

BCA

Business Council of Australia

Non-compete clauses and other restraints on workers

Business Council of Australia

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1. Executive summary

The Business Council of Australia (BCA) welcomes the opportunity to provide a submission to Treasury's Consultation Paper Reform to non-compete clauses and other restraints on workers.

The BCA represents and advocates for its members, comprised of around 130 of Australia's largest employers. We are a member-led organisation, and our submissions reflect engagement with those members and the expertise and practical experience they bring.

We acknowledge the Treasurer's commitment made in March 2025 to ban non-compete clauses for employees earning less than the high-income threshold in the *Fair Work Act 2009* (Cth) (FW Act), along with some reforms to the *Competition and Consumer Act 2010* (Cth) (CCA) centred on anti-competitive agreements or limitations on staff being hired by competitors. While this is now the government's formal policy, we would like to reiterate our concerns and principled opposition to these commitments and potential reforms anticipated to come into effect from 2027, notably:

- Non-compete clauses play an important role in businesses' legitimate protection of confidential information, intellectual property and customer and client relationships, particularly in circumstances where other business protection mechanisms have failed or may be otherwise insufficient or where the employee has demonstrated non-compliance with confidentiality obligations owed to their employer or former employer.
- Non-compete and non-poach clauses can benefit employees by giving employers the confidence to invest in their workforce, including training, and access to development of strategy and other commercially sensitive information.
- The Australian courts have already developed a balanced and nuanced approach to the enforcement of restraints at common law, adaptable to the facts and circumstances of individual cases.

In our view, existing common law principles already address many of the risks associated with non-compete clauses, and education and guidance for employers and employees on the circumstances in which such clauses are enforceable remains a better approach than additional regulation. Introducing new legislation would add to the regulatory burden, contrary to the Economic Reform Roundtable's commitment to reduce regulation, simplify processes for business, and lift productivity. While we acknowledge that non-compete clauses are not appropriate in all circumstances, we are concerned that this proposal, despite being considered a productivity measure, risks producing the opposite effect by having numerous unintended consequences.

The BCA has long recognised that non-compete clauses are not appropriate in all circumstances. However, we remain confident in the existing approach taken by Australian courts, which appropriately balances the restrictive nature of such clauses with the legitimate interests of Australian businesses in protecting their intellectual property and investment. Under common law, restraints are generally presumed to be unenforceable unless the employer can demonstrate otherwise. The onus is on the employer to pursue court action to enforce a restraint, which can be costly and is therefore typically undertaken only when there is a strong belief that the employee or former employee has grossly breached their obligations.

In Section 2 of this report, we outline our key observations and recommendations, which include:

- **Regulatory burden:** Businesses are already facing heavy compliance demands. Any new reforms should be independently assessed for their real-world impact on productivity and dynamism, ensuring compliance costs are proportionate to the harm being addressed. We are cognisant that many small- to medium-sized businesses do not have access to large compliance resources. For them, additional regulatory obligations can be disproportionately costly, diverting time and capital away from investment, innovation, and growth.
- **Scope and exemptions:** Independent contractors should be excluded from any reforms, as they differ from employees and already have protections under existing law. A broad set of exemptions should also apply so that reforms do not restrict the legitimate protection of business interests and confidential commercial and other such proprietary information or conflict with other legal requirements.

- **Labour mobility:** Labour mobility depends on many factors well beyond restraints, including economic factors, licence recognition, tenure benefits, housing availability and relocation costs.
- **Income thresholds:** If income thresholds are used, they must reflect the full remuneration (including commissions, incentives and bonuses) and allow exemptions for roles involving access to, and usage of an employer's sensitive information. This is particularly important in sales and business development roles where employees are rewarded for sales growth and pipeline.
- **Other restraints:** Non-solicitation clauses should not be restricted as they do not prevent employees from working elsewhere and only temporarily protect legitimate client, supplier and staff relationships. Restrictions on concurrent employment should also not be introduced; education about risks such as unsafe working hours and confidentiality breaches is a better approach.

In section 3 we respond to several detailed questions posed in the consultation paper.

