



## **SUPPLEMENTARY SUBMISSION TO CONSULTATION ON NON-COMPETE CLAUSES AND OTHER RESTRAINTS**

**5 September 2025**

Professionals Australia welcomes the opportunity to contribute further to the Treasury's proposed policy details to ban non-compete and other restraint clauses.

Professionals Australia is the trading name of The Association of Professional Engineers, Scientists and Managers, Australia (APESMA), which is a registered trade union.

The union's membership consists of technical, professional, supervisory and managerial employees, such as engineers, architects, IT professionals, mining supervisory and managerial staff, pharmacists, scientists, veterinarians and other professionals.

The Union is uniquely placed to comment on restraints of trade as we offer an employment contract review service to our members. Each year a team of legally qualified staff review hundreds of employment contracts. Most of our members are employed under written contracts of employment and many of our members are subject to restraint of trade clauses.

### **ACTU submissions**

We thank the ACTU for consulting with us and allowing us the opportunity to contribute to their submissions.

### **In respect of Treasury's consultation questions, Professionals Australia supports and endorses each submission of the ACTU.**

In particular, and for the reasons submitted by the ACTU, we submit that any prohibition on restraint and non-compete clauses should apply to all employees, and not just employees who earn below the high-income threshold. The unfair and unreasonable use of restraint clauses identified in this inquiry is not unique to lower income groups. Further, the macro-economic reasons identified for the ban are just as applicable to high-income employees.

Given that we endorse the ACTU submissions, we do not propose to address the specific questions posed in the Treasury consultation paper. However, having been concerned about the fairness and prevalence of restraints of trade clauses for some time we do wish to share some general observations about restraint clauses for the benefit of the inquiry.



## Lack of genuine negotiation

We agree strongly with the observations in Professor Joellen Munton's submission<sup>1</sup> and elsewhere that restraints of trade clauses have become 'boilerplate in standard form contracts' often 'used blindly as risk mitigation tools' by the employer, and rarely the subject of serious or genuine negotiation.

When members come to us to have their employment contracts reviewed, they may only have a few days to agree to the contract on offer. The contract commonly contains restraint clauses, which were not the subject of any prior conversation. The member is often not aware that there is a restraint clause, has no idea what it means and is surprised to learn that such a clause is legal. There is often no apparent regard for an employee's seniority, their access to sensitive or confidential information, their access to the employer's clients or trade secrets. We are not aware of any contracts in our practice area providing additional compensation for the restraint.

Frequently the prospective employee's only point of contact is a human resource representative who did not write the contract, and who is not in a position to negotiate terms. The offer is therefore take-it-or-leave it. As has been noted during this inquiry, this frequently results in many employees signing onto a restraint of trade clause for which there may be no legitimate reason at all simply because of an imbalance of bargaining power.

Professionals Australia therefore welcomes any legislation against restraint clauses that addresses this power imbalance.

## Unreasonable restraint terms

In our day-to-day work, we are exposed to many restraints of trade clauses that are manifestly unreasonable.

Reviewing restraint clauses for the purpose of this inquiry, we have come across:

- Restraint and non-compete clauses for graduates and junior staff
- Restraint clauses which require the employee to *notify* the employer that they have been offered other employment, and to *provide a copy* of the restraint to the prospective employer.
- Clearly excessive restraints. For example, a clause purporting to restrain a pharmacist from working for any competitor within a three-kilometre radius of a well-known pharmacy brand name for two years.
- Contracts with damages for breach of the restraint clause baked into the contract.

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<sup>1</sup> Munton, J 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity. Issues Paper 2024', *Submission to Competition Taskforce*.



It is not unusual to see contracts that provide:

- Restraints requiring an employee to not work for any clients, when the employer's clients are unknown to the employee
- Standard contract terms in which the employee agrees in writing that the restraint is reasonable
- Restraints that provide that an employee is prohibited from working not only for competitors but *any similar business*.

These clauses are all the more unreasonable given that the employee already has an implied duty of confidence to the employer and has invariably signed a confidentiality clause whose obligations are ongoing.

In addition to this, we have observed that it has become normalised in employment contracts for an employee to agree that the employer will initiate *injunctive relief* for breach of a restraint clause, and also for the employee to *indemnify* the employer for any legal action taken in respect of a restraint clause breach.

In our experience, many people agree to these terms without fully understanding what they mean. Further, as has been identified during this inquiry, employees may become disinclined to leave the employment under threat of litigation.

## Warranties

A related matter that we raised in our original submission, is that in addition to signing onto restraint clauses, many employees when accepting new employment provide a series of 'warranties' that include something similar to the following:

*The employee warrants that they are not subject to any direct or indirect restrictions on their ability to perform the role and will not be breaching any obligation to any third party by entering into the employment.*

Breach of a warranty term generally provides the employer with a valid reason for termination of employment.

These terms are also increasingly common in employment contracts, reflecting the increasing prevalence of restraint terms. The employee who is subject to a restraint is therefore in a difficult position: simultaneously under threat of litigation from a past employer and under threat of dismissal from the new employer merely for earning a living.

## Restraints of trade at termination of employment

Finally, as has been noted by other Unions in this inquiry, it is becoming increasingly common for restraint clauses to be used tactically by the employer in negotiations around the end of employment.



Waiver of a restraint clause may be offered by an employer as an incentive in exchange for an employee to resign or otherwise sign a deed releasing the employer from any further liability.

We have found that some employees are so perturbed by their restraint clause that they would give up all legal rights in order to no longer be bound by their restraint clause. As we noted previously, there are no guarantees for waiver in respect of employees made redundant or terminated soon after engagement.

In this context, restraint clauses – obtained initially only through a power imbalance and which may not even be legally valid – serve no purpose other than to extract a final advantage over an employee.

## **Conclusion**

Professionals Australia therefore welcomes the proposed ban on non-compete clauses. We sincerely hope that the proposed ban helps to address the unjust practices identified in our submissions.

## **PROFESSIONALS AUSTRALIA**

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