

Reform to non-compete clauses and other restraints on workers Consultation Paper, 25 July 2025.

Submission by Professor Joellen Riley Munton, UTS Law, 2 September 2025.

Please note that this submission responds to only some of the questions in the Consultation Paper. I commend the Taskforce for its work on this important reform.

3.2 Scope of workers affected

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

Yes. In Australia today many workers are persuaded to undertake work as independent contractors. According to statistics published in 2018, approximately 9 per cent of the Australian workforce were engaged as ‘independent contractors’. Most of these were unincorporated sole traders, who hired no employees. Many of those who operated through incorporated entities did not employ any other staff, so they were also effectively sole traders, notwithstanding their incorporated status.¹ These workers ought not to be burdened by restraints in their contracts of engagement. The very nature of their supposedly ‘independent’ status means that they owe no implied duties of loyalty to the employer who engages them, so it makes no sense that they should be held to post-engagement restraints on their ability to take assignments from other enterprises. Allowing restraints in contracts with contractors while banning them from employment contracts would simply create another incentive for employers to engage workers as contractors.

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3. *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?*

A key rationale for a ban on restraints in employment contracts is to avoid the ‘in terrorem’ effect that these clauses have, even when they are arguably unenforceable at common law because of the doctrine making pure non-compete clauses illegal. For a ban to be effective it is important that the clauses are not allowed to be included in employment contracts at all, so that their existence cannot mislead employees into believing that they are enforceable. So any employment contract with a commencement salary below the high income threshold ought not to be permitted to include non-compete restraints. (Indeed, pure non-compete restraints should not be permitted in

¹ See G Gillfillan, *Trend in use of non-standard forms of employment* (Parliament of Australia Parliamentary Library Research Paper Series 2018-19, 10 December 2018). According to Australian Bureau of Statistics 6333.0 – *Characteristics of Employment, Australia, August 2016* (2 May 2017), Summary of key findings, there were 1,193,100 unincorporated independent contractors, and 949,600 employed no employees. There were 826,900 incorporated independent contractors, and 338,400 employed no other workers.

any employment contracts because they would not be enforceable at common law and can only operate ‘in terrorem’.)

It should also be the case that an employer is not permitted to enforce a restraint against any worker who is earning less than the high income threshold at the time of termination. This would ensure that restraints cannot be enforced against workers who may have been engaged on a salary exceeding the high income threshold but have subsequently been receiving a reduced income. This may occur if an employee is demoted, or accepts part-time employment subsequent to signing their initial employment contract.

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

I cannot imagine any. It beggars belief that such clauses should have become common in collective agreements in the first place. These kinds of clauses, if justifiable at all, are justifiable on the basis of the particular engagement of individual workers with very specific talents, so are only suited to individual contracting arrangements and not collective enterprise agreements.

3.3 Enforcement

5. *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.

Penalties need to be sufficient to deter the inclusion of clauses in employment contracts.

Penalties should be higher for the purveyors of standard form contracts, because it is the blind use of such contracts by many small businesses that has created the erroneous expectation that these clauses are valid even under the common law.

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

It is conceivable that a small business operator who has used a standard form contract on the advice of a business management service of some kind might fall into the trap of including a prohibited clause. Standard form documents are notorious for being adopted without scrutiny. In such a case, reasonable reliance on professional advice may be deemed a defence, but on the basis that the penalty for including the clause falls upon the advisory firm.

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

Proceedings challenging a breach on the ban on non-compete clauses should be able to be initiated by the departing employee, and also any new employer seeking to employ the departing employee. New employers have an interest in preventing non-compete clauses from interfering in their freedom to recruit staff. The Fair Work Ombudsman should also have standing to pursue actions in respect of breaches of clauses.

8. *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?*

Given the widespread use of non-compete clauses in standard form contracts, it would be advisable for the FWO to undertake a public education program to make sure that the proposed ban is well-known among employers, employees, and certainly among those organisations that provide packaged business start-up and management information to small businesses. A ban will not be effective until it is widely known and understood. It would be advisable to require that the Fair Work Information Statement issued to employees at the time of recruitment should include a note on the unenforceability of non-compete clauses in employment contracts.

