

# **Treasury Consultation on Reform to Non-compete Clauses and other Restraints on Workers**

Submission of the United Workers Union

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5 September 2025

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## Acknowledgement to Country

The United Workers' Union is a national trade union. We acknowledge and respect the continuing spirit, culture and contribution of Traditional Custodians on the lands where we work, and pay respects to Elders – past and present. We extend our respects to Traditional Custodians of all the places that United Workers' Union members live and work around the country.

## About the United Workers' Union

United Workers Union ('UWU') is a powerful union with 150,000 workers across the country from more than 45 industries and all walks of life, standing together to make a difference. Our work reaches millions of people every single day of their lives. We feed you, educate you, provide care for you, keep your communities safe and get you the goods you need. Without us, everything stops. We are proud of the work we do—our early childhood educators are shaping the future of the nation one child at a time; supermarket logistics members pack food for your local supermarket and farms workers put food on Australian dinner tables; hospitality members serve you a drink on your night off; hairdressers make sure you look and feel your best; disability and aged care members provide quality care for our families and communities both in centres or in homes; and cleaning and security members ensure the spaces you work, travel and educate yourself in are safe and clean.

## Introduction

- A. The UWU welcomes the opportunity to provide a submission in relation to the Australian Government's proposed reforms concerning non-compete clauses and other restraints on workers. The UWU supports the Government's commitment to progressing reform in this area, particularly in light of the evidence demonstrating the prevalence of unreasonable restraints that operate to inhibit workers' mobility and limit fair labour market outcomes.
- B. The emerging evidence and data set out in the Government's consultation paper<sup>1</sup> align closely with the experiences of UWU members, underscoring the need for reform to prohibit clauses that restrict job mobility and, in turn, limit workers' capacity to earn a livelihood. Such restraints also impede competition and innovation, producing adverse consequences not only for workers, but also for consumers and the broader economy.
- C. The UWU represents members across a wide range of industries, many of whom are adversely affected by the use of non-compete clauses. These clauses have been found in employment contracts spanning diverse sectors—from hospitality and food production to disability support—demonstrating the widespread and indiscriminate use of such restraints.
- D. Such clauses frequently lack a legitimate business justification and primarily function to suppress competition and restrict worker mobility. While many of these restraints are likely to be unenforceable if challenged in court, they nonetheless exert a chilling effect on workers due to limited awareness of their legal rights. The UWU continues to

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<sup>1</sup> Australian Government, The Treasury, Reform to non-compete clauses and other restraints on workers, Consultation Paper, 25 July 2025 (Treasury Consultation Paper).

advocate for the prohibition of these clauses, particularly where they serve no legitimate purpose and disproportionately impact low-paid and insecure workers.

- E. The UWU has had the benefit of reviewing both the ACTU's draft submission in response to the Treasury's 2025 consultation paper and its prior formal response to the Treasury's 2024 consultation. The UWU endorses the ACTU's position that the most effective approach to limiting the use of non-compete clauses is to adopt a legislative model similar to that used for the prohibition of pay secrecy provisions under the *Fair Work Act 2009 (FW Act)*. This approach provides clarity, enforceability, and consistency, and ensures that workers are protected from contractual restraints that undermine their rights and employment mobility.

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

- 1.1. The UWU considers that the Federal Trade Commission (**FTC**) definition of a non-compete clause provides a good foundation for reforms in the Australian context. The definition contains a number of important elements that should be incorporated into any Australian legislative approach. The FTC definition recognises that non-compete clauses are not limited to formal contractual terms, but can also be embedded in workplace policies or informal arrangements. This breadth is critical to ensuring that workers are properly protected from restraints that operate to limit their employment opportunities.

- 1.2. The FTC definition states that a non-compete clause is:

*“A term or condition of employment that either prohibits a worker from, penalises a worker for, or functions to prevent a worker from:*

*(a) seeking or accepting work with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or*

*(b) operating a business after the conclusion of the employment that includes the term or condition. The term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.”*

- 1.3. This definition covers many of the post-employment restraints that are commonly found in our members' employment contracts<sup>2</sup>.

### ***Restraints on resigning***

- 1.4. The UWU submits that the definition should also cover any term or condition that directly or indirectly attempts to prevent an employee from resigning from their employment.<sup>3</sup> As a matter of basic employment freedom, employees must be able to end the employment relationship, subject only to reasonable notice and any obligations in relevant industrial instruments. Contractual devices that, in effect, coerce continued service function as a restraint on job mobility and should be prohibited.

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<sup>2</sup> Appendix 1 – UWU example clauses

- 1.5. The following case study—concerning a UWU member in the hospitality sector—illustrates why the definition must extend to such terms.
- 1.6. In this case, the member worked at a small bakery/café making coffee and serving tables. The member’s contract guaranteed a minimum of 38 hours per week and a 12-month minimum employment period, with an option to extend by a further 12 months by agreement. A term of the contract stated as follows:  
  
