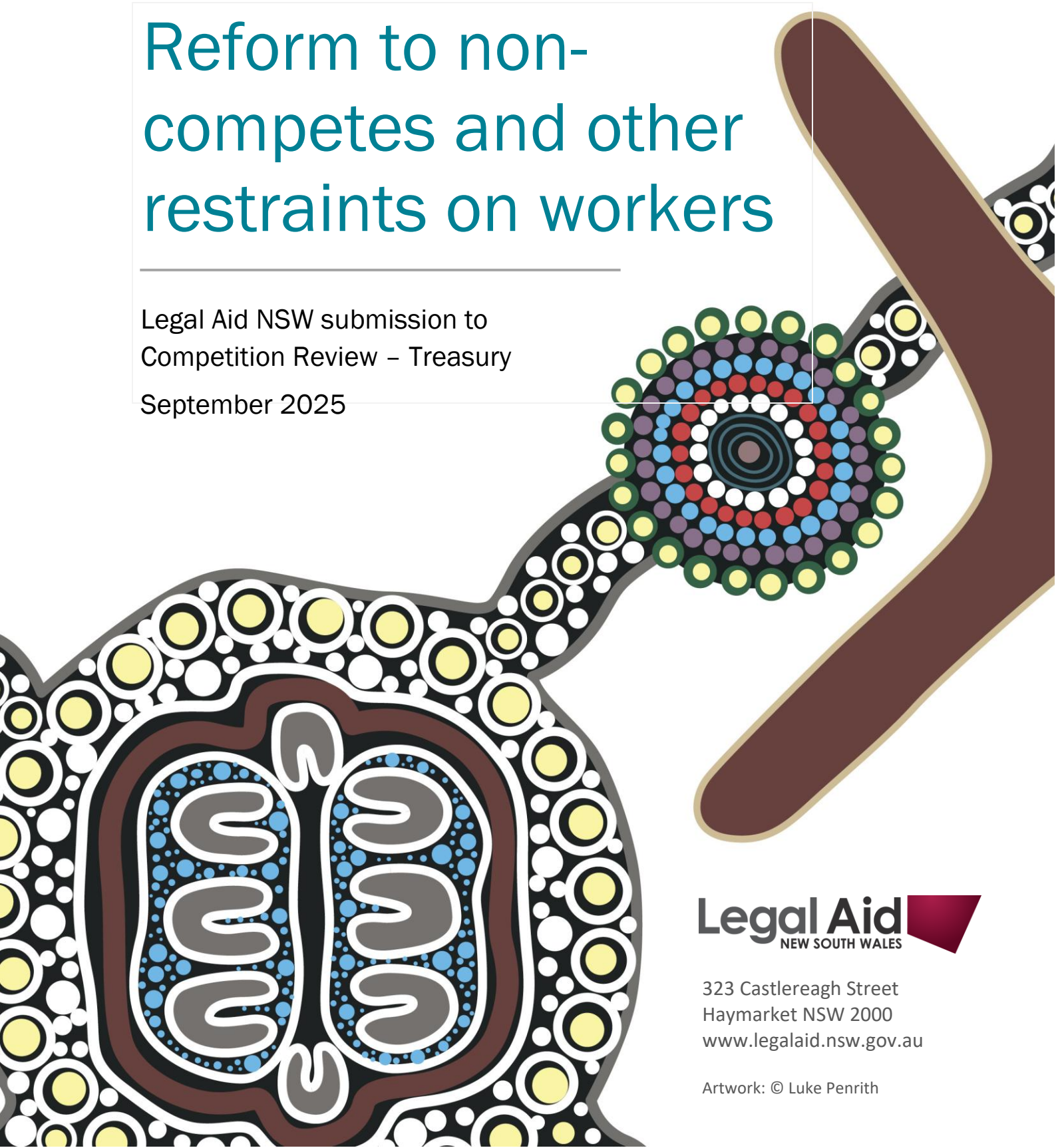


# Reform to non-competes and other restraints on workers

Legal Aid NSW submission to  
Competition Review – Treasury  
September 2025



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# Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

# 1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Services, all six

specialist Children's Courts, and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdiction.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners, older people experiencing elder abuse and people impacted by disasters.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

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## 2. Introduction

Employment law is consistently in the top three areas of civil law advice with Legal Aid NSW providing 2,548 advice services in 2022/23; 2,267 in 2022/21; and 2,965 in 2021/20. The most common areas of employment legal help are about unfair dismissal, underpayment of wages and general protections claims.

The specialist Workplace Rights Service in Legal Aid NSW's Civil Law Division undertakes advice and case work for priority clients and provides training and support to generalist civil lawyers about employment law, sexual harassment, and discrimination in employment. We use our practice experience, advising and representing some of the most disadvantaged workers in NSW, as a foundation for our law reform work and systemic advocacy.

While acknowledging the policy behind non-competes and other restraint of trade clauses in employment contracts, Legal Aid NSW is concerned about the increasing prevalence of these clauses and their impact on disadvantaged and low-income workers. In our experience these clauses are increasingly widespread and not limited to particular industries or occupation types.

We routinely advise our clients that the clauses in their contracts are likely to be unenforceable. However, in our experience, workers are intimidated when faced with the risk of having to defend themselves in costly litigation and are more likely to adhere to the terms of a restraint. This intimidation is compounded for workers who have fewer employment choices, lower capability, and less access to legal knowledge.

Legal Aid NSW welcomes the Federal Government's proposal to ban non-compete clauses for workers earning less than the high-income threshold in the *Fair Work Act 2009* (Cth) (**FW Act**) with complementary reforms proposed for other types of restraints.

### Key Recommendations

**Recommendation 1:** Implement a national uniform law that bans the use of non-competes in Australia for low- to middle-income workers.

**Recommendation 2:** Ensure that the ban on non-competes be broadly defined to capture the range of formats that non-competes appear.

**Recommendation 3:** Ensure that the ban on non-competes applies to all employees and extend to independent contractors, including 'employee-like' workers.

