



Law Council  
OF AUSTRALIA

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

Competition Taskforce  
The Treasury

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## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 107,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2025 are:

- Ms Juliana Warner, President
- Ms Tania Wolff, President-elect
- Ms Elizabeth Shearer, Treasurer
- Mr Lachlan Molesworth, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au](http://www.lawcouncil.au).

## Acknowledgements

The Law Council acknowledges the assistance of the Law Society of the Australian Capital Territory, the Law Society of New South Wales, the Queensland Law Society, and the Law Society of South Australia.

The Law Council is also grateful for the contribution of members of the following committees:

- Competition and Consumer Committee of the Business Law Section;
- Industrial Law Committee of the Federal Dispute Resolution Section;
- Intellectual Property Committee of the Business Law Section; and
- Young Lawyers Committee.

## Introduction

1. The Law Council appreciates the opportunity to provide a submission to the Competition Taskforce in response to the **Consultation Paper** on *Reform to non-compete clauses and other restraints on workers*.
2. On 25 March 2025, the Treasurer announced (as part of the 2025–26 Federal Budget), that the Government would implement a ban on non-compete clauses for employees earning less than the high-income threshold in the *Fair Work Act 2009* (Cth) (**FW Act**).<sup>1</sup> The Law Council notes that the Consultation Paper has been developed to inform the implementation of this announcement.
3. The Law Council is broadly supportive of the Australian Government’s objective of addressing the misuse of non-compete and related clauses as part of its broader competition policy review. We recognise the potential for this reform to improve labour market efficiency, boost productivity and improve outcomes for workers who might otherwise be unnecessarily restrained.
4. Members of the legal profession report struggling to advise clients in relation to the applicability and enforceability of post-employment restraint clauses. This applies in relation to advising: employees in relation to restraints; employers seeking to enforce restraints, and; prospective employers whether a potential hire is subject to an enforceable post-employment restraint clause.
5. While reform is necessary to address the proliferation and misuse of non-compete and related clauses, care must be taken to avoid overregulation, legal uncertainty, and unintended consequences. The common law provides a robust framework for many issues, and statutory intervention should be targeted, clear, and proportionate.
6. The Law Council has received differing views from its stakeholders in response to some matters. Where this is the case, we have provided the alternative views separately for consideration by the Competition Taskforce. These views should be attributed to the relevant Constituent Body and/or Committee where they are listed.
7. The Law Council responds below to each of the Consultation Questions set out in Parts 3–6 of the Consultation Paper.

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<sup>1</sup> The Hon Dr Jim Chalmers MP, Treasurer, ‘[Cracking down on non-compete clauses to boost wages and productivity](#)’ (Media Release, 25 March 2025). The Treasurer also announced that the Government would seek to ‘close loopholes’ in the *Competition and Consumer Act 2010* (Cth) that may allow businesses to make agreements that cap wages or conditions or prevent staff from being hired by competitors.

# Responses to the Consultation Questions

## Part 3: The ban on non-compete clauses for low- and middle-income workers

### 3.1 Definition of a non-compete clause

#### Question 1.

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

8. The Law Council notes that the United States Federal Trade Commission (**US FTC**) defines a non-compete clause as follows:

*Non-compete clause means:*

- (1) *A term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from:*
  - (i) *Seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or*
  - (ii) *Operating a business in the United States after the conclusion of the employment that includes the term or condition.*
- (2) *For the purposes of this part ... term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.<sup>2</sup>*

9. While the US FTC definition of a non-compete clause may provide a useful starting point for consultation, the Law Council considers that the definition adopted should be consistent with existing terminologies and practices within the Australian industrial law context, including the diversity of contractual arrangements and the role of industrial instruments. The existing common law understanding of the nature of a non-compete clause is generally clear and should inform any legislative reform.
10. Terms such as 'penalises', 'functions to prevent' and 'seeking work' are foreign to the Fair Work Act and decisions in restraints of trade generally. From an Australian legal perspective, the language of 'restrict' or 'restrain' is more appropriate.
11. To achieve consistency with the Fair Work Act, the Law Council suggests that a format similar to the one adopted in relation to the pay secrecy prohibition in section 333D of the Fair Work Act could be considered.<sup>3</sup> For example, 'an employer

<sup>2</sup> Federal Trade Commission (United States), '[Non-Compete Clause Rule](#)', *US Government Federal Register*, 2024, 89(89), 38361–38366. The Law Council notes that the US FTC's Noncompete Rule is no longer in enforceable. At the time of writing, the US FTC website on the Noncompete Rule includes the following disclaimer: 'The Noncompete Rule is not in effect and it is not enforceable. On August 20, 2024, a district court issued an order stopping the FTC from enforcing the rule. The FTC appealed that decision on October 18, 2024. On September 5, 2025, the FTC took steps to dismiss its appeal in the Fifth Circuit': Federal Trade Commission (United States), [Noncompete Rule](#) (Web Page).

