

5 September 2025

Non-competes Reform Unit
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

Dear Treasury

Re: Treasury Consultation on reform to non-compete clauses and other restraints on workers

We welcome the opportunity to contribute to this important consultation on the Federal Government's proposed reforms to non-compete clauses and other restraints on workers.

Australian Services Union

The Australian Services Union (ASU) is one of Australia's largest unions, representing members across a diverse range of industries, including disability services, energy, and the legal sector. We play a vital role in advocating for meaningful improvements in the working lives of our members. This submission focuses on the experiences of those disability support workers, though the issues raised are relevant across all sectors in which our members are employed.

The ASU represents members in every state and territory, in metropolitan, regional, and remote communities. Our members predominantly work in non-government, not-for-profit, and faith-based organisations that support people with disability, both those who are participants in the National Disability Insurance Scheme (NDIS) and those who are not, including many living with mental health and psychosocial disabilities.

Our members have shared firsthand how non-compete clauses have negatively impacted their livelihoods. Whether a low-paid worker in the disability sector or a high-income professional in the energy or legal industries, these clauses restrict income-earning potential, limit job mobility, and undermine financial and professional stability.

Non-compete clauses are increasingly being applied across all income levels and occupations, often without clear justification. In the disability services sector, they disproportionately affect workers with limited bargaining power and are particularly harmful in environments where continuity of care and workforce flexibility are essential.

Australia's growing and ageing population is driving up demand for care services. The proportion of Australians aged over 65 is projected to increase from 16% in 2021 to 20% by 2031. The number of NDIS participants is expected to grow by 84% by 2030.¹ The disability workforce crisis is being fuelled not only by rapid sector growth but also by the high numbers of workers exiting the industry. Insecure employment, low pay, constant pressure to deliver complex support within inadequately paid hours, and the persistent undervaluing of disability support work are driving stress and burnout - pushing skilled workers out and deepening shortages of labour.²

The National Disability Insurance Agency publicly share data, including the number of active participants with approved NDIS plans each quarter, which provides key insights into sector demand and participant needs. This information is critical for understanding the impact of non-compete clauses on workforce mobility, as restrictions on disability support workers can worsen staffing shortages and limit workers' ability to respond to participant demand, undermining both service delivery and the economic empowerment of workers.

It can also demonstrate the most common types of disability that our members are working with while supporting NDIS participants. For instance, one of our members provides support to a young person who has autism. The young person is non-verbal and requires 24/7 care. She struggles to eat, sleep and walk. Our member has cared for the young person for over five years. Sometimes she requires our member to be present when she is taking medication (even if our member is not rostered on a shift).

Table 1: Active Participants by Primary Disability for Q3 FY24/25 across Australia³

Primary Disability	Active participants
Autism	274,360
Intellectual Disability	94,698
Developmental Delay	88,112
Psychosocial Disability	64,865
ABI	19,292
Hearing Impairment	28,738
Other Neurological	24,438
Other Physical	20,099
Global Developmental Delay	19,058
Cerebral Palsy	18,196

¹ Frances McMurtrie et al, *The Halo Effect: Reimagining Australia's Care Workforce to Help Solve the Broader Skills Shortage* (Report, PwC Australia, 19 September 2022) <https://www.pwc.com.au/health/reimagining-australias-care-workforce.html>.

² Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report – Executive Summary, Our vision for an include Australia and Recommendations* (Report, 2023) 180

³ National Disability Insurance Agency, *NDIS Participant Data: Active Plans by Quarter, Active Participants by Primary Disability* (2025) <https://dataresearch.ndis.gov.au/explore-data> (accessed 02/09/2025)

Down Syndrome	11,699
Multiple Sclerosis	11,613
Other	11,533
Visual Impairment	10,670
Stroke	10,249

At the same time, the nature of care is evolving. Services are increasingly required for individuals with more complex physical and psychosocial needs, and demand for in-home aged and disability care is rising. In this context, non-compete clauses restrict the ability of skilled workers to move between employers or offer services independently - undermining workforce capacity and limiting the choices available to people who rely on care.

Our members work across the disability sector in a wide range of roles: as disability support workers, local area coordinators, service coordinators, team leaders, and in residential and independent supported living services. They are also engaged as sole traders and platform workers. Many of the people they support are experiencing, or are at risk of experiencing, crisis, disadvantage, social dislocation, or marginalisation.