*“By signing this contract, you agree to Minimum 12 months employment, with option of 12 months after that as per agreed by you and your employer.”*
- 1.7. Despite these terms, within the first 12 months the employer repeatedly failed to roster and pay the member for his contracted hours. Unable to sustain living costs on reduced pay, the member sought alternative employment.
- 1.8. After securing new work, the member gave two weeks’ notice of his intention to resign. The employer then threatened to commence legal proceedings against the café worker to recover “gross wages” for the balance of the fixed term. The member was distressed and uncertain about whether they could lawfully resign and therefore sought advice from UWU.
- 1.9. This conduct demonstrates how an employer can fail to honour core obligations (e.g., guaranteed hours) while simultaneously representing to employees that they cannot resign from their employment. While it is unlikely that a court would order specific performance of a contract of employment that stipulates that an employee must work for a minimum of 12-months for the employer in this instance, the clause was nonetheless initially successful as a scare tactic which illegitimately prevented the employee from leaving a bad employment situation in favour of other employment.
- 1.10. This example highlights the significant power imbalance that can exist within the employment relationship—particularly where an employer fails to uphold its own contractual obligations yet seeks to rely on legal threats to deter an employee from resigning. Such conduct has a chilling effect on workers’ ability to exercise their right to leave and pursue alternative employment, undermining both fairness and mobility in the labour market
- 1.11. To address this, the definition of a non-compete clause should explicitly encompass terms that prohibit, penalise, or function to prevent resignation (subject to reasonable notice and award/agreement requirements). A clear rule will reduce uncertainty, deter coercive practices, and protect freedom of movement. Including this safeguard within the definition will ensure employees are not trapped in untenable roles and can seek better opportunities without fear of legal reprisal, promoting fairness and aligning with the objectives of the Fair Work Act.

### **Concurrent employment restraints**

- 1.12. The UWU also believes that the definition of non-compete clauses should include clauses that unreasonably or unfairly restrict concurrent employment. Concurrent restrictions should also be recognised as harmful when they apply during employment, especially in the case of casual or part-time employees. This is consistent with the ACTU’s position

and reflects the experience of many workers across UWU membership. For example, in the disability care sector, UWU members are frequently restricted from working concurrently for more than one provider. This form of restriction demonstrates how restraints can operate during employment to reduce job mobility, limit income opportunities, and undermine worker and client choice.

- 1.13. Accordingly, the UWU recommends that the adoption of a definition of non-compete clause consistent with the FTC's formulation that extends to capture both post-employment and concurrent-employment restraints. This would ensure a comprehensive approach to protecting workers' rights to mobility and fair access to employment.

### ***Indirect penalties for breaches of restraint***

- 1.14. As the ACTU's submission also highlights, employers frequently rely on clauses that operate to indirectly penalise workers to discourage or prevent them from moving to alternative employment. For example, the UWU has identified a clause in the contract of a Team Leader employed by a National Disability Insurance Scheme (NDIS) provider which stated: *"You acknowledge that you will be liable in damages (including punitive or special damages) arising out of the breach of any of the terms of this provision."*
- 1.15. Similarly, in the hospitality sector, a worker was subject to a restraint clause providing that: *"You agree that, in the event of a breach by you of any of clauses 18, 19 or 20, damages may not be an adequate remedy and we or any other aggrieved party may, in addition to any other remedies, obtain an injunction restraining any further violation and other equitable relief."*
- 1.16. These examples demonstrate how contractual terms can impose significant financial or legal risks on workers, functioning as indirect penalties that restrict mobility and suppress competition. Importantly, whether such terms are ultimately enforceable or not, workers generally comply with them because they are fearful of legal consequences, legal proceedings and associated costs. They often lack the resources or legal knowledge to challenge their validity. In this way, the mere existence of these clauses exerts a powerful deterrent effect.
- 1.17. To ensure that such provisions are effectively addressed, the UWU supports the ACTU proposed to add to the FTC definition by inserting the words *"whether directly or indirectly"*. This amendment would ensure that the definition captures not only overt prohibitions, but also clauses that operate through indirect forms of penalty or restraint.
- 1.18. Due to the foregoing, the UWU support the proposed amendments to the FTC definition proposed by the ACTU.

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

- 2.1. The UWU does not consider any exceptions would be warranted.

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

- 3.1. Yes —the UWW believes that the prohibition should extend to all workers, including independent contractors and, in particular, “employee-like” contractors. Independent contractors often occupy some of the most vulnerable positions in the labour market. In sectors such as disability support, we have observed employers attempting to enforce unreasonable non-compete clauses that restrict movement between engagements and limit workers’ capacity to earn a livelihood. Allowing any carve-out for contractors would create a significant loophole and incentivise misclassification, undermining the reform’s intent.
- 3.2. Many UWW members are ostensibly engaged as independent contractors — some genuinely, but many without a sound legal basis — across manufacturing, disability support, security, and cleaning, among other industries. These workers commonly lack bargaining power and awareness of their rights; in several instances, individuals did not realise that being engaged as a contractor rather than an employee could leave them materially worse off. The Government has recently introduced protections for “employee-like” independent contractors, recognising this cohort’s need for statutory safeguards; the proposed restraints reforms should mirror that policy logic so that contractors are equally protected from non-competes and similar restraints.
- 3.3. For these reasons, the ban should apply equally to employees and independent contractors, ensuring fairness, preventing exploitation across work arrangements, and removing incentives for sham contracting or other forms of misclassification.
- 3.4. The UWW supports the ACTU’s proposal that this be addressed by the definition of a “worker” be adopted from the *Work Health and Safety Act 2011 (Cth)* to ensure the protection of all workers<sup>3</sup>.

### **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?**

- 4.1. The UWW, consistent with the ACTU’s position, does not support reliance on the high-income threshold for determining access to protections against non-compete and related restraints. The new provisions should apply to all workers. A high-income threshold approach risks a range of unintended consequences that would undermine the policy objective of enhancing labour mobility and protecting workers with limited individual bargaining power.
- 4.2. First, UWW members sometimes earn above the high-income threshold because they benefit from strong collective bargaining arrangements at their workplace, not because they possess strong individual bargaining power. In such cases, a high-income-threshold carve-out would withhold protections from the very workers the reforms are intended to support. This is especially likely in sectors where enterprise agreements deliver higher rates while workers still face asymmetric power dynamics at the individual level.