<sup>3</sup> *Fair Work Act 2009* (Cth) s 333D states that:

*An employer contravenes this section if:*

*(a) the employer enters into a contract of employment or other written agreement with an employee; and*

contravenes this section if ... the contract or agreement includes a term that restricts or restrains the employee from' engaging in various activities, including accepting work from companies in a similar field, or establishing a business that competes with the business. The activities covered should be defined in an expansive rather than exhaustive way.

12. The term 'penalises' is problematic, as penalties are generally unenforceable in Australian contract law. A preferable formulation would be 'adversely affects' or similar, to capture the practical effect of a clause that deters or restricts post-employment competition, without relying on the concept of a penalty.
13. The phrase 'functions to prevent' is overly broad and likely to create legal uncertainty, potentially capturing legitimate clauses such as confidentiality or narrowly tailored non-solicitation provisions. A narrower term such as 'precludes or substantially restricts' competition could be adopted to avoid unintended consequences and excessive litigation.

## **Question 2.**

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

14. Whether any specific kinds of common contractual terms should be explicitly included or excluded from that definition will largely depend on the definition ultimately adopted.
15. The Law Council generally considers that the definition should exclude standard confidentiality clauses, and clauses relating to intellectual property and other critical information. These clauses serve distinct legal and commercial purposes—protecting sensitive information—and should be considered separately to avoid unintended consequences. The inclusion or exclusion of these clauses should be based on a clear policy rationale and not assumed under the broader definition of non-compete clauses.
16. The Law Council received mixed views on the exclusion of non-solicitation clauses from the definition. On the one hand, they protect a distinct legal and commercial purpose—client relationships. On the other hand, to the extent that the rationales for banning non-compete clauses are derived from the absence of bargaining power of a low-paid employee, and the desirability of mobility of employees, not banning non-solicitation clauses seems difficult to justify.
17. It should also be recognised that overly broad confidentiality and non-solicitation clauses can operate as *de facto* non-compete clauses and may need to be scrutinised accordingly.

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(b) the contract or agreement includes a term that is inconsistent with subsection 333B(1) or (2) (about employee rights relating to pay secrecy).

### 3.2 Scope of workers affected

#### Question 3.

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

18. The Law Council received mixed views in relation to this question.
19. On one view, the same policy rationale applies to employees and independent contractors, particularly as many lower-paid workers (for example, in the hairdressing or fitness industries) are engaged as contractors. Excluding such workers could undermine the policy intent of the proposed reforms.
20. However, on the other view, there is a risk of complicating the contractor/employee distinction and potentially undermining established legal tests for employment status.
21. Regarding independent contractors, the type of relationship is different to an employment relationship, as independent contractors are engaged through a contract *for* services rather than a contract *of* service. As service providers, independent contractors may also often provide services to clients in the same industry. As noted in the Consultation Paper, independent contractors are protected by legislation such as the *Independent Contractors Act 2006* (Cth) and the Fair Work Act, where remedies exist for issues such as unfair contract terms.<sup>4</sup> Complexities could arise in seeking to cover independent contractors who, for a variety of reasons, may be engaged by a principal directly or through an interposed services company.
22. Should the Australian Government decide to apply a ban on non-compete clauses to workers who are not employees, careful drafting will be required to ensure the ban applies to 'employee-like' workers without creating perverse incentives or legal uncertainty.<sup>5</sup>

#### Question 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?**

23. In our submission in response to the Competition Taskforce's previous Issue Paper,<sup>6</sup> we recommended that the Australian Government consider legislating an income threshold below which non-compete clauses are not permitted.<sup>7</sup> We noted that one option may be to determine the threshold by reference to the existing definition of 'high income employee' in section 329 of the Fair Work Act, as this definition is relied on in various aspects of the FW Act and is generally well understood.<sup>8</sup>

<sup>4</sup> Competition Taskforce, The Treasury (Cth), [Reform to non-compete clauses and other restraints on workers](#) (Consultation Paper, 25 July 2025) 12 (**Consultation Paper**).

<sup>5</sup> The term 'employee-like worker' is defined at section 15P of the *Fair Work Act 2009* (Cth).

<sup>6</sup> Competition Taskforce, The Treasury (Cth), [Non-competes and other restraints: understanding the impacts on jobs, business and productivity](#) (Issues Paper, April 2024).

<sup>7</sup> Law Council of Australia, Submission to Competition Taskforce, The Treasury (Cth), [Non-competes and other restraints: understanding the impacts on jobs, business and productivity](#) (7 June 2024) 10-11.

<sup>8</sup> Ibid.



24. Subject to the below comments, the Law Council continues to consider that reliance on the high-income threshold in the Fair Work Act would provide a generally useful—although imperfect—proxy for bargaining power and would assist consistency and certainty in compliance. Adding another threshold or test may add unnecessary complexity.

