

TO Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600
Email CompetitionTaskforce@treasury.gov.au

5 SEPTEMBER 2025

Submission in response to the Consultation Paper - Reform to non-compete clauses and other restraints on workers

This submission is made by the Employee Relations & Safety teams of King & Wood Mallesons¹ in response to the invitation of the Treasury Competition Taskforce for submissions regarding the Federal government's proposed reforms to employment related non-compete clauses and other restrictions on workers, as set out in the *Consultation Paper: Reform to non-compete clauses and other restraints on workers dated 25 July 2025 (Consultation Paper)*.

We appreciate the opportunity to make the following submission in relation to the Consultation Paper. These comments are limited to identifying issues that we consider warrant further consideration from a legal perspective as part of the Taskforce's review.

We provide the following submission, adopting the sections and numbering utilised in the Consultation Paper and the consultation questions arising in the Consultation Paper:

3. The ban on non-compete clauses for low- and middle-income workers

3.1 Definition of a non-compete clause

1 *How should a non-compete clause be defined in the Fair Work Act 2009 (Cth) (Fair Work Act)? Is the Federal Trade Commission (FTC) definition appropriate for an Australian context?*

Box 1 in the Consultation Paper provides that the FTC definition of a non-compete clause is as follows:

"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*
- 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 The views expressed in this submission reflect the views of the partners and lawyers practising in the employee relations & safety practice group of King & Wood Mallesons in Australia (as named below) and is not a submission made on behalf of King & Wood Mallesons. We are grateful for the support of members of our competition practice group.

The FTC definition referred to in the Consultation Paper does not provide the basis for an appropriate definition of a non-compete clause for use in an Australian employment law context, for the reasons set out below.

The FTC definition provides that a non-compete can occur in three ways, namely:

- by prohibiting a worker from seeking or accepting work or operating a business [First limb];
- by penalising a worker for seeking or accepting work or operating a business [Second limb]; and
- by functioning to prevent a worker from seeking or accepting work or operating a business [Third limb].

The first limb describes what in our experience is typically included in a non-compete clause, which operates to prohibit an employee from working for a competitor or starting a competing business, and which applies for specific durations and/or to specific geographic areas. In our view the definition of non-compete clause to be included in the Fair Work Act should include this first limb.

The second limb refers to a “penalty” being imposed on an employee for breach. Traditionally the general law has viewed penalties as being unenforceable contractual provisions and in our view such language should not be adopted in this context. We understand that the use of the term here is not intended to be that narrow and based on the Consultation Paper is intended to include a range of arrangements, from broad liquidated damages clauses through to other adverse financial consequences such as forfeiting a bonus or other employment benefit, or by an employer seeking to recover training costs. These types of provisions have not historically been considered to be post-employment restraints or subject to the common law test of reasonableness, though the potential for such doctrines to apply to those types of provisions has long been recognised by Australian courts. In our view the definition of a non-compete clause should not include reference to the second limb, but these arrangements should remain subject to interpretation and enforcement under general law principles.

The third limb seeks to cover clauses that are said to “function to prevent” workers from seeking or accepting new work, or operating a competing business. We understand that the intention is to cover clauses drafted in such a way that would otherwise avoid any non-compete clause ban, but may achieve the same objective of restricting the employee’s mobility. In addition, we understand that the intention is not to affect the operation or enforceability of existing employee duties under common law, equity or statute that may extend beyond employment or targeted and well-drafted non-disclosure and non-solicitation clauses. Having said, with the exclusion of those duties and clauses, it is difficult to see what additional activities would be captured by the third limb which would not otherwise be captured in the first two limbs, and in our view the third limb should not be included in the definition.

We also consider the definition should be limited to “employees” and that the use of a broader category of “worker” would be inappropriate in this context, as further discussed below. There is a specific definition of “worker” in the Fair Work Act which is utilised in relation to the prohibition of sexual harassment in connection with work² and in connection with stop bullying orders³. In both of those cases, the term “worker” is defined so as to have the same meaning as in the *Work Health and Safety Act 2011* (Cth) (**WHS Act**). In section 7(1) of the WHS Act (subject to sections 7(2) to 7(3) of the WHS Act), a “worker” is defined very broadly in the following terms:

² Section 527D(2) of the Fair Work Act.

³ Section 789FC(2) of the Fair Work Act.