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<sup>3</sup> ACTU submission, WHS Act s.7;



- 4.3. Second, using the high-income threshold would create incentives for employers to structure remuneration to fall just above the threshold—through reclassification, rolled-up allowances, or discretionary bonuses—in order to avoid the ban. This risks salary inflation without commensurate power or security for workers, encourages sham “upgrading” of roles, and would likely increase disputation over how remuneration is calculated for threshold purposes.
- 4.4. Third, a single national threshold does not account for regional cost-of-living differences or volatile earnings. Workers may drift above the threshold temporarily due to overtime, loadings or bonuses, producing on-again/off-again coverage and legal uncertainty. This is particularly problematic in sectors with variable hours and earnings.
- 4.5. Fourth, a high-income-threshold exclusion risks entrenching inequities across industries and demographics. It may disproportionately disadvantage workers in occupations where higher headline pay masks low job security and weak individual leverage, and it may interact poorly with gendered pay structures and occupational segregation.
- 4.6. For these reasons, the UWU recommends that the ban on non-compete and similar restraints apply to all workers, irrespective of income. However, if government nevertheless proceeds with a high-income-threshold element, the following safeguards are essential to mitigate unintended consequences:
- (a) Coverage for award- and enterprise agreement-covered workers regardless of income. Mirror the unfair dismissal model by ensuring that any worker covered by a modern award or an enterprise agreement remains covered by the ban even if they exceed the high-income threshold. This approach would protect many UWU members who are above the threshold due to collectively bargained outcomes, not individual bargaining strength.
  - (b) Explicit inclusion of “employee-like” independent contractors. Reflecting recent policy recognising the vulnerability of employee-like contractors, extend the ban to these workers irrespective of income to remove incentives for misclassification and to ensure consistent mobility protections across engagement types.
  - (c) Clear and worker-protective remuneration definitions. If a threshold is retained, define “remuneration” narrowly (for example, base rate only), exclude volatile elements such as discretionary bonuses, overtime and loadings, and apply a 12-month averaging method with a presumption in favour of coverage where there is ambiguity. This reduces gaming and legal uncertainty.
  - (d) Anti-avoidance provisions. Prohibit arrangements that have the purpose or effect of pushing workers above the high-income threshold to defeat protections, with an evidentiary presumption against employers where remuneration is re-structured proximate to the imposition of a restraint.
- 4.7. However, the UWU believes that the most ideal ban would be one that is simple and universal, so that the above complexities are unnecessary, administrative burden is minimised, and enforcement is more effective.

- 4.8. In summary, reliance on the high-income threshold would misclassify many workers' real bargaining power, invite avoidance behaviours, and generate uncertainty. The most robust solution is universal coverage. Failing that, the safeguards outlined above are necessary to align the framework with the reform's purpose and to ensure that workers' freedom to change jobs or start a business is protected in practice.
- 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?**
- 5.1. The UWU supports the position of the ACTU. The high-income threshold should be assessed at the point at which it requires consideration, for instance, when the alleged contravention occurs. This might be when the contract is entered into, or when the employer seeks to vary a contract to include a non-compete clause.
- 6. Would the application of the ban to all fair work instruments, as defined by the Fair Work Act, have any unintended consequences?**
- 6.1. The UWU does not foresee unintended consequences from applying the ban on non-compete clauses to all fair work instruments. The UWU agrees with the approach proposed by the ACTU that the ban on non-compete clauses be addressed in a similar way to the pay secrecy provisions in the Act. This would minimise any unintended consequences as the model does not require changes to the delicate enterprise bargaining framework. It relies on mechanisms the system already used and are understood by parties. Under this model:
- (a) Any non-compete clause in an enterprise agreement or other fair work instrument would have no effect by operation of the Act.
  - (b) Civil penalties would apply for attempting to enforce such a clause.
  - (c) The Fair Work Commission could identify the issue during approval and alert the parties, but there would be no statutory requirement for an undertaking because the term would not be classified as an unlawful term under section 194.
- 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.**
- 7.1. The UWU supports the ACTU position that the Fair Work Act's civil remedy framework is the appropriate enforcement mechanism for a ban on non-compete clauses. Criminal penalties are not necessary.

**(a) Type of penalty**

*Civil penalties*

- 7.2. Civil penalties should apply to including, offering, maintaining, or attempting to enforce a prohibited restraint in any contract, policy or agreement. Ancillary liability should extend to those involved in a contravention.

*Remedies alongside penalties*

- 7.3. Courts should have the power to make any orders they see fit for contravention, including express powers to declare terms void, grant injunctions (including interim relief to restrain enforcement threats), order compensation where contraventions caused loss (for example, lost earnings from rescinded job offers), and make non-punitive orders (for example, compliance training).

**(b) Magnitude of the penalty**

- 7.4. The UWU believes it would be appropriate for the magnitude of penalties available to a court to align with existing Fair Work Act provisions for civil penalties. That is, at the level of up to 60 penalty units for an individual and up to 300 penalty units for a body corporate. Penalties should be capable of being imposed per contravention and per affected worker to deter systemic use.
- 7.5. For serious contraventions (knowingly or recklessly engaging in a breach): adopt the higher, existing Fair Work Act provisions for large companies (as apply to pay-secrecy and fixed-term prohibitions).