#### **High-income employees with low ‘base salaries’**

25. Where the high-income threshold is used in other contexts under the Fair Work Act, payments where the amount cannot be determined in advance—such as commissions, incentive-based payments and bonuses—are excluded from the calculation.
26. In the context of the potential ban of non-compete clauses, the exclusion of those types of payments may have unintended consequences. For example, an employee who receives a relatively low base salary may nonetheless be eligible to receive (and may have historically received) a very large cash-based bonus or equity. That employee may have access to highly valuable confidential information and could otherwise have been appropriately covered by a post-employment non-compete restriction (and other restrictions).
27. One option to address this concern may be to clarify the definition of ‘earnings’ in the context of non-compete clauses to include all forms of guaranteed and regular remuneration. Consideration should be given to how variable or commission-based pay is treated.
28. Another option may be to use the value of all past payments to an employee, and calculate the yearly amount of payments received, rather than the usual earnings test, against the high-income threshold.

#### **High-income ‘junior’ employees**

29. Conversely, it may also be that reliance on the high-income threshold will capture relatively junior employees with limited bargaining power or limited connection to the operational and commercial information held by that organisation and its clientele. This may particularly be the case in higher paying industries—such as those in emerging tech, creative industries, or specialised consulting.
30. By way of example, some businesses may employ ‘middle-managers’ on a ‘high-income’, but these people do have knowledge of sensitive or highly valuable information relevant to the business. The Law Council’s Young Lawyers Committee notes that many relatively junior lawyers (particularly those who live in capital cities) may quickly exceed the high-income threshold despite not being in executive or leadership roles.
31. These employees would be excluded from protection under the current proposal and could face the challenge of either complying with clause or seeking to litigate. These challenges may not appear to be reasonable based on their role.
32. Rather than the threshold operating as a blanket exemption, to address the above concern, the Competition Taskforce could consider the inclusion of additional factors such as the nature of the role, industry norms, and the worker’s bargaining power.

## View of the Queensland Law Society

33. The Law Council notes the alternative view of the Queensland Law Society (**QLS**). While the QLS considers there is some merit to a high-income threshold, income, itself, may not be the appropriate determinative factor for assessing whether a non-compete clause is reasonable. A non-compete clause is most appropriate when attached to the contract of a senior person in the business who has a sufficient connection to the operational and commercial information held by that organisation and its clientele.
34. On balance therefore and noting the findings of the Productivity Commission,<sup>9</sup> and the stated objectives of these reforms, QLS considers there should not be a particular threshold reached where these clauses will then be permissible. Rather, the QLS suggests a complete ban, save for retaining obligations relating to confidentiality and permissible non-use of intellectual property and non-solicitation clauses.

### Question 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?**

35. The Law Council is generally of the view that the threshold should be applied at the time the contract is entered into or varied. This would provide certainty for both parties and allow employers to adjust contracts as employees' remuneration changes. Applying the threshold at enforcement could create uncertainty and retrospective application issues.
36. The Law Council notes the alternative view of the Law Society of South Australia (**LSSA**) that the high-income threshold test should apply at the date of the termination of the employment to align with its application in relation unfair dismissal.

### Question 6.

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

37. The Law Council understands that that non-compete clauses are generally used in common law contracts and rare in enterprise agreements and other fair work instruments. As such, extending the ban to these instruments may have little practical impact.
38. However, the application of the ban to all instruments would be consistent with the analogous section 333C of the Fair Work Act regarding pay secrecy.
39. Care should be taken to ensure that the ban does not inadvertently affect other legitimate terms or create confusion about the enforceability of existing agreements.

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<sup>9</sup> Productivity Commission, [National Competition Policy: modelling proposed reforms](#) (Study Report, 1 November 2024).

### **3.3. Enforcement**

#### **Question 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.**

- 40. The Law Council considers that the penalty regime should be proportionate and consistent with other Fair Work Act contraventions. Civil penalties, similar to those for sham contracting and pay secrecy provisions, are appropriate. Non-compete clauses should be void and unenforceable, with civil penalties applying at the point of contract entry, not merely at enforcement.
- 41. An additional potential remedy for a person impacted by a breach of the proposed ban could be an order for costs. This would require amendment to section 570 of the Fair Work Act which currently limits when a court may make such an order.
- 42. Breaches of the ban should not attract criminal penalties.
- 43. The Law Council notes the alternative view of the LSSA that there is no need for a penalty for breach of the ban, as the clause is simply of no effect if the employee is earning below the high-income threshold.