2. Key observations and recommendations

2.1 General observation

1. **We remain concerned that the case for reform does not sufficiently acknowledge or give appropriate weight to the existing common law framework, which already governs and enforces non-compete clauses.** The Australian courts have already developed a balanced and nuanced approach to the enforcement of restraints at common law, adaptable to the facts and circumstances of individual cases. The reason courts have a long history of balanced but limited enforcement of restraints, despite their potential impact on competition, is recognition of the special position employees are in by virtue of their employment and the unique damage they can do to their employer as a consequence.

Recommendation: In our view, while legislating to regulate restraints appears to be the government's preferred approach, we strongly believe that a more effective and proportionate first step would be to enhance awareness and understanding of the existing legal framework. This could be achieved through targeted education initiatives led by the Fair Work Ombudsman, the ACCC, employer organisations, and employee representatives. Alternatively, codifying the current common law principles in legislation may offer a more balanced path forward than introducing broad prohibitions without fully assessing their potential consequences and would create a consistent national framework. If this view is not accepted, we have proposed a form of wording for regulation in part 3 of this submission below.

2.2 Ban on non-compete clauses for low- and middle-income workers (section 3)

2. **Independent contractors do not have the characteristics of an employee and therefore should not be subject to these reforms.** Further, independent contractors are already entitled to remedies for unfair contract terms under the FW Act, the *Independent Contractors Act 2006* (Cth) and the CCA.

Recommendation: Independent contractors should be exempt from these reforms.

3. **If it is determined to proceed with the additional layer of regulation, a broad range of exemptions should be available to ensure the reforms do not extend beyond the normal scope of legitimate business activity.**

Recommendation: A broad range of exemptions should be available to ensure the reforms do not extend beyond the normal scope of legitimate business activity. In support of this recommendation, and despite our general opposition to the proposal to ban non-competes for certain workers, we have proposed a definition for the non-compete ban that creates an exemption based on a codification of existing common law principles aimed at permitting targeted enforcement in a limited set of circumstances.

4. **Labour mobility is influenced by multiple factors.** Labour mobility supports competition and enhances productivity across the economy. A more mobile workforce allows labour to flow more efficiently to sectors and regions where it is most in demand. Restrictions on post-employment arrangements are not the sole factor that limits labour mobility, there are broad range of factors including structural factors, such as the state of the economy and availability of desirable job vacancies,¹ the benefits of longer tenure (e.g., long service leave and other entitlements), and challenges with mutual recognition of licences and qualifications across state and territory boundaries. To the extent increasing labour mobility (with consequential wage increases) is the stated policy intent for these proposed measures, we encourage Treasury and the Department of Employment and Workplace Relations to consider how other recent amendments to the FW Act impact the availability and desirability of job switching for employees, and the ability of employers to

¹ See for example, Ng, Thomas W H et al, Determinants of job mobility: A theoretical integration and extension *Journal of Occupational and Organizational Psychology* (2007), 80, 363-386

ensure workers are best matched for available roles. These include amendments made in the last term of Government such as those aimed at increasing and cementing ‘job security’ i.e. the duration of a workers’ employment with a single employer, and measures such as multi-employer bargaining which are aimed at standardising wages and conditions across employers in industries or locations and encouraging “*business competing on quality...and on product and service offerings, rather than wages and conditions...*”²

Recommendation: Government efforts should also focus on addressing other barriers to labour mobility, particularly the challenges associated with mutual recognition of state-based licences and qualifications across state and territory boundaries.

5. **Introducing mandatory compensation for non-compete clauses may impose additional costs on employers and could have a range of unintended consequences.** It may also lead to an increase in enforcement activity before the courts. There are also a number of unresolved practical considerations, including how compensation would be calculated, who would be responsible for administering the process, whether it would involve regulatory or judicial oversight, and whether any defences would be available in recognition of the legitimate role restraints can play in protecting proprietary information and employer investment. Rather than promoting labour mobility, such a change could inadvertently discourage investment in employee development.

Recommendation: Mandatory compensation for non-compete clauses should not be introduced.

