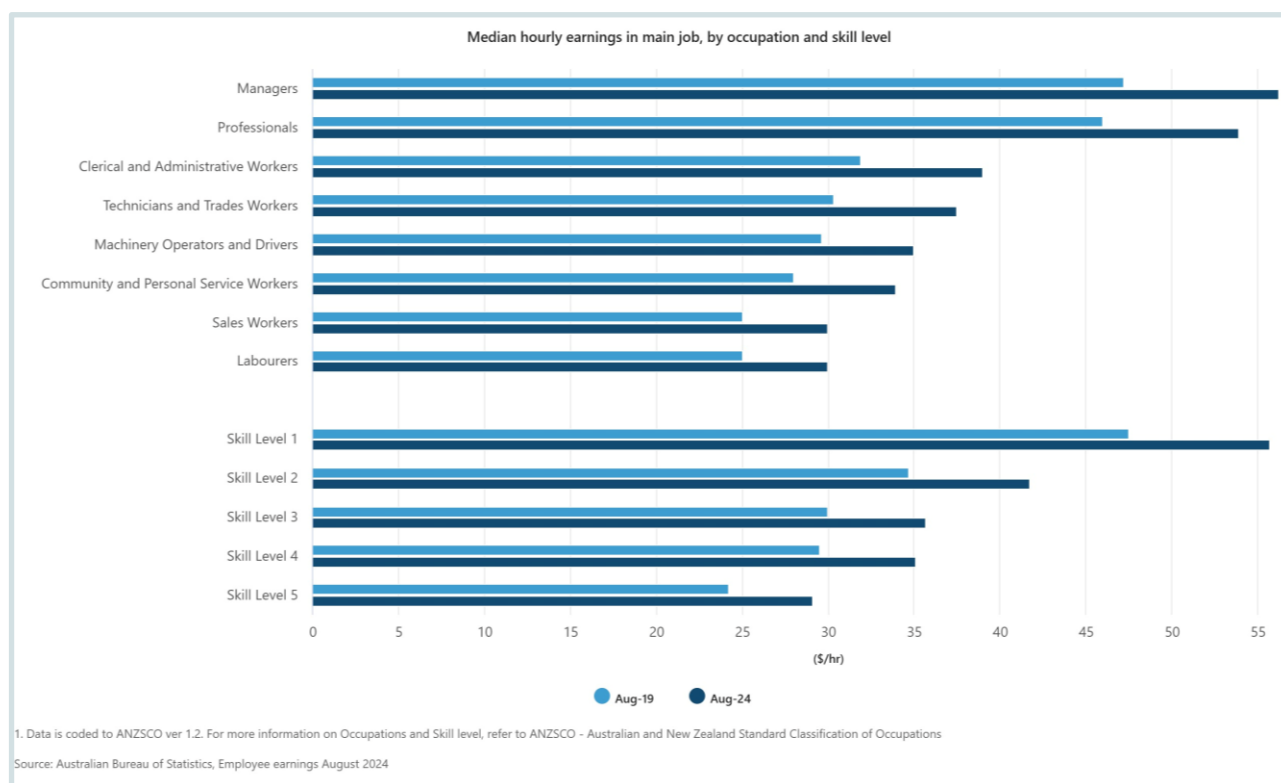
²⁷ Australian Bureau of Statistics (August 2024), [Employee earnings](#), ABS Website, accessed 21 August 2025.

75. The most recent ABS estimates of average weekly earnings for the period May 2025 reinforces that the HIT is an inappropriate threshold. The average weekly total earnings for all full-time adult employees is reported as \$2086.30 per week, which is approximately **\$108,488 per annum**²⁸. This amount is slightly less than **60% of the HIT**.
76. The ABS breakdown of median hourly earnings by job/occupation and skill provides some further context, where employees in occupations that may be more likely to have access to confidential (or customer/supplier connections) show earnings again significantly below the HIT. For example:
- **Managers** (who may, for example, have a broad exposure to valuable trade secrets such as confidential business strategies, costs, budgets, contract expiry dates, contract negotiations, revenues or budgets, be the external face of the business and have key relationships with employees and clients) have median earnings of \$56.20 per hour (approximately 60.7% of the high income threshold hourly rate of \$92.66)
 - **Professionals** (who may, for example, have significant exposure to client relationships and confidential business strategies and may be the external face of the business) have median earnings of \$53.90 per hour (approximate 58.2% of the high income threshold hourly rate of \$92.66)
 - **Skilled technicians and trade workers** (who may, for example, have access to trade secrets, research data, proprietary software, algorithms, designs, proprietary formulas and production processes) have median earnings of \$37.50 per hour (approximately 40.5% of the high income threshold hourly rate of \$92.66)
 - **Sales workers** (who may, for example, have significant knowledge of pricing strategies, customer databases and market sensitive information etc.) have median earnings of \$30.00 per hour (approximately 32.4% of the high income threshold hourly rate of \$92.66).
77. The graph and table below provide some detail on this and the statistics referred to above.