#### **Question 8.**

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

- 44. The Law Council received divergent feedback as to whether defences should be available.
- 45. The majority of responses received by the Law Council suggested that defences should be available in limited circumstances. For example, where:
  - (a) the employer had a reasonable belief, based on legal advice or a genuine mistake regarding the employee's income threshold or status; or
  - (b) where a historical contract had not been updated, provided this was an error.Such defences could protect employers who act in good faith and provide a safeguard against inadvertent breaches.
- 46. However, other contributors were of the view that the availability of defences would reintroduce uncertainty (contrary to the stated purpose of the proposed reforms) and may not be necessary as the ban on non-compete clauses does not involve a level of complexity to warrant a defence (as compared to the sham contracting provisions, for example).

### **Question 9.**

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

47. Employees, unions, and regulators should have standing to commence proceedings for a breach of the ban on non-compete clauses. Representative actions for groups of employees with similar contracts may be appropriate, but care is needed to avoid unintended consequences, such as competitors using the process to challenge multiple contracts.
48. The Law Council generally also supports providing standing to other businesses that in good faith intend to hire an employee bound by a non-compete clause (i.e. a prospective employer) to, for example, seek a declaration on whether the non-compete clause is valid. However, third parties (such as prospective employers) should not be able to initiate actions where the affected prospective employee does not wish to challenge the restraint, as this could undermine the employee's autonomy.
49. The Law Council notes the view of the LSSA, consistent with its response to Question 7, that there should be no proceedings for breach of a ban as the ban should simply mean that any post-implementation restraint is invalid.

### **Question 10.**

#### **What role should the Fair Work Ombudsman have in relation to the ban on noncompete clauses? Are there particular areas where employees and employers may need assistance to understand and implement any proposed ban on non-compete clauses?**

50. The Law Council considers that the primary role of the Fair Work Ombudsman (**FWO**) should be education and guidance.
51. As part of its education and guidance role, the FWO should develop and publish appropriate factsheets and other information. The Law Council suggests that the FWO should include information about the ban on non-compete clauses in the Fair Work Information Statement.<sup>10</sup>
52. Additionally, as the ban will be provided for in the Fair Work Act, we consider that the FWO would have a role in enforcing compliance with any civil remedy provisions.
53. The Law Council notes the alternative view of the LSSA that that there is no role for the Fair Work Ombudsman in relation to the ban on non-compete clauses, other than to advise employees that if they are earning below the high-income threshold the cause is unenforceable.

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<sup>10</sup> Section 124 of the *Fair Work Act 2009* (Cth) requires the Fair Work Ombudsman to prepare and publish a 'Fair Work Information Statement' which provides new employees with information about their conditions of employment. Section 125 requires an employer provide each employee with the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

#### **Question 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?**

54. Remedies should include declarations of invalidity, injunctions, and compensation for any loss suffered as a result of an unenforceable clause. The FWO should have the power to issue compliance notices and seek penalties, but the focus should remain on education and voluntary compliance.

#### **Question 12.**

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

55. The Law Council notes that the Fair Work Commission (**FWC**) cannot exercise judicial power and that any disputes would need to be resolved by a court applying the usual common law remedies.
56. However, the FWC could provide a low-cost, accessible forum for resolving disputes by conciliation or arbitration-by-agreement, particularly where there is uncertainty about the application of the ban. Consideration could be given to providing the FWC with the same powers that it has in relation to fixed-term contract disputes under section 333L of the Fair Work Act.

#### **Question 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?**

57. The FWC may require the power to make binding determinations in limited circumstances, but the Law Council's preference is for a primarily conciliatory role, with recourse to the courts for final resolution.

### **3.4. Limited statutory exemptions**

#### **Question 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)?**

58. In the Law Council's view, exemptions should be limited and clearly justified on public interest or national security grounds (for example, certain defence or intelligence roles). No legislative amendment should prohibit or otherwise affect protections that employers have relating to confidentiality obligations and protection of intellectual property and other commercially sensitive information, nor obligations of fidelity and loyalty. Exemptions should be subject to strict criteria and, where possible, be time-limited or subject to application and review.

59. An example of an exemption that would be justified on strong public policy grounds is an exemption in respect of workers who are engaged to conceive, create or develop particularly valuable or otherwise material intellectual property, or whose role is reasonably expected to involve accessing such intellectual property. The Law Council repeats the comments in paragraphs 61–67 of its response to the 2024 Issues Paper and submits again that there are legitimate reasons for businesses to use non-complete clauses and similar restraints in relation to such workers, irrespective of whether those workers earn less or more than the high-income threshold.<sup>11</sup>
60. That is because, as set out in detail in those earlier submissions, pursuing a former employee (or other worker) for intellectual property infringement and/or breach of confidence is generally cumbersome, excessively costly and forensically difficult to prove in Australia, owing to the intangibility of intellectual property, confidentiality rights and the materials in which they subsist. Non-compete clauses and similar restraints provide essential protection for businesses in these contexts. As much was recognised by the NSW Court of Appeal in a passage that has been cited with approval in several subsequent cases, including as recently as 2022:

*A reasonable employment restraint is easier to enforce than a breach of confidence or breach of copyright claim; it removes the temptation for the former employee to offer and for the new employer to solicit confidential information; and it provides certainty of definition as regards the area of confidential information to be protected.*<sup>12</sup>

61. In its response to the 2024 Issues Paper, the Law Council cited *Motorola Solutions, Inc. v Hytera Communications Corporation Ltd* [2022] FCA 1585 as an illustrative example. Since those submissions, the Full Court of the Federal Court of Australia has delivered an appeal judgment in that case, which further highlights how complex and difficult it is for businesses to enforce their intellectual property rights, particularly when dealing with intangibles such as copyright in source code or object code. In a further 923 paragraphs (over 240 pages), the Full Court found largely in favour of Motorola, but was still unable to completely conclude the case and has ordered an additional hearing in relation to copyright infringement.<sup>13</sup>
62. The Consultation Paper cites an article dated 24 March 2024 by US academics entitled ‘Can You Keep a Secret? Banning Noncompetes Does Not Increase Trade Secret Litigation’, and states:
- [E]vidence from the US suggests that trade secret litigation could actually decrease over the long-run, using data following bans on non-compete clauses at the state-level.*<sup>14</sup>
63. The Law Council questions the applicability of this article given the differences between US and Australian laws and litigation practices, including that, unlike the US, Australia does not have a legislative regime for the protection of trade secrets.<sup>15</sup> In any event, as the article itself concludes, ‘results suggest banning [noncompete

<sup>11</sup> Law Council of Australia, Submission to Competition Taskforce, The Treasury (Cth), [Non-competes and other restraints: understanding the impacts on jobs, business and productivity](#) (7 June 2024) 15–16.

<sup>12</sup> *Woolworths Limited v Mark Konrad Olson* [2004] NSWCA 372, [66]–[67].

<sup>13</sup> *Hytera Communications Corporation Ltd v Motorola Solutions Inc* [2024] FCAFC 168, [920]–[921].

<sup>14</sup> Consultation Paper, 23, citing Brad Greenwood, Bruce Kobayashi and Evan Starr, ‘Can You Keep a Secret? Banning Noncompetes Does Not Increase Trade Secret Litigation’ (Donald G. Costello College of Business at George Mason University, Research Paper, 24 March 2024).

<sup>15</sup> Law Council of Australia, Submission to Competition Taskforce, The Treasury (Cth), [Non-competes and other restraints: understanding the impacts on jobs, business and productivity](#) (7 June 2024) 15.



agreements] had a significant chilling effect on trade secret litigation',<sup>16</sup> which the Law Council submits would be a regrettable outcome where businesses have, without the buffer of appropriate non-compete clauses and similar restraints, a legitimate need or desire to enforce their intellectual property rights and/or confidentiality rights.

64. Any exemption provision could include a provision similar to paragraph 333F(1)(i) of the Fair Work Act (in the context of limitations on fixed term contracts), which allows regulations to prescribe exempted contracts.

### **Additional suggestion of the Queensland Law Society**

65. The QLS Franchising Law Committee suggests that particular consideration should be given to contracts where the worker is employed by a franchisee to ensure there are no unintended consequences, noting franchising is a distinct business model relying on the sharing of confidential systems, intellectual property, and know-how by franchisors with franchisees.
66. While the QLS does not specifically call for non-compete clauses in franchising contexts to be expressly exempt from a ban, it notes that restraint provisions are already considered by the Franchising Code of Conduct (for example in section 42).<sup>17</sup> The QLS cautions against reforms that lead to inconsistency and uncertainty and that create any unreasonable burden on the franchising industry. As stated, the reform should allow obligations relating to confidentiality and non-use of intellectual property of business owners, franchisors, licensors, and their associates to continue to apply and remain fully enforceable.

### **3.5. Transitional arrangements**

#### **Question 15.**

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

67. The Law Council suggests alignment with the transitional arrangements used for the reforms to pay secrecy clauses as referred to on page 21 of the Consultation Paper.
68. The ban should apply prospectively to new contracts and to existing contracts only when varied or replaced after commencement. Existing non-compete clauses should become unenforceable from the commencement date, but penalties should not apply to pre-existing clauses unless they are enforced after the ban takes effect.
69. A grace period (of at least 6 months) before penalties apply, requirements for employers to notify employees that existing non-compete clauses are no longer enforceable and clear guidance materials are also recommended.

<sup>16</sup> Brad Greenwood, Bruce Kobayashi and Evan Starr, 'Can You Keep a Secret? Banning Noncompetes Does Not Increase Trade Secret Litigation' (Donald G. Costello College of Business at George Mason University, Research Paper, 24 March 2024) 26.

<sup>17</sup> *Competition and Consumer (Industry Codes—Franchising) Regulations 2024* (Cth), ch 2 ('Franchising Code of Conduct').