6. **Reforms to any employment arrangements are administratively burdensome for all businesses and often require extensive consultation and communication with employees.**

Recommendation: Any prohibition on non-compete clauses should apply prospectively from an agreed future date to allow employers adequate time to assess and adapt to the implications for various roles, remuneration structures, and broader business arrangements. A commencement date such as 2027 may not sufficiently account for the complexity and scale of the changes required, particularly for larger or more regulated organisations. A considered lead time would help ensure orderly implementation and years should be provided to allow businesses sufficient time to communicate the changes to employees and implement alternative measures to protect their legitimate business interests. We urge Treasury to be cognisant of the regulatory burden on businesses of all sizes, and the impact of a range of recent reforms.

7. **Employment contracts that include non-compete terms that infringe the purported ban should not be actionable per se. Rather, clauses that offend the ban should be unenforceable.** This reflects the current and careful balance maintained by the common law.

Recommendation: Non-compete clauses that breach the ban are unenforceable; rather than being actionable by an individual, the FWO or a registered organisation. The ban on non-competes is not a civil remedy provision

2.3 Other reforms to employee restraints of trade (section 4)

8. **Restrictions linked to the Fair Work Act income threshold are not practical in many cases, as the legitimate business interests employers seek reasonable protection for are not always related to wage and salary levels but are linked to the specific duties and tasks in a role.** In our view, this threshold is arbitrary and restrictive. By relying on the high-income threshold, it assumes employees below this level have no potential to damage legitimate business interests or misuse their employer’s confidential information. The case law demonstrates this is not the case. Many roles under the threshold still involve sensitive commercial and proprietary information or client relationships in which the employer has invested

² The Hon Tony Burke MP, *Secure Job Better Pay Second Reading Speech*, 25 October 2022.

significant resources. Excluding commissions and bonuses also means some highly paid employees may fall outside non-compete protections. This approach may have the impact of encouraging employers to restructure pay in ways that disadvantage employees.

Recommendation: If wage/salary is to be considered a determining factor in establishing a threshold, then we recommend that the threshold include a fair representation of an employee's salary currently not captured by the high income threshold (namely commissions, incentive payments, and/or bonuses), and exemptions be made possible in circumstances where individuals below the current threshold have access to highly valuable or sensitive information. We also propose that non-compete terms be enforceable against employees earning below the threshold in limited and defined circumstances which reflect the intention and effect of the common law.

9. **Non-solicitation clauses do not prevent an employee from working elsewhere and do not impose an unreasonable constraint on job mobility.** They must be appropriately limited both by time and geographical application to be enforceable.³ They play an essential role in protecting employers' legitimate business interests in their customer connections and their investment in recruiting, attracting and most importantly, in investing in talent.

Recommendation: Non-solicitation clauses should not be restricted.

2.4 Restraints on concurrent employment (section 5)

10. **We recognise that many Australians choose to work for multiple employers concurrently, either because they are underutilised by their primary employer or value the diversity of different roles.**

There is no general rule prohibiting employees from engaging in gainful employment in their spare time, and this has been confirmed by case law in various Australian and other common law jurisdictions.⁴ It is also demonstrated by the rise in the gig-economy, where ABS statistics indicate 68 per cent of gig workers did not consider digital platform work to be their main job.⁵

Issues arise when outside employment involves the misuse of the primary employer's confidential information, interferes with the performance of work for which the employee is being paid by the first employer (i.e., the employee is performing and being paid for two roles simultaneously), or represents a conflict of interest. Because of this, there is insufficient evidence, or business case presented in the consultation paper, for a modification of the common law in relation to concurrent employment.

Restrictions on concurrent employment imposed by employers are generally legitimate, reflecting obligations for employees to discharge tasks and duties in an appropriate time frame using due skill and diligence, or for employers to meet work health and safety obligations, and support employer expectations around fidelity, good faith, and confidentiality, and avoiding conflicts of interest. These restrictions do not affect post-employment arrangements and, in most cases, simply require employees to consult with their employer before taking on additional work.

Treasury will also be aware that certain professions are subject to specific legal and regulatory restrictions on concurrent employment, particularly where strict independence requirements apply, for example, personnel working within audit firms.