Median hourly earnings in main job, by occupation and skill level			
Column1	Aug-19 (\$)	Aug-24 (\$)	% of HIT rate
Managers	47.20	56.20	61
Professionals	46.00	53.90	58
Clerical and Administrative Workers	31.90	39.00	42
Technicians and Trades Workers	30.30	37.50	40
Machinery Operators and Drivers	29.60	35.00	38
Community and Personal Service Workers	28.00	33.90	37
Sales Workers	25.00	30.00	32
Labourers	25.00	30.00	32
Skill Level 1	47.50	55.70	60

²⁸ Australian Bureau of Statistics (May 2025), Average Weekly Earnings, Australia, ABS Website, accessed 21 August 2025.

Skill Level 2	34.70	41.70	45
Skill Level 3	30.00	35.70	39
Skill Level 4	29.50	35.10	38
Skill Level 5	24.20	29.10	31
Source: Australian Bureau of Statistics, Employee earnings August 2024			



Whether an employer has a legitimate business interest or not, is not correlated with an employee's earnings

78. Secondly, the use of the HIT also fails to recognise that the question of whether information is confidential is one of fact and that is not necessarily correlated to income.
79. The fact is that many employees earning under the HIT will have access to confidential information and trade secrets, and this will be related to their particular role and the industry they work in, not whether they earn over or under the HIT. Members have confirmed this to us. These employees on leaving their employers could through the use of their previous employers' confidential information, cause their previous employers' irreparable harm and unfairly so.
80. For example, J.D. Heydon summarised the following non-exhaustive questions any of which may be relevant (or not) to assessing whether information is protectable as confidential – none of which states that an employee must have a certain income threshold to enable the protection²⁹:
 - How far is the information known outside the business?
 - How far is it known by employees and others involved in the business?

²⁹ Heydon, J. D, "The Restraint of Trade Doctrine", 4 ed, 2018, page 109-110

- How far were measures taken to guard its secrecy?
- What is its value to the plaintiffs and their competitors?
- How much effort and money were expended in developing it?
- Was the employee put plainly on notice that it was regarded by the employer as confidential?
- Do the usages and practices of the industry support claims of its confidentiality?
- Have particular employees been permitted to share in the information only by reason of their seniority or level of responsibility?
- How readily is the information identifiable?
- What is the extent to which the information is readily capable of isolation from the general skills of employees which they are entitled to use after their employment ends.

81. The question of validity is directed to establishing whether there is a legitimate business interest and, if so, is the proposed non-compete reasonable in the circumstances having regard to the interests of justice? It is not focused on how much an employee might earn.

82. Relevantly, members have shared numerous examples of employees earning less than the HIT who have access to significant amounts of confidential information or trade secrets that if disclosed to a competitor could cause the employer significant and irreparable harm. Similarly, those employees may have supplier/customer connections that are extremely valuable.

83. Many members rely on non-competes, including:

- to ensure that the information loses its 'confidentiality' (and its potential to cause damage) and to enable them take steps within their businesses to shore up customer relationships during that non-compete period;
- where they are involved in tenders, which can take many months to finalise and in respect of which participants hold significant confidential information;
- to limit the damage that sales teams (many of which earn under the HIT) can do to a business, being in possession of confidential pricing and market information, product development and product testing – particularly in circumstances where the clients are potentially competitors;
- to protect themselves in niche areas where it is vital to have time to cement customer relationships for the business, once the employee with that key customer relationship leaves;
- to prevent middle management or even less senior personnel who, for example, in the transport industry might have route and timetable information and other commercial financial and competitive information, using that with another directly competing employer (In the road transport sector this would include, for example, commonly include allocators);
- to protect design or recipe formulations for a particular product which, if shared with a competitor, would decimate the business;
- to protect important trade supplier contacts, including the contact person, address, phone numbers, email addresses and any special terms of trade;