**Question 16.**

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

70. See above response to Question 15.

## **Part 4. Other reforms to employee restraints of trade**

### **4.1. Non-compete clauses for high-income employees**

**Question 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?**

71. The Law Council does not support a full ban on non-compete clauses to those earning above the high-income threshold (however calculated).
72. High income employees are more likely to have bargaining power to negotiate the terms of these clauses—such as the duration of the clause or the compensation payable—so that a fair balance is more readily struck between the interests of the employer and the employee. High-income employees are also better able to absorb any loss of income in order to comply with a non-compete clause. They are also in a stronger position to negotiate compensation or a settlement in the event of a dispute.
73. However, if non-compete clauses are to be permitted for this group, they should be subject to strict reasonableness tests and possibly mandatory compensation. See further discussion below.
74. As noted at paragraphs 33 and 34 above, the QLS does support the adoption of a high-income threshold. Accordingly, the QLS does not consider mandatory compensation to be necessary or that there should be any maximum duration period.

**Question 2.**

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

75. If mandatory compensation is adopted, the compensation should be sufficient to disincentivise unnecessary restraints but not so high as to make legitimate restraints unworkable.
76. The Law Council notes the view of the LSSA's Industrial Relations Committee that the justification for the restriction on post-employment restraints from a productivity perspective is the mobility of labour leading to an increase in productivity and that paying employees mandatory compensation to stay at home does not achieve that goal.



### Question 3.

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

77. International practice suggests 12 months as a reasonable maximum, but the Law Council has received feedback that a maximum period of 6 months may be appropriate in most cases. The duration should be proportionate to the protectable interest and subject to judicial scrutiny.

### 4.2. Non-solicitation clauses for clients and co-workers

### Question 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).**

78. As outlined in our previous submission in response to the Competition Taskforce's previous Issue Paper, the Law Council considers that non-solicitation clauses should be permitted but subject to clear limits.<sup>18</sup> The Law Council recognises that losing clients to competitors when particular workers leave can have a significant commercial impact on a business and notes that there are limited alternative protections available to employers.
79. The Law Council does not support broad restrictions on the use of client non-solicitation clauses beyond the current limitations imposed by operation of the restraint of trade doctrine and other common law principles. Restrictions should be limited to active solicitation of clients with whom the employee had direct contact, and duration should be reasonable (for example, 3–6 months).
80. Consideration could, however, be given to limiting the use of non-solicitation clauses in particular roles in which a personal relationship with the client, or skills and experience only developed through working with a particular client, is central, for example in certain care, medical, therapeutic, education, and personal fitness or coaching roles.<sup>19</sup> Care would be required in defining these categories so as not to cast these limits too widely. We would not generally support a differentiated outcome based upon the workers' sector.
81. Additionally, the definition of 'solicitation' should be clarified to avoid chilling effects, such as employees being afraid to advertise generally.
82. The LSSA considers that the notion of 'solicitation' is somewhat antiquated. Solicitation previously encompassed acts such as calling someone on the telephone, visiting someone in person, or sending them a letter in an attempt to solicit their business. Now, in the digital era, when people change jobs, they may update their online profiles (such as LinkedIn) and indirectly encourage people to follow them through social media. It is therefore less clear where solicitation is considered to start and finish. As such the LSSA supports redefining what constitutes solicitation—perhaps by reference to directly contacting a person with a view to soliciting their custom.

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<sup>18</sup> Law Council of Australia, Submission to Competition Taskforce, The Treasury (Cth), [Non-competes and other restraints: understanding the impacts on jobs, business and productivity](#) (7 June 2024) 14-17.

<sup>19</sup> Ibid 17.

#### Question 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?**

83. The Law Council is sceptical of the legitimacy of co-worker non-solicitation clauses, as they restrict the freedom of third parties who are not party to the contract.
84. However, we recognise that solicitation of co-workers can cause significant commercial impact through the loss of skill and expertise within an organisation. As such, co-worker non-solicitation clauses may be appropriate in limited circumstances, particularly where there is a risk of coordinated departures that could destabilise a business.
85. If co-worker non-solicitation clauses are to be permitted, such clauses should be narrowly tailored, limited in duration (for example, 3–6 months), and only apply to senior employees with genuine influence over the workforce.

#### 4.3. Other requirements for valid restraint clauses

#### Question 6.

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

#### **New South Wales approach**

86. As a means of increasing the likelihood that a restraint will remain in place and enforceable, the use of cascading clauses has become standard in most employment and other similar contracts, particularly in circumstances where the *Restraints of Trade Act 1976* (NSW) (the **NSW Act**) does not apply.
87. The Law Council notes that the NSW Act provides a mechanism for bringing some clarity to workers and employers by enabling the court to ‘read down’, or declare invalid, what it considers would otherwise be an unreasonable restraint. Subsection 4(1) of the NSW Act reverses the common law position; in that it provides that a restraint will be valid to the extent that it is not against public policy. This means that, in applying the NSW Act, courts will:
  - (a) determine whether an alleged breach infringes the terms of a restraint clause;
  - (b) determine the extent to which the relevant restraint is contrary to public policy; and
  - (c) to the extent to which the restraint is not contrary to public policy, declare it to be valid.
88. Under subsection 4(3) of the NSW Act, where there has been a manifest failure of an employer to attempt to make a restraint reasonable, a court has a discretion to treat that restraint as being altogether invalid, or invalid on such terms as it thinks fit, on public policy grounds.
89. The consequence should be that, in most circumstances, the use of cascading clauses is unnecessary, at least in relation to employment contracts to which the NSW Act applies.

