

RCSA Submission: Reform to Non-Compete Clauses and other Restraints on Workers

September 2025

Introduction

The Recruitment, Consulting and Staffing Association (RCSA) welcomes the opportunity to provide comment to the Department of Treasury's Consultation Paper *Reform to non-compete clauses and other restraints of trade on workers*.

As the peak industry body representing the staffing and recruitment sector in Australia and New Zealand, RCSA represents more than 1,000 corporate and individual members who source, place, and manage permanent and temporary workforces across almost every industry sector. Our industry employs over 550,000 Australians and plays a vital role in supporting labour mobility, driving economic productivity, and supporting business and jobs growth.

Support for the Australian Chamber of Commerce and Industry (ACCI) Submission

RCSA will confine its input on this paper to brief directional and high-level observations, along with specific feedback provided by, and issues directly relevant to, our member businesses. As Association members of the Australian Chamber of Commerce and Industry (ACCI), RCSA has contributed to the development of ACCI's more detailed response to the document and endorse the Chamber's submission as reflective of RCSA's more detailed position on issues raised in the paper.

The feedback outlined below builds upon RCSA's May 2024 response to Treasury's issues paper and to feedback provided by our members directly through an online consultation with Treasury during development of that paper.

RCSA Position Overview

As the peak industry body representing the staffing and recruitment sector in Australia and New Zealand, RCSA strongly advocate for the retention of the current construction, as developed by the courts, with respect to non-compete and non-solicitation clauses. These clauses exist as they currently stand in market to protect legitimate business interests, and RCSA does not believe their current form serves to stifle labour mobility or reduce productivity.

While we are sympathetic to reform that helps ensure non-compete clauses are not applied in an unreasonable or overly broad manner, it is also important to recognise that such clauses continue to serve an important commercial and economic purpose when used appropriately.

Protection of Commercially Sensitive Information and Intellectual Property

Businesses invest heavily in developing intellectual property and confidential business strategies. In industries where competitive advantage is built on proprietary know-how, unrestricted employee movement to a direct competitor can risk the immediate transfer of commercially sensitive information. Non-compete clauses provide a proportionate safeguard against this leakage, protecting the very innovation and investment that drives economic growth.

Preserving Client and Customer Relationships

In service-based industries, client relationships often represent a business's most valuable asset. Employees who work directly with customers have unique access to these relationships, and without a short, targeted restriction, competitors could unfairly leverage this goodwill. Non-compete clauses can help preserve stability and protect customer confidence, ensuring that transitions between employers are managed fairly.

Supporting Fair Competition

Used appropriately, non-compete clauses do not prevent competition — they ensure that competition is fair. They prevent the misuse of insider knowledge and relationships in ways that could cause disproportionate harm to the original employer, while still allowing employees to pursue work in other sectors or competitors after a reasonable period. This balance is critical to maintaining a competitive but fair business environment.

We acknowledge that non-compete clauses should be curtailed where they are unnecessarily restrictive or applied indiscriminately. However, a blanket prohibition would fail to recognise the legitimate commercial need for such clauses in certain contexts. Retaining non-compete provisions — subject to reasonable limits on scope, duration, and application — is critical to protecting intellectual property, incentivising innovation and training, safeguarding client relationships, and supporting fair competition.

Interconnected Nature of Non-Compete, Non-Solicitation and Non-Poaching Clauses

It is important that any approach on non-compete clauses considers carefully the connected nature of the supports currently available to employers in protecting their commercial interests and intellectual property.

Individually, each clause has limits. A non-solicitation clause, for example, prevents direct targeting of clients but may not stop a competitor from gaining an advantage if a former employee is immediately embedded in a rival's team and uses confidential knowledge indirectly. Likewise, a non-poaching clause protects workforce stability but does not address leakage of strategy or IP.

When used together, these provisions provide a layered framework of protection:

- **Non-compete** acts as a shield against the most immediate and high-risk transfers of sensitive information.
- **Non-solicitation** preserves the integrity of client and customer relationships.
- **Non-poaching** prevents destabilisation of the workforce.

This integrated approach allows businesses to tailor restrictions proportionately — applying the narrowest effective protection where possible, while reserving non-compete clauses for high-risk situations where commercial interests cannot be safeguarded otherwise.

RCSA strongly supports the retention of the current legal framework governing restraints of trade. Australia's common law already provides clear parameters, ensuring that clauses are enforceable only when they protect a legitimate business interest and are reasonable in scope. Overly broad or poorly drafted clauses are routinely struck down by the courts, demonstrating that the current system offers an effective balance between fairness for workers and protection for businesses. We caution against introducing arbitrary income thresholds to determine enforceability, as salary is not an accurate reflection of the commercial risk associated with a role. Critical roles, regardless of remuneration, can expose businesses to significant loss if protections are weakened. Rather than pursuing blanket bans, we encourage reform efforts that focus on clarity, standardisation, and education for both workers and employers.