Recommendation: There is no justification for restricting concurrent employment arrangements as they currently operate in Australia, particularly for full-time employees. Instead, greater emphasis should be

³ *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535

⁴ *Cementaid (NSW) Pty Ltd v Chambers* (unreported, Spender J, 29 March 1995); *Robert Lawrence and Attorney-General's Department* [2004] NSWIRComm 59, cited in, Sappideen et. Al., (8th ed, 2016), *Macken's Law of Employment*, Lawbook Co.

⁵ Australian Bureau of Statistics (August 2024), *Working arrangements*, ABS Website, accessed 3 September 2025.

placed on educating both employers and employees about the associated risks, most notably work health and safety concerns (such as excessive or unsafe working hours) and confidentiality and conflict of interest risks.

2.5 No-poach and wage-fixing agreements (section 6)

11. **We do not see a business case in Australia for further reforms to address no-poach or wage-fixing arrangement.** We have not yet seen any significant evidence to suggest that wage fixing, or non-poaching arrangements present a current threat to employment and post-employment opportunities.

Recommendation: With the intention to amend Part IV of the Competition and Consumer Act to proscribe no-poach and wage-fixing arrangements as their own form of anti-competitive conduct, we encourage the government to consider very broad exemptions which recognise the realities of Australian employment landscape namely collective bargaining agreements (including the push on Multi-employer bargaining), Joint Ventures, Secondment arrangements, Labour hire firms, Professional sports leagues and ACCC authorisations.

2.6 Unintended consequences

The existing common law already appropriately and efficiently manages the risks of non-compete clauses effectively. Rather than adding new laws and supporting regulations, educating employers and employees about the appropriate use of these clauses and their enforceability is a better approach. Introducing legislation will increase regulatory burdens for all businesses, conflicting with the Economic Reform Roundtable's goals to reduce regulation and enhance productivity. While non-compete clauses aren't always appropriate, we are concerned this proposal, aimed at improving productivity, will lead to unintended negative consequences such as:

- Potentially constraining the career development of junior employees, as employers may adopt a more cautious approach that limits their exposure to strategic or commercially sensitive information and reduces opportunities for direct engagement with clients, customers, or suppliers.
- Undermining Australia's investment attractiveness compared with jurisdictions that allow such restraints, particularly for businesses engaged in the development of intellectual property or other commercially sensitive activities.
- Employers may be less willing to invest in upskilling and training their workforce.
- Investors may be less willing to pursue acquisitions or mergers if they cannot get reasonable assurances that key employees will remain within the business for a reasonable period after acquisition.
- Employees may earn less. American studies have found that workers subject to non-compete terms have higher pay than those without, and other US data has found that workers with non-competes are more likely to ask for a raise or promotion, and more likely to apply for new jobs, despite adjustments for other worker characteristics,⁶
- If the policy is implemented to the full extent canvassed in the consultation paper, there will be gaps in the law protecting legitimate business interests. For example, the common law duty of confidence does not protect staff and customer connections,⁷ similarly s 183 of the *Corporations Act 2001* (Cth), only applies to confidential information, and is further limited to application to directors, officers and employees of 'corporations' and therefore will offer no protection to a large range of businesses. It will also add further

⁶ Federal Reserve Bank of Minneapolis (2023) *New data on non-compete contracts and what they mean for workers*, <https://www.minneapolisfed.org/article/2023/new-data-on-non-compete-contracts-and-what-they-mean-for-workers>

⁷ Ian Neil SC and Nicholas Saady, *The reasonableness of Restraints: An Analysis of the Enforcement of Post-Employment Restraints* (2018) 46 ABLR 99.

compliance burdens to businesses at a time when we are collectively looking to reduce red tape across the economy to boost productivity.

