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Competition Taskforce  
The Treasury  
Langton Crescent  
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Dear Competition Taskforce

### **ACCC submission - reform to non-compete clauses and other restraints on workers**

Thank you for the opportunity to provide a submission to the Treasury's consultation paper on reform to non-compete clauses and other restraints on workers.

The Australian Competition and Consumer Commission (**ACCC**) welcomes the Government's announcement that it will close perceived loopholes in the competition law that may allow businesses to make no-poach and wage-fixing agreements.

The ACCC is an independent Commonwealth statutory agency, responsible for promoting competition, fair trading, consumer protection and product safety for the benefit of all Australians. The ACCC is responsible for enforcing the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**). Part IV of the Competition and Consumer Act contains prohibitions on restrictive trade practices, including prohibitions on cartel conduct (Division 1) and other anti-competitive conduct (Division 2).

The ACCC supports reform that:

- is simple and minimal, including to avoid unforeseen consequences such as benign conduct being unintentionally captured;
- is coherent with the existing provisions in Part IV of the Competition and Consumer Act;
- provides for the application of the existing penalties available for contraventions of the existing provisions in Part IV of the Competition and Consumer Act and
- provides exemption for agreements that are in the public interest, including so as not to deter agreements in the public interest, such as those relating to sustainability collaborations or anti-slavery initiatives.

### **No-poach and wage-fixing agreements**

As set out in the consultation paper, no-poach agreements can involve two or more businesses agreeing to refrain from actively recruiting or hiring each other's workers. Wage-fixing is a similar form of collusion that can involve two or more businesses agreeing to set a cap on wages and employment conditions for their workers. Both agreements can be

explicit or implicit and are often made without the knowledge of affected workers, and seek to limit staff turnover between firms that compete in similar labour markets.

When the businesses involved in a no-poach or wage fixing agreement are competitors, it is possible that these agreements will be cartel conduct and, as stated in the consultation paper, analogous to supplier allocation or price-fixing cartels.

In essence, no-poach and wage-fixing agreements are arrangements between businesses about the supply of business inputs, being employee services.

### **The existing provisions in Part IV**

The suite of restrictive trade practices prohibitions in Part IV apply to anti-competitive arrangements between businesses, with the particular facts and circumstances of the conduct determining which prohibition or prohibitions are applicable.

Cartel conduct is defined and prohibited in Division 1 of Part IV of the Competition and Consumer Act. Cartel conduct is prohibited per se, regardless of its effect on competition. To be caught by the definition of cartel conduct under the Competition and Consumer Act, the contract, arrangement or understanding must be between parties, two or more of whom are, or are likely to be (or would be but for the provision) in competition in relation to the supply or acquisition of the relevant goods or services. This is known as the **competition condition**.

Conduct which falls outside the scope of the definition of cartel conduct, or which benefits from an exemption from the per se prohibition (under the “anti-overlap” provisions), may still contravene other provisions in the Competition and Consumer Act; most notably section 45.

Section 45 prohibits making or giving effect to contracts, arrangements, understandings and concerted practices that have the purpose, effect or likely effect of substantially lessening competition in a market. This is the case even if the behaviour doesn’t satisfy the competition condition and meet the stricter definition of a cartel.

Unlike the cartel provisions, under section 45 there is no requirement that parties be competitors. As a result, section 45 will capture both horizontal and vertical agreements that substantially lessen competition in a market in Australia, subject to some exceptions and anti-overlap provisions.

### **Stand-alone provision in Part IV**

The consultation paper states that to avoid complicating existing prohibitions in Part IV of the Competition and Consumer Act, no-poach and wage-fixing agreements could be proscribed as their own form of anti-competitive conduct, which would not benefit from the broader exemption for employment conditions in Part IV of the Competition and Consumer Act.

It is not clear from the consultation paper whether a new stand-alone provision would include a per se prohibition, or incorporate the competition condition, or include a substantial lessening of competition test, or introduce a new test to Part IV.

To the extent that the intention is for no-poach and wage fixing conduct to be covered by the full range of Part IV prohibitions, rather than only be treated in the same way as cartel conduct, a stand-alone provision would need to replicate a number of provisions in Part IV (including the anti-overlap provisions and the exemptions) which will increase the level of

complexity and uncertainty. Further, it will be unclear whether the case law for the existing Part IV provisions is applicable to the new stand-alone provision.

A stand-alone provision restricts the application of the competition law to only those agreements that strictly satisfy the elements of the stand-alone provision.

A stand-alone provision that only applies to arrangements between businesses about specific business inputs would be out of step with the universal nature of the competition provisions in Part IV. Additionally, the introduction of a stand-alone provision may give rise to unforeseen consequences.

A stand-alone provision was the approach taken in relation to the price signalling provisions that applied to the banking industry, which were contained in Part IV, Division 1A of the Competition and Consumer Act from 2012 to 2017. In 2015, the [final report of the Competition Policy Review](#) (the Harper Review) recommended that the price signalling provisions be repealed and replaced with a concerted practices prohibition of general application.