It is important to emphasise that the principles underpinning the NDIS include:

- Respecting the rights of people with disability to exercise choice and control over matters that affect them; and
- Enabling people with disability to make decisions that shape their lives.⁴

Non-compete clauses imposed on disability workers fundamentally undermine these principles. By limiting the ability of workers to move freely between employers or to establish their own services, these clauses reduce the availability of support options and restrict the choices available to people with disability. This is inconsistent with the intent of the NDIS and the rights of participants to exercise genuine choice and control.

We urge Treasury to consider the real-world impacts of non-compete clauses on workers and the people they support, and to implement reforms that promote fairness, mobility, and equity in the Australian labour market.

⁴ National Disability Insurance Scheme Act 2013 (Cth) s.17A

THE BAN ON NON-COMPETE CLAUSES FOR LOW- AND MIDDLE-INCOME WORKERS

Definition of a 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?*

The ASU has carefully considered the Australian Council of Trade Unions (ACTU) submission and strongly supports its recommendations. The ACTU's proposals are both practical and necessary to ensure that a ban on non-compete clauses delivers meaningful protections for workers and cannot be undermined through loopholes or employer workarounds. This is particularly important in sectors such as the NDIS, where workers are often low-paid, part-time, and in insecure employment. Ensuring the integrity of the ban is not only about upholding workplace rights but also about promoting economic empowerment for these workers, who need genuine freedom to seek work, build skills, and provide continuity of care to participants.

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

Non-solicitation clauses should be included in any ban under the definition, particularly within the disability support industry. In the NDIS context, such clauses undermine the core principles of choice and control, preventing participants from continuing to engage workers they know and trust. They also restrict the ability of skilled workers to provide services where they are most needed, reducing workforce flexibility and availability. The Royal Commission highlighted the value of collaborative care planning between a person with disability, their support persons, and medical practitioners, enabling individuals and families to be “active partners,” “think outside the square,” and exercise greater choice and control over their care and treatment.⁵ Non-solicitation clauses directly conflict with this approach by restricting participants' ability to retain trusted support workers.

Sally* - a disability worker

Sally*, a disability support worker, was engaged via an online platform. Her contract prohibited her from working in “any business of providing allied health or mentoring services within 20km for 12 months”. When a former client sought to re-engage her through the platform, she declined out of fear that the restraint would be enforced. This undermined both her right to work and the NDIS principle of participant choice and control.

⁵ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report – Executive Summary, Our vision for an include Australia and Recommendations* (Report, 2023) 18

Scope of workers affected

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

Yes. The ban must extend to independent contractors because they face the same, and in some cases greater, risks as employees when subjected to non-compete clauses. Employers and providers often attempt to use contractual forms (employee vs contractor) to avoid legal responsibilities while still restricting a worker's ability to earn a living.

John* - a regional support coordinator

John* a regional support coordinator's contract barred him from working with clients for "*six months after leaving employment.*" When his provider withdrew services, participants wanted to continue with him directly. He was warned not to, forcing her to relocate to a city to keep working. This reduced service options in his community and caused personal and financial disruption.

Independent contractors and sole traders are just as vulnerable to restraint clauses as employees. In fact, they often have fewer protections and greater exposure to financial harm if challenged. A ban limited only to employees would create a loophole whereby providers could adopt a business model that shifts the risk to the worker by classifying them as contractors to maintain restraints.

Further, the ban must clearly operate for all types of employees – full time, part-time, permanent, fixed-term, and casual. There is a large reliance on casual workforce in the disability sector, but this has not limited the use of non-competes and other restraints on workers. The nature of the engagement, particularly the reliance on insecure work like casual employment, has not made any difference to providers' insistence upon non-compete clauses and the like. This is so even when workers are paid modern award rates, that is, the bare legal minimum. The doctrine of restraint of trade rests on adequate consideration flowing from one party to the other. It is against public policy for someone to be paid a bare legal minimum, but also have an economic restraint placed on their labour. And yet, this is the reality for thousands of disability support workers around Australia.

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?*

Yes. Reliance on the high-income threshold risks creating a carve-out that leaves some workers exposed to unfair restraints, even where it is against the public interest.

Nathan* – an engineer from Victoria

Nathan*, an engineer in the renewable energy sector, earns above the high-income threshold. An engineer subject to a restraint clause could be prohibited from working for a competitor for 6–12 months. While their income level places them outside many statutory protections, preventing them from working directly undermines the public interest by restricting access to critical renewable energy expertise at a time when it is urgently needed.

If any threshold is retained, a clear public interest test should apply to ensure restraints cannot be enforced where contrary to public interest.

