

COMMENTS OF THE AMERICAN BAR ASSOCIATION  
ANTITRUST LAW AND INTERNATIONAL LAW SECTIONS ON THE  
AUSTRALIA TREASURY’S REQUEST FOR FEEDBACK AND COMMENTS ON THE  
CONSULTATION PAPER, “REFORM TO NON-COMPETE CLAUSES AND OTHER  
RESTRAINTS ON WORKERS”

September 15, 2025

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The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

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The American Bar Association’s Antitrust Law Section and International Law Section (the Sections) welcome the opportunity to submit these comments to the Treasury of the Government of Australia (Treasury) in response to the Request for Feedback and Comments regarding the Treasury’s July 2025 Consultation Paper, “Reform to non-compete clauses and other restraints on workers.”<sup>1</sup> These comments reflect the expertise and experience of the Sections’ members with competition law and economics.

The Antitrust Law Section (ALS) is the world’s largest professional organization for antitrust and competition law, trade regulation, consumer protection, and data privacy, as well as related aspects of economics. Section members, numbering 11,000, come from all over the world and include attorneys and non-lawyers from private law firms, business entities, non-profit organizations, consulting firms, and federal and state government agencies, as well as judges, professors, and law and economics students. The Antitrust Law Section provides a broad variety of programs and publications on all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For over 30 years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section’s scope of expertise.<sup>2</sup>

The International Law Section (ILS) focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-governmental entities, and legal academics, and represent over 100 countries. The ILS’s over fifty substantive committees cover competition law, trade law, data privacy, and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures.

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<sup>1</sup> The Consultation Paper is available at <https://consult.treasury.gov.au/c2025-681950>.

<sup>2</sup> Past comments of the Antitrust Law Section are available at [https://www.americanbar.org/groups/antitrust\\_law/resources/comments\\_reports\\_amicus\\_briefs](https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs).

Throughout its century of existence, the ILS has provided input to debates relating to international legal policy. With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.<sup>3</sup>

## SPECIFIC COMMENTS AND RECOMMENDATIONS

### I. Ban on Non-Compete Clauses for Low- and Middle-Income Workers

As applied to low-wage workers, the Sections believe that non-compete agreements are generally not justified or beneficial.<sup>4</sup> The Sections also believe there are administrable standards for differentiating low-wage workers from other categories of workers. For a detailed discussion and explanation of the Sections' views, we refer the Treasury to ALS's 2023 comments<sup>5</sup> on this topic prepared in response to a U.S. Federal Trade Commission (FTC) Notice of Proposed Rulemaking<sup>6</sup> We have included a copy of that comment as an attachment to this submission.

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<sup>3</sup> Past submissions of the International Law Section may be accessed at [https://www.americanbar.org/groups/international\\_law/policy/blanket\\_authorities\\_initiatives/](https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/).

<sup>4</sup> These comments express no position on the question of whether non-competes are harmful for high-wage workers in general or for any category of high-wage workers in particular.

<sup>5</sup> Comments on the Federal Trade Commission's Notice of Proposed Rulemaking on Non-Compete Clauses, <https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2023/comments-ftc-rulemaking-non-compete-clauses.pdf>.