### **Alternative reform option**

Confirming the application of both the existing cartel provisions and restrictive trade practices provisions to no-poach and wage-fixing agreements would ensure the Competition and Consumer Act applies to a broad array of no-poach and wage-fixing agreements, including agreements between businesses that are not competitors but whose arrangements nevertheless substantially lessen competition.

The ACCC considers that the following amendments are sufficient to achieve this clarification to the Competition and Consumer Act:

- amendment to the definition of 'services' in the Competition and Consumer Act so that it captures employment services; and
- amendment to sections 51(2)(a) and (aa) which currently exempt acts, contracts, arrangements, understandings or concerted practices that relate to the remuneration, conditions of employment, hours of work or working conditions of employees from many of the provisions in Part IV of the Competition and Consumer Act.

This approach would be simpler and coherent with existing provisions, provided that:

- the same penalties apply to wage fixing and no poach agreements as apply to cartel provisions and relevant restrictive trade practices provisions. If different penalties were introduced for wage-fixing and no poach agreements, this would add complexity and an inconsistent application of principle to existing provisions. The better approach in those circumstances may be a stand-alone provision. The ACCC does not support different penalties applying for wage fixing and no poach agreements (discussed further below).
- any exceptions to wage fixing and no-poaching agreements that are introduced are appropriate to apply across Part IV.

Regardless of whether a stand-alone provision is introduced or amendments are made to clarify the application of existing provisions, consideration will need to be given to ensure benign conduct is not unintentionally captured

## Penalties

### Consultation questions

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?**

The ACCC considers that no-poach and wage-fixing agreements should be subject to the same penalties that apply to other conduct that is prohibited by other relevant provisions in Part IV of the Competition and Consumer Act.

This means that if a no-poach or wage-fixing agreement is found to have contravened a civil provision in Part IV, the existing civil penalties available for contraventions of Part IV should apply. If a no-poach or wage-fixing agreement is found to have contravened a criminal provision in Part IV, the existing criminal penalties available for contraventions of Part IV should apply.

This will ensure a consistent deterrence message for anti-competitive conduct, regardless of the nature of the conduct.

The penalties available for contraventions of Part IV are set out below.

### ***Restrictive trade practices***

For corporations, the maximum pecuniary penalties for breaches of many provisions in Part IV are the greater of:

- \$50,000,000
- if the Court can determine the value of the benefits reasonably attributable to the contravention, 3 times that value, or
- if the Court cannot determine the value of the benefits reasonably attributable to the contravention, 30% of the corporation's adjusted turnover during the breach turnover period for the contravention.

For individuals, the maximum pecuniary penalty for breaches of Part IV is \$2,500,000.

### ***Cartel conduct***

The Competition and Consumer Act prohibits cartels under civil law and also makes it a criminal offence for businesses and individuals to engage in cartel conduct.

- Corporations can face fines for each criminal cartel offence or pecuniary penalties for each civil contravention. The maximum fine or pecuniary penalty amount is the same as penalties for restrictive trade practices, as set out above.
- Individuals found guilty of criminal cartel conduct could face:
  - up to 10 years in jail, or
  - fines of up to \$660,000 per criminal cartel offence (2,000 penalty units).
- The maximum pecuniary penalties for civil contraventions of the cartel prohibitions by individuals is \$2,500,000.

## Exemptions

### Consultation questions

- 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?**
- 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?**

If the Government is minded to provide statutory exemptions for no-poach or wage-fix agreements that are otherwise subject to the Competition and Consumer Act, we consider it most efficient for the Government to expressly include these exemptions in the legislation itself rather than leave it for the ACCC to deal with on a case by case basis through one of the exemption processes provided by the Competition and Consumer Act.

One such exemption process is authorisation. The authorisation process in the Competition and Consumer Act is an important feature of Australia's competition laws. It recognises that, in certain circumstances, particular conduct may not harm competition or may give rise to benefits to the public that outweigh the public detriment.

Broadly, the ACCC may grant authorisation where proposed conduct is likely to result in a net public benefit (i.e. where the likely public benefit resulting from the conduct outweighs the likely public detriment). In some cases, it will also be open to the ACCC to grant authorisation because the proposed conduct would not be likely to substantially lessen competition.

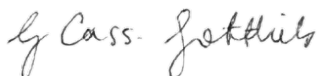
The authorisation process would be available for no-poach and wage-fixing agreements that might otherwise contravene the Competition and Consumer Act.

Clarifying that no-poach and wage-fixing agreements are subject to the competition law may in itself lead to increased applications for authorisation for arrangements that may be in the public interest.

Clear application of statutory exemptions, in addition to clear availability of exemption processes, is important to ensure that no-poach or wage-fixing agreements that may be in the public interest are not abandoned due to concerns that agreements may contravene the competition law. In the absence of this clarity, the proposed reform may have the effect of "chilling" agreements that are contended to be in the public interest, such as those relating to sustainability collaborations or anti-slavery initiatives.

If you have any questions regarding this submission, please contact Melinda McDonald, Executive General Manager, Competition Division on (07) 3835 4628.

Yours sincerely



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