

Thursday, 4 September 2025

Competition Taskforce
The Treasury
Submitted Online

Dear Competition Taskforce,

RE: Reform to non-compete clauses and other restraints on workers

We welcome the opportunity to provide feedback about the proposed ban on non-compete clauses and related restraints in employment contracts, allegedly preventing workers from moving to higher paid jobs.

Our submission is based on the views of our business (a SMB), an outsourced human resources (HR) business, combined with feedback from SMBs to whom we provide HR support services.

As a background to our response; our business has been operating more than six years, with our team holding various levels of experience and exposure to both corporate and SMB businesses across a range of industries. As the Founder, I have been working in HR for more than 25 years and have been exposed to businesses from 1 employee to 5500 employees and have seen various levels of success developing and enforcing restraint-type clauses in employment contracts.


Currently, we support between 40-50 organisations (both SMBs and NFPs) each year across the gambit of generalist HR activities, including the development and issuance of employment contracts, NDAs, position descriptions, policies, talent acquisition, and engagement and retention strategies. Through this experience, we have a clear understanding of why SMBs choose to include these clauses and what these non-compete and restraint clauses are hoping to achieve.

We propose it is **the reason why organisations wish to include these clauses should be at the heart of any decision** to place a unilateral ban on their inclusion.

However, it appears by the wording of the consultation paper and questions the input sought is not whether non-compete clause should be banned, but how the ban should be executed.

We suggest the focus from The Treasury should be on how businesses can be better supported to overcome the challenges that these clauses are designed to address; thereby reducing risk and the need for these clauses to be enforced; which would then result in greater freedom for workers to move from employer to employer, in their chosen industry, to advance their career and earning capacity.

Sincerely



Martha Travis
Founder | Director
Martha Travis People Innovators

Introduction

According to the ASBFEO¹, as of 2023, SMBs engaged around 67% of private sector workers.

Two-thirds of non-government workers rely on SMBs for their livelihood and career prospects.

This employment sector is a significant contributor to the Australian economy, tax income generation, unemployment statistics, productivity, and local area engagement.

The rights of employees to fairly earn a living, choose to work in the workplaces best suited to them, and to earn the best possible income for their skill set, should be protected. However, these rights must not come at the cost of an individual SMB owner's business, livelihood, goodwill and sustainability.

We suggest that a balance needs to be found between protecting the interests of SMBs and the broader SMB economy and the rights of workers to earn a fair living.

The issue here, we believe, is less about banning non-compete clauses in employment contracts and more about addressing the issue of SMBs being exposed to the loss of goodwill and sometimes years of hard work, marketing, training and financial sustainability.

Context

Over time, it has become more and more difficult for SMBs to protect their IP, interests, client base, pricing methodologies, formulas, and talent from being stolen, re-purposed, or eroded by employees who leave and move to work with a competitor.

When we consider social media, smart phone use, BYOD policies, and generally, the volume of technology in our workplaces and community; preventing employees from stealing IP from their employer is almost impossible.

Generally, most SMB owners understand that there will be losses. Employees who leave cannot completely disconnect what they know or have learned during their tenure with their prior organisation and this information will undoubtedly benefit the next organisation for whom they work in some way, however small.

For any service-based business, however, their client-base, their unique selling proposition, their methods and programs, may well have taken significant input of time and money to develop, and for this IP to be simply taken and used by a competitor via an employee transition can cause catastrophic impacts for that organisation, other workers in the organisation, and for the SMB economy generally.

It is this we need to protect against.

Client Feedback

Feedback from our clients indicates that the top 3 reasons for including a non-compete clause in an employment contract is:

1. To prevent employees from taking their customers
2. To prevent ex-employees from poaching other employees.
3. To prevent employees from working for a direct competitor.

As to the most important aspect a non-compete/restraint clause is there to protect: taking clients and employees out of a small business could break what they have worked so hard for.

One said: “Impact on the sustainability of the business that I have paid for”.