**Recommendation 4:** Implement civil penalties to deter the use of unenforceable non-competes.



**Recommendation 5:** Ban client non-solicitation clauses for workers earning below the High-Income Threshold.

**Recommendation 6:** Ban co-worker non-solicitation clauses entirely. Alternatively, ban co-worker non solicitation clauses for low-income workers, or insecure workers such as casual employees, workers under 18 years of age, and gig workers.

**Recommendation 7:** Ban cascading duration periods and geographic extents in restraint clauses. Alternatively, ban these for workers earning under the High-Income Threshold.

**Recommendation 8:** Ban enforcement of post-employment restraints by employers where any invalid restraint is imposed against the worker. Require employers to specify the business interest they seek to protect within any restraint clause.

**Recommendation 9:** Ban concurrent employment restraint clauses entirely. Alternatively, ban concurrent employment restrains for part time, casual, and gig workers.

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

#### 3.1 Definition of non-compete clause

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

Legal Aid NSW considers that the US Federal Trade Commission definition<sup>1</sup> (**FTC definition**) of a non-compete clause is appropriate for the Australian context, as it captures the range of formats that non-competes commonly appear in the contracts of low- and middle-income workers.

However, as discussed in more detail, **below**, Legal Aid NSW recommends that the proposed ban on non-competes apply not only to employees, but also to independent contractors, including ‘employee-like’ workers such as gig workers. For this reason, our submissions use the terms ‘worker’ and ‘work’ in place of ‘employee’ and ‘employment’ to emphasise the need to capture a broader spectrum of work relationships. Where the term ‘employer’ is used, we intend for this to include the ‘principal’ in an independent contractor arrangement.

The FW Act already contains definitions of ‘worker’, ‘employee’ and ‘employee-like worker’, so any policy response should consider how the wording of the definition of a non-compete would interact with the definitions already in the FW Act.

As noted in the Consultation Paper, the FTC definition is also appropriate as it is not limited to just the employment *contract*, but the broad employment *relationship*, including deeds or written undertakings separate to the employment agreement and workplace policies.<sup>2</sup> This is particularly important for situations where an employer attempts to assert or negotiate a non-compete after the end of the working relationship. As above, Legal Aid NSW recommends that this also covers independent contractor arrangements and any separate or supplementary agreement or policy that would apply to those arrangements.

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<sup>1</sup> US Federal Trade Commission, ‘Non-Compete Clause Rule’, *US Government Federal Register*, 2024, 89(89): pp. 38361–38366.

<sup>2</sup> Treasury, *Reform to non-compete clauses and other restraints on workers*, 2025, p. 7.

## Case study – Manager of a laundromat in a small regional town

Our client was employed as a laundromat manager in a small regional town under an oral contract. Our client was made redundant and was given a letter by her former employer entitled "Confirmation of Redundancy". The letter referred to our client's "implied employment obligation" and stated that our client was subject to a non-solicitation restraint. The letter stated that the "implied" restraint prohibited our client from soliciting, canvassing, approaching, or accepting any approaches from clients of her former employer for a period of 12 months. No restraint area was specified. The letter stated that her former employer may take steps to enforce the obligation if her former employer were to become aware of any breach.

Our client sought legal advice as the "implied employment obligation" had never been discussed with her during her employment. Our client was concerned that the restraint would affect her prospects of employment as she intended to work in the same industry within her town.

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

It is our experience that low-paid or vulnerable workers are increasingly subject to a variety of non-compete formats. We therefore consider that any definition of a non-compete clause inserted into the FW Act should be sufficiently broad so that it captures the contractual terms common in the employment contracts of vulnerable workers.

Consistent with the FTC definition, this includes the following:

- Clauses that prohibit future work, including, but not limited to:
  - Clauses that prevent former workers from engaging in future work with a competitor in a similar industry.
  - Clauses that prevent former workers from engaging in future work within a particular radius or geographic area.
- Clauses that penalise future work, including:
  - Liquidated damages clauses that financially penalise former workers for engaging in future work.
  - Clauses that would result in other adverse financial consequences, such as forfeiture of bonus payments that were not awarded on a discretionary basis.
- Clauses that function to prevent future work, noting that whether a clause operates in this way will depend on the circumstances.

### Case Study – The ‘Indefinite Restraint’ for a health worker

Our client was a health worker in a regional area earning less than \$80,000.

Our client’s employment contract contained an extreme example of post-employment restraints including cascading non-solicitation and non-compete restraints which defined the maximum duration of the restraints as “indefinite” and the maximum geographical area as “Australia and New Zealand”.

Our client’s employer lost the contract with a major health service in the area. The company that won the contract offered our client a job. Our client’s former employer threatened to enforce the restraint of trade clause in our client’s contract. Despite our advice that the non-compete was highly unlikely to be enforceable in its entirety, our client did not accept the contract holder’s job offer for fear of legal action by their former employer.

## 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?

The proposed ban on non-competes should include all employees and extend to independent contractors, including ‘employee-like’ workers such as gig workers. This would be in line with recent reforms that have extended protections under the FW Act to these cohorts of worker.<sup>3</sup> We consider this is necessary because non-competes have become increasingly common for these workers, and they are often lowly paid, their work is insecure, and they have limited bargaining power.

A recent survey of independent contractors (including gig workers) found:

- most respondents worked significant hours, with 41 per cent working over 40 hours per week;
- of those working over 40 hours, at least 66 per cent earned less than the minimum wage; and
- workers with greater dependence on ‘gig work’ have lower take-home pay.<sup>4</sup>

These roles often do not provide a living wage, meaning that workers need to supplement their income through additional jobs and income streams. Non-compete clauses prevent these workers from being able to do so. Non-compete clauses also limit opportunities for

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<sup>3</sup> *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

<sup>4</sup> Australian Bureau of Statistics, *Working Arrangements* (Catalogue No 6336.0, 13 December 2023).

these workers to develop skills that might allow them to enter more secure forms of employment.