**(c) Circumstances in which the penalty should apply**

- 7.6. Penalties should apply to employer who breach the prohibition on including a non-compete clause in a contract of employment, deed, policy or other written agreement.
- 7.7. Apply the prohibition and penalties across all engagement types—employees, independent contractors and employee-like workers—to remove incentives for misclassification and ensure consistent protections for all workers.
- 7.8. Civil penalties for contravening the prohibition should apply at any of the following stages:
- (a) At formation of the contract of employment: proposing, offering or requiring a prohibited restraint as a condition of engagement by a prospective employer or principal
  - (b) During employment/engagement: inserting, maintaining, relying on, or threatening to enforce a prohibited restraint; conditioning promotion, training or benefits on acceptance of such a term; or presenting a restraint in a policy or code and asserting that it is binding.
  - (c) At or after termination: threatening litigation, issuing demand letters, or otherwise seeking to enforce a prohibited restraint.

*Workplace-rights framing and misrepresentation*

- 7.9. The protections against unlawful restraints should be recognised as a “workplace right” within the meaning of the Fair Work Act. This ensures that penalties also apply where an

employer or principal misrepresents that a prohibited restraint is lawful or enforceable, coerces acceptance of such a term, or takes adverse action because a worker refuses it (capturing misrepresentation and coercion within the general protections).

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

- 8.1. The UWU does not consider that there is any basis for the inclusion of “reasonable” defences and supports the submission of the ACTU.

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

- 9.1. The UWU, as the ACTU, believes that standing to commence proceedings for a breach of the non-compete ban should be granted to:
- (a) any employee, prospective employee, independent contractor or prospective contractor affected by the breach;
  - (b) a Fair Work Inspector; and
  - (c) a registered employee organisation entitled to represent the industrial interests of the relevant employee or contractor.

***Importance of standing for unions***

- 9.2. It is essential that unions are given independent standing to initiate proceedings for breaches of the non-compete prohibition for the following reasons:

**(a) Access to justice for vulnerable workers**

Many workers affected by non-compete clauses—such as those in insecure or low-paid roles—lack the financial resources, legal knowledge, or confidence to initiate proceedings themselves. Without union standing, these workers may simply comply with unlawful restraints rather than challenge them.

**(b) Collective enforcement and deterrence**

Unions can act strategically on behalf of multiple members or groups of workers, ensuring systemic breaches are addressed rather than leaving enforcement to fragmented individual claims. This creates a stronger deterrent effect and promotes compliance across industries.

**(c) Efficiency and expertise**

Unions have the industrial expertise and organisational capacity to identify breaches quickly and pursue remedies effectively. This reduces the burden on individual workers and the regulator, while ensuring consistent interpretation of the law.

**(d) Alignment with existing Fair Work Act principles**

The Fair Work Act already recognises the role of registered organisations in enforcing workplace rights. Extending standing to unions for non-compete breaches is consistent with this framework and reinforces the principle of collective representation.

- 9.3. The Treasury Consultation Paper also canvasses the option of providing standing to businesses intending to hire a worker subject to a restraint. UWW agrees this is justifiable, as these third parties have a legitimate interest in worker mobility and should be able to challenge unlawful restraints that impede recruitment of employees.

**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?**

- 10.1. The Fair Work Ombudsman's (FWO) primary responsibility should be to lead a comprehensive education and awareness campaign targeting both employees and employers. This includes developing accessible resources that explain the scope and implications of the ban, particularly for vulnerable workers such as independent contractors and those in low-paid or insecure roles.

- 10.2. Particular areas where assistance will be needed include:

- (a) Clarifying the scope of the ban, especially in relation to existing contracts and transitional arrangements.
- (b) Supporting small businesses and contractors, who may lack legal resources to understand the implications of the reform.
- (c) Ensuring culturally and linguistically diverse workers have access to translated and plain-language materials.
- (d) Providing guidance to employers on how to amend their standard form contracts to comply with the new law.

**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?**

- 11.1. As discussed above, any appropriate remedies available for breaches of other provisions of the Fair Work Act should be available to workers, including injunctions and compensation orders. As noted above, the FWO should have standing to bring proceedings, as part of its broader enforcement role using current compliance tools.

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

- 12.1. The UWW believes that the Fair Work Commission (**Commission**), is best placed to resolve disputes arising from the proposed ban on non-compete clauses. The Commission

already deals with a wide array of employment matters meaning the decision-makers already have the requisite expertise.

- 12.2. Also of benefit is the Commission's ability to deal with matters in a timely and low-cost way and its accessibility to unrepresented parties.

**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?**

- 13.1. The Commission should be given jurisdiction to both conciliate or arbitrate disputes regarding:
- (a) Whether a non-compete clause in a contract or other written document is covered by the ban;
  - (b) Whether the employee meets the high-income threshold;
  - (c) If the employee does meet the high-income threshold, whether the employee is nonetheless covered by the ban due to being covered by an award or enterprise agreement.

**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)?**

- 14.1. The UWW does not consider that there are any justifiable exemptions. The UWW supports the submission of the ACTU.

### **3.5 Transitional arrangements**

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

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

- 16.1. The UWW supports the submission of the ACTU regarding transitional arrangements. As the ACTU, the UWW would not oppose a 6-month grace period from commencement of the non-competes ban, during which employers are not penalised if they have non-compete clauses in existing contracts.

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

- 16.2. The UWW agrees with the submission of the ACTU in relation to consultation questions 17-19.