“A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:

- (a) an employee; or*
- (b) a contractor or subcontractor; or*
- (c) an employee of a contractor or subcontractor; or*
- (d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or*
- (e) an outworker; or*
- (f) an apprentice or trainee; or*
- (g) a student gaining work experience; or*
- (h) a volunteer; or*
- (i) a person of a prescribed class.”*

The above definition clearly goes beyond those circumstances where a non-compete clause will generally arise and is too broad for use in the context of any ban on non-compete clauses. We note that for other purposes the term “worker” in the Fair Work Act is said to have its ordinary meaning, relying on common law definitions.⁴

We consider that the use of the term “employee”, adopting an appropriate existing definition from the Fair Work Act, is a preferable alternative.

Consistent with that position, our view is that the reference to “term or condition of employment” as contained in the FTC definition should be retained.

In the *Issues Paper: Non-competes and other restraints: understanding the impacts on jobs, business and productivity* dated April 2024 (**Issues Paper**), non-compete clauses are referred to as:

“Non-compete clauses can restrict former workers from working for a competitor or establishing a competing business, typically within a certain geographic area and for a certain time period after the worker leaves the business.

Non-compete clauses are generally considered a ‘catch all’, compared to other more targeted restraint of trade clauses, providing businesses with more far-ranging protections.”⁵

We consider that this reference in the Issues Paper more appropriately reflects the coverage of non-compete clauses in an Australian employment context and provides a better basis upon which the term “non-compete clause” could be defined in the Fair Work Act through the use of the term “restricts”.

⁴ Section 12 of the Fair Work Act.

⁵ Issues Paper, p. 6.

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

It will largely turn on the definition of “non-compete clause” adopted as to whether any specific kinds of common contractual terms should or need to be explicitly included or excluded.

Having said that, it may be appropriate to expressly exclude “non-solicitation clauses” and “non-disclosure clauses”, adopting definitions based on the descriptions of those clauses contained in the 2024 Issues Paper:

“Non-solicitation clauses can restrict former workers from ‘soliciting’ former clients (or customers) or other business contacts (for example, suppliers), or co-workers.

...

A non-solicitation clause may seek to protect the business against the former worker using the knowledge of, and relationship with, these former contacts for the benefit of their new employer or to start a new competing business.

...

Non-disclosure (or confidentiality) clauses can restrict former workers disclosing confidential information gained during the course of employment. Such confidential information can include trade secrets, such as product formulas and client lists, that the worker may otherwise seek to use in a future job.”⁶

These clauses do not prevent competition per se and have traditionally been recognised by the courts as providing a more targeted and reasonable protection of an employer’s legitimate protectable business in protecting its customer and employee connections.

The ban should also exclude negative covenants that operate to restrict the activities of employees during their period of employment (for example during a notice period which may be served as ‘garden leave’) because again these provisions have generally been recognised by the courts as being reasonable. That position appears to be supported in section 3.1.3 of the Consultation Paper. See our further submissions on ‘concurrent employment’ clauses in Section 5 below.

3.2 Scope of workers affected

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

In our view the ban on non-compete clauses should not be extended to independent contractors.

If there is a genuine independent contractor relationship (as determined by applying the current test as contained in the Fair Work Act), then that independent contractor should be operating their own business, have greater bargaining power, and therefore a better ability to negotiate the terms of any restrictions that may apply to them.

Amongst other avenues, independent contractors continue to have the ability to seek the setting aside or variation of any purported unfair contract terms under the *Independent Contractors Act 2006* (Cth), including in relation to any non-compete clause or other post-engagement restriction.

⁶ Issues Paper, p. 6.

In addition, independent contractors can be engaged by a principal in a variety of different ways, including by way of direct engagement of an individual or via a personal services company. Unnecessary complexities could arise if any ban was sought to cover such arrangements.

- 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?*

Consideration should be given as to what pay elements should be included in an employee's "earnings" for the purposes of that high-income threshold calculation.

Where the high-income threshold is relied upon in the Fair Work Act, such as where it is used to determine whether an employee may be able to commence an unfair dismissal claim, then by operation of section 332 of the Fair Work Act amounts which cannot be determined in advance, such as commissions, incentive-based payments and bonuses, are not included in the calculation.