3. Detailed questions

Question	BCA Response
Section 3: The ban on non-compete clauses for low- and middle-income workers	
<p>1. How should a non-compete clause be defined in the Fair Work Act? Is the FTC definition appropriate for an Australian context?</p>	<p>No. In our view, the FTC definition is not appropriate for an Australian context. Given that the ban on non-compete clauses is intended to be implemented via the FW Act, the language should be consistent with that Act, and terms that are understood in Australian jurisprudence. The definition should also be limited to contracts of employment, and not other commercial documents such as shareholding agreements. In our view, guidance for the legislative structure of a limitation on contractual terms can be found in Part 2-9, Div 5 of the FW Act relating to limitations on fixed term contracts. The FTC clause was blocked by US Courts, including the US District Court in Texas, because it was arbitrary and capricious, based on it being unreasonably broad and lacking a reasonable explanation.⁸ We concur that the FTC clause is too broad and vague and if used, will lead to a significant regulatory burden and difficulties both for workers and employers in interpretation and application, particularly to the extent it seeks to prevent a “<i>term or condition</i>” that “<i>functions to prevent</i>” various defined activities.</p> <p>A preferable approach would be to take guidance from the limitation on fixed-term contracts in s 333E of the FW Act. The clause could take the following form:</p> <p><i>(1) A term contravenes this subsection if:</i></p> <p><i>(a) the person (the first person) enters into a contract of employment with an employee; and</i></p> <p><i>(b) the contract includes a term that prohibits the employee from being employed or engaged by another person, or operating a business, after the termination of the employment with the first person; and</i></p> <p><i>(c) at the time the term in (b) is sought to be enforced, the employee’s annual rate of earnings will be less than the High-Income Threshold; and</i></p> <p><i>(d) the term in (b) does not meet the Non-Compete Code</i></p> <p>The Non-Compete Code would set out limited exceptions to the general rule banning non-competes for employees below the high-income threshold. It would provide certainty and clarity for employees by codifying common law principles, and allow employees the benefit of negotiating a remuneration package that recognises their agreement to limited and confined restraint terms e.g.:</p> <ul style="list-style-type: none"> ■ The non-compete term protects a specified legitimate business interest(s);

⁸ Ryan LLC v Federal Trade Commission, Case: 3:24-CV-00986-E

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	<ul style="list-style-type: none"> ■ The non-compete term is for a limited duration; ■ The non-compete term is reasonable in the circumstances; or ■ Another specified exemption applies.
2. Should any specific kinds of common contractual terms be explicitly included or excluded from this definition?	<p>See our answer to question 1 above.</p> <p>In addition, common contractual terms about confidentiality, intellectual property and non-solicitation of clients, customers, suppliers or employees, should be excluded as their purpose is specific to the protection of assets of a business, not a restraint on an individual leaving an organisation.</p>
3. Should the ban on non-compete clauses apply to workers who are not employees, such as independent contractors?	<p>No. Independent contractors do not possess the characteristics of employees and, therefore, should not be subject to these reforms. Further, independent contractors are already entitled to remedies for unfair contract terms under the FW Act, <i>Independent Contractors Act 2006</i> (Cth) and the CCA.</p>
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?	<p>Yes, there are multiple unintended consequences. The reliance on the high-income threshold assumes that employees earning below this level have no legitimate business interests to protect. This threshold is both arbitrary and restrictive in the context of prohibiting non-compete clauses. Further, the calculation of the high-income threshold excludes contingent remuneration such as incentives, bonuses or commissions, meaning some very highly paid employees can still be assessed as earning below the threshold based on their base salary alone.</p> <p>In practice, many roles below the high-income threshold still involve sensitive information, client relationships, or other protectable business interests. This is particularly the case for occupations such as sales, commercial, procurement, buying, and other business development roles, which are often remunerated wholly or in part by way of commission or incentives, but for whom customer and supplier connections are particularly key business interests, warranting protection. As a result, relying on the high-income threshold risks incentivising employers to restructure remuneration arrangements, which may not always serve employees' best interests.</p> <p>If the High-Income Threshold is used as the threshold to apply the ban on non-competes, its application should be modified so that bonuses, incentives and commissions can be included in the calculation of earnings for the purpose of applying the threshold.</p>
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	<p>The high-income threshold should be applied at the point of termination of employment to determine whether or not a non-compete restraint is enforceable. An employee may earn less than the threshold when their employment contract starts, but their pay can increase and surpass that threshold. Changes such as moving from part-time to full-time work or slower salary growth compared to indexation of the threshold</p>