Workers engaged in employee-like work are some of the most vulnerable workers advised by Legal Aid NSW and are extremely susceptible to workplace exploitation. They are often women, from a non-English speaking background, younger or older workers, or workers with a disability. Further, many workers who would be classed as independent contractors under a black-letter application of the law with respect to determining the nature of a work relationship are in fact performing work more akin to an employment relationship.

The current common law doctrine with respect to non-competes stifles the ability of workers with expertise, talent, and industry insight from contributing to new and innovative projects. One of the key benefits of independent contractor arrangements are that they allow for greater flexibility in work compared to employees under a full- or part-time contract of employment. This should not be unduly restricted by allowing the use of non-competes in independent contractor arrangements.

As discussed, below, the ban on non-competes for independent contractors could be tied to the high-income threshold as set out in the FW Act. As a minimum, the policy response should ensure that workers entitled to bring a claim in the Fair Work Commission under the FW Act's unfair deactivation and unfair contracts regimes are also protected by the ban on non-competes.

#### 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?

While historically confined to senior level executives, non-competes are now commonplace in the contracts of low and middle-income workers. Our experience is that non-competes are prolific in the contracts of workers earning less than \$80,000<sup>5</sup> per annum and affect all occupation types. This includes, but is not limited to, disability and aged-care workers, yoga instructors, early childcare workers, and hairdressers. These workers do not have the bargaining power or legal know-how of more senior workers and are often unaware that they are accepting a non-compete clause or feel that they have no choice but to accept.

Legal Aid NSW's view is that there should be a complete ban on non-competes for low and middle-income workers. The ban on non-competes should therefore be subject to the

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<sup>5</sup> Noting that \$80,000 is the current annual salary threshold to receive advice from a Legal Aid NSW lawyer about an employment law issue.

High-Income Threshold (HIT) as already set out in the FW Act.<sup>6</sup> Reliance on the HIT would strike an appropriate balance between the need to protect low- and middle-income workers from oppressive non-compete clauses and the desire for employers to protect their legitimate interests.

An advantage of tying the proposed ban on non-competes to the HIT is that the HIT is indexed every year on 1 July. This is necessary to protect workers who may not see their wages or earnings rise in step with inflation.

Indexation of the HIT may result in valid non-competes for workers earning above the HIT becoming suddenly unlawful on 1 July when indexation takes effect. However, if an employer values the ability to enforce a non-compete, they can give that worker a small wage increase to meet the threshold. This may also give workers greater bargaining power, as they will then be able to negotiate their salary based on an employer's desire to subject them to an enforceable non-compete. Indexation also incentivises employers to lift wages to avoid being subjected to civil penalties for being in breach of the ban on non-competes.

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?**

Legal Aid NSW envisions that there are two common scenarios where the HIT will need to be applied:

1. For the purpose of any civil penalty proceeding brought against the employer for entering into a non-compete with a worker earning below the HIT, the HIT should be applied at the time of the alleged contravention. It is anticipated that this will most commonly be the time that a contract with a non-compete clause is entered into.
2. For the purpose of any proceedings brought by a former employer to enforce a non-compete, the HIT should apply at the date the employment relationship is terminated. This is consistent with the unfair dismissal provisions under the FW Act.

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<sup>6</sup> *Fair Work Act 2009* (Cth) s 332(1). If necessary for the proposed ban to apply to independent contractors, the separate contractor high-income threshold could also be used, which is set to the same amount as the employee high-income threshold.

The HIT should otherwise perpetually apply throughout the working relationship, whereby any non-compete with a worker who earns less than the HIT be rendered unenforceable.

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

Legal Aid NSW recommends that the ban on non-competes be extended to apply to all fair work instruments, including modern awards, enterprise agreements, and workplace determinations. This should also include any fair work instruments applicable to independent contractors, such as an ‘employee-like minimum standards order’.

With respect to enterprise agreements, the Consultation Paper points out that such agreements can only include ‘permitted matters’. While it is acknowledged that there is some debate about whether non-compete clauses are ‘permitted matters’, Ross notes that even if non-competes in enterprise agreements are likely to have no legal effect as they are not about a ‘permitted matter’, they nevertheless exert a ‘chilling’ or *in terrorem* effect on workers’ mobility.<sup>7</sup>

It would therefore be a more efficient policy response to make non-competes unlawful in all fair work instruments, and let employers, if they choose to do so, negotiate non-competes with individual employees earning above the HIT.

### 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

It is Legal Aid NSW’s experience that employers often require workers to enter into non-competes that are unlikely to be enforceable but that such (unenforceable) non-competes nonetheless exert a ‘chilling effect’ on workers and restrict mobility.

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<sup>7</sup> Dr I Ross, ‘Non-compete clauses in employment contracts: The case for regulatory response’, *Tax and Transfer Policy Institute Working Paper*, 2024, no. 4, p. 31.

Overseas research suggests that some employers are likely to continue issuing contracts with non-compete clauses even if a ban is introduced.<sup>8</sup> For example, in the United States - where a patchwork of regulation applies in some states but not others - various studies have found that non-competes are found in approximately similar levels in states that will and will not enforce them.<sup>9</sup>

Legal Aid NSW recommends that the proposed ban should therefore seek to limit both the *enforceability* and *use* of non-competes, and so should include the following two elements:

1. Provide that a non-compete with a worker who earns less than the High-Income Threshold is unenforceable and has no effect to the extent it would be inconsistent to the proposed ban.
2. Expose employers to a civil penalty in the event that they enter into a non-compete with a worker who earns less than the High-Income Threshold.

The proposed ban can be modelled on similar provisions in the FW Act such as the pay secrecy provisions in sections 333B to 333D and the fixed-term contracts limitations in sections 333E to 333H.

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<sup>8</sup> Evan Starr, *Noncompete Clauses: A Policymaker's Guide through the Key Questions and Evidence* (Report, 31 October 2023).

<sup>9</sup> See Balasubramanian, N, E Starr, and S Yamaguchi. "Employment Restrictions on Resource Transferability and Value Appropriation from Employees." Available at SSRN 3814403 (2023). Starr, Evan P., James J. Prescott, and Norman D. Bishara. (2021). Rothstein, D, and E Starr. (2022).