RCSA is concerned that removing or severely restricting the use of non-compete and non-solicitation clauses would disproportionately harm small and medium-sized enterprises, which are less able to absorb losses from staff turnover or the erosion of client relationships.

Scenarios or instances of inappropriate or overuse of non-compete clauses likely stem more from a lack of clear statutory guidance, than deliberate intent to mislead workers.

Feedback from members suggested that a lack of clear direction on what constitutes non-solicitation leaves many businesses with low confidence in the levels of protection that exists for their commercially sensitive information, intellectual property, and client relationships. This lack of confidence and certainty may contribute in some instances to the overuse or inappropriate use of non-compete and restraint clauses. RCSA sees this review as an opportunity to enhance clarity and direction for business around the application and scope of non-solicitation clauses as a way of providing greater certainty around protection of commercial interests and intellectual property.

Indeed, we see value in the development of a set of words for reference and/or inclusion in contracts that provides clear, plain-language guidance on what constitutes non-solicitation of clients, vendors, and colleagues. Such guidance would deliver much-needed clarity for employers and employees. It would also have the potential to reduce reliance on expensive litigation and curb the proliferation of overly broad 'cowboy' clauses. We encourage the government to work with business and industry to develop definitions of key concepts such as client lists, vendors and clients, to support the application and communication of non-solicitation obligations and undertakings at the point of engagement for all parties.

Clear guidance and direction in communication around an employee's obligations and restrictions in relation to client relationships and intellectual property would go a long way toward improving business confidence in their ability to safeguard their client investments and intellectual property without unnecessarily restricting employees' ability to move between roles.

Specific RCSA feedback, supplementary to the submission from ACCI

Exemption for Temp to Perm Staffing Fees in Non-Poach and other Restraint Restrictions

RCSA welcomes the scenario in the discussion paper around the legitimacy of temp to perm fees charged by recruiters for exemption from restrictions that might apply on restraints of trade.

RCSA was concerned to see submissions to earlier processes raise questions around whether temp to perm fees, which often exist in commercial terms for temporary staffing services, should be considered a restraint on mobility within the context of the review.

We have subsequently discussed those concerns with Treasury, clarifying that temp-to-perm fees are not a restraint on workers or mobility. Rather, they are a fee-for-service commercial payment, used as a recoupation mechanism for the upfront investment made by a recruitment company in sourcing, screening and placing a candidate.

Employers who use a recruiter to find a candidate to hire directly, will typically pay a substantial fee to the agency that reflects the effort, skill, market knowledge and costs associated with finding a good candidate. In temporary staffing however, the cost of sourcing, screening and placing a candidate in a role is amortised over the life of the placement. For that reason, should an employer wish to take on a candidate directly, prior to an agreed period of time, temp-to-perm fees allow a recruitment firm to be financially compensated for the services they have provided.

We welcome the acknowledgement of these types of fees as fee for service, as opposed to a mobility barrier. Indeed, staffing firms are always welcome and support transition of employment from themselves to their clients where the opportunity presents. It is important however to ensure that fees like these,

which are fees for services rendered and NOT barriers to mobility, and not unintentionally impacted by restrictions on use of non-poach, non-compete and non-solicitation measures.

These arrangements are critical to sustaining the business models that enable staffing firms to invest in candidate attraction, vetting, and training. Without them, host employers could bypass labour hire providers and employment agencies, undermining the value of these services and reducing incentives to invest in workforce development. Retaining these protections is essential to maintaining fair commercial relationships, supporting the integrity of recruitment services, and ensuring the staffing and recruitment industry can continue to deliver a reliable and skilled workforce to Australian businesses.

Application of an Income-Threshold for Non-Compete Clauses

RCSA believes that any threshold for high-income exemptions to restrictions on the use of restraints of trade must reflect total earnings, including commissions and other incentive payments, in its application. In Recruitment and Staffing, as well as in other industries that are heavily sales based, it is commonplace for base salaries to be modest, with incentivised earning potential extremely high.

While RCSA agrees that higher skilled and higher income earners are often better equipped to negotiate and navigate employment clauses, such as restraints of trade, than lower earners, we don't believe the high-income threshold, exclusive of bonus and incentive payments, adequately captures employees who have critical access and proximity to commercially important information.

As flagged above, many sales-based roles are particularly connected to a businesses' commercial interests and relationships and often have remuneration structures which are highly financially incentivised. Recruitment consultants for a staffing and recruitment agency may be responsible for bringing in over 10% of the businesses revenue and be the main contact for said business' client list. It is also not uncommon in Recruitment and Staffing to business leaders, with considerable commercial knowledge, to be on a base wage which falls well short of the high-income threshold, despite regularly earning wages in excess of 2-3 times the high-income threshold.