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entered into or varied, the time the employment relationship ends, or some other time?	<p>could all be relevant and would be missed by application of the high-income threshold at the commencement of the contract or employment.</p> <p>This issue illustrates the complexity that could be introduced into employment arrangements. Additionally, the legislation should make clear that non-compete terms:</p> <ul style="list-style-type: none"> (i) are permitted to be included in an employment contract where it is possible that an employee might earn above the high-income threshold at some later point in their employment; however (ii) are enforceable where an employee does earn above the high-income threshold <p>i.e. it should not breach the relevant provision of the FW Act to simply include a non-compete term in a contract where an employee earns less than the high-income threshold at any given time, given that their remuneration may increase over the life of the contract.</p>
6. Would the application of the ban to all fair work instruments, as defined by the Fair Work Act, have any unintended consequences?	We are not aware of any unintended consequence from this proposal; however, it may take time to fully appreciate the unintended consequences given the complexity this may introduce.
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.	<p>We do not think any civil remedy is necessary or appropriate, rather we consider that clauses that breach the proposed ban on non-competes should be unenforceable. The approach reflects the current state of the common law.</p> <p>If these laws are to proceed it is important to bear in mind that the position at law has been that employers are permitted to include reasonable post-employment restraints in employment contracts but also bear the onus of enforcing them and demonstrating that they are reasonable. Care must be taken not to punish employers for what has been a legitimate position at law.</p> <p>If this view is not accepted, we refer to our answer to question 1 in section 3 above. We consider the existing scheme of civil penalties in the FW Act is appropriate. Breach of the ban provision could be a civil remedy provision in the same way the limitation on fixed term contracts in s 333E of the FW Act is.</p>
8. Should there be any defences available to contraventions of the ban on non-compete clauses? If so, in what circumstances?	<p>Yes, rather than a defence, we think appropriately targeted exceptions to the general rule should be included. These could essentially preserve a common law position, for example where the restraint is reasonable in the circumstances to protect the legitimate business interests of the employer as we have set out in question 1 above.</p> <p>We also consider it should be a defence to the ban, if an employer held a reasonable belief that it could seek to enforce a non-compete against the employee.</p>
9. Which parties should be able to commence proceedings for a	We do not think breaches of the ban should be actionable, rather clauses that offend the ban should be unenforceable.

Question	BCA Response
breach of the ban on non-compete clauses and why?	
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?	The FWO should be given comparable powers to provide education, assistance and advice to employers and employees.
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?	We refer to our answers to questions 7 to 10 above.
12. Should the Fair Work Commission have a role in resolving disputes that arise from the ban on non-compete clauses?	No, we do not consider there is a case for the FWC to have a role in resolving disputes about individual employment contract matters. Any disputes about the enforcement of non-compete terms should remain within the Courts' jurisdiction.
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?	We refer to our answer to question 12 above.
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)?	<p>Yes, we refer to our answer to question 1 above. In addition, other specific exemptions should include:</p> <ul style="list-style-type: none"> ■ Sale or acquisition of a business. Restraints such as post-acquisition non-competes for key employees can be defensible, as they protect the goodwill acquired, maintain continuity of client and supplier relationships, and safeguard confidential information. Without such protections, business valuations may become less reliable, potentially deterring investment. This is particularly significant in strategically important sectors such as energy, digital/AI, and defence. This may also result in employees immediately leaving and starting businesses in competition with the business that has just been sold which will create uncertainty in business valuations and have a real potential to impact on mergers and acquisitions across the market. ■ Where individuals below the current high-income threshold have access to highly valuable or sensitive information. ■ As required by other legal or regulatory requirements, for example, requirements for auditor independence. ■ Where an employee has already demonstrated a disregard for their employment or contractual obligations, such as