### Example

#### **333C Pay secrecy terms to have no effect**

A term of a fair work instrument or a contract of employment has no effect to the extent that the term would be inconsistent with subsection 333B(1) or (2) (about employee rights relating to pay secrecy).

#### **333D Prohibition on pay secrecy terms**

An employer contravenes this section if:

- (a) the employer enters into a contract of employment or other written agreement with an employee; and
- (b) the contract or agreement includes a term that is inconsistent with subsection 333B(1) or (2) (about employee rights relating to pay secrecy).

Note: This section is a civil remedy provision (see Part 4-1).

Civil penalties are already a common feature in the FW Act with the Federal Circuit and Family Court of Australia (Division 2) (FCFCOA) and the Federal Court of Australia (FCA) able to impose orders against companies or individuals found to have contravened provisions of the FW Act. Although the civil penalties in the FW Act have recently increased significantly,<sup>10</sup> some members of the judiciary have argued that current civil penalty rates don't adequately deter non-compliance and have called for further increases.<sup>11</sup>

The magnitude of civil penalties for contraventions of the proposed ban should therefore impose a sufficient 'cost' on employers to deter non-compliance without being punitive. We also note that increased penalties are available under section 557A of the FW Act for 'serious contraventions' where a person knowingly contravenes a civil remedy provision or was reckless as to whether the contravention would occur.

Similarly to the prohibition on pay secrecy terms at section 333D of the FW Act (extracted above), civil penalties should apply here in circumstances where an employer enters into a contract or other written agreement with a worker and the contract or written agreement includes a term that is inconsistent with the proposed ban. We consider this broader wording is necessary as it is our experience that non-competes are employed in various written agreements beyond contracts, including settlement agreements, deeds, and written undertakings.

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<sup>10</sup> *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*, part 11.

<sup>11</sup> *Fair Work Ombudsman v Aica International Pty Ltd* [2025] FedCFamC2G 976 per Street J.

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

The overarching purpose of the proposed ban is to provide certainty to both workers and employers about when non-competes and other restraints can be used and enforced, and what they can include. Legal Aid NSW considers that any defences to the proposed ban would increase uncertainty by adding unnecessary legal complexity and risk perpetuating the ‘chilling effect’ of otherwise unenforceable non-competes.

Defence provisions are rare in the FW Act. If a defence to the proposed ban is to be established, which we consider unnecessary, it should only be available in exceptional circumstances by way of a statutory exemption (e.g. for national security purposes). Alternatively, if the defence is to be broader and modelled on the ‘reasonably believes’ test in s 357(2) of the FW Act,<sup>12</sup> Legal Aid NSW considers it should be limited to circumstances where, for example, an employer reasonably believes that a worker is excluded due to their earnings being in excess the High-Income Threshold (HIT)<sup>13</sup> or that they are not otherwise covered by the proposed ban.<sup>14</sup>

While Legal Aid NSW acknowledges that most low and middle-income workers will be protected from such defences due to the broad application of the HIT and coverage of the FW Act,<sup>15</sup> we consider that any general defences may be misunderstood or exploited by some employers. Overall, the proposed ban should be modelled on the pay secrecy provisions in sections 333B to 333D and the fixed-term contracts limitations in sections 333E to 333H of the FW Act, neither of which include defence provisions.

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<sup>12</sup> See e.g. s 357(2) FW Act which provides a defence for an employer accused of misrepresenting employment as an independent contractor arrangement (known as ‘sham contracting’) if the employer can show they ‘reasonably believed’ they were correct in classifying a worker as an independent contractor.

<sup>13</sup> The application of the HIT under s 333(1) of the FW Act can be complex. See e.g. *Association of Professional Engineers, Scientists and Managers Australia v Peabody Energy Australia Coal Pty Ltd* [2022] FCA 945; *Zappia v Universal Music Australia Pty Ltd* (2012) 225 IR 122; *Low Latency Media Pty Ltd v Rossi* [2023] FWCFB 14; *Mr Murray Hobson v Murrin Murrin Operations Pty Ltd* [2025] FWC 157.

<sup>14</sup> Noting the FW Act covers most but not all employees and not all types of workers.

<sup>15</sup> Approximately 91% of workers in Australia have earnings below the HIT, however not all these workers are covered by the FW Act.

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

Legal Aid NSW considers the following parties should be able to commence proceedings for a breach of the proposed ban on non-compete clauses:

- A person affected by the contravention (e.g. an employee);
- A union (e.g. which the employee is a member of, and who has an interest in ensuring the legal rights of its members are upheld);
- The Fair Work Ombudsman (who has a public interest in ensuring compliance with the FW Act);
- Other parties such as businesses that intend to hire an employee bound by a non-compete clause, and employer organisations (e.g. which the prospective employer is a member of and who has an interest in ensuring the legal rights of its members are upheld).

It is appropriate that a broad range of parties are given standing to commence proceedings as it recognises that contraventions of the proposed ban can have broader implications that affect the rights or interests of parties beyond those immediately involved in the matter. Overall, this helps with deterring non-compliance. Further, giving standing to unions and other employee organisations to commence proceedings could also assist in supplementing the work of the Office of the Fair Work Ombudsman which is currently only able to prosecute a small percentage of the claims its office receives each year within its remit.<sup>16</sup>

10. What role should the Fair Work Ombudsman have in relation to the ban on noncompete clauses? Are there particular areas where employees and employers may need assistance to understand and implement any proposed ban on non-compete clauses?

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?

Given the proposed ban will be legislated in the FW Act, the Fair Work Ombudsman (FWO) should play a central role in ensuring compliance with the ban. The FWO can use existing statutory investigative and enforcement tools at its disposal such as compliance and

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<sup>16</sup> See *Effectiveness of the Office of the Fair Work Ombudsman's Regulatory Functions*, Auditor-General Report No.30 of 2024–25.

infringement notices, enforceable undertakings, and the use of strategic litigation to seek penalties for contraventions of civil penalty provisions.

