

Competition Taskforce
The Treasury
Langton Crescent
Parkes, ACT 2600

05 September 2025

By email: CompetitionTaskforce@treasury.gov.au

Dear Competition Taskforce,

REFORM TO NON-COMPETE CLAUSES AND OTHER RESTRAINTS ON WORKERS (THE CONSULTATION)

The Mortgage and Finance Association of Australia (MFAA) welcomes the opportunity to make a submission to the consultation.

The MFAA is Australia's peak body for the mortgage and finance broking industry with over 16,000 members, 97% of which are mortgage and finance brokers and the vast majority of these are small businesses. Mortgage and finance brokers are an essential part of Australia's financial ecosystem, supporting over 37,000 jobs and contributing \$4.1 billion to the Australian economy each year.¹

Further information about the MFAA can be found in **Attachment A**.

OUR SUBMISSION

The MFAA supports the Government's commitment to fostering a more dynamic, competitive, and fair labour market. We also believe that workers should be able to choose where they want to work and to move freely – whether it is to another business or to be entrepreneurial and set up a business themselves.

As such, and subject to a number of caveats, we do not oppose a restriction on the use of non-compete clauses within employment contracts. In fact, we believe that appropriate restrictions on the use of non-complete clauses will make it easier for broking businesses to recruit talent.

We do not support *any* legislative restrictions on the use of non-solicitation clauses with respect to clients or customers of a business. This is because non-solicitation clauses are an important protection mechanism for broker businesses in the event an employee or contractor leaves to either join a competing business or to set up a business themselves.

¹ Deloitte, *The value of mortgage and finance broking 2025*, <<https://www.mfaa.com.au/policy-and-advocacy/research>>.

Non-solicitation clauses safeguard a business's most valuable asset – its client relationships – by helping to prevent unfair competition. In mortgage broking, where trust and long-term connections are central to business viability, these clauses ensure that departing staff or contractors cannot exploit established goodwill to the detriment of the business and its clients. Any reform of restraint laws should therefore preserve the legitimate role of non-solicitation clauses, recognising their importance in maintaining fair competition and business continuity.

With this in mind, we make the following recommendations:

1. Clarity needed on scope of “non-compete” definitions
2. Do not extend the ban on non-competes to genuine business-to-business contractor relationships
3. Do not ban client non-solicitation clauses
4. Transitional arrangements must be appropriate

RECOMMENDATION 1: CLARITY NEEDED ON SCOPE OF “NON-COMPETE” DEFINITIONS

The consultation paper proposes adopting the US FTC definition of non-compete clauses. In our view, this definition is overly broad and risks capturing contractual arrangements that are fundamental to the operation of small broking businesses. Trail commissions and clawback provisions are not mechanisms designed to restrict workers from moving between employers, but rather essential commercial arrangements that allow small broker businesses to manage cash flow, recover costs, and remain sustainable in a highly competitive market.

These are long-standing features of broker remuneration. Clawback provisions allow lenders to recoup commissions where a loan is terminated within a defined period (usually 12–24 months), while trail commissions are payable only while a loan remains active. Neither operates to prevent a broker from moving employers or establishing their own business; rather, they reflect the underlying economic reality of the loan product and align incentives between lenders, brokers and customers. As Treasury has already recognised in relation to training repayment agreements, there are legitimate business arrangements that should be carved out from any prohibition. We strongly recommend that clawback recoupment and the cessation of trail commissions be expressly excluded from the definition of non-compete or penalty clauses, to avoid creating significant disruption to the operation of Australia's mortgage and finance broking industry.

We also encourage examples of non-compete clauses to be included in any proposed definition. This will give certainty to businesses and employees alike when negotiating employment agreements.

The definition of a non-compete clause should expressly exclude confidentiality, intellectual property and non-solicitation clauses and the use of these clauses should not be restricted in any way. This is because these types of clauses are important mechanisms to protect small businesses from the loss of client relationships, misuse of proprietary information and the erosion of business value they have invested time and resources to build.

In developing an appropriate definition, we also recommend clear guidance on when the high-income threshold applies, including when how earnings are assessed (especially where variable or non-monetary components are included). We also recommend consistent application of any proposed restrictions across enterprise agreements and non-enterprise employment contracts.

RECOMMENDATION 2: DO NOT EXTEND THE BAN ON NON-COMPETES TO GENUINE BUSINESS-TO-BUSINESS CONTRACTOR RELATIONSHIPS

Extending a blanket ban or restrictions on non-compete clauses to all independent contractors could have unintended consequences that go beyond the policy intent. In our view, restrictions should not extend to contracts between businesses and independent contractors who themselves operate as businesses in their own right. Contractors who are providing services through their own Australian Business Number (ABN), carrying their own commercial risk, and are responsible for managing business obligations such as tax, insurance, and compliance should be excluded from any proposed ban.