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?*

The ASU does not support the application of a high-income threshold to the ban on non-compete clauses. A threshold would undermine the purpose of the ban by creating loopholes and leaving some workers unprotected.

If, despite this, a high-income threshold were adopted, it must be applied at the point when the relevant circumstance arises. This ensures clarity and prevents retrospective application. Specifically, the threshold should be assessed at the time when:

- A prospective employer seeks to engage a worker under a contract that includes a non-compete clause; or
- An employer seeks to vary an existing employment contract to insert a non-compete clause.

This approach ensures consistency, prevents manipulation through later contract variations, and protects workers by making their rights clear at the moment decisions are made.

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

We consider that non-compete clauses should have no legal effect when included in any fair work instrument- such as awards, enterprise agreements, workplace determinations, or individual flexibility arrangements.

To achieve this, we recommend adopting a legislative approach similar to that used for pay secrecy clauses under section 333C of the Fair Work Act. Specifically, the legislation could state that “a term of a fair work instrument or a contract of employment” that imposes a non-compete restriction on a worker is of no effect.

The prohibition could apply broadly to both fair work instruments and employment contracts, or - following the model of section 333D -be limited to “a contract of employment or other written agreement with an employee.” In either case, the objective should be to ensure that non-compete clauses cannot be legitimised or enforced through industrial instruments or employment contracts.

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?*

Terms that contravene the proposed ban on non-compete clauses should be rendered void and unenforceable. The enforcement framework currently in place under the Fair Work Act for pay secrecy provisions provides an appropriate model for extending penalties to unlawful non-compete terms. This would ensure consistency in regulatory enforcement and deter employers from including prohibited restraints in employment contracts.

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

No, there should be no defences available to contraventions of a ban on non-compete clauses. Providing for defences would undermine the intent and effectiveness of the reform, which is to ensure that all workers—regardless of income level, occupation, or location—have the freedom to seek employment without unreasonable restraint.

Non-compete clauses are fundamentally different from other employment-related legal concepts, such as sham contracting. In sham contracting cases, the defence often hinges on whether the relationship was genuinely one of independent contracting or employment. These cases involve factual disputes about the nature of the working relationship and are assessed on a case-by-case basis.

In contrast, non-compete clauses are explicit contractual restraints that restrict a worker’s ability to earn a living, regardless of the nature of the employment relationship. Their impact is clear and direct: they prevent workers from taking up new roles, starting businesses, or continuing to work in their

field. Introducing defences would create loopholes that employers could exploit, particularly in sectors where workers have limited bargaining power.

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

Workers themselves, unions (e.g., ASU), and the Fair Work Ombudsman should all be able to commence proceedings. It ensures timely intervention in cases where employers use legal threats to intimidate workers or restrict workforce mobility. Allowing unions and the Ombudsman to act also helps address the power imbalance that arises when an employer engages costly legal representation against an individual worker.

Holly* – a small business owner from Queensland

Holly*, a support worker who set up their own small business as an NDIS provider, was threatened with legal action under a restraint clause after several clients chose to follow them. The employer engaged external lawyers and demanded that the worker sign a statutory declaration restricting them from taking clients and from working within 50 km of multiple sites across the region, which effectively blocked them from most of Southeast Queensland. With union support and legal advice, the worker challenged the restraint, and the employer ultimately withdrew.

Without the union supporting Holly, she would have either been forced to sever the relationship and connection she had formed with those clients, or been unable to leave her employer. Neither of those options was good for Holly, her clients, or the economy.

10. *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?*

The Fair Work Ombudsman should provide guidance to both employers and workers on the distinction between permissible clauses, such as those protecting intellectual property, and unlawful non-compete clauses that restrict an individual's ability to earn a living. The Ombudsman should also investigate complaints, educate employers on compliant contract drafting, and support workers - particularly in regional or specialised sectors - who may be subject to overbroad or intimidating and prosecute non-compliance.

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?*

The existing remedies available under the Fair Work Act for breaches of civil remedy provisions - such as injunctions and compensation orders - should also apply to workers subjected to non-compete clauses in breach of the ban. This is consistent with the approach taken to the pay secrecy prohibition.

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

Yes. The Fair Work Commission should act as an accessible forum to resolve disputes quickly and enforce compliance with the ban. It could issue orders and injunctive relief related to the operation of such clauses at any stage of the employment relationship at the time of engagement, during employment, or after employment ends, which would reduce reliance on costly and time-consuming court proceedings.