Legal Aid NSW considers the FWO should also promote ongoing compliance by developing a suite of educational resources to assist workers and employers to understand and comply with the new changes. It is our experience that non-competes have become prevalent for low and middle-income workers across a wide range of industries and occupations. The FWO should therefore prioritise the following in any compliance strategy:

- Sector-specific resources for low-paid sectors where non-compete use is more prevalent e.g. disability support services sector, hairdressing, etc;
- Targeted resources for small business employers and workers; and
- Resources for employers and workers from culturally and linguistically diverse backgrounds, with resources developed in different community languages.

The correct application of the HIT, which can be complex in the unfair dismissal context, is likely to be a point of confusion and dispute between some employers and middle to high-income workers. As such, the FWO could develop a free online tool similar to (or as part of) its existing Pay and Conditions Tool that assists parties to understand whether the HIT is likely to apply or not for the purposes of the ban. Such a tool may also assist more broadly with unfair dismissal matters.

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

Except for NSW, Australian courts apply the common law to determine disputes regarding the enforceability of non-competes. In NSW, the *Restraints of Trade Act 1976* (NSW) applies, and the Supreme Court of NSW is the primary jurisdiction dealing with non-compete disputes. Such proceedings, despite mostly be determined at an interlocutory stage, are prohibitively expensive for both employers and employees.

In contrast, the Fair Work Commission (**FWC**) is a low-cost and accessible jurisdiction that is principally designed for self-represented parties to resolve disputes as informally and efficiently as possible by way of conciliation, mediation, and arbitration. As Australia's national workplace relations tribunal, the FWC is well positioned to deal with disputes arising from the proposed ban, particularly regarding the application of the HIT which the FWC already deals with in relation to unfair dismissal claims.

However, the FWC's designation as a tribunal limits its ability to make certain orders for financial compensation and it is precluded from making orders for the imposition of civil penalties under the FW Act. As such, a worker (or other party commencing proceedings) that successfully argues a non-compete was in breach of the proposed ban would still need to proceed to the FCFCOA or FCA to seek an order for civil penalties.

Further, Legal Aid NSW is concerned there may be unintended consequences of lowering the barriers (financial and otherwise) for parties to dispute non-competes in the FWC as businesses seeking to enforce non-competes may do so more readily in the FWC which is a no-costs jurisdiction that doesn't require legal representation. Further, some employers may consider the costs of non-compliance with the ban to be lower, noting that most workers would only proceed to the FWC stage, and not on to court (like, for example, general protections disputes).

Legal Aid NSW therefore considers it may be appropriate to explicitly empower the FWC to, upon arbitrating a non-compete dispute, make a monetary order based on its consideration of what is a fair outcome between the parties and other issues relevant to the industrial merits of the matters, in the same manner it is empowered to do so in relation to stand down disputes under section 526 of the FW Act.<sup>17</sup>

### 3.4 Limited statutory exemptions

1. 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)?

Legal Aid NSW does not intend to respond to this question.

### 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?

Legal Aid NSW considers the ban should also apply to non-competes in existing contracts which should be rendered unenforceable after commencement of the proposed ban. Employers should also be required to provide clear notice to workers subject to a

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<sup>17</sup> See *Carter v Auto Parts Group Pty Ltd* [2021] FWCFB 1015 at [27].

prohibited non-compete, in an individualised communication, that the worker's non-compete clause will not be, and cannot legally be, enforced against the worker. An employer should also be required to provide notice by commencement date of the ban to a worker by hand-delivery, by mail at the worker's last known street address, by email, or by text message.

However, it is appropriate to apply a transitional period of 3 to 6 months from commencement during which an employer cannot be subject to an order for civil penalties for contravening the proposed ban. This provides employers a reasonable period to review their existing contracts entered prior to commencement and to negotiate new contracts with affected employees, while also ensuring prohibited clauses do not remain in contracts and perpetuate the 'chilling effect' for impacted workers.

## 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?
2. If mandatory compensation were adopted what should be the minimum compensation required?
3. If a duration limit were imposed, what would be the most appropriate maximum duration?

Legal Aid NSW currently has a salary threshold of \$80,000 per annum for clients seeking advice and representation about a workplace issue. Given the limit of Legal Aid NSW's exposure to the issues facing workers earning over the High-Income Threshold, we have elected not to comment on the questions in Part 4.1.

### 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).

Businesses use client non-solicitation clauses in work contracts to protect their proprietary interests by seeking to prevent a worker from soliciting or enticing away their clients if that worker leaves to set up their own business or join a competing business.

A non-solicitation clause usually includes prohibitions on 'soliciting' clients of a former employer with the intention to entice them to use their products or services instead. The term 'solicit' in such clauses may not be limited to circumstances where a former worker approaches a client to entice them away from a former employer but can include circumstances where a client initiates contact with the former worker.<sup>18</sup>

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<sup>18</sup> *Barrett and Ors v Ecco Personnel Pty Limited* [1998] NSWSC 545; *Ecolab Pty Ltd v Klen International Pty Ltd* [2007] FCA 1376

For example, in *Barrett and Ors v Ecco Personnel Pty Limited* [1998] NSWSC 545, a client contacted a former employee and invited him to make a proposal. The Court found that the client's approach was "catalyst or trigger" for the solicitation by the worker.

Further, Australian Courts have upheld non-solicitation clauses that prohibit a former employee from even accepting instructions from a client of the former employer, regardless of who initiated contact.<sup>19</sup>

#### Case Study – NDIS worker dismissed after clients approached for care

Our client was dismissed from her employment as a physiologist for 'breaching' the non-solicitation clause in her contract. Some clients had contacted her through her private practice when the waitlist was too long at her employer's practice. In effect, the employer's use of the non-solicitation clause prevented clients from receiving timely quality care.

A determination of whether a non-solicitation clause is reasonable and enforceable requires judicial intervention to consider the individual factual circumstances;<sup>20</sup> a process that is costly, time-consuming and almost certainly financially untenable for low-income workers.