Examples

Hairdressing

One of our clients, a hairdressing salon, has been in business for more than 17 years. Over this period, they have spent a significant amount of time and money building a local clientele, building their brand in the local market through advertising, marketing and social media.

They have employed more than 10 apprentices, with 6 of them staying on after the completion of their apprenticeship. They have paid for employees to travel interstate and overseas for training and development and worked hard to retain their best workers. Nonetheless some have moved on to other roles and some have decided to start their own venture.

Most recently, they have seen a significant impact from one of their hairdressers (high-performer, 2 years post-trade) making the decision to start their own enterprise. The owners were initially happy to support the worker with their endeavours until it became clear that the employee was using their Facebook and Instagram audiences to promote their services and had used their facilities and equipment to create social media content, including using other employees as models and advocates.

Short of terminating their employment for performance-related reasons and pursuing them via the Courts (at a high cost) to cease and desist (there was no restraint or non-compete clauses to enforce) there was little they could do to protect themselves from having their clients, other employees and IP from being siphoned out of their business.

So, an employee who had been in their business for less than 5 years, was able to have a significant negative impact on their business by “innocently” stealing their goodwill.

NDIS

One of our clients, for whom we wrote their employment agreements, including post-termination non-solicitation clauses, operates in the NDIS Home Care industry, employing around 80 support workers.

As can be expected in these environments, NDIS program participants often become emotionally attached to their support worker(s).

On several occasions, we have had to send cease and desist letters to support workers who, after their employment ends, have messaged clients via Facebook messenger, called them or just 'mentioned' during their last service where they are going... and if the client likes them...

While this is usually effective, it relies on the employer receiving the right information from the right person at the right time. If this warning doesn't come, clients and employees could be lost before the employer has a chance to take any action to protect their interests.

In reply to The Treasury's consultation questions, we respond as follows:

Definition of a non-compete clause

Non-compete clauses should be defined such as:

A clause that legally restrains an employee from gaining employment with a direct competitor or commencing their own commercial interest in direct competition to the employer, at all, or for a period more than 3 months, or in a location further than two postcodes from the location of the employer's business operations.

Inclusions or exclusions:

While this clause should go no further than to protect the interests of the employer's business, the employee must ensure that they do not engage in unlawful acts, such as soliciting clients or other employees of the employer, using confidential or commercial-in-confidence information and materials for direct or indirect financial gain; or disparaging the employer's brand, its officers, or workers.

Scope of workers affected

Independent Contractors

If the use of non-compete clauses is to be included in the Fair Work Act, then it should not include Independent Contractors, as their engagement is a commercial (common law) engagement, not covered by industrial legislation and their engagement document would not be considered an employment contract.

The exception to this may be where an Independent Contractor is engaged in a manner that entitles them to have the superannuation guarantee paid on their behalf by the employer. In such cases, a clause should be able to be included in their engagement document, provided it does not breach fair trading legislation.

High-income earners

As the talent market continues to shift and some worker groups such as ICT and Finance may have a Modern Award that underpins their employment and also be a high-income earner (e.g. Professional Employees Award); therefore it should not be assumed that all high-income earners have c-suite or executive roles and responsibilities, or have access to more strategic information.

Conversely, there may be some workers under the high-income threshold who are key personnel from an IP and business threat perspective (e.g. the CEO of one of our clients, a small sporting/registered club).

Using the high-income threshold as a parameter for the inclusion or exclusion of a non-compete clause would be highly inaccurate and/or lead to inconsistencies of application. It should not be applied at any time during the employment relationship.

Application to all Fair Work Instruments

Undoubtedly there is more risk from some sectors, industries and roles than others when trying to protect against the loss of goodwill.

Each industry, Award and instrument should be considered before application.

As per our examples above, even though workers may be considered low-income, if they work in a service-based industry, they potentially are a greater threat to an SMB than someone earning twice as much in another industry (e.g. retail).