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?*

The Fair Work Commission should be empowered to declare non-compete clauses of no effect where they breach the statutory ban, and to award compensation for any losses caused by their use. It should also have the authority to make binding determinations on whether a clause falls within the scope of the prohibition, including in relation to the application of any high-income thresholds or exemptions (if such provisions are introduced). This would give workers an accessible, low-cost pathway to challenge unlawful restrictions, rather than relying solely on expensive court proceedings.

Nick* - a part-time disability worker in NSW

Nick*, a part-time disability support worker on the NSW South Coast, had a contract with a 12-month restraint preventing them from working within 50 km of their employer's base. This would have effectively excluded them from most local work, despite strong demand for support workers in the region.

As the worker explained: *"the clause has the potential to stop me from earning a living with the skills I have in my area"* and *"I was deeply concerned about having to go at least an hour to another major centre to work, it would impact my ability to ensure my son has the transport and support he needs, as there is very very limited public transport in our town."*

A role for the Fair Work Commission in making binding declarations would help prevent employers from imposing such unreasonable restrictions in the first place.

Limited statutory exemptions

14. *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)?*

There should be no exemption to the ban on non-completes on public policy or national interest grounds except for national interest or defence grounds.

Transitional arrangements

15. *What transitional arrangements are required to support workers, and business compliance with the ban?*

To ensure a smooth transition, both workers and businesses will require clear guidance and support. Transitional arrangements should include:

- Education campaign by the Fair Work Ombudsman (FWO): The FWO should deliver accessible information to employers and employees explaining the ban, its scope, and lawful alternatives for protecting legitimate business interests.
- Union education grants: Funding should be made available to unions to develop and deliver education programs for workers. This will ensure employees are aware of their rights and have support in challenging unlawful clauses.
- Practical compliance guidance: The government should publish template employment contracts and best-practice guidance to assist businesses in complying with the new rules without relying on unlawful restraints.

These measures will help avoid confusion, promote compliance, and protect workers from being unfairly restricted during the transition period.

16. *How should the ban apply to non-compete clauses contained in existing contracts after commencement?*

Existing non-compete clauses should be automatically unenforceable if they exceed what is necessary to protect legitimate business interests, and those with unenforceable terms should not lose pay. This

approach is particularly important in the disability and allied health sector, where the May 2023 NDIS Review projects the workforce must grow by 40% (around 128,000 workers) over three years to meet demand.⁶ Enforcing overly broad restraints would directly undermine this workforce expansion and limit access to essential services.

OTHER REFORMS TO EMPLOYEE RESTRAINTS OF TRADE

Non-compete clauses for high-income employees

17. *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?*

High-income earners should not be exempt from the ban on non-compete clauses, except in narrowly defined circumstances where legitimate business interests are at stake—such as the protection of intellectual property, patents, or highly sensitive confidential information.

Courts have recognised the principles around legitimate business interest. Those should continue to apply, where they do not contradict the ban on non-competes and other restraints, such as confidential information, goodwill, and customer relationships. Clauses that merely seek to suppress competition should not be enforceable.

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

Compensation should reflect the reasonable loss of income for the restraint period, as well as any additional expenses incurred to secure alternative employment, such as relocation or retraining.

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

No limit should apply. This aligns with the objectives of the NDIS by promoting choice and control for participants, supporting workforce mobility, and preventing unnecessary barriers that restrict skilled workers from moving quickly to where they are most needed. For many people with disabilities, a pause in consistent and continuous care for hours or days can be fundamental, profound and very damaging.

⁶ NDIS Review, *Building a More Responsive and Supportive Workforce* (Report, 15 May 2023) 4 <https://www.ndisreview.gov.au/resources/paper/building-more-responsive-and-supportive-workforce#:~:text=Is%20the%20NDIS%20building%20a,We%20also%20know%20that:>

Non-solicitation clauses for clients and co-workers

20. *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).*

Yes. Client non-solicitation clauses should not be used in the disability sector, as they conflict with the principles of choice and control for people with disability, and restrict their ability to engage preferred providers.

Lesley* – a part-time support coordinator

Lesley*, a part-time support coordinator, was told that even though their employer was ceasing a service, if participants wanted to continue with them, *“there would be problems.”* The worker believed these restrictions could apply and, as a result, relocated from a regional area to the city, now providing support coordination as a sole trader.

This demonstrates how client non-solicitation clauses can unnecessarily restrict service continuity and workforce mobility, contrary to the NDIS principle that participants should make decisions that shape their lives.