**20. 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).**

- 20.1. The UWU believes that a ban or limitation on client non-solicitation clauses is of critical importance and urges the government to extend the ban on post-employment restraints to cover non-solicitation clauses.
- 20.2. Non-solicitation clauses appear to be common in NDIS provider contracts, purporting to prevent the employee from approaching or soliciting business from individuals and families supported by their former employer. However in practice, it appears employers misuse these clauses in an attempt to stymie any client from moving providers of their own accord to stay with a valued disability support worker<sup>4</sup>.
- 20.3. A particularly concerning case study involves an UWU member who is a disability support worker who became the subject of legal action initiated by their former employer. A detailed outline of the UWU's members case study has been included in the ACTU submission and has also been appended to this submission and marked Appendix 3. The employer alleged breaches of confidentiality and non-solicitation provisions, stemming from the worker's engagement with a platform provider after leaving their role.
- 20.4. The non-solicitation clause in question sought to prevent the worker from "*directly or indirectly... soliciting, canvassing, approaching... or accepting an approach from*" any of the employer's clients for up to 12 months." The employer is pursuing approximately \$180,000 in damages, claiming the loss of two clients. However, the worker maintains that they did not initiate contact with the clients—who instead located the worker independently through the platform.
- 20.5. The employment contract also contained a restraint of trade clause, which imposed a 12-month restriction within a 50-kilometre radius. This case illustrates the disproportionate and punitive nature of such clauses, particularly when applied to low-paid, insecure workers in sectors like disability support and who may work in regional areas.
- 20.6. The UWU shares the concerns of stakeholders set out in the Treasury's consultation paper about the use of these clauses for employees particularly in the healthcare and broader care and support sector<sup>5</sup>.
- 20.7. The National Disability Insurance Scheme (NDIS) is the most significant reform of disability services in Australia in a generation. It aims to increase both the funding available for disability services, and the control that people living with disabilities have over the design and delivery of their care<sup>6</sup>. The NDIS 'choice and control' principle is the core principle that empowers participants to make their own decisions about their supports and how they are delivered, allowing them to choose service providers, manage funding, and direct their lives

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<sup>4</sup> See for example *Mental Illness Fellowship of Australia (NT) Inc v Sandrey* [2025] NTSC 57 where the employer brought proceedings for alleged breach of non-solicitation provisions, despite having no evidence of solicitation. It was found at trial that the defendant had not solicited any of the clients who gave evidence, and in fact they had moved providers of their own accord.

<sup>5</sup> Treasury Consultation Paper page 29

<sup>6</sup> Warr, D, Dickinson, H, Olney, S, et. al. (2017) *Choice, Control and the NDIS*, Melbourne: University of Melbourne

to achieve their NDIS plan goals. This includes the freedom to decide which providers to work with, how supports are used, and when and where services are received, with the understanding that participants have the right to dignity and respect while pursuing their goals.

20.8. Non-solicitation clauses that employers seek to rely on to essentially prevent an NDIS user from moving providers so that they can access their preferred and trusted home care or support worker appears to be antithetical to this core principle of the NDIS.

20.9. Given the importance of continuity of care and choice and control for NDIS users, any employment contract terms that seek to limit the ability for an NDIS user to follow a disability support worker to another provider should they change jobs should be prohibited. While non-solicitation clauses in theory do not prevent this, in theory it appears that NDIS providers are using these clauses in an attempt to limit NDIS users from moving to a different provider to access their preferred support worker.

**21. 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?**

21.1. The UWW does not consider there are any circumstances where it would be legitimate for businesses to use co-worker non-solicitation clauses. The UWW agrees with the views of legal academics mentioned in the Treasury's consultation paper who argue that businesses should not have a special interest of protecting a stable workforce that is protected by the courts. If employers wish to achieve a stable workforce this should be done through the use of attractive terms and conditions of employment<sup>7</sup>.

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

21.2. The UWW supports the submission of the ACTU in respect of questions 22-26.

## **5. Restraints on concurrent employment**

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

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

28.1. The United Workers Union supports the position put forward by the ACTU regarding the use of non-compete and related restraint clauses for part-time, casual, and gig economy workers. These clauses are fundamentally inappropriate for workers who are not guaranteed full-time hours or stable income. It is unreasonable for employers to expect exclusive commitment from individuals whose employment arrangements do not provide financial security or sufficient working hours.

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<sup>7</sup> Treasury consultation paper, page 31 referring to Professor J Riley Munton, *Submission to the Competition Review's Issues Paper*, 2024, p. 3.



- 28.2. Many workers in these categories must take on multiple jobs to meet basic living costs. Contractual terms that restrict their ability to do so—such as non-compete clauses or requirements to notify employers of secondary employment—should be expressly prohibited. These provisions unfairly limit workers’ autonomy and earning capacity, and serve no legitimate purpose in most cases.
- 28.3. However, if such clauses are to be permitted under law, they must be tightly constrained. The only acceptable application would be in circumstances where a secondary job would directly interfere with the employee’s ability to perform their primary role, or where a genuine conflict of interest arises. This approach is consistent with the Treasury Consultation Paper’s suggestion that any exceptions should be narrowly defined and justified.

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

### 29. 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?

- 29.1. The UWW supports the position advanced by the ACTU that no-poach and wage-fixing agreements should be prohibited. These arrangements serve only to benefit employers, while unfairly restricting competition and distorting wage markets to the detriment of workers. They suppress wages, limit job mobility, and undermine the ability of workers to negotiate fair pay and conditions—particularly in sectors where labour is already undervalued.
- 29.2. The UWW agrees with the ACTU that such agreements should be treated as a distinct form of anti-competitive conduct under Part IV of the *Competition and Consumer Act 2010*.
- 29.3. The UWW maintains that employers should be incentivised to retain staff through fair wages and decent conditions, not through collusive practices that restrict workers’ rights and suppress competition and wages.