Question	BCA Response
	<p>where there has been a breach of obligations regarding good faith, conflict of interest, confidentiality and/or intellectual property.</p> <ul style="list-style-type: none"> Where the employer and employee expressly agree at the commencement of the contract or at any point throughout to the inclusion of restraints in the employment contract that are subject to the common law principles.
15. What transitional arrangements are required to support workers, and business compliance with the ban?	There needs to be sufficient time to review the contracts, restructure businesses appropriately, and understand alternative remuneration structures and design educational resources. The minimum transition period would be 2 years.
16. How should the ban apply to non-compete clauses contained in existing contracts after commencement?	<p>The proposed ban on non-competes should only apply prospectively to new contracts or contractual variations if implemented. We consider non-compete clauses contained in existing employment contracts entered into prior to the commencement of the ban continue until such time as those existing contracts are terminated or replaced. Those terms may have been specifically negotiated between a worker and their employer, and their remuneration may have been set at a level to include compensation for the employee's agreement to the non-compete terms in their contract. It would be unfair for those terms to be automatically rendered unenforceable in those circumstances. As a matter of fairness, it cannot be assumed that all existing restraints in contracts were in themselves unfair, anti-competitive, unreasonable and not for protection of the employer's legitimate business interests.</p> <p>This approach is consistent with the transitional arrangements implemented in respect of other changes to the FW Act which impact employment contracts, including pay secrecy and fixed-term contract limitations.</p>
Section 4: Other reforms to employee restraints of trade	
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?	Under existing common law, a restraint of trade is void unless the employer can demonstrate it is no broader than necessary to protect an employer's legitimate business interests. This position is appropriate, as it ensures that only legitimate interests are protected while balancing the rights of employees and the wider public. In our view there is little to be gained from legislating reform for high-income earners, particularly in relation to employees who are generally well-placed and do negotiate restraint terms and related compensation at the outset of employment or can do so at any point throughout their employment.
2. If mandatory compensation were adopted what should be the minimum compensation required?	Mandatory compensation for non-compete clauses should not be introduced, as it would impose an unnecessary financial burden on employers. It would also likely incentivise employers to rely instead on other contractual mechanisms, such as extended notice periods or garden leave, that are often more restrictive than non-competes, given the continuing contractual and fiduciary obligations placed on employees during these periods. Moreover, introducing

Question	BCA Response
	<p>mandatory compensation would likely increase the number of enforcement proceedings brought before the courts. There should be an opportunity for that allows for employees and employers to freely negotiate on restraints regardless of the level of their salary/wages as this could well work to the advantage of employees and provide stability and reassurance to employers regarding their investment in employees.</p>
<p>3. If a duration limit were imposed, what would be the most appropriate maximum duration?</p>	<p>No fixed timeframe should be imposed. The existing common law approach already provides the necessary flexibility by allowing the duration to be determined according to the individual facts and circumstances of each case. Imposing a universal limit would remove this flexibility and, in some instances, may prevent employers from adequately protecting their legitimate business interests.</p>
<p>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).</p>	<p>Non-solicitation clauses recognise that relationships with clients and suppliers are valuable assets that require significant time and investment to build. Employees, especially those in senior roles, often cultivate strong connections with these stakeholders through regular contact, largely due to the opportunities provided to them through their employment.</p> <p>Non-solicitation clauses should not be restricted. The assertion that non-solicitation clauses impact business dynamism and competition fails to recognise that such obligations only apply for a limited period, which gives an employer a reasonable opportunity to stabilise their relationships with suppliers, customers and employees.</p> <p>These do not prevent an employee from working elsewhere and as such they do not impose an unreasonable constraint on job mobility. Their purpose is to protect the legitimate interests of employers by safeguarding investments in client relationships and business connections. Limiting the use of non-solicitation clauses would undermine an employer's ability to protect goodwill and maintain fair competition. Existing common law already places reasonable boundaries on such clauses, requiring them to be proportionate in scope, tied to relevant clients, and connected to the employee's duties. Additional restrictions would be unnecessary and arbitrary.</p>
<p>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?</p>	<p>These restraints protect an employer's legitimate interest in maintaining a stable, trained workforce in which it has invested resources and may only be for a reasonable period, limited by scope and geography. Such clauses have been in place since the early 1990s to acknowledge the significant investment in training and the confidential information employees hold. However, they do not prevent employees from exploring opportunities through their inquiries or recruitment agencies, only restricting the specific former employee bound by the non-solicitation provision. Overall, these restrictions are limited, only enforced to the extent necessary and removing them is unlikely to significantly</p>