- to ensure that they remained competitive, both domestically and globally – including with other jurisdictions that permit restraints of trade;
 - in the manufacturing context, to protect confidential information about production processes that is within the knowledge of workers (including award-covered production employees) that cannot be protected through confidential information or non-solicitation provisions, but which if divulged to a customer or competitor, would have major (and in some cases ruinous) impacts for the business (and ultimately undermine manufacturing capacity in Australia).
84. Our members also confirmed their strong need for non-compete clauses and the inadequacy of garden leave and/or other forms of restraints in providing protection to the business for a reasonable period in respect of confidential information, trade secrets and customer/supplier connections.
85. It was also our members' view that there is inadequate evidence that non-competes have had a widespread "*chilling effect*" on labour mobility, and many by contrast experience significant staff turnover notwithstanding their use.
86. Case law provides numerous examples of confidential information or trade secrets that the courts have recognised as justifying the enforcement of reasonable non-compete clauses, including but not limited to the examples set out below:
- Elements of an operational costs base, including the actual costs and its performance against budgeted cost and statistical measures used to track throughput and efficiency and how the actual performance compared with the budget.
 - Client contracts, including required performance standards, revenue generated and their expiry dates and strategies for obtaining new contracts, the content of proposals made to current and future clients and problems in meeting performance standards under the contracts with clients.
 - Terms of rental arrangements between the employer and its suppliers or landlord.
 - Expansion and development plans.
 - Plans to implement automation in the business and projections and targets for improvements to productivity and performance.
 - Investment plans, including plans to buy and bring online new equipment or plant.
 - Software source code that might reveal the algorithm and uniqueness of confidential software applications.
 - A confidential manufacturing process that gives advantages to the business such as lower cost, a better product, enhanced efficiencies or a more competitive marketing edge.
 - The use of a particular raw material in a product or a process that makes the ultimate product unique or makes it more desirable for clients.
 - A particular business method such as a process or system that makes a business particularly efficient as compared to its competitors.
 - A tool of any kind that provides some advantage to the business over its competitors.
 - Information that may support a patent application in relation to a new product, process or invention.

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?

87. Ai Group does not support the proposed non-compete ban, or specifically, the use of the HIT as a threshold if such a ban is introduced.
88. We observe that the long-standing approach when determining whether a restraint of trade will be enforceable at common law (and under the *Restraint of Trade Act 1976*) is to consider only the factual matrix, documentary context and surrounding circumstances at the date of entry into the restraint, which is generally at the outset of employment.
89. It is accordingly appropriate to ensure that any changes made in relation to restraint clauses is consistent with the common law position, noting that the Fair Work Act will not apply to all employment arrangements due to the limitations imposed by the Australian Constitution, as discussed above.

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

90. Ai Group does not support the proposed non-compete ban, including its extension to all fair work instruments.

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.

91. Ai Group does not support the proposed non-compete ban.
92. If despite our position, the ban is introduced, we do not support the imposition of any penalty regime.

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

- 93. Ai Group does not support the proposed non-compete ban.
- 94. If despite our position, the ban is introduced, we agree that appropriate and broad defences be available.
- 95. An employer should be able to rely on specialist advice, for example, to determine whether a particular clause or agreement falls outside a proposed ban.

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

- 96. Ai Group does not support the proposed non-compete ban.
- 97. If despite our position, the ban is introduced, standing to commence proceedings should be appropriately limited. Given that we have not yet seen the details of any proposed ban it is difficult to give considered views on standing, as it is unclear as to the Government's specific legislative intentions.
- 98. However, at a high level and subject to the issuing of an exposure draft and further intermediate consultation, we do have serious concerns that should unions be given standing there is the potential for a union to then abuse that standing for industrial purposes. Standing should lie with the Fair Work Ombudsman.

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?

- 99. Ai Group does not support the proposed non-compete ban.
- 100. If despite our position, the ban is introduced, we support the Fair Work Ombudsman having a role to provide educational support.

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?

- 101. Ai Group does not support the proposed non-compete ban.
- 102. If Treasury recommends changes, it would be appropriate for an exposure draft to be issued and further intermediate consultation to take place, so we can provide comments on specific proposed changes.

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

103. Ai Group does not support the proposed non-compete ban.

104. If despite our position, the ban is introduced, we do not support the Fair Work Commission having a role in relation to any restrictions on restraints of trade, whether it is to resolve disputes or otherwise. That is subject to our proposal in relation to fair work instruments as set out in Part B of this submission and as set out below in relation to exemptions.

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?

105. As set out above, we do not agree the Fair Work Commission should have a role subject to our proposal set out in Part B of this submission and as set out below in relation to exemptions.