It is our experience that:

- a. Client non-solicitation clauses are common in workplace contracts of ordinary and low-income workers;
- b. Employers routinely attempt to enforce such clauses by threatening litigation, with little or no regard to the factual circumstances or whether the clause is reasonable or enforceable;
- c. Many workers choose to adhere to the limitations in such clauses rather than assuming the high costs and risks involved in litigation; and
- d. Client non-solicitation clauses therefore have a disproportionate impact on low paid workers, who do not have the resources to defend legal proceedings or even pay for initial legal advice.

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<sup>19</sup> *Koops Martin v Dean Reeves* [2006] NSWSC 449

<sup>20</sup> See eg *Wallis Nominees (Computing) Pty Ltd v Pickett* [2013] VSCA 24



### Case Study – Casual cleaner receives cease and desist

Our client worked as a casual cleaner and contacted a client who no longer wanted to use her former employer's services. Our client was served a cease-and-desist letter threatening legal action if the breach continued.

### Case Study – Legal threats by employer against casual NDIS worker

In March 2024, our client resigned from her employment as a casual psychosocial recovery coach with an NDIS provider ('former employer').

Our client's contract of employment had a cascading non-solicitation clause which had a maximum restraint period of 12 months. The clause prevented our client from soliciting current and prospective clients of her former employer directly or through a competing business.

After our client left her employment, some of her former employer's clients left the service. One person contacted our client after she resigned and sought to continue to receive services from her.

In April 2024, our client received a letter from her former employer alleging a breach of the non-solicitation clause in her employment contract. Our client was given two days to respond to their allegations of her breach of contract. In her response, our client disputed that she had breached the non-solicitation clause.

Four days after sending her reply, our client received a response from the HR department of her former employer which acknowledged the feedback provided by our client and made no mention of the restraint of trade clause.

Legal Aid NSW acknowledges that non-solicitation clauses are a more targeted instrument than non-compete clauses and that there are legitimate business interests of employers that may be appropriately protected using non-solicitation clauses.

However, as we have set out in our other responses, restraints such as non-solicitation clauses are often drafted broadly with 'laddered' or 'cascading' clauses, and are likely unreasonable and unenforceable.

Employers then use threats of costly litigation and damages against former workers in an attempt to enforce these unreasonable restrictions.

It is our experience that non-solicitation clauses in contracts for low-income workers have the primary effect of dissuading workers from seeking alternative work and are often

wielded by employers as a punishment to departing workers, rather than a tool to protect their legitimate business interests.

Accordingly, Legal Aid NSW considers that the use of non-solicitation clauses in the work contracts of low-income workers, and insecure workers such as casual employees, workers under 18 years of age, and gig workers is inappropriate.

Legal Aid NSW does not propose in these submissions to alter any obligations of confidentiality on workers, imposed either by contract, common law, equity, or legislation. However, it is important to note that there is significant overlap between confidentiality obligations and the kind of client non-solicitation clauses that have become common in work contracts. We consider it likely that a ban on client non-solicitation clauses for low-income workers will likely have a minimal effect on an employer's ability to protect their reasonably necessary legitimate business interests through the enforcement of confidentiality obligations.

**Recommendation 5: Ban client non-solicitation clauses for workers earning below the High-Income Threshold.**

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?

It is our experience that non-solicitation clauses have become common in the contracts of low-income workers and that they are often broadly drafted to include restraints on both client and co-worker non-solicitation.

Businesses use co-worker non-solicitation clauses in contracts to protect their proprietary interests and maintain a stable workforce. Employers seek to protect their business interests by preventing competitors from soliciting staff that give them a competitive advantage or who have unique skills or expertise. The scenario that employers seek to protect against is an ex-worker with intimate knowledge of the business' intellectual property or trade secrets going to work for a competitor or starting their own business and soliciting or enticing other staff to go and join them.

While employers may have a legitimate interest in preventing trade secret disclosure, as Graves observes, there is no inherent link between co-worker solicitation and trade secret

disclosure.<sup>21</sup> The risk of trade secret disclosure is not guaranteed to eventuate or increase because a former worker solicits a former colleague. This makes co-worker non-solicitation clauses an inappropriate legal mechanism to address this risk.

Moreover, as discussed above, there are already pre-existing, appropriate legal mechanisms available for employers seeking to prevent trade secret disclosure. While Australia does not have a discrete legislative regime for trade secrets protection, the *Corporations Act 2001* (Cth) (**Corps Act**), contractual confidentiality clauses, non-disclosure agreements, implied common law and equitable duties, and copyright law all provide different and effective legal mechanisms to protect employers from the risk of trade secret misappropriation.

Employers also use co-worker non-solicitation clauses to keep their staff by effectively punishing a worker for seeking better work conditions and entitlements. This is particularly unfair, because the punished worker is not a party to the agreement relied upon by the employer and therefore:

- a. has no standing to challenge the restraint in court, and
- b. is not afforded the ability to bargain or be compensated for the restraint that primarily affects them.

If employers wish to keep valuable workers, rather than losing them to former workers-turned-competitors, they should not be entitled to rely on the proverbial stick of a co-worker non-solicitation clause. Rather, employers should convince them to stay by offering superior working conditions and compensation. Co-worker non-solicitation clauses currently have the capacity to keep wages and conditions below the market rate.

Legal Aid NSW considers co-worker non-solicitation clauses in workplace contracts should be banned entirely. Such clauses are inherently unfair as they seek to restrain workers that are not party to the contract (i.e. the worker who is said to have been solicited or enticed away). Other commentators have argued that co-worker non-solicitation clauses treat staff as objects and not subjects, and that such clauses should be rendered 'entirely unenforceable'.<sup>22</sup>

If co-worker non-solicitation clauses are not banned, their use should be substantially restricted to ensure they do not apply to low-income workers, or insecure workers such as casual employees, workers under 18 years of age, and gig workers.

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<sup>21</sup> Charles Graves, 'Questioning the Employee Non-Solicitation Covenant' (2022) 55(4) 959, 988.

