

Vivienne Court Trading's response to the Australian Government Competition Taskforce's consultation on reform of non-compete clauses

Respondent: Vivienne Court Trading Pty Ltd

Executive summary

- 1 This paper constitutes Vivienne Court Trading Pty Ltd's (**VivCourt's**) response to the Australian Government's consultation on reform of non-compete clauses (**Consultation Paper**). VivCourt supports reforms to prohibit non-compete clauses and recommends that they apply universally, including to high-income earners. This position may be unusual in an industry characterised by highly skilled and globally competitive workforces, however, VivCourt has never relied on non-compete or non-solicitation clauses. Its experience demonstrates that Australian businesses can thrive without such restraints. VivCourt's proposed legislative wording is below.

VivCourt Trading

- 2 VivCourt is one of a small number of proprietary trading firms headquartered in Australia. It is a participant on the ASX and ASX24, providing liquidity to domestic and global markets and supporting efficient, orderly trading. From its main office in Sydney, it trades both Australian and international markets.
- 3 VivCourt employs some of the brightest graduates in Australia through a structured trading program, alongside engineers, researchers, and other highly skilled professionals. Competitors in the industry almost universally use non-compete and non-solicitation clauses. VivCourt has deliberately chosen not to, on the basis that such clauses are unnecessary, harmful to labour market efficiency, and often misused by employers who wield greater bargaining power than their employees. It is also a selling point for VivCourt (particularly in recruiting senior roles) that it does not use such clauses.

KEY POINTS

- 4 VivCourt rejects the idea that banning non-competes would increase risk and pressure on employers. Its experience is that mobility benefits both the economy and workers. A mobile workforce circulates skills and knowledge, drives competition between employers to improve conditions, and ensures talent is allocated to where it is most productive. Employers benefit from broader recruitment pools and stronger industry growth. VivCourt's experience and approach includes:
 - a. *No restraints on staff:* VivCourt does not impose non-competes or non-solicitation clauses, though it remains successful in an intensely competitive industry.
 - b. *Recruitment benefits:* Mobility is a recruitment advantage. Prospective employees value the absence of artificial restrictions and parties may negotiate without fear of third-party disputes.
 - c. *Mobility:* removing restraints shifts the balance of power towards a fairer employment relationship. Greater employee mobility places the responsibility on employers to foster workplaces where people want to remain. This should serve to encourage investment in the elements that support a sustainable and engaged workforce, including remuneration, mental health, work-life balance, leave policies, and workplace culture, factors that may be compromised when employers know it is difficult for employees to move.
 - d. *Challenges faced:* VivCourt has seen competitors prevent employees from working for up to a year, even those on modest salaries, merely to prevent them carrying out work for a competitor, regardless of any threat to the legitimate business interests of the former employer. Employers with minimal bargaining power are unlikely to dispute when pressure is exerted, noting the uncertainty and costs associated with disputes. This creates personal and professional hardship, slower transfer of knowledge, and reduced productivity. In one specific instance VivCourt saw a junior part-time worker who had been employed for 11

months as a researcher earning ~AUD36,000 per year receive multiple aggressive and intimidating letters and calls from a previous employer's lawyers, threatening legal action if the individual commenced work at any rival trading firm (regardless of the role). The individual was required to sign a deed of release to secure payment of final wages and entitlements (despite already having a legal entitlement to them) and was offered no compensation for the restraint period. Such conduct is not uncommon and provides no obvious benefit to Australian workers or the economy.

- e. *Commercial impact*: Candidates often delay joining VivCourt until their restraint period expires, fearing litigation from former employers, reputational damage in an insular industry, or (significantly) loss of deferred earnings tied to compliance with restraints. Despite these challenges, VivCourt considers the benefits of open labour markets outweigh the risks and continues to reject the use of non-compete and non-solicitation provisions. The ability to access a larger, more motivated pool of candidates, the goodwill earned from acting as a fair employer, and the long-term benefits of fostering innovation and loyalty outweigh the short-term recruitment frictions caused by competitor restraints.

Employer protections

- 5 VivCourt acknowledges the importance of protecting intellectual property, confidential information, client and employee relationships. In Australia, these are already safeguarded under existing corporate, intellectual property, and copyright law regimes. In VivCourt's experience, non-compete clauses and other restraints