9. *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 that the objective of the ban is to prevent the influence of these restraints on labour mobility – and not to punish employers per se – it would be advisable for the FWO to be able to use its powers to obtain enforceable undertakings from employers who have been found to breach the ban, requiring those employers to remove the clauses from contracts, and to inform employees that the clauses have been removed and cannot be enforced.

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

Yes. In general, the FWC provides a forum for resolution of disputes that is quicker and less expensive to participants than litigation in the ordinary courts. So the ban on non-compete clauses, and any provisions restricting the use of similar restraints (such as restraints on the use of allegedly confidential information) should be able to be resolved in FWC proceedings. The FWC's recently introduced jurisdiction to deal with unfair contract terms in contractor agreements might be used as the model for such a jurisdiction. (See *Fair Work Act 2009* Part 3A-5, ss 536NA-NK.

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3.4 Limited statutory exemptions

12. *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)?*

Strictly speaking, pure non-compete clauses are not enforceable even at common law, and even for high income employees. The only reason that they have been enforced is on the ground that they (arguably) support a restraint protecting a legitimate interest of the employer, such as genuinely confidential business information, or customer relationships. Therefore there is no ground to permit any exemptions to a ban on non-compete clauses. Employers who wish to protect confidential information and/or customer relationships should be required to use clauses limited to the specific

protection of those interests, and should not be able to seek a restraint on a former employee changing jobs in order to support those other restraints.

3.5 Transitional arrangements

13. *What transitional arrangements are required to support workers, and business compliance with the ban?*
14. *How should the ban apply to non-compete clauses contained in existing contracts after commencement?*

All non-compete clauses in contracts made prior to enactment of the ban should be immediately unenforceable.

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?*

Pure non-compete clauses should also be banned for all employees. These clauses are – strictly speaking – unenforceable at common law in any event. See *Belflora Pty Ltd v Vinflora Pty Ltd* [2021] NSWCA 178, [46]; *AIE Insurance Group Pty Ltd v Martin (No 4)* [2024] FCA 1110, [255]. Restraints should only be permitted where they specifically identify legitimate interests of the employer in confidential information and customer connection, and they should not be enforceable by an injunction that prevents the worker from accepting the new position.

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

I would not agree that any restraint should be enforced by preventing a person from taking up fresh employment. However if the government is minded to permit such restraints upon payment of compensation, the minimum compensation for enforcing a restraint in a manner that would prevent a person from taking up alternative employment should be the remuneration that the employee would earn ***if engaged by the new employer***. This would require an employer to match the remuneration level of the new employment opportunity.

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

As noted above, there should be no enforcement of pure non-compete clauses for any worker. If however the government is minded to permit clauses to be enforced by injunction, the maximum duration should not exceed a period for which the former employer can prove that they will suffer harm by refusal of the injunction. The risk of setting a specific maximum duration in legislation is that this pre-determined maximum is likely to become the default position. All employers will seek to claim the maximum duration, whether it is justified in their circumstances or not.

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).*

The common law jurisprudence used to be tolerable on this point. The duration for an injunction preventing a departing employee from contacting their former clients was the time it would reasonably take for the employer to re-establish the employer's relationship with the client through other staff, and that should be a matter of weeks, not months or years. The common law approach allowed such a restraint to apply in respect of clients with whom the employee had developed a personal relationship NOT all clients of the firm, and the common law permitted the former employee to be restrained from initiating contact with the client. This old approach respected the rights to clients to deal with whomever they pleased. A client making an approach to the former employee would not breach such a restraint. Over time, the common law jurisprudence has become much more protective of employers' interests, to the disadvantage of employees, and to the serious inconvenience of clients. The old approach of the common law should be restored, so that non-solicitation restraints should be enforceable only for short periods, sufficient for the employer to reestablish client contact, and should apply only to prevent the departing employee from contacting the client, and not vice versa.