90. The Law Society of New South Wales advises that, in its members' experience, subsection 4(3) of the NSW Act is underutilised by the courts as a means of declaring altogether invalid clauses which are manifestly unreasonable, such as where an employer has arguably made no real attempt to impose a reasonable restraint, but rather, has drafted an overly broad restraint, with the expectation that a court will do the work of reading it down significantly.
91. At common law, courts (in jurisdictions other than NSW) apply what is referred to as the 'blue pencil test' whereby the court will assess whether discrete portions of a restraint clause that the Court considers unreasonable can be run through with the 'blue pencil' and removed, whilst still retaining the remainder of the otherwise reasonable clause, such that it can still be applied. The ability to sever parts of a restraint clause is why it is common to see cascading clauses in other jurisdictions.

### **Law Council position**

92. As noted in the Law Council's previous submission, cascading clauses can be confusing to workers, place undue risk on employees and create uncertainty in employment contracts. These effects can serve to reinforce the power imbalance between employers and workers.<sup>20</sup>
93. As such, the Law Council generally opposes the use of cascading clauses and suggests the adoption of a 'one-shot rule' as outlined in the Consultation Paper—either invalidating the entire restraint if it contains cascading terms or interpreting only the narrowest restraint as valid. This would incentivise employers to draft reasonable, targeted restraints.

### **Alternative position**

94. The Law Council does note, however, the alternative view of the QLS and the Law Society of the Australian Capital Territory that cascading non-solicitation clauses should be permitted—at least where they are narrowly defined to prevent excessive or ambiguous restrictions.

### **Question 7.**

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

95. In the Law Council's view, severability should be limited to prevent employers from drafting overly broad restraints in the hope that courts will 'read down' the clause. Only incidental overlaps (for example, overlapping office locations) should be permitted.
96. As noted in the Law Council's previous submission, there is also scope for Australian courts to take a more active approach in applying common law principles in declaring cascading clauses void for uncertainty, particularly where numerous alternatives are proposed for the activities covered duration and/or geographical area, leading to a large and unreasonable number of possible combinations.<sup>21</sup>

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<sup>20</sup> Ibid 9.

<sup>21</sup> Ibid 10.

#### **Question 8.**

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

97. While placing a requirement on an employer to specify the legitimate interest which is intended to be protected by a restraint clause is reasonable and unlikely to create a significant burden, the Law Council notes that this additional requirement could simply lead to employers pointing to all potential legitimate interests as providing a basis for a particular restraint, with no material change to practice or enforcement. If such a requirement is introduced, it should be coupled with a genuine reasonableness test and the opportunity for judicial scrutiny.<sup>22</sup>

#### **Question 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?**

98. As a general position, the Law Council considers that, where a non-solicitation clause would suffice, a non-compete clause should not be permitted for the same purpose or duration. However, this is an appropriate matter to continue to be dealt with by courts in determining what restraint or restraints are reasonable and enforceable in any particular circumstance.

#### **Question 10.**

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

99. The Law Council considers that the current approach of the courts is appropriate and does not significantly require clarification or amendment. Additionally, overregulation could create more problems than it solves, particularly for small businesses.
100. However, clarification of the threshold for injunctions and the treatment of restraints following redundancy may be beneficial.

#### **View of the Law Society of South Australia**

101. The LSSA considers that the common law doctrine should be codified to state that post-employment restraint clauses are invalid for employees earning below the high-income threshold, and only valid for those earning above the high-income threshold to the extent that there is a legitimate business interest which requires protecting, and provided the restraint goes no more than is necessary to protect a legitimate business interest.

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<sup>22</sup> See, eg, *Restraints of Trade Act 1976* (NSW) s 4(3).

102. In addition, the LSSA recommends that:

- (a) there should be provision for the length of service (and if there is, a period of time before a restraint would apply); and,
- (b) there should be clarity around when the restraint period starts, whether that is from the last day of stopping work (for example, the date of being on 'garden leave' until the termination proper of the employment contract), or at the termination of the employment contract.