106. If Treasury recommends changes, it would be appropriate for an exposure draft to be issued and further intermediate consultation to take place, so we can provide comments on specific proposed changes.

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)?

107. Ai Group does not support the proposed non-compete ban.

108. We refer to Part B of this submission.

109. If despite our position, the ban is introduced, it is important that exemptions are established that:

- Permit a non-compete clause to operate lawfully in circumstances that employers determine they have a legitimate proprietary interest to protect and in circumstances where the clause is reasonable and enforceable.
- Exempt all existing employment relationships, agreements and any applicable fair work instruments.
- There would also be merit in any legislation exempting certain industries and occupations, including where a non-compete ban may adversely impact business due to the risks around disclosure of their confidential information or trade secrets to competitors, either domestically or overseas. These exemptions will need to be informed by further consultation with industry.

However, given the foreseeable difficulty in reliably identifying all of the needs for targeted exemptions, there should be a principles-based approach of exempting provisions that comply with a code, as we have proposed in Part B, and a capacity for the Fair Work Commission to approve broad categories of exemptions in particular industries, occupations, roles or cohorts of workers.

- There should be an ability for regulation or a Ministerial Declaration to be issued granting further exemptions. This would be a safeguard that enables prompt action to be taken to address any unintended consequences.

Transitional arrangements

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

110. Ai Group does not support the proposed non-compete ban.
111. If despite our position, the ban is introduced, it is difficult to articulate appropriate transitional arrangements given that we have not yet seen the details of any proposed ban.
112. Subject to us seeing an exposure draft and being provided with the opportunity to participate further and intermediate consultation, we consider that the following transitional arrangements may support business compliance:
- Commencement delayed by 12 months, and for 24 months for small business employers.
 - From commencement, to only apply to relationships entered into on or after the that date.
 - From commencement, to only apply to written agreements that are entered into, or applicable fair work instruments made, on or after that date
 - We do not agree with any provision that results in existing agreements or instruments being subsequently brought into coverage through a variation or other change to that arrangement.
 - This type of provision creates significant uncertainty for business as determining whether a contractual arrangement has been varied is not always clear. Additionally, variations to remove existing provisions cannot be made unilaterally and require the agreement of both parties.
 - In respect of fair work instruments such as enterprise agreements and awards, variations are not a simple process (nor has it been established that such existing provisions are actually causing a problem).
 - If despite our objections, there are any penalties or monetary remedies, they should be delayed for at least 24 months after commencement.
 - A legislative review should be conducted not less than 2 years from the commencement and completed by not later than 3 years from legislation being given Royal Assent.

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

113. Ai Group does not support the proposed non-compete ban.
114. If any such ban was to be imposed, it should not apply to any contract of employment entered into before commencement, or any subsequent variation or extension of that contract.

4. Other reforms to employee restraints of trade

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?

115. Ai Group similarly does not support any other reforms to employee restraints of trade. This is speculative and there is no reason to support any change.
116. To deny an employer the reasonable protection of its legitimate business interests would be a direct attack on its ability to compete at both a domestic and international level, where it will not be on a level playing field.

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

117. Ai Group also does not support any other reforms to employee restraints of trade. This is speculative and there is no reason to support any change.
118. As set out above, we reiterate again that to deny an employer reasonable protection of its legitimate business interests would be a direct attack on its ability to compete at both a domestic and international level, where it will not be on a level playing field.
119. Further, we do not agree mandatory compensation should be adopted in any form.

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

- 120. Ai Group does not support any other reforms to employee restraints of trade. This is speculative and there is no reason to support any change.
- 121. To deny an employer reasonable protection of its business interests will be a direct attack on its ability to compete at both a domestic and international level, where it will not be on a level playing field.
- 122. If Treasury recommends changes, it would be appropriate for further consultation with industry, an exposure draft to be issued and further intermediate consultation to take place, so we can provide comments on specific proposed changes.
- 123. To the extent that a time frame is adopted, we suggest that it should be for default period of 6 months, with a capacity for a longer restriction to be valid if it necessary to protect the legitimate interests of the employer and where it is reasonable in the circumstances.

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).

- 124. Ai Group does not support any restriction on non-solicitation clauses other than that which is already provided for in the common law.
- 125. If Treasury recommends changes, it would be appropriate for further consultation with industry, an exposure draft to be issued and further intermediate consultation to take place, so we can provide comments on specific proposed changes.
- 126. Appropriate exemption and transitional arrangements will need to be put in place.
- 127. The prohibition of non-solicitation clauses should certainly not be entertained until there has been a robust review of any proposed restriction in the use of non-compete provisions.