The exclusion of those types of payments in the context of a ban on "non-compete clauses" may have unintended consequences. There are many industries, such as in the start-up and technology spaces, where it is not uncommon for a critical employee to receive a lower salary (which is below the high-income threshold) but be nonetheless eligible to receive (and may have historically received) very large cash-based bonuses or equity grants which would result in the employee's actual total remuneration being in excess of the high-income threshold. Those critical employees may have access to highly confidential and valuable proprietary information of their employer and in any other circumstances be appropriately covered by a post-employment non-compete restriction (and other restrictions). The use of the existing high-income threshold and associated "earnings" test would result in that employee not being able to be subject to a non-compete clause.

As a result, in our view it may be more appropriate to use the value of past remuneration provided to an employee (necessarily calculated at the time of potential enforcement - see our response to question 5 immediately below) to determine what restrictions should apply to an employee, rather than the usual earnings test against the high-income threshold. Practically this could only operate where the employee has been employed for a sufficient period of time to have received past remuneration payments; prior to that time the traditional earnings test could be used.

The definition of remuneration could have regard to the definitions used for remuneration reporting requirements under the *Corporations Act 2001* (Cth) (**Corporations Act**) as informed by Accounting Standards, which are intended to capture a broad form of remuneration benefits and are already reasonably well understood by the business community.

- 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?*

This is an important issue which requires careful consideration. Clearly, an employee's earnings could be tested as against the threshold at differing times with very differing results.

For example, an employee may have earnings less than the threshold at the time that their employment contract is entered into. Typically an employee's remuneration will change over time and any future increase could result in their remuneration then exceeding the threshold (which is indexed annually on 1 July in accordance with CPI changes). For more complexity, that employee could move from part-time to full time employment or vice versa which could further impact whether they move above or below the threshold, or their remuneration may simply not keep pace with the index of the threshold so that while they were initially earning above the threshold, they are not at the time of potential enforcement.

In our view there is a good argument that any testing as against the threshold (however defined) could occur at both the time that a contract of employment is entered (or when it is varied to include a non-compete clause) and at the time of potential enforcement taking into account the “true” earnings level of an employee.

Depending on where the government lands on these issues, it may be that employment contracts will be drafted in the future, for example, to include a non-compete which is only triggered and operable if and when an employee’s remuneration later exceeds the high-income threshold. The practical application of such an approach may have complexities. However, such an approach would provide a degree of flexibility to both an employee and employer to ensure that the non-compete clauses operate at the appropriate remuneration thresholds and therefore meets the objectives of the reforms.

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

In our experience it is rare for a non-compete clause or similar restriction to be contained in a fair work instrument. As such we consider that the extension of any ban so as to cover fair work instruments, in addition to application to the usual contractual terms, to be largely unnecessary but also to not lead to any unintended consequence.

3.3 Enforcement

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

- (a) *the type of penalty*
- (b) *the magnitude of the penalty, and*
- (c) *the circumstances in which the penalty should apply.*

In our view, to the extent that a penalty is considered necessary to deter the inclusion of non-competes in employment agreements, existing civil penalties in the Fair Work Act, such as those which apply for a breach of the pay secrecy or fixed term contract breaches, would be appropriate to replicate for any breach of the proposed non-compete clause ban.

An alternative approach could be that the inclusion of a non-compete clause in an employment agreement is void and unenforceable (similar to the parameters associated with pay secrecy clauses) but that no penalties are applicable.

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

In our view if penalties are to apply, then it is appropriate to include defences against the application of penalties. For example, we consider it would be appropriate to include defences where an employer “reasonably believed”:

- they were correct in considering an employee as earning above the threshold and not being subject to any ban; or
- an individual was an independent contractor, rather than an employee, so the ban had no application (assuming the ban on non-compete clauses is not extended to independent contractors).

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

Affected employees (being those covered by the employment contract in question), an interested union (acting on behalf of an employee), an employer organisation (acting on behalf of an employer) and a Fair Work Inspector, should be able to commence proceedings for a breach of the non-compete clause ban.

We do not support other persons, such as employees who may be “indirectly affected” as a result of being bound by a similar employment contract or post-employment restriction, or for a new business that intends to hire an employee bound by a non-compete clause, from being able to commence proceedings for a breach of a ban. Extending standing so as to cover those two groups could lead to unintended consequences including that a competing business commences proceedings other than in good faith or for a legitimate purpose, in an attempt to gain some commercial advantage. That could include seeking to undermine a competitor’s ability to properly retain its staff, protect its confidential information and enforce its contractual rights.

Given the ban will be included in the Fair Work Act, the Fair Work Ombudsman should have a role in enforcing compliance with those provisions designated as civil remedy provisions, where it considers it in the public interest to do so.

