



List of consultation questions

This consultation seeks information and views to support the government's consideration of reforms to non-compete clauses and related restraints that restrict worker from moving to higher paying jobs.

You are invited to answer some or all of the questions, or to comment on the issues more broadly.

While submissions may be lodged electronically or by post, electronic lodgement is preferred.

All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless you indicate that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain confidential should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

Closing date for submissions: 5 September 2025

Online <https://consult.treasury.gov.au/c2025-681950/consultation>

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1. Introduction

2. Scope and purpose of consultation

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?

Response:

The FTC definition is inappropriate for the Australian context. It is overly broad and rooted in a U.S. legal framework that does not reflect Australia's industrial relations system. A suitable definition must acknowledge the legitimate business need to protect intellectual property, strategic investments, and confidential information. Non-compete clauses should be defined narrowly to target post-employment restrictions that prevent employees from joining competitors or starting similar businesses, but must allow businesses to safeguard proprietary knowledge.

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

Response:

Yes. The definition must explicitly exclude confidentiality clauses, intellectual property protections, and narrowly tailored non-solicitation clauses. These are essential tools for businesses to protect sensitive information and client relationships. Including them risks undermining legitimate business interests and creating legal uncertainty.

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?

Response:

No. Independent contractors often have access to the same strategic information and intellectual property as employees. Excluding them would create a loophole that incentivizes misclassification and exposes businesses to IP theft. The ban should not apply to contractors where legitimate business interests are at stake.

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?

Response:

Yes. The high-income threshold is an arbitrary measure that fails to reflect access to sensitive information or strategic roles. It may exclude vulnerable workers in high-cost industries and incentivize employers to manipulate pay structures. A better approach would combine income with role-based access to confidential information and allow Fair Work Commission discretion in borderline cases, if at all.

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?

Response:

It should be applied at the time the contract is entered into. Businesses need certainty when drafting agreements. Applying the threshold retrospectively at the end of employment introduces ambiguity and undermines enforceability. Employers must be able to assess risk and protect IP from the outset.

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

Response:

Yes. It risks invalidating enterprise agreements and awards that include legitimate restraints negotiated in good faith. This undermines collective bargaining and industrial autonomy. Fair work instruments should be exempt from the ban where they include reasonable, targeted restraints.

3.3 Enforcement

7. What is the appropriate penalty for breaches of the ban on non-compete clauses? Are the existing penalties in the Fair Work Act for other contraventions appropriate? Please consider the following matters in your feedback:

- (a) the type of penalty

Response:

Civil penalties are appropriate, but only where clauses are clearly abusive or deceptive. Penalising businesses for protecting IP is unjust.

- (b) the magnitude of the penalty, and

Response:

Penalties should be scaled based on business size and severity of breach. Blanket penalties risk punishing responsible employers.

- (c) the circumstances in which the penalty should apply.

Response:

Penalties should apply only when non-compete clauses are enforced unlawfully or used to exploit vulnerable workers, not when they serve legitimate business purposes.

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

Response:

Yes. Defences must be available where the clause protects legitimate interests such as trade secrets, client relationships, or strategic investments. A blanket ban removes necessary nuance and punishes responsible employers.

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

Response:

Only affected employees should have standing. Allowing third parties or unions to litigate opens the door to abuse and unnecessary legal costs. Legal action should be limited to those directly impacted.

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?

Response:

The Ombudsman should provide education and guidance, not enforcement. Businesses need support in drafting fair and enforceable clauses. Punitive oversight will discourage investment in employee development and strategic roles.

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?

Response:

Remedies should be limited to actual harm, not theoretical opportunity loss. Compensation must be proportionate. The Ombudsman should not require new enforcement powers — existing mechanisms are sufficient if the ban is not implemented.

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

Response:

Only if the ban proceeds. Otherwise, the Commission's current role in interpreting and enforcing restraint clauses is sufficient. Expanding its jurisdiction risks overreach and delays.

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?

Response:

If the Commission is tasked with resolving disputes, it would need powers to declare clauses void, award compensation, and issue compliance directions. However, these powers are unnecessary if the ban is rejected. A reminder, that the Fair Work Commission needs to support the employer as much as the employee, I believe this currently isn't the case and this should be addressed!

3.4 Limited statutory exemptions

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

Response:

Yes. Sectors such as defence, technology, finance, and pharmaceuticals require non-compete clauses to protect national interest and innovation. Exemptions should be permanent and clearly defined, not subject to bureaucratic application processes.