Under the definition of 'earnings' as adopted by Treasury in the consultation papers, these types of arrangements would not be covered as bonus and incentive payments are not guaranteed. The adoption of this threshold as a blunt instrument does not sufficiently capture workers who, based on an assessment of earnings that included incentives, would not be subject to restrictions on the use of non-competes.

If the Government is determined to introduce a threshold for the restriction on use of non-competes, RCSA argues any threshold should incorporate assessment of total remuneration, incorporating base salary plus commissions and any guaranteed or historically reliable variable pay. The application of the threshold should be made at the time of termination, as this is the best reflection of a role's established earnings trajectory and potential risk to the business.

RCSA believes this approach will help ensure the application of the threshold does not result in perverse outcomes where individuals earning take home pay far in excess of high-income thresholds, in highly commercial roles, with substantial business impact are exempt from critical restraints simply because of their remuneration structure.

Enforcement of Employee Notice Periods

In consulting RCSA members to develop this response, the issue of enforcement of employee notice periods was raised as a critical gap in the current system. Currently, businesses have limited capacity to enforce employee notice periods, in scenarios where those employees do not see out their notice periods within the business they are leaving.

Members suggested exploring mechanisms that allow for easy enforcement of notice periods in cases where a worker's previous employer is paying full wage and benefits to that worker, even though they are no longer conducting work activity within the business. Members suggested this would go a significant way to providing greater reassurance for business around protection of commercial interests.

Coupled with other measures, including clearer non-solicitation protections, clear statutory guidance, greater capacity to enforce notice periods would enhance business productivity, improve regulatory clarity, and protect workers' freedom to move employers without undermining the integrity of Australian enterprises.

Role of Clauses in Staffing and Recruitment Industry

Recruitment and staffing firms are IP-intensive businesses. Their commercial value lies in their market knowledge, client and talent networks, and the skills of their consultants. Non-solicitation clauses are essential to safeguarding this intellectual property, ensuring a fair return on significant investments in workforce training, and promoting fair competition. In an industry without formal tertiary training pathways, firms shoulder the responsibility of equipping staff with specialist skills. Without the protection these clauses provide, investment in developing skills and talent pipelines would decline, impacting the industry's ability to deliver workforce solutions in a tight labour market.

There is also evidence of clients imposing unenforceable restraints directly on workers, which creates confusion and makes placements harder. A clearer regulatory and legislative framework would not only protect businesses but also provide transparency and certainty for workers.

Clearer Guidance around Non-Solicitation

RCSA recommends that government provide businesses with the ability to safeguard their legitimate commercial interests through the use of twelve-month non-solicitation clauses in contracts where employees are granted access to sensitive or commercially valuable information. We view this review as a timely opportunity to refine and clarify both the scope and practical application of such clauses, ensuring consistency and certainty for businesses across sectors. Clearer guidance will not only support employers in protecting intellectual property, client connections, and confidential data, but will also provide a balanced framework that gives both businesses and employees confidence in the fair use of non-solicitation provisions.

We see particular value in the development of standard wording, expressed in plain language, for reference or inclusion in employment contracts. Such wording would clarify what is meant by the non-solicitation of clients, vendors, and colleagues, reducing reliance on costly litigation and curbing the use of overly broad, poorly drafted clauses. We urge government to collaborate with business and industry to define key concepts—such as client lists, vendors, and clients—in order to support the fair and consistent application of non-solicitation obligations at the point of engagement.

Importantly, we believe that if government were to provide clearer guidance on non-solicitation clauses, the reliance on restrictive non-compete clauses would diminish. By giving businesses targeted clarity on how they can reasonably protect their intellectual property and client connections, employers would have less incentive to turn to broader restraints that unnecessarily limit employee mobility. This approach would strike a more balanced outcome—protecting commercial interests while ensuring fair career opportunities for workers.

Transitional Arrangements

It is critical that government allow for a sufficient transition period before any changes of this nature are brought into effect. Employers will need adequate time not only to review and, where necessary, amend

existing contracts, but also to restructure their businesses in a way that aligns with the new requirements. This will involve considering alternative remuneration structures, recalibrating incentive schemes, and ensuring that contractual terms are compliant yet still effective in supporting business objectives.

In addition, a meaningful transition period would allow industry bodies, such as RCSA, to design and deliver educational resources to assist both employers and employees in understanding their rights and obligations under the new framework. This kind of sector-wide education is essential to reduce confusion, ensure consistent application, and avoid unnecessary disputes or litigation. Without such lead time, businesses may be forced into rushed and poorly informed decision-making, undermining both compliance and confidence in the reforms.

For these reasons, we strongly recommend a minimum transition period of no less than two years. This timeframe strikes the right balance between ensuring reform momentum and giving businesses, employees, and industry stakeholders the practical space they need to adapt effectively and responsibly.