- 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?*

Information concerning any ban on non-compete clauses (and any other restrictions arising following this consultation) should be properly included in the Fair Work Information Statement which is prepared and maintained by the Fair Work Ombudsman.

As it did after the introduction of various reforms contained in the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth), the Fair Work Ombudsman must take a primary role in educating both employers and employees in relation to the scope and operation of the ban.

- 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?*

No further specific remedies need be provided to parties seeking compliance with the non-compete clause ban, beyond those generally provided for under the Fair Work Act.

Given it is intended that the non-compete clause ban will be introduced into the Fair Work Act, then the Fair Work Ombudsman should be tasked with the primary responsibility of enforcing breaches of the ban and seeking appropriate penalties, where it is in the public interest to do so and in the absence of any action being taken by relevant parties (see the answer to question 9 above). We consider that the powers currently available to the Fair Work Ombudsman are sufficient for this purpose and that no “new” compliance tools are necessary for the Fair Work Ombudsman to perform that role.

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

As is the case in other areas, such as disputes over the limitations on fixed term contracts⁷ or an employee's right to disconnect⁸, the parties to any dispute in relation to the non-compete clause ban, including disputes about whether a contractual clause constitutes a non-compete, the calculation of an employee's earnings and the application of the high-income threshold, and whether any potential exemption applies to a specific circumstance, should first be required to attempt to resolve the dispute at the workplace level by direct discussions between the parties. This requirement, however, should be limited to only those circumstances where the dispute arises between an employer and a current employee (which may be limited given the context).

Only if those discussions do not lead to a resolution of that dispute, should the parties be able to approach the Fair Work Commission. In our view, it is important that the Fair Work Commission's role in this regard is limited to disputes that involve matters such as the calculation of an employee's earnings and the application of the high-income threshold and whether any potential exemption applies to a specific circumstance, rather than a broader remit. For those disputes the Commission should be able deal with those matters as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion. Only where all parties consent, should the Commission be able to deal with a dispute by way of arbitration. Again, in our view this should also be limited to only those disputes involving a current employee.

Outside of the above limited disputes, parties should remain able to approach the Courts to enforce post-termination restrictions, with those courts utilising the current general law principles (subject to our comments in Section 4.3 below) and being able to make orders and provide injunctive relief where it is necessary to preserve the status quo or prevent the potential breach of a non-compete or related clause.

- 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?*

As referred to in response to question 12 above, the Fair Work Commission should have the usual powers of mediation, conciliation, making a recommendation or expressing an opinion, and only when all parties consent, arbitration, in dealing with any dispute properly before it. We do not consider it is necessary or appropriate for the Fair Work Commission to be provided with additional powers to deal with any such disputes.

3.4 Limited statutory exemptions

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

In circumstances where the government has clearly signalled that it intends that any statutory exemptions to the non-compete clause ban should be very limited, we do not propose that any specific exemptions apply, beyond those arising from the definition of non-compete clause to be adopted, the calculation of earnings for the purposes of the high-income threshold, and the like.

⁷ Section 333L of the Fair Work Act.

⁸ Section 333N of the Fair Work Act.

However, we do consider it would be appropriate to include the potential for exemptions to apply to classes of employees and/or classes of employment contracts, as prescribed by the *Fair Work Regulations 2009* (Cth).⁹

3.5 Transitional arrangements

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

Particularly in light of the large number of recent reforms introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth), there should be a “grace period” utilised, so as to allow employers sufficient time to review their current practices and to amend those practices and related contractual provisions for new employment contracts where required.

Consideration could also be given to a staggered implementation, with the ban on non-compete clauses initially applying only to non-small business employers, with a later implementation for small business employers.¹⁰

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

In our view the ban on non-compete clauses should only apply to those employment contracts entered into, or varied after, the relevant implementation date.¹¹ Any remuneration change for an employee should not be considered to be a variation for those purposes.

4. Other reforms to employee restraints of trade

4.1 Non-compete clauses for high-income employees

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

Those employees whose earnings (however calculated) are above the high-income threshold are more likely to be in a position to negotiate the specific terms of their own employment contracts, including whether any such restrictions should be included in those contracts, and if so, the scope, geographical limit and/or duration of any such included restrictions. Those employees are also more likely to be able to better conduct or respond to any proceedings concerning the operation of any such restrictions and/or to reach any agreed position with their employer as to the how such restrictions could operate.