### 30. Should there be exemptions to the proposed ban on no-poach agreements? If yes, on what grounds? What restrictions should apply to their use?

### 31. Should there be exemptions to the proposed ban on wage-fixing agreements? If yes, on what grounds? What restrictions should apply to their use?

- 31.1. The UWW supports the proposal in the Treasury Consultation Paper for an exemption for multi-employer agreements from the ban on wage-fixing agreements<sup>8</sup>
- 31.2. The UWW does not consider there are any justifiable exemptions and agrees with the ACTU submission that there should be mandatory transparency regarding any agreement that is made under any exemption. Multi-employer bargaining under the FW Act provides a transparent means of setting wages for multiple employers that also empowers workers to bargain and take industrial action in support of improving their

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<sup>8</sup> Treasury consultation paper at 41

wages and conditions. Multi-employer agreements contains appropriate safeguards for employees including the requirement that they have genuinely agreed to the bargained outcome and most importantly, unions are generally involved in the creation of multi-employer agreements which increases workers access to unions and representation.

- 31.3. The UWW does not consider there to be any valid exemptions to a ban on no-poach agreements.

## **Appendix 1**

### **United Workers Union – Restraint of Trade clause examples**

# Hospitality worker

## Hospitality Worker 1

### **19. Restraint During Employment**

19.1 During your employment, you must not, without our prior written consent:

- a. act as an officer or employee of, or as a consultant or adviser to, any other corporation, firm, organisation or person;
- b. take up any other position with any other corporation, firm, or organisation (whether paid or unpaid); or
- c. hold any shares or securities which create or may create a conflict of interest.

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### **20. Restraint After Employment Ceases**

20.1 After termination of your employment, you must not, without our prior written consent:

- a. for the Restraint Periods; and
- b. in the case of clause 20.1(c), within the Restraint Areas,

either directly or indirectly do or engage in any of the following:

- c. alone or jointly with, or on behalf of, anybody else in any Capacity, carry on, operate or be engaged, interested or employed in a Competing Business;
- d. interfere with, disrupt or attempt to disrupt, or procure or solicit anybody else to interfere with, disrupt or attempt to disrupt, the relationship (contractual or otherwise) between us and any of:
  - i. our customers in respect of whom you have carried out work or have had a business relationship at any time during the last 12 months of your employment; or
  - ii. our Identified Prospective Customers with whom you have been involved in developing a business relationship for our benefit, at any time during the last 12 months of your employment;
- e. induce, encourage or solicit any of our employees, contractors or agents, with whom you have worked or have had a business relationship at any time during the last 12 months of your employment, to leave our employment or agency or to cease providing services to us; or
- f. procure or solicit any other person to induce, encourage or solicit any of our employees, contractors or agents, with whom you have worked or have had a business relationship at any time during the last 12 months of your employment, to leave our employment or agency or to cease providing services to us.

20.2 This restraint does not prevent you from owning less than 5% of the shares in a publicly listed company.

20.3 You agree that:

- a. the restraints set out above will apply as if they consisted of several separate, independent and cumulative covenants and restraints consisting of:
  - i. each of clauses 20.1(c), 20.1(d) and 20.1(e) combined with each separate Restraint Period; and
  - ii. clause 20.1(b) combined with each separate Restraint Period, and each such combination with each separate Restraint Area;
- b. if any separate covenant and restraint referred to in clause 20.3(a) is unenforceable, illegal or void, that covenant and restraint is severed and the other covenants and restraints remain in force;
- c. each of these separate provisions is a fair and reasonable restraint of trade, that goes no further than reasonably necessary to protect our Confidential Information, staff and client connections, goodwill and business;
- d. substantial and valuable consideration has been received for each separate covenant and restraint in this clause directly and indirectly by you, including your employment, remuneration and leave entitlements; and
- e. any combination of the acts referred to above for each separate Restraint Period and, if applicable, Restraint Area would be unfair and calculated to damage our Confidential Information, staff and client connections, goodwill and business, and would lead to substantial loss to us.

20.4 Any reference to “us” or “our” in this clause includes our Related Bodies Corporate.

20.5 This provision continues to apply after this Contract comes to an end.

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## **21. Remedies for Breach**

21.1 You agree that, in the event of a breach by you of any of clauses 18, 19 or 20, damages may not be an adequate remedy and we or any other aggrieved party may, in addition to any other remedies, obtain an injunction restraining any further violation and other equitable relief.

## **Schedule 2**

### **General**

#### **Item 4 Restraint Areas**

- a. within the Melton City and surrounding suburbs
- b. 60km radius of company outlets

#### **Item 5 - Restraint Periods**

- a. 12 months after termination of the employment.
- b. 6 months after termination of the employment.
- c. 3 months after termination of the employment.