Enforcement

Similar to the unfair dismissal process, which doesn't prevent employers from dismissing their employees, but requires them to do so fairly, or take the risk of a claim being brought against them; the inclusion of a non-compete-type clause should not be banned or penalised, but rather require the employer to provide a valid reason for its inclusion. This allows for the case-by-case application of the 'ban'.

The employee or their representative could commence proceedings at any time from the time of the issuance of the employment contract. However, if the Commission was to allow the Applicant to lodge (for example) a General Protections claim while still a candidate, this could create a significant burden on SMBs and the FWC,

If we are realistic about this scenario, a SMB employer is unlikely to want to proceed with employment if a candidate refuses to sign an employment contract that they believe contains a non-compete/restraint clause in breach of a non-compete requirement under the Act and who subsequently raises a dispute with the FWC.

Similar to a stop-bullying application, an employer should also be able to bring an application to the FWC to stop an ex-employee from engaging in conduct that would, could or was negatively impacting their commercial operations.

Exemptions

We propose that there should be no ban.

If instead, there was a clause in Awards (or other fair work instruments) containing a definition of what was reasonable to include in an employment contract, to prevent solicitation and the loss of commercial and confidential information, then it would only be in situations where an employee or their representative felt that they were being unfairly prevented from finding other employment or starting their own venture that a dispute would be raised.

In which case no exemptions would be required.

Transitional arrangements

Similar to the changes to Fixed Term Contracts, a date should be set for all contracts that become effective after that date; where an employee can request a revision of a long-standing contract and the employer would need to respond within 21 days with an updated contract, or a valid reason why the employer is justified to retain this clause.

Other reforms to employee restraints of trade

High income earners

As previously stated, the high-income threshold should not be used as a parameter to allow/ban the use of any restraint clauses.

Award-free would be a better definition; however, many SMBs find this concept confusing and may assume that their Finance Manager is Award-free; however, this role could be classified under the Clerks - Private Sector Award, depending on the scope and responsibilities of the role.

Non-solicitation clauses for clients and co-workers

There should be no ban on these types of clauses, as they are the most significant component for SMBs to protect their business.

Other requirements for valid restraint clauses

If a definition of an 'allowable' clause can be established, then all others need to be determined on a case-by-case basis. It would be far too challenging to try to prescribe how clauses should be set out for every permutation of circumstances that would justify a different type of clause.

Restraints on concurrent employment

For most of our clients, this is managed via a Conflict of Interest clause. In many service organisations that engage numerous casuals, having their employees working across two or more competing businesses is not uncommon. These clauses usually require the employee to declare who, when and where they are working for other organisations and to seek written authorisation before doing so.



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Conclusion

We are not lawyers or professional policy writers.

Our business works with other SMBs to assist them to navigate the minefield of legislative burden they are required to understand and comply with when they employ people.

When it becomes too hard, scary, or burdensome for employers to employ people, they will look for other ways to circumvent the red-tape – leading to cash wages, sham contracting, modern slavery, and other dubious employment practices.

The lawmakers often fail to consider the impacts changes such as these have on SMBs and how these changes can impact the economy.

We propose that serious consideration be given to what we are trying to achieve with the proposed ban.

Are we doing it to protect workers' rights at the cost of SMBs?

If so, what will be the long-term effect?

Are we not better to help set down the rules of engagement as simply as possible?

Employer: do not get in the way of an employee having access to a new and/or better job that provides greater pay and/or career advancement in another business without loss of income or career momentum; and

Employee: you will do the right thing by respecting that your employer has worked hard to build their business, and as a result, you will not steal their IP, their clients, or their people for your own benefit and/or for that of your new employer.

If the Fair Work Act is going to soon prescribe when and how non-compete/restraint clauses are to be applied (or not); then, it is reasonable that the FWC takes responsibility for managing disputes that arise from the related circumstances, making the protection of their goodwill much more affordable and accessible for SMBs rather than having to pursue ex-employees via the court system.