21. *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?*

Co-worker non-solicitation clauses should never be legitimate. Even if a worker encourages a colleague to join them in a new role, the ultimate decision always rests with the worker themselves. Restricting such movement undermines freedom of association, limits career opportunities, and weakens labour mobility. Workers must retain the right to choose where and with whom they work without contractual restraints imposed by past employers. If workers wish to suggest good workers to their new employers, because they know their work or know their relationships with clients, they should not have the threat of the tort of inducing breach of contract able to be made against them.

Other requirements for valid restraint clauses

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

No. Cascading restraint clauses—those that include multiple overlapping durations or geographic scopes—should not be permitted. These clauses are overly complex, legally ambiguous, and often punitive. They create significant uncertainty for workers, particularly those with limited access to legal advice or bargaining power.

This is especially problematic in sectors like the NDIS, where a large proportion of the workforce is employed on a part-time or casual basis and is heavily reliant on modern awards for their minimum conditions. As this literature review highlights, many NDIS workers are subject to insecure, low-hour contracts and fragmented working time arrangements.⁷ These workers often lack the leverage to negotiate fair contract terms and are disproportionately affected by restrictive clauses that limit their ability to seek supplementary or alternative employment.

Cascading clauses are frequently included in template contracts drafted by employers or legal advisors, and their proliferation across industries. Given the power imbalance between employers and workers in these sectors, such clauses can have a chilling effect on workers' mobility and income security.

Joanne* – a support worker

Joanne*, a 48-year-old support worker, employed in the industry had a client who recently approached her for support from a prior employer. However, Joanne declined the work out of fear of breaching a restraint clause in her contract. The clause in question includes multiple overlapping durations (3, 6, and 12 months) and geographic areas (5, 10, and 20 km), and applied to a broad range of activities, including working with former clients. This “cascading” structure is designed to intimidate rather than clarify. It is not only excessive but also incompatible with the NDIS's core values.

The ASU supports the position of the ACTU on the “one-shot rule”. This would render an entire restraint clause void if it includes cascading durations or geographic scopes. This approach is preferable to the alternative proposal—which would interpret only the narrowest clause as valid—because it would more effectively deter the use of cascading clauses altogether.

In sectors like the NDIS, where workers are already navigating unpredictable rosters, low pay, and limited access to leave entitlements, the added burden of unclear and overreaching restraint clauses is unjustifiable. Prohibiting cascading restraints would be a small but meaningful step toward

⁷ Meg Smith and Sara Charlesworth, *Literature Review for the Modern Awards Review 2023–24 Relating to the Workplace Relations Settings within Modern Awards That Impact People When Balancing Work and Care* (Report, Fair Work Commission, March 2024) <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am2023-21-literature-review-work-care-2024-03-08.pdf>.

improving job quality and mobility for some of the most vulnerable workers in the Australian labour market.

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

Yes. Severability should not allow employers or platforms to salvage and enforce parts of a restraint clause if the clause as a whole is unreasonable. Allowing severability in this way undermines the purpose of a clear ban on non-competes by encouraging employers to draft broad, complex restraints in the hope that some elements might survive. This creates uncertainty, increases litigation risk, and imposes additional costs on workers who are already at a disadvantage in challenging unlawful terms.

Limiting severability ensures that employers cannot benefit from “overreach drafting” and places the responsibility on them to ensure contracts comply with the law from the outset. A bright-line approach – where unreasonable clauses are struck out in their entirety – will deter misuse, simplify enforcement, and provide workers with clarity and certainty about their rights.

Employees are generally not armed with a legal education to understand whether a restraint clause will be enforceable or severable or which parts of a clause might be or might not. The mere presence of the clauses in contracts deters workers from acting inconsistently with the terms. It is a very real threat which workers take seriously. However, it should not be up to an individual worker to try to figure out which parts of their contract will be deleted and which parts won’t be. Our members want to concentrate on delivering support for people with disabilities, and they ought to be free to do so.

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

Yes. Employers should be required to clearly specify the legitimate business interests a restraint is intended to protect, to prevent misuse or overreach.

We support the proposal to codify the existing common law principle that a non-compete clause must extend no further than is reasonably necessary to protect legitimate business interests, such as trade secrets, other confidential information. To the extent that client relationships are codified as a legitimate business interest, this must include clear exemptions for industry-specific contexts, such as disability support, where client choice and continuity of care are paramount.