As a country how are we providing new employment opportunities, where business owners can generate new commonwealth opportunities in the world economy when we can't fairly manage our labour resources. Employers rights are continuously being revoked and removed for no benefit to our countries economy and future.

3.5 Transitional arrangements

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

Response:

If implemented, a grace period is essential for businesses to review and renegotiate contracts. However, this will impose significant legal and administrative costs and expose businesses to IP theft during the transition.

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

Response:

Existing contracts must be honoured. Retrospective invalidation is legally indefensible and undermines business confidence. A sunset clause may be considered, but only with strong protections for proprietary information.

4. Other reforms to employee restraints of trade

4.1 Non-compete clauses for high-income employees

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

Response:

Allow non-compete clauses with mandatory compensation and clear justification. High-income employees often hold strategic roles and access sensitive information. Removing protections invites poaching and destabilises industries.

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

Response:

At least 50% of base salary during the restraint period. This ensures fairness and discourages overuse of non-compete clauses.

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

Response:

Six months is reasonable. Twelve months may be appropriate for senior executives with access to long-term strategic plans.

4.2 Non-solicitation clauses for clients and co-workers

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

Response:

Restrictions should be reasonable: duration up to 12 months, limited to clients the employee had direct contact with, and focused on active solicitation. These clauses protect relationships without stifling competition.

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?

Response:

They are legitimate in team-based industries and senior roles. Restrictions should include a maximum duration of six months and scope limited to direct reports or team members.

4.3 Other requirements for valid restraint clauses

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

Responses:

Yes. They provide flexibility and ensure enforceability. Courts can assess reasonableness based on context.

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

Response:

Courts must retain the ability to sever unreasonable parts without invalidating the entire clause. This promotes fairness and legal certainty.

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

Response:

Yes. Transparency strengthens enforceability and ensures clauses are tailored to actual business needs.

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?

Response:

Yes, where the risk of indirect solicitation or strategic leakage is high. Non-compete clauses offer broader protection in sensitive roles.

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

Response:

No. The existing common law doctrine already provides a 'balanced' and flexible framework for assessing the validity of restraint clauses. It considers reasonableness, legitimate business interests, and proportionality on a case-by-case basis. Codifying or amending these principles risks oversimplifying complex employment relationships and undermining judicial discretion. The doctrine should remain intact to allow courts to adapt to evolving business realities without imposing rigid statutory constraints.

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?

Response:

Yes. Over-regulating concurrent employment could severely limit an employer's ability to manage conflicts of interest, protect confidential information, and ensure productivity. Businesses must retain the discretion to restrict dual employment where it poses a risk to intellectual property, client relationships, or operational integrity. A statutory framework may inadvertently encourage moonlighting in sensitive roles, increasing the risk of IP leakage and reputational harm.

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

Response:

Any restrictions must be narrowly tailored and allow employers to justify restraints based on legitimate business needs. Implementation should:

- Require written justification tied to specific risks (e.g. IP, client conflict).
- Permit reasonable limitations on concurrent employment in strategic or confidential roles.
- Preserve the employer's right to enforce these restraints through contract and internal policy.

6. No-poach and wage-fixing agreements

1. What civil penalty should apply to businesses that have no-poach and wage-fixing agreements in breach of the ban? Should criminal penalties also apply, in line with the cartel provisions in Part IV of the Competition and Consumer Act?

Response:

Civil penalties may be appropriate for egregious or deceptive conduct, but criminal penalties are excessive and misaligned with the nature of these agreements. Unlike cartels, no-poach and wage coordination often arise from legitimate efforts to stabilize workforce planning in franchise networks or joint ventures. Criminalizing such arrangements risks overreach and discourages collaborative business models. Penalties should be proportionate and context-sensitive.

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?

Response:

Yes. Exemptions should apply where:

- The agreement is part of a legitimate joint venture or franchise arrangement.
- The purpose is to protect workforce stability, not suppress wages. Restrictions should include:
 - Transparency and disclosure to affected workers.
 - Time-limited and role-specific application.
 - Prohibition on blanket bans across unrelated entities.

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?

Response:

Yes, but only in tightly controlled circumstances such as:

- Lawful collective bargaining under industrial relations frameworks.
- Coordinated pay structures within integrated business units. Restrictions should include:
 - Compliance with Fair Work Act provisions.
 - Prohibition on cross-employer wage coordination outside formal bargaining channels.
 - Mandatory reporting and oversight to prevent abuse.