<sup>6</sup> Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023), *available at* <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>. In 2021 the U.S. Federal Trade Commission proposed a comprehensive ban on non-compete clauses in labor contracts. Federal courts issued conflicting rulings on the FTC's non-compete ban, including one that imposed a nationwide injunction blocking its enforcement. Although the FTC initially appealed adverse decisions, the agency since paused its challenges and on September 5, 2025 announced that it requested dismissal of its appeals and vacatur of the rule. Press Release, Fed. Tr. Comm'n, Federal Trade Commission Files to Accede to Vacatur of the Non-Compete Clause Rule (Sep. 5, 2025), Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule | Federal Trade Commission (3-1 decision). The FTC noted that two of the current Commissioners dissented from issuing the Rule under the previous Administration on the ground that the agency lacked statutory authority to issue the Rule. *Id. Accord*, Statement of Chairman Andrew M. Ferguson, joined by Commissioner Melissa Holyoak, *Ryan, LLC v. FTC* (Sep. 5, 2025), Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding *Ryan, LLC v. FTC*. *But see* Dissenting Statement of Commissioner Rebecca Slaughter,, *Ryan, LLC v. FTC* (Sep. 5, 2025). *See also* Statement of Commissioner Mark Meador in the Matter of Non-Compete Clauses, at 1, 3 (Sep. 5, 2025), Statement of Commissioner Mark R. Meador In the Matter of Non-Compete Clauses (voting in favor of vacatur but opining that "Noncompetes tend to be less justified when applied to low-wage workers, as such individuals are less likely to receive employee-specific training and typically have limited access to confidential information. Noncompete provisions in this context are more likely to operate in a manner that restricts worker mobility without protecting legitimate business interests."). The legality of non-compete provisions, however, remains subject to State law in the U.S. As of the date of this submission, eleven states have enacted statutes restricting non-compete agreements for workers earning below certain thresholds, and other states are considering similar legislation. On September 4, 2025, the FTC announced a settlement and proposed consent order against a pet cremation company and its subsidiary that freed their hourly employees from noncompete restraints. Press Release, Fed. Trade Comm'n, FTC Takes Action to Protect Workers from Noncompete Agreements (Sept. 4, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-takes-action-protect-workers-noncompete-agreements>. In simultaneously issuing a Request for Information about the use of noncompetes, the FTC stated: "While noncompete agreements can serve valid purposes in some circumstances, available evidence indicates that they are often subject to abuse." Press Release, Fed. Trade Comm'n, Federal Trade

## II. No-Poach and Wage-Fixing Agreements

The Sections support a ban on wage-fixing and no-poach agreements among horizontal competitors, which are deemed *per se* illegal under U.S. antitrust law.<sup>7</sup> Recent guidance from the U.S. Department of Justice (DOJ) and FTC explains that “[w]hen formed between competing or potentially competing employers, these types of agreements—whether entered into directly or through an intermediary—are illegal even if they did not result in actual harm such as lower wages.”<sup>8</sup> Furthermore, the DOJ has the authority to bring felony criminal charges against companies and individuals who participate in conspiracies of this type.<sup>9</sup> Other jurisdictions have adopted a similar approach.<sup>10</sup>

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Commission Issues Request for Information on Employee Noncompete Agreements (Sept. 4, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-issues-request-information-employee-noncompete-agreements>. *Accord*, Statement of Chairman Andrew M. Ferguson, joined by Commissioner Melissa Holyoak, *supra* note 6, at 2-3.

<sup>7</sup> **Wage-Fixing:** *See, e.g.*, *Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring) (“Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.”); *Todd v. Exxon Corp.* 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor J., concurring) (“If the plaintiff in this case could allege that defendants actually formed an agreement to fix . . . salaries, [the] *per se* rule would likely apply.”); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 157 (N.D.N.Y. 2010) (“Generally, price-fixing [or in this case wage-fixing] agreements are considered a *per se* violation of the Sherman Act.”) (citation omitted).

**No-Poach:** *See, e.g.*, *United States v. Patel*, No. 3:21-CR-220 (VAB), 2022 WL 17404509, at \*6-17 (D. Conn. Dec. 2, 2022) (no-poach is *per se* illegal, rejecting arguments that the restraint in question is a procompetitive ancillary restraint or a vertical restraint subject to the rule of reason); *United States v. DaVita, Inc.*, No. 1:21-CR-00229-RBJ, 2022 WL 266759, at \*\*5-8 (D. Colo. Jan. 28, 2022) (no-poach is *per se* illegal); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019) (citing cases and treatise for the proposition that no-poach agreements among competitors were *per se* illegal), *In re High-Tech. Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1121-23 (N.D. Cal. 2013) (plaintiffs “successfully pled a *per se* violation . . . for purposes of surviving a [motion to dismiss]” where the plaintiffs alleged the defendant tech companies agreed to not cold call competitors’ employees to solicit applications).