25. *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. Client relationships or workforce stability should never justify the use of a non-compete clause. A non-compete goes much further by restricting a worker's fundamental right to take up employment in their chosen field, which is neither justified nor proportionate. In practice, appeals to "client relationships" or "workforce stability" are often used as employer rationalisations for suppressing mobility and limiting competition in the labour market. Protecting clients and maintaining stable services should never come at the expense of workers' right to work, freedom of movement, or - particularly in sectors such as the NDIS - the rights of participants to exercise genuine choice and control.

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

After reviewing the ACTU's submission, the ASU fully endorses and supports its position. The ACTU is seeking to limit the misuse of post-employment restraints by employers, particularly through the ready availability of interlocutory injunctions. They argue the legal threshold for such injunctions raised, so employers must show it is likely the restraint will be upheld and that the public interest in promoting competition and protecting employees is considered, rather than relying solely on potential business harm.

Additionally, the ACTU wants legislation to explicitly protect employees who are involuntarily made redundant or wrongfully dismissed, ensuring that non-compete and non-solicitation clauses cannot be enforced against them. This would prevent undue restrictions on workers' ability to find new employment and support fairer post-employment outcomes.

RESTRAINTS ON CONCURRENT EMPLOYMENT

27. *Are there any other considerations or potential unintended consequences if restraints on concurrent employment were to be regulated beyond the common law?*

Incorrectly regulating restraints on concurrent employment beyond the common law risks undermining workers' rights to earn a living, particularly in low-paid, insecure industries such as disability support, aged care, and other parts of the NDIS sector, where multiple jobs are often necessary to achieve a living income. Ultimately, protecting the right to concurrent employment for low-paid and part-time workers is critical to economic empowerment, fair competition, and worker mobility. Accordingly, the ban should extend to restraints on concurrent employment.

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

Restrictions on restraints to secondary employment should be implemented with a clear presumption in favour of workers' right to hold multiple jobs, unless an employer can demonstrate a legitimate and specific conflict of interest or a genuine safety concern. This approach is consistent with the literature's emphasis on addressing the growing prevalence of insecure and fragmented work, particularly among casual, part-time, gig, and platform workers, who often rely on multiple jobholding to achieve income security.

The literature highlights that many modern award provisions and National Employment Standards entitlements are structured around a normative full-time, ongoing employment model, which does not reflect the lived reality of many worker-carers. Casual and part-time workers, especially in feminised sectors such as care, often face unpredictable hours, low guaranteed minimums, and fragmented schedules.⁸ These conditions necessitate the ability to engage in secondary employment to manage both income and care responsibilities.

NO-POACH AND WAGE-FIXING AGREEMENTS

29. *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?*
30. *Should there be exemptions to the proposed ban on no-poach agreements? If yes, on what grounds? What restrictions should apply to their use?*
31. *Should there be exemptions to the proposed ban on wage-fixing agreements? If yes, on what grounds? What restrictions should apply to their use?*

The ASU supports the ACTU's submissions in response to these questions.

Conclusion

The use of non-compete clauses is fundamentally at odds with the objectives of the NDIS. The scheme is built on principles of participant choice and control, workforce mobility, and the creation of a skilled, sustainable workforce. Non-competes undermine these goals by preventing workers from moving

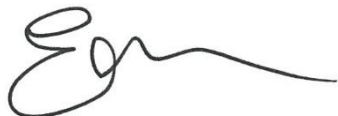
⁸ Meg Smith and Sara Charlesworth, *Literature Review for the Modern Awards Review 2023–24 Relating to the Workplace Relations Settings within Modern Awards That Impact People When Balancing Work and Care* (Report, Fair Work Commission, March 2024) <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am2023-21-literature-review-work-care-2024-03-08.pdf>.

freely between providers, restricting participants' ability to maintain trusted support relationships, and discouraging skilled workers from entering or staying in the sector.

This is particularly harmful in the disability context, where much of the workforce is low-paid, part-time and often juggling multiple jobs to make ends meet. Rather than being locked out of future employment opportunities, disability support workers need greater economic empowerment and security so they can build sustainable careers in the sector. Protecting workers' mobility is therefore not only a matter of fairness for employees - it is also critical to retaining skilled staff and ensuring participants receive the continuity and quality of support they deserve.

A strong and absolute ban on non-compete clauses is therefore essential to both empowering the workforce and delivering on the NDIS's promise of dignity, independence, and genuine choice for people with disability.

Yours faithfully



Emeline Gaske
NATIONAL SECRETARY

Tel: +61 3 9342 1422
Mobile: 0402 291 960
E-mail: egaske@asu.asn.au