To minimise the risk of unintended consequences, we recommend the definition of employee and independent contractor should be consistent with the established definitions used in Fair Work legislation or in ATO guidance materials.²

RECOMMENDATION 3: DO NOT BAN CLIENT NON-SOLICITATION CLAUSES

We do not support any restriction on the use of client non-solicitation clauses in employment or contractor contracts.

While non-solicitation clauses may not be often enforced, they have important deterrent value and serve a legitimate function in protecting established client relationships, guarding against financial loss and preserving business goodwill—particularly in industries built on long-term client trust such as mortgage and finance broking.

Protecting established client relationships

In the broking sector, a firm may invest considerable time, training, and support into onboarding an employee or contractor, who in turn services clients under the brand and systems of the principal. Broking businesses often rely on personal relationships with clients and key staff. Even a single departure, where a former employee solicits those contacts can significantly disrupt operations and client trust—and substantially destabilise the business.

As the case of *Dargan Financial Pty Ltd ATF the Dargan Financial Discretionary Trust* (trading as “Home Loan Experts”) v *Nassif Issac* [2017] NSWSC 1077 illustrated, which is a case about a broking business, clients are at the very heart of a business’s success, and the relationships forged with them are among its most valuable assets.

Non-solicitation clauses are critical because they safeguard not just a company’s proprietary systems, but also a business’s most valuable asset – their client relationships.

Protection from financial loss

There is another consequence of client poaching on broking businesses. Brokers place loans with lenders on behalf of their clients and in return receive a commission which is paid by the lender. In

² For example, the ATO in *Super for independent contractors* clarifies when an independent contractor is considered an employee for purpose of the superannuation guarantee scheme, <<https://www.ato.gov.au/businesses-and-organisations/super-for-employers/work-out-if-you-have-to-pay-super/super-for-independent-contractors>>.

the event a loan is extinguished within a period (usually between 12 – 24 months), the lender will reclaim or ‘claw back’ the commission paid to the broker.³

We are aware of instances where employees have left a brokerage, established their own business, and subsequently refinanced clients they previously serviced. In these cases, the original brokerage has faced substantial commission clawbacks from lenders, despite having invested significant time and resources into originating the loans. We would be happy to share specific examples of these occurrences with Treasury.

For these reasons we do not support any legislative restriction on non-solicitation clauses.

RECOMMENDATION 4: TRANSITIONAL ARRANGEMENTS MUST BE APPROPRIATE

To ensure a smooth transition for small businesses, awareness and practical support will be essential.

We recommend applying any restriction to non-compete clauses only to new contracts entered into after the date it takes effect, and applying a ‘grandfathering’ approach to contracts made prior to the effective date. Importantly, time-poor small businesses, should not be penalised for having a clause in their contracts if entered into before the date a ban is imposed, those clauses can simply become unenforceable after a set date. Unlike larger organisations, small businesses lack time and resources to do retrospective contract reviews.

We also recommend providing government led support for small business employers through guidance notes, education materials and model clauses developed in consultation with industry. Delivery should be coordinated with the Council of Small Business Organisations of Australia (COSBOA) and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to ensure those resources reach their intended audience.

Finally, we believe the Fair Work Commission will be best placed to handle disputes, if any arise.

CLOSING REMARKS

If you wish to discuss this submission or require further information, please contact naveen.ahluwalia@mfaa.com.au or Stefania Riotto at stefania.riotto@mfaa.com.au.

Yours sincerely,



Naveen Ahluwalia

Executive, Policy & Legal
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³ The business cannot recoup any clawback cost from their clients – **Reg 28VG** of the NCCP Act. For more information, see “How mortgage brokers get paid” fact sheet available on <https://www.mfaa.com.au/policy-and-advocacy/why-choose-a-broker>.

Attachment A – About the MFAA

The MFAA's membership includes mortgage and finance brokers, aggregators, lenders, mortgage managers, mortgage insurers and other suppliers to the mortgage and finance broking industry.

Brokers play a critical role in intermediated lending, providing access to credit and promoting choice in both consumer and business finance. Over time, consumers have increasingly sought the services of a mortgage and finance broker with the latest MFAA quarterly market share showing mortgage brokers facilitated 76.8% of all new residential home loans⁴ and approximately four out of ten small business loans⁵ in Australia.

The MFAA's role, as an industry association, is to provide leadership and to represent its members' views. We do this through engagement with governments, financial regulators and other key stakeholders on issues that are important to our members and their customers. This includes advocating for balanced legislation, policy and regulation and encouraging policies that foster competition and improve access to credit products and credit assistance for all Australians.

⁴ MFAA media release, *Mortgage broker market share reaches new peak*, <<https://www.mfaa.com.au/news/mortgage-broker-market-share-reaches-new-peak>>, 2 June 2025.

⁵ Productivity Commission, *Small business access to finance: The evolving lending market Research paper*, September 2021, <<https://www.pc.gov.au/research/completed/business-finance/business-finance.pdf>>, pg 44.