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?*

NEVER. This is the most obnoxious form of restraint, because it impacts the opportunities available to the coworkers who were not even a party to the agreement that the employer is seeking to enforce. These kinds of restraints were once not enforceable at all under the common law rules: see *Kores Manufacturing Co Ltd v Kolk Manufacturing Co Ltd* [1958] 2 All ER 65, 74. It has been an unwarranted and highly unfortunate development in the law that such restraints have been permitted. This development has only really occurred in Australia since the decision in *Cactus Imaging v Peters* [2006] NSWSC 717, [55]. Such a relatively recent development ought to be outlawed now.

4.3 Other requirements for valid restraint clauses

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

No. Cascading clauses create uncertainty. Employers who have legitimate interests to protect should be required to specify the duration and scope of the restraint. There was great wisdom in the decision of the New South Wales Supreme Court in *Austra Tanks Pty Ltd v Running* [1982] 2 NSWLR 840 that the multiplicity of permutations available from a cascading restraint clause was conducive of uncertainty, and impermissibly required the court to make a decision for the parties. Courts do not, and ought not, make parties' contracts for them. The onus is on the parties to a contract to provide sufficiently certain terms at the time they enter into the contract.

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

The rule should be that any unreasonable element in a restraint causes the whole restraint to fail. This would ensure that the onus is on the employer who drafts the contract to be sure to include only a reasonable, and hence enforceable, clause.

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

Yes. Where confidential information is specified, the general nature of the information should be specified, and it should only be permitted to be the kind of information that would be treated as confidential for the purposes of a claim for breach of confidence under the general law. It should not be possible for an employer to specify the kind of information that is easily discoverable by other means, or information that is already in the public domain, as confidential.

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?*

No. Workforce stability restraints should never be enforceable.

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

It would be useful if the orthodox jurisprudence of the common law (prior to recent very permissive developments) were codified, so that employers, employees, their advisors, and the courts are held to the old wisdom that restraints may protect only legitimate interests, and cannot do so for longer, or over a wider territory, than is necessary to protect that interest.

5. Restraints on concurrent employment

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2. ...

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?*

It is my understanding that the only reason that these kinds of clauses are not presently governed by the competition legislation is that the legislation carves out employment relationships from its scope. This carve-out (as I understand it) was to avoid the risk that union negotiated collective agreements might fall foul of restrictions on anti-competitive practices. It might be argued that it is an unintended consequence of this carve-out that anti-competitive practices have been able to develop in individual employment contract arrangements without scrutiny. If this is so, it makes sense to treat the problem of no-poach and wage-fixing agreements as a matter of competition law, and provide for competition law remedies for breach.

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?*

No. There are no legitimate grounds for enforcing an agreement in one person's contract by restricting the movement of other persons. Even in labour hire arrangements, where it has become common for a labour hire agency to require agreement from a host employer that the host must not offer direct employment to workers, such restraints are not justified. The so-called 'right to protection from disintermediation' discovered by the court in *Informax International Pty Ltd v Clarius Group* [2012] FCAFC 165, cannot be justified, especially when the *Fair Work Act* now expresses a very clear legislative intent to prefer direct employment over labour hire employment, at least to the extent of requiring that labour hire workers enjoy the 'same pay' for the 'same job': see *Fair Work Act 2009* (Cth) Part 2-7A, ss 306A-306V. Where a host employer proposes to comply completely with the obligation to ensure the same conditions to labour hire workers by offering the workers direct employment, it should not be permissible for a contract with the labour hire agency to defeat that proposal. A worker should be at liberty to accept direct employment with the host unrestrained by any clause in the labour hire agreement.

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?*

No. There is a provision in the *Fair Work Act* (s 354) which effectively prevents insistence on the use of site agreements. A person (including an employer) is not permitted to discriminate against an employer on the basis that their employees are covered by the NES or some other instrument. The predecessor of this provision was the *Workplace Relations Act 1996* (Cth) s 804 and at the time this provision was introduced (with the Work Choices amendments in 2005) some employer associations objected to it, because it would interfere with their practice of using site agreements to make sure that all contractors working on a building site were covered by the same instruments. If it is not justifiable to allow site agreements because they are potentially discriminatory, what possible justification is there for allowing wage-fixing agreements between employers?