In that context, we do not support any full ban to the use of non-compete clauses for those employees. We agree with views expressed by others in response to the Issues Paper that in many cases, a non-compete clause may be the only practical and efficient way to allow an employer to protect its legitimate interests where an employee is seeking to move to a competitor or to set up a rival company, and that any ban could lead to unintended consequences, such as an increase in more costly complex intellectual property litigation or through claims under the Corporations Act.

⁹ In similar terms to that contained in section 333L(1)(i) of the Fair Work in relation to limitations on fixed term contracts.

¹⁰ Such an approach was adopted for the implementation of the right to disconnect provisions in the Fair Work Act.

¹¹ This approach was adopted in relation to the introduction of the pay secrecy provisions in the Fair Work Act.

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

In addition to not supporting any ban to non-compete clauses for high-income employees, we do not support any requirement for mandatory compensation to be payable by an employer where it seeks to enforce a non-compete clause as against an employee, including at a minimum level.

In our view the imposition of any such compensation requirement could also have unintended consequences, such as to deter an employee from seeking any alternative employment while receiving such compensation, and that not all businesses could similarly manage any such additional payments potentially exacerbating any current competitive advantages enjoyed by larger and/or more established businesses.

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

We do not support any maximum duration being imposed on the operation of non-compete clauses, noting that the courts have historically recognised that the specific factual circumstances that apply to any particular matter will have a material effect on the duration that any restriction will be enforceable. If the government was minded to impose a maximum duration to apply to non-compete clauses, then we would support a maximum duration of 12 months for non-compete clauses in employment contracts only.

4.2 Non-solicitation clauses for clients and co-workers

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

We do not support the imposition of any statutory restriction on the use of non-solicitation clauses, both those clauses referred to in the Consultation Paper as aiming to prevent employees from hiring former co-workers (co-worker non-solicitation) and those designed to prevent employees approaching or providing a service to former clients and suppliers once they leave a business (client non-solicitation clauses).

In our view, the application of the common law restraint of trade doctrine in establishing that a clause will be enforceable only to the extent reasonably necessary to protect an employer's legitimate interests, provides appropriate restrictions on the use of both co-worker non-solicitation and client non-solicitation clauses. The application by courts of that doctrine, together with general law principles in relation to the granting of injunctive and related relief to enforce those restrictions, provide appropriate restrictions which do not require statutory intervention.

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?*

In our view, for the reasons set out in response to question 4 above, the potential use of co-worker non-solicitation clauses do not require statutory intervention and should remain subject to the application of the restraint of trade doctrine and related general law principles only.

4.3 Other requirements for valid restraint clauses

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

The use of cascading clauses has developed in response to the limited options to courts outside of NSW to sever (via the "blue pencil" severance test), but not vary, what would otherwise be an unreasonable restraint and leaving potentially something reasonable to enforce. In NSW the operation of the *Restraints of Trade Act 1976* (NSW) provides some greater clarity and provides a NSW court the additional power to "read down" what may otherwise be an unreasonable and

unenforceable restraint of trade. This has meant that in many circumstances it is unnecessary for an employer to seek to impose a cascading clause.

It may be that some consideration should be given to parties operating in states outside of NSW being able to rely upon equivalent powers to those provided to NSW courts under the *Restraints of Trade Act 1976* (NSW). We consider that such an approach would provide the necessary flexibility to parties recognising that employment relationships generally evolve over time and the interests of an employer that require protection will also change over that period. In our view that approach is certainly preferable to the “one-shot rule” referred to in the Consultation Paper, which could operate to invalidate an entire restraint if it specifies intentionally overlapping duration periods and/or geographic extents or that only the “minimum” restraint should be enforceable in those circumstances.

This change would result in simpler drafting as compared to the often-convoluted cascading clauses that are not well understood by employees and employers. It may also operate to encourage the contracting parties to consider and negotiate a reasonable restraint provision at the point of entering into a contract rather than relying on a series of cascading options.

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

As referred to in our response to question 6 above, we do not support the introduction of a “one-shot rule” as referred to in the Consultation Paper.

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

Requiring employers to specify the legitimate business interest to be protected by a restraint clause is of itself a reasonable and minimal imposition. However, in our view it could simply lead to employers pointing to all potential legitimate interests as providing a basis for a particular restraint. In this respect it may lead to more complex and convoluted drafting in employment contracts which does not achieve the aim of clarifying and focusing on the operation of the restraint clause itself.