<sup>8</sup> U.S. DEP’T OF JUST. & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR BUSINESS ACTIVITIES AFFECTING WORKERS 5 (Jan. 2025), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p251201antitrustguidelinesbusinessactivitiesaffectingworkers2025.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p251201antitrustguidelinesbusinessactivitiesaffectingworkers2025.pdf) [hereinafter U.S. GUIDELINES]. The Sections note that two of the Commissioners of the Federal Trade Commission dissented because of the comments issuing just before the then new federal Administration took over. *See* Fed. Trade Comm’n, Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Antitrust Guidelines for Business Activities Affecting Workers, FTC Matter No. P251202 (Jan. 16, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/at-guidelines-for-business-activities-affecting-workers-ferguson-holyoak-dissent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/at-guidelines-for-business-activities-affecting-workers-ferguson-holyoak-dissent.pdf). Nor does the Sections’ citation to these guidelines for the limited points cited above necessarily constitute an endorsement of any other points made in these guidelines beyond those made in these comments.

<sup>9</sup> U.S. GUIDELINES, *supra* note 8, at 5.

<sup>10</sup> The European Commission recently imposed a fine of €329 million on Delivery Hero and Glovo for cartel conduct that included an alleged no poach agreement implemented through a cross-directorship as an infringement by object under Article 101). European Commission, Press Release, Commission fines Delivery Hero and Glovo €329 million for participation in online food delivery cartel (June 1, 2025), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_1356](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1356). *See also* Canada Competition Bureau, Enforcement Guidelines on Wage-Fixing and No Poaching Agreements (May 2025), <https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements>. *See generally*, Joint Section Comment on the Turkish Competition Authority Guidelines on

The Sections note, however, that there is a difference between naked horizontal agreements that warrant per se treatment and restraints that are ancillary or reasonably necessary to achieve a transaction's procompetitive objectives and, therefore, evaluated using the rule of reason test. For example, courts have applied the rule of reason (i.e., balancing anticompetitive and procompetitive effects) to hiring restraints in franchise operations (as applicable to intrabrand franchisees of the franchisor themselves and not to their competitors) where the restrictions imposed by the franchisor were part of a vertical, intrabrand agreement to enhance brand identity and promote competition within the franchise system.<sup>11</sup>

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The Sections appreciate the opportunity to comment. We would be pleased to respond to any questions regarding these comments or to provide additional comments or other information that may be helpful to the Treasury.

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Competition      Infringements      in      Labor      Markets      (Nov.      7,      2024),  
<https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2024/comment-turkish-competition.pdf>.

<sup>11</sup> See, e.g., *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1110 (9th Cir. 2021) (finding agreement between healthcare staffing companies not to solicit each other employees in exchange for handling overflow requests that could not be staffed with just the one company to be an ancillary, procompetitive restraint because “[t]he non-solicitation agreement . . . promotes competitiveness in the healthcare staffing industry—more hospitals receive more traveling nurses because the non-solicitation agreement allows AMN to give spillover assignments to Aya without endangering its establish[ed] network[ ] [of] recruiters, travel nurses, AVs, and of course, hospital customers.”) (internal citation and quotation marks omitted); *Conrad v. Jimmy John’s Franchise, LLC*, No. 318CV00133NJRRJD, 2019 WL 2754864, at \*3 (S.D. Ill. May 21, 2019) (holding in context of franchise agreement that whether per se or rule of reason applies “will ultimately come down to the facts behind these no-poach agreements, the relative independence of Jimmy John’s franchisees, and more”); see also *Deslandes v. McDonald’s USA, LLC*, 81 F.4th 699, 703-04 (7th Cir. 2023); *United States v. Patel*, 2022 WL 17404509, at \*16 n.2 (D. Conn. Dec. 2, 2022) (noting split of authority as to whether horizontal intrabrand restraints were per se illegal).