Question	BCA Response
	<p>impact competition,⁹ while it may have a significant detrimental effect on employers.</p> <p>Co-worker non-solicitation clauses are often legitimate, and no further limitations are necessary. Their purpose is to protect the employer's investment in human capital, namely, experienced staff who have been developed with specific skills and industry knowledge. These clauses are already subject to common law safeguards, which require them to be current, relevant, and proportionate to the employee's role and circumstances.</p>
<p>6. Should restraints with cascading duration periods and geographic extents be allowed?</p>	<p>Cascading restraints by duration and geographic extent should be permitted. Such restraints are presumed unenforceable unless reasonable, having regard to the interests of both the parties and the public. The existing common law framework already provides this safeguard - allowing enforcement only to the extent reasonably necessary - and no further limitation is necessary.</p> <p>While the reasonableness test is sometimes criticised for creating uncertainty, particularly where cascading clauses are used, such concerns are overstated. The objective standard of reasonableness is well-established across the law, including throughout the FW Act, which confer significant employee rights and obligations. The real issue lies in insufficient education for workers on the limited circumstances in which a cascading restraint may be enforced - including that the employer bears the onus of enforcing the clause. Other policy options are available to address this. Where cascading clauses are carefully drafted within narrow circumstances and used appropriately, they have a legitimate role. Properly drawn and enforced in line with settled principles, they serve important economic purposes: encouraging employers to invest in innovation, expand their businesses, and train employees, while reasonably protecting their interests in confidential information, customer connections, and workforce stability¹⁰.</p>
<p>7. Should severability of other parts of restraint clauses be limited in other ways?</p>	<p>No. The severability of restraints is already constrained, as only legitimate business interests can be protected. This framework ensures an appropriate balance between the employer's need for protection, the employee's circumstances, for example, seniority and/or type of role, and the broader public interest.</p>
<p>8. Should businesses be required to specify the legitimate interests to be protected by a restraint clause?</p>	<p>No. Legitimate business interests vary between each role and these interests evolve as the employment relationship develops. This is particularly true of large employers, where an employee can have a vast range and number of roles throughout their tenure, meaning that the protection of the employer's legitimate business interests continues to change.</p>

⁹ Tamvakologos, M & Neil SC, Ian, *Non Compete Restraints in Australia: Analysing the Case for Reform*, Seyfath Shaw, 2024

¹⁰ Tamvakologos, M & Neil SC, Ian, *Non Compete Restraints in Australia: Analysing the Case for Reform*, Seyfath Shaw, 2024

Question	BCA Response
	Additionally, the assessment of a business's legitimate business interests occurs when the restraint is sought to be enforced, rather than when the contract was entered into.
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?	See above. The approach being taken to the restraint's legislation risks undermining the stability of businesses and investment in the workforces.
10. Should other aspects of the existing common law doctrine be clarified or amended?	See our answer to section 4, question 1 above.
Section 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?	The BCA strongly opposes limitations on concurrent employment restraints. The common law already provides an appropriate balance between the interests of employers and employees in relation to an employee's duties of fidelity, loyalty, and good faith, and an employee's interests in maximising their earning potential. Recent changes to the casual definition in the FW Act, and other changes directed at increasing job security, have already extended protections to employees who work on a casual basis, or in other temporary arrangements such as labour hire. There is no evidentiary case presented in the consultation paper for further legislative intervention in this area, particularly in view of the consequences for business of this proposed change. There is a significant public policy interest in employees not engaging in outside employment or other activities that represent an actual or perceived conflict of interest with their employer.
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?	There should be no ban on no poach. The need to consider if there should be exemptions further underlines the complexity that these reforms law will introduce, the uncertainty and the unforeseen consequences that could negatively impact on employment and productivity.
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?	Given multi-employer bargaining model we see these proposed bans as introducing further conflict and confusion.

BCA

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