# Food production worker

## 1. Restraint of Trade

- a) The Employee covenants with the Employer that the Employee shall not, whether individually or as principal, agent, partner, joint venture, shareholder (except as shareholder in a company whose shares are quoted on an Australian Stock Exchange) directly or indirectly without the previous consent in writing of the Employer be concerned or interested or employed in, or manage or operate or participate in the management or operation of any activities which are likely to be in competition with the Employer's business activities during the Employee's employment, and for a period of 6 months following the termination of employment with the Employer.
  - b) During the term of the Employee's employment with the Employer and for a period of six (6) months following the termination of such employment for any reason whatsoever, the Employee will not, either direct or indirectly, on the Employee's behalf or on behalf of others, solicit, divert or hire, or attempt to solicit, divert or hire any person employed by the Employer.
  - c) While the Employee will retain the absolute right to pursue any claim, demand, action or cause of action that the Employee may have against the Employer, the existence of any claim, demand, action or cause of action by the Employee against the Employer shall not constitute a defence to the enforcement by the Employer of any of the Employee's promises contained in this Agreement.
  - d) During the term of your employment by the Employer and for a period of six (6) months following the termination of this Agreement for any reason whatsoever, the Employee shall not (except on behalf of or with the prior written consent of the Employer), either directly or indirectly, on your behalf or on behalf of others:
    - (i) Solicit, divert, appropriate to or accept on behalf of any competing business; or
    - (ii) Attempt to solicit, divert, appropriate to or accept on behalf of a competing business,
- Any business from any customer or actively sought prospective customer of the Employer with whom the Employee has dealt, whose dealings with the Employer have been supervised by the Employee or about whom the Employee has acquired proprietary information in the course of the Employee's employment.
- e) For the purpose of this sub-clause a competing business is any business, organisation or enterprise that offers services of a similar nature to the services provided by the Employer.

# Disability Support Worker

## **Other Employment**

Prior to commencing employment, you must disclose all / any existing employment or engagements. During

the course of your employment with the Employer, you may not undertake any additional employment or

engagement without prior permission from the Chief Executive Officer. You may not undertake any

employment or engagement that:

- a. Results in you competing with the Employer;
- b. Adversely affects the Employer; or
- c. Hinders your performance of duties owed to the Employer.

...

## **Commitment to the Employer**

You agree that at no time during your employment at the Employer or within 12 months of ceasing employment

at the Employer will you:

- a. Approach, directly or indirectly, any individuals and families supported by The Employer to

influence them to cease or refrain from using the services of the Employer

- b. Approach, directly or indirectly, any employee of the Employer to influence that person to cease employment with the Employer or otherwise entice them away from the Employer; and

- c. Solicit, canvass or in any way seek the custom, business or referral of any individuals and families supported by the Employer whether on your own accord or behalf of another service provider either directly or indirectly.

You agree that at no time within 12 months of ceasing employment with the Employer will you directly or indirectly provide support services to any individuals and families currently or previously supported by the Employer, unless given specific permission in writing by the CEO.

## Team leader at an NDIS provider

### 25. NON-SOLICITATION AND POST-TERMINATION RESTRAINT

25.1 From the date your employment ends, you agree not to solicit or attempt to solicit business from any client for the duration of the Restraint Period.

25.2 From the date your employment ends, you agree not to engage or prepare to engage in a business that competes with the business of the Employer or any Associated Entities for the duration of the Restraint Period within the Restraint Area.

25.3 From the date your employment ends, you agree not to solicit, attempt to solicit, entice or encourage any employee of the Client or the Employer or any Associated Entities to leave their engagement with the Employer for the duration of the Restraint Period within the Restraint Area.

25.4 From the date your employment ends, you agree not to interfere or attempt to interfere with the relationship between the Employer or any Associated Entities and its Clients, employees or suppliers for the duration of the Restraint Period.

25.5 In this provision:

(a) Client means any person, firm or company who at any time during the period of 12 months prior to the termination of your employment was a Client of the Employer or any Associated Entities, in respect of the part or parts of the business in which you were employed.

(b) Restraint Period means:

(i) 12 months or

(ii) 6 months or

(iii) 3 months.

(c) Restraint Area means:

(i) 50 km radius from the location described in Item 6 of the Schedule or

(ii) 25 km radius from the location described in Item 6 of the Schedule or

(iii) 10 km radius from the location described in Item 6 of the Schedule.

25.6 The restrictions in this clause apply to conduct which is either direct or indirect (eg done

through an agent of any kind) and regardless of whether the conduct is engaged in for your own benefit or for the benefit of any other person or entity.

25.7 Each of the covenants in this clause will have effect as if it were the number of separate covenants resulting from combining each covenant with each subsection of the defining terms, referred to in the covenant. Each of the above obligations are separate and independent obligations. In the event that one or more of the obligations are found to be unenforceable, the remaining obligations will continue to apply.

25.8 You acknowledge that each of the above restrictions are reasonable and necessary to protect the Employer's legitimate interest.

25.9 You acknowledge that you will be liable in damages (including punitive or special damages) arising out of the breach of any of the terms of this provision

## Clause in an enterprise agreement covering a small employer in the early childhood education sector

### **CONFLICT OF INTEREST, NON-SOLICITATION AND RESTRAINT**

1. During employment, an Employee should at all times endeavour to avoid situations where a conflict of interest may arise between their activities as an Employee of the Employer and their dealings with other parties. Should an Employee potentially be in such a situation, the Employee must take action to avoid the conflict of interest (including notifying your Employer immediately) unless the Employee has obtained the written consent of the Employer.
2. Failure to make a declaration to the Employer where a conflict of interest arises may result in termination of the Employee's employment.
3. While employed by the Employer and for a period of up to six months following termination of employment, the Employee will not:
  - (a) encourage or persuade any other Employee of the Employer (or its related entities) to resign; and
  - (b) encourage or persuade any of the Employers, clients or suppliers to terminate or restrict their relationship or trade relationship with the Employer.
4. The conflict of interest, non-solicitation and restraint of trade provisions referred to in this clause are
5. to protect the legitimate business interests of the Employer and its related entities.