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?*

Including for the reasons expressed in response to question 4 above, in our view the use of both co-worker non-solicitation and client non-solicitation clauses can be justified in some circumstances by an employer, and the potential application of those clauses in conjunction with, or as an alternative to, a non-compete clause is a matter properly dealt with by the courts applying the restraint of trade doctrine and related general law principles only.

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

We do not consider that matters such as whether the compensation of employees for a restraint is sufficiently considered in the context of enforceability, the scope of legitimate interests which may be protectable, and when injunctions should be granted by a court, require any statutory intervention.

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?*

In our view employees should be subject to restrictions during their employment, which would operate to prevent them from working with a competitor, setting up a competing business, or be prevented from taking an advantage of a business opportunity that they only become aware of as a result of their employment. This is the position largely reflected by the general law position and those duties implied into an employee's employment contract, regardless of the terms of any written employment contract.

For full time employees, the use of "concurrent employment restraints" can often be justified on the basis that any secondary employment undertaken by an employee may affect their capacity or performance in their primary role. We do not support any statutory intervention in this area and consider that the general law principles should continue to apply

We recognise that that it can be more difficult to justify those restrictions where an individual is employed for less than full time hours, whether on a part-time or casual basis. In those circumstances, subject to restrictions primarily directed at potential conflicts of interest that could arise, such as an individual performing services for a competitor, setting up a competitor or taking up a business opportunity, those individuals should not be restricted from performing such secondary employment as they see fit.

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

Any restrictions imposed on the use of "concurrent employment restraints" should be included in the Fair Work Act, consistent with the approach proposed for the ban of non-compete clauses for lower income employees.

6. No-poach and wage-fixing agreements

- 1 *What civil penalty should apply to businesses that have no-poach and wage-fixing agreements in breach of the ban? Should criminal penalties also apply, in line with the cartel provisions in Part IV of the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act)?*

Assuming that no-poach and wage-fixing agreements would be considered to fall within the cartel provisions in the Competition and Consumer Act, then it would be appropriate for the existing civil penalties for contraventions of the civil cartel prohibitions to apply.

In line with the existing criminal cartel provisions, criminal penalties may also be justified for serious contraventions, in line with the existing criminal cartel provisions.

Consequential amendments are likely required, however, to:

- limit the application of the existing exception for employment conditions (see e.g., sections 51(2)(a) and (aa) of the Competition and Consumer Act, as to 'remuneration, conditions of employment, hours of work or working conditions of employees'); and
- amend the definition of 'services' in section 4(1) of the Consumer and Competition Act to clarify that the existing carve out for 'rights or benefits being the...performance of work under a contract of service' does not apply in respect of the proposed no-poach and wage fixing agreement provisions.

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?*

The exemptions identified in the Consultation Paper are appropriate, including for the reasons stated in the Consultation Paper - those exemptions are as follows:

- collective bargaining agreements;
- joint ventures;
- secondment arrangements;
- labour hire firms;
- professional sports leagues; and
- ACCC authorisation.

The existing exceptions to the cartel conduct prohibition (in addition to joint ventures) should also be exempt, including for related entities, exclusive dealing, collective acquisitions and for dual listed company arrangements.

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?*

The same exemptions should apply.

We understand that all information contained in formal submissions will be made available to the public on the Australian Treasury website.

We would welcome the opportunity to discuss these submissions with the Taskforce. Should you have any queries in relation to this submission, please contact any of the contacts listed below.

Yours sincerely

[Sgd] KWM

King & Wood Mallesons Employee Relations and Safety Team:

Brett Feltham, Senior Consultant - Sydney

Angela Weber, Partner - Sydney

John Tuck, Partner - Melbourne

Paul Burns, Partner - Melbourne

Sarah Clarke, Partner - Melbourne

Philip Willox, Partner - Perth

Anthony Longland, Partner - Brisbane / Perth

Graeme Watson, Strategic Counsel, Melbourne

Andrew Gray, Partner - Sydney

Cilla Robinson, Partner - Sydney

Murray Kellock, Partner - Melbourne

Annamarie Rooding, Partner - Melbourne

Ruth Rosedale, Partner - Perth

Giacomo Giorgi, Partner - Perth

Kirsty Faichen, Partner - Brisbane

Michael Coonan, ERS Counsel, Brisbane

With support from the King & Wood Mallesons Competition Team:

Tamara Hunter, Partner - Sydney

Lisa Huett, Partner - Melbourne