## Part 5. Restraints on concurrent employment

### Question 1.

**Are there any other considerations or potential unintended consequences if restraints on concurrent employment were to be regulated beyond the common law?**

- 103. It is appropriate in most circumstances for workers to be subject to restrictions during their employment to prevent them from engaging in conduct in competition with their employer, setting up a competing business, or taking advantage of a business opportunity that arose during their employment which is relevant to their employer's business or operations.
- 104. The question as to whether a full-time employee should be permitted to engage in secondary employment without obtaining consent from their primary employer is a more complicated issue. The issue is often considered to be one of whether the secondary employment will have any negative effect on the employee's performance and productivity in their primary role.
- 105. In relation to part-time employees and casual workers, the ability for a primary employer to regulate engagement in secondary employment should be much more restricted.
- 106. As outlined in the Law Council's previous submission, this matter should remain regulated by the employment contract entered into between the parties, and by the common law.<sup>23</sup>

### Question 2.

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

- 107. Restrictions should be limited to genuine conflicts of interest or performance issues. However, existing common law duties (e.g., confidentiality, fidelity) are generally sufficient.
- 108. Any new regulation should be narrowly targeted and avoid interfering with legitimate business interests. Consistent with the proposed ban on non-compete clauses, to the extent that any such restrictions are implemented, we suggest that they should be included in the Fair Work Act.

<sup>23</sup> Law Council of Australia, Submission to Competition Taskforce, The Treasury (Cth), [Non-competes and other restraints: understanding the impacts on jobs, business and productivity](#) (7 June 2024) 19.

## Part 6. No-poach and wage-fixing agreements

109. The Law Council notes the announcement by the Treasurer, on 25 March 2025, that the Australian Government intends to ‘close loopholes’ in the *Competition and Consumer Act 2010* that may currently allow businesses to make agreements that cap wages or conditions or prevent staff from being hired by competitors.<sup>24</sup>
110. The Law Council is broadly supportive of this proposal—particularly as it relates to wage-fixing agreements—but notes that there is a continuing role for no-poach agreements in certain circumstances.
111. As noted in our previous submission, the regulation of no-poach and wage-fixing agreements as between commercial entities should be regulated under the Competition and Consumer Act, rather than as part an industrial relations framework and under the FW Act.<sup>25</sup>

### 6.2. Implementing the announced reform

#### Question 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?**

112. The Law Council suggests that civil penalties consistent with those for cartel conduct are appropriate. Additionally, criminal penalties may be justified for egregious or intentional breaches, but the focus should be on deterrence and education.

### 6.3. Limited statutory exemptions

#### Question 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?**

113. As noted in the Law Council's response to the 2024 Issues Paper, there is a continuing role for no-poach agreements between cooperating businesses, such as in the context of joint venture agreements, secondment arrangements, collective bargaining agreements, where labour hire businesses are conducting business, for professional sports leagues, or where Australian Competition and Consumer Commission authorisation has been obtained.<sup>26</sup>
114. In the case of joint venture agreements, no-poach agreements allow a joint venture partner to lend its employees to work in, or for, the joint venture itself, while minimising the risk of losing employees to the other joint venture partner. Similar issues arise where an employee is seconded to provide services for the benefit of another entity. For simplicity and coherence with the cartel provisions, the Law Council is also of the view that the existing exceptions to cartel conduct (in addition

<sup>24</sup> The Hon Dr Jim Chalmers MP, Treasurer, ‘[Cracking down on non-compete clauses to boost wages and productivity](#)’ (Media Release, 25 March 2025).

<sup>25</sup> Law Council of Australia, Submission to Competition Taskforce, The Treasury (Cth), [Non-competes and other restraints: understanding the impacts on jobs, business and productivity](#) (7 June 2024) 20.

<sup>26</sup> Ibid 20-21.

to joint ventures) should also be available, including for related entities, exclusive dealing, collective acquisitions and for dual listed company arrangements.

115. In the case of a labour hire business, without a no-poach agreement in place, that business may incur costs in finding and placing an appropriate individual with a host entity, to be left with a significant commercial risk that the host entity will simply look to directly employ that individual so as to avoid payment of any continuing fee to the labour hire provider. In those circumstances, the labour hire business model may become unsustainable for some providers.
116. The above issues are most appropriately dealt with by including specific exemptions in any changes otherwise implemented. Any exemptions should be narrowly defined and subject to oversight.
117. The Law Council notes the alternative view of the LSSA, that no-poach agreements should be banned without exception.

### **Question 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?**

118. Views of Law Council Committee members differ in respect of which specific exemptions should be available to the proposed ban on wage-fixing agreements.
119. The Competition and Consumer Committee is of the view that the same exceptions should apply to wage-fixing as those proposed in respect of no-poach agreements (discussed at paragraphs 113–117 above) to achieve greater simplicity and policy coherence within the existing framework.
120. Alternatively, the Industrial Law Committee is of the view that there should be no exemptions to the proposed ban on wage-fixing agreements, except where wage-fixing is part of a legitimate collective bargaining process or required by law. Any other exemption risks undermining the policy intent of the proposed reform.