6. A breach of this clause by the Employee may be grounds for summary dismissal and or enable the Employer to seek legal remedies for such breach.
7. If any provision of this clause or any part of this clause is deemed invalid, illegal or unenforceable for any reason, then such part of the provision may be severed and the rest of this clause will remain in full force in effect.

## **Appendix 3**

### **UWU Case Study: Secondary Employment and Restraint of Trade**

#### **Background**

- A disability support worker was employed by a regional disability services provider (“the Employer”) from mid-2022 until December 2024.
  - In early 2024, the worker also commenced casual employment working ad hoc shifts with an online platform (“the Platform”), after being contacted by a former client who had difficulty securing stable support.
  - The client occasionally received services from the Employer, but on an irregular basis.
  - In October 2024, the Employer asked staff to declare secondary employment. The worker disclosed that they were performing 10–15 hours per week through the Platform.
  - In November 2024, the worker gave notice of resignation from the Employer.
- 

#### **Employer’s Claim**

- In February 2025, the worker received a legal notice from the Employer’s lawyers, stating an intention to pursue a claim of approximately \$180,000.
  - The claim was based on allegations that the worker:
    1. Misused confidential information to contact clients; and
    2. Breached a restraint of trade clause in their contract, which prohibited soliciting or accepting work from the Employer’s clients for 12 months post-employment.
  - The Employer argued that the amount claimed represented one year of lost income from two clients who had engaged the worker through the Platform.
- 

#### **Worker’s Position**

- The worker denied ever soliciting clients of the Employer or encouraging them to use the Platform.
- Both clients had already joined the Platform independently due to the Employer’s inability to provide consistent support.

- It was common in the region for clients to rely on multiple providers, including ad hoc platform workers, because single providers were often unable to meet their full needs.
- It is common for disability support workers to work for multiple employers as an employee and/or as an independent contractor to get enough work.

#### **Specific circumstances:**

- *Client A:* Required extensive daily support which the Employer could not provide. Another client recommended the Platform, and Client A signed up independently. On some occasions, the worker provided 10 hours of support through the Employer, then an additional 3 hours via the Platform. This arrangement occurred intermittently for about 8 weeks and ceased before the worker resigned.
- *Client B:* Was directly encouraged by the Employer to use the Platform when the Employer could not reliably fill shifts.
- The worker believed they were not in breach of their restraint clause because:
  - They had not approached or solicited clients;
  - Clients were already using the Platform independently; and
  - To their knowledge, the clients were no longer receiving services from the Employer.

#### **Clauses in employment contract**

There are two provisions relating to solicitation and restraint of trade. The first provides as follows:

##### ***“26. NON-SOLICITATION AND POST-TERMINATION RESTRAINT***

*26.1 From the date your employment ends, you agree not to solicit or attempt to solicit business from any client for the duration of the Restraint Period.*

*26.2 From the date your employment ends, you agree not to engage or prepare to engage in a business that competes with the business of the Employer or any Associated Entities for the duration of the Restraint Period within the Restraint Area.*

*26.3 From the date your employment ends, you agree not to solicit, attempt to solicit, entice or encourage any employee of the Client or the Employer or any Associated Entities to leave their engagement with the Employer for the duration of the Restraint Period within the Restraint Area.*

26.4 From the date your employment ends, you agree not to interfere or attempt to interfere with the relationship between the Employer or any Associated Entities and its Clients, employees or suppliers for the duration of the Restraint Period.

26.5 In this provision:

(a) **Client** means any person, firm or company who at any time during the period of 12 months prior to the termination of your employment was a Client of the Employer or any Associated Entities, in respect of the part or parts of the business in which you were employed.

(b) **Restraint Period** means:

- i 12 months or
- i 6 months or
- i 3 months.

(c) **Restraint Area** means:

- i 50 km radius from the location described in **Item 6** of the Schedule or
- i 25 km radius from the location described in **Item 6** of the Schedule or
- i 10 km radius from the location described in **Item 6** of the Schedule.

26.6 The restrictions in this clause apply to conduct which is either direct or indirect (eg done through an agent of any kind) and regardless of whether the conduct is engaged in for your own benefit or for the benefit of any other person or entity.

26.7 Each of the covenants in this clause will have effect as if it were the number of separate covenants resulting from combining each covenant with each subsection of the defining terms, referred to in the covenant. Each of the above obligations are separate and independent obligations. In the event that one or more of the obligations are found to be unenforceable, the remaining obligations will continue to apply.

26.8 You acknowledge that each of the above restrictions are reasonable and necessary to protect the Employer's legitimate interest.

26.9 You acknowledge that you will be liable in damages (including punitive or special damages) arising out of the breach of any of the terms of this provision."

\*Notably, the restraint area, although unclear, applies to a maximum of a 50km radius from the address in the schedule (**Restraint Address**). The worker only provided disability services within an area well in excess of 200km from the Restraint Address.

The second of the two provisions is as follows:

27 *“During your employment and from the date this Contract ceases, you agree that you will not directly or indirectly, whether for your own benefit or for the benefit of another entity, solicit, canvass, approach (or attempt to solicit, canvass or approach) or accept an approach from a client of the Employer for a period of:*

*I. 12 months*

*II. 6 months or*

*III. 3 months.*

*27.1 Each of the above obligations are separate and independent obligations. In the event that one or more of the obligations are found to be unenforceable, the remaining obligations will continue to apply.”*