<sup>22</sup> Ian Ross, 'Non-compete Clauses in Employment Contracts: The Case for Regulatory Response' (Working Paper No 4/2024, Tax and Transfer Policy Institute Working Paper, Australian National University, March 2024) 30.

**Recommendation 6:** Ban co-worker non-solicitation clauses entirely. Alternatively, ban co-worker non solicitation clauses for low-income workers, or insecure workers such as casual employees, workers under 18 years of age, and gig workers.

### 4.3 Other requirements for valid restraint clauses

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

Cascading duration periods and geographic extents have been criticised by both academics,<sup>23</sup> and courts and tribunals<sup>24</sup> for creating uncertainty for workers.

In all Australian jurisdictions a restraint that is more onerous than is reasonably required to protect the legitimate business interest of the employer is void and unenforceable, unless the courts can sever the offending part of the clause without affecting its original nature by adding or modifying the existing words. This is known as the 'blue pencil' test.<sup>25</sup> In NSW, the Supreme Court has extended statutory powers to amend an otherwise unreasonable restraint clause in any way the Court thinks fit.<sup>26</sup>

By including cascading restraint clauses, employers are able to draft restraint clauses in the broadest possible terms whilst maintaining the best possible chance that the restraint will be enforceable, at least to some extent. The practical effect of such clauses is that the actual enforceable extent and duration of a restraint clause with cascading elements is not ascertainable without judicial intervention.

Given the time and cost of such an intervention, most affected workers cannot afford to seek judicial determination, and cannot afford the risk of breaching the restraint and being forced to defend litigation commenced by a former employer.

Further, workers who are paid below the High-Income Threshold are often provided 'take it or leave it' contracts and, given the relative disparity in bargaining power between an employer and the worker, are not afforded the luxury of negotiating the terms of such a clause.

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<sup>23</sup> A Stewart, "Drafting and Enforcing Post-Employment Restraints" (1997) 10 AJLL 181, 218.

<sup>24</sup> See eg *Schindler Lifts Australia Pty Ltd v Debelak and Ors* [1989] FCA 311; *Goddard v Richtek* [2024] FWC 979 at [27].

<sup>25</sup> *SST Consulting Services Pty Limited v Rieson* [2006] HCA 31, [44]-[48].

<sup>26</sup> S.4(3) of the *The Restraint of Trade Act 1976*.

Employer overreach is common when drafting restraint clauses, as exemplified by the case study at page 12 of these submissions.<sup>27</sup> We commonly see cascading variations of the restraint's duration, geographic area, as well as the activities affected, with maximum restraints significantly in excess of what could rationally be considered reasonable. We commonly advise clients that the non-compete clause in their contract is unlikely to be enforceable due to its scope, however we are unable to give clients certainty, particularly where there are cascading or laddered restraints.

Cascading restraints should be the subject of a total ban. Employers should be required to provide clarity to workers when implementing a restraint clause and turn their mind to what is reasonable when drafting the clause.

This would be complimented by a requirement that employers must specify the legitimate business interest they are seeking to protect (as discussed below).

**Recommendation 7: Ban cascading duration periods and geographic extents in restraint clauses. Alternatively, ban these for workers earning under the High-Income Threshold.**

7. Should severability of other parts of restraint clauses be limited in other ways?
8. Should businesses be required to specify the legitimate interests to be protected by a restraint clause?

As discussed above, s4(3) of the *Restraint of Trade Act* (NSW) allows the reading down of otherwise invalid non-compete clauses to what the court thinks reasonable. This allows employers to draft broad and onerous restraints without regard to what is reasonable or what business interests they are seeking to protect.

The use of cascading restraints in other Australian jurisdictions has the same effect, using the current common law 'blue pen' test.

It is our experience that employers generally seek to enforce the broadest possible version of the restraint until the point of judicial intervention. It is also our experience that an increasing number of such restraint clauses are manifestly unreasonable and likely entirely unenforceable.

This burdens the worker with making one of three unreasonable choices, ether:

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<sup>27</sup> Case Study – The 'Indefinite Restraint'.

- a. spend the considerable time and money required to simply clarify the enforceable extent of the restraint;
- b. comply with the restraint as is; or
- c. continue in breach of the written restraint and risk the employer commencing legal proceedings against them.

### Case Study – Legal threats by employer against casual beautician

Our client, a young single parent, was employed as a casual brow specialist and lash technician in a brow and eyelash boutique pursuant to a written employment contract and was covered by the Hair and Beauty Industry Award. Our client was paid a base rate of \$28.58 per hour with penalty rates applying on weekends and public holidays.

Our client's employment contract contained a cascading non-compete clause and a cascading non-solicitation clause preventing our client from engaging with a competing business or soliciting former clients:

- At a maximum, within 30 kilometres of any of the 10 locations in NSW and QLD owned by her previous employer for 6 months; and
- At a minimum, within 15 kilometres of any of the 10 locations in NSW and QLD owned by her previous employer for 3 months.

During her employment, our client established her own at-home lash and brow business. When our client's employer became aware of our client's at-home business, our client was called into a disciplinary meeting where our client's employer reminded her of the restraint of trade clause in her employment contract. Our client received a letter from her employer requiring her to cease operating her business.

Our client subsequently resigned and sought legal advice about whether legal action would be taken against her. Our client stated while she had not contacted any former clients, some former clients had found her independently.

Further, where the business interest the employer is hoping to protect is not specified in the restraint clause, obtaining legal advice about the enforceability of the clause is:

- a. far more expensive, because such advice needs to cover all possible business interests, and
- b. less likely to have practical use for the worker, because the employer can wait to see what the worker does post-employment and tailor the targeted business interests to the worker's conduct.

### Case Study – Casual NDIS Disability Support Worker

Our client was employed as a casual Disability Support Worker for a NDIS-registered disability service provider of in-home support services on the south coast of NSW. Our client commenced employment in March 2023 pursuant to a written employment contract and was covered by the SCHADS Award and paid \$40.46 per hour. There was a transmission of business, and our client was offered casual employment with the new employer.