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?

- 128. Ai Group does not support any restriction on non-solicitation clauses other than that which is already provided for in the common law.
- 129. If Treasury recommends changes, it would be appropriate for further consultation with industry, an exposure draft to be issued and further intermediate consultation to take place, so we can provide comments on specific proposed changes.
- 130. In relation to this question, we refer the Treasury to the position at common law where it has been recognised that a stable workforce is a legitimate interest that is capable of protection.

131. See for example *Grace Worldwide (Australia) Pty Ltd v Alves* [2017] NSWSC 1296 (in relation to an operations manager of a local and international removalist/relocation business).
132. In *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9 at [55], Brereton J set out the following reasons why a co-worker non-solicitation clause may be legitimate:
 - Employees, along with suppliers and customers, make up the three relations upon which the profitability of a business depends.
 - Employees (along with the suppliers and customers) are not the property of a business; however a stable, trained workforce adds value to the business because while employees are not property, a business with a stable trained workforce will be more attractive to a purchaser and command a higher price than one with a workforce which is unstable, disruptive or poorly trained, just as a loyal and satisfied clientele makes a business more attractive and valuable.
 - Staff connection constitutes part of the intangible benefits which may give a business value over and above the value of the assets employed in it and comprises part of its goodwill.
 - Protecting a stable workforce is amenable to protection in a restraint of trade in a manner similar to customer connection, even in the absence of confidential information.
133. At common law, to prove that a stable workforce is a legitimate business interest that should be protected, an employer must demonstrate it would otherwise suffer real harm to its business if the exiting employee was not prevented from soliciting its employees. As set out above, a restraint cannot be used to protect an employee against “*mere competition*”. The Treasury should take this into account.
134. It is also important to recognise that the finding that an employer has a legitimate business interest is not in itself sufficient for a court to find that a post-employer restraint of trade is enforceable. The restraint clause must also be reasonable as between the interests of the public, the employer and the employee. When assessing this a court will consider the time period of the restraint, its geographic scope and its subject matter or activity which is being restrained. A court may also consider other factors, including whether the employee has acknowledged the restraint was reasonable, whether the employee has obtained advice about its terms and had negotiated in relation to its scope and operation, whether consideration has been provided and the balance of bargaining power as between the parties.

Other requirements for valid restraint clauses

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

135. Yes.
136. A properly drafted cascading restraint of trade may present a range of variables that the parties consider reasonable. It may be severed to the extent that a court considers reasonable, with the remaining variables being preserved and enforceable. This is necessary outside of New South Wales.
137. If a restriction was applied, then consistent legislation will need to be enacted in similar terms to that in New South Wales under the *Restraint of Trade Act 1976* (NSW), where a court is permitted to read down the restraint if required so it is no longer unreasonable.

138. If cascading clauses are to be prohibited, and courts are not afforded an ability to read down a provision, clear guidance must be provided to industry as to how to determine the form of a valid restraint.

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

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

139. Ai Group does not support limiting severability as proposed.

140. We observe that written arrangements providing for restraints already commonly set out the legitimate interests that they are protecting. We do not support a requirement that requires an employer to do so.

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?

141. Yes, these are already recognised at common law.

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

142. We are not aware of any need for clarification or amendment. However, we recognise the clarity that *may* flow to industry and employees through a carefully prepared legislative scheme that codifies this doctrine as set out in Part B.
143. Ai Group would be pleased to consider any proposals that the Treasury might have that support employers reasonably protecting their legitimate business interests.

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?

144. Ai Group does not support any constraint on employers imposing restrictions where appropriate on their employees in relation to concurrent employment.
145. We note the duty of fidelity already precludes an employee from working for a competing business.

146. We also note that employers have obligations to ensure to ensure a safe working environment under work health and safety laws, including to ensure that its workers are not fatigued. It would not be appropriate to prevent employers utilising concurrent employment limitations which may potentially be an effective control measure to reduce the risk of fatigue and consequent risks to the health and safety of workers and others.

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

147. Ai Group does not support the implementation of restrictions.

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?

148. Ai Group does not support the imposition of civil or criminal penalties.

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?

149. Ai Group does not support the proposed ban on no-poach agreements.

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?

150. Ai Group does not support the proposed ban on wage-fixing agreements.

About Australian Industry Group

Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our purpose is to create a better Australia by empowering industry success. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international), we have the resources and expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance you need to run your business. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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