Less than two weeks after the transmission of business, our client was dismissed for alleged misconduct. After the termination of her employment, our client began providing disability support services as an independent contractor. Some of the participants our client worked with during her employment sought services from our client.

Our client later commenced employment with a different NDIS-registered disability service provider. More of the people with disability that our client had provided services to during her employment sought to transfer their NDIS plans to our client's new employer.

Our client received a letter from her former employer stating that our client had breached the restraint of trade clauses in her employment contract which at a maximum restrained our client from competing with the former employer in Australia or New Zealand, or soliciting clients, for a period of 6 months.

Our client sought legal advice from us about the enforceability of the restraints and whether she could remain working in the disability support sector. Our client was particularly stressed by the experience and was fearful of accepting work from her new employer, in case her former employer decided to commence legal action.

We propose that the burden of clarifying the extent of the restraint and ensuring it is reasonable should rest with the employer when drafting the restraint, taking into account the greater bargaining power and resources generally enjoyed by employers. We recommend a modification of the 'one shot' rule by not permitting an employer to enforce a restraint against a worker where *any* invalid restraint is imposed on the worker by that employer, whether in the same contract or a different one.<sup>28</sup>

This will require employers to ensure any restraint is not greater in scope than is reasonable to protect the legitimate business interest specified in the clause.

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<sup>28</sup> As proposed by Dr Iain Ross & Prof Andrew Stewart in their submissions to the Treasury dated 28 May 2024.

**Recommendation 8:** Ban enforcement of post-employment restraints by employers where any invalid restraint is imposed against the worker. Require employers to specify the business interest they seek to protect within any restraint clause.

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?

Our recommendation is that both non-compete clause and non-solicitation clauses should be banned for workers earning below the High-Income Threshold.

If this ban is not adopted, a non-compete clause aimed at protecting client relationships or workforce stability is manifestly too broad. It may unreasonably restrict a worker from seeking work in their chosen industry, where a more targeted non-solicitation clause could adequately protect the employer's interests.

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

Legal Aid NSW considers the primary focus of any policy approach should be to ensure that non-competes can no longer be used for low-income workers.

However, should something other than a complete ban be adopted:

- a. **Financial compensation:** financial compensation should be a mandatory component of any non-compete clause. It is uncontroversial that a non-compete has value to the employer, but there are no current requirements that the worker's obvious detriment is compensated.

We refer to the policy approach of countries that have implemented a requirement that workers be compensated during a restraint period. For example, in Germany workers receive 50% of their regular salary during the period of a restraint and in Finland workers receive 40%. In Spain, workers are required to be paid 'adequate compensation' during a restraint period, which can range from 20 – 70% of their regular salary. In Denmark, workers receive either 40 or 60% of their monthly salary (depending on the duration of the restriction) at the effective date of termination of employment.

- b. **Stable workforce as a legitimate interest:** As discussed above, co-worker non-solicitation clauses are inherently unfair to workers and disincentivise employers from offering more favourable, or even market rate, working conditions to existing workers.

A stable workforce should never justify limiting a worker's ability to be offered, or accept, more favourable employment. The person most affected by such a



restraint is not a party to the agreement so has no ability to negotiate the terms of the restraint and, more importantly, is not compensated for the significant restriction placed on their employment opportunities.

- c. **Threshold for use of injunctions:** It is impossible to measure the true impact of injunctions on workers by looking only at the matters before the courts and the thresholds for such injunctive relief. The operation of the current law can only protect those parties who can afford legal advice and have the resources to fight any attempt to have a restraint enforced. It is our experience that the threat of legal action is enough for most affected workers to simply comply with the restraint, regardless of whether it is enforceable. To prevent such harm to workers, any changes short of a full prohibition on employers' ability to threaten such injunctions, will have a negligible effect.

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

Workers engaged in part-time, casual and gig work are often the most vulnerable workers advised by Legal Aid NSW, as these roles often do not provide the worker a living wage and so workers need to supplement their income through additional jobs and income streams.

Restraints on concurrent employment serve to prevent these workers from being able to earn a living wage as well as limiting the opportunities for the development of workers' skills, thereby limiting the opportunities for them to enter more secure employment.

A common argument in these submissions is that legal restrictions placed on the operation of potentially valid restraints are only useful to those affected workers who have the resources to obtain legal advice and challenge any attempt to enforce the restraint. This argument is especially relevant to concurrent employment restraints, as secondary work is most important to those low paid and vulnerable workers who are not otherwise paid a living wage.

If something less than a full ban on concurrent employment restraints is implemented, a vast majority of these workers will have no option but to accept and comply with the restraints imposed in their contracts, regardless of the reasonableness or enforceability of those restraints. Workers are also far less likely to challenge a restraint imposed by a current employer as it will almost certainly affect the relationship between the employer and the worker.

The consultation paper proposed an option of limiting restrictions on concurrent employment to *"circumstances where the secondary employment would conflict with the proper performance of the employee's duties in their primary job, or otherwise present a conflict of interest"*.

If a complete ban on such restraints is implemented, employers have other existing avenues to address the issues posed in this option. For example, if a worker is not performing their duties to a standard expected by the employer, an appropriate disciplinary process is available to the employer to address the worker's performance. It is not appropriate to pre-determine that a worker is unable to properly perform their duties simply because they have a second job.

Legal Aid NSW recommends that there be a complete ban on the use of concurrent employment restraint clauses.

In the event that the government does not implement a full ban, Legal Aid NSW recommends that any legislative amendment should make unlawful restraints of trade in relation to part time, casual and gig workers.

**Recommendation 9:** Ban concurrent employment restraint clauses entirely. Alternatively, ban concurrent employment restraints for part time, casual, and gig workers.

## 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?

Legal Aid NSW considers civil penalties and criminal sanctions for no-poach and wage-fixing agreements should mirror the cartel provisions of Part IV of the *Competition and Consumer Act 2010*.

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?
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?

Legal Aid NSW does not consider there are any appropriate exemptions to the proposed ban on either no-poach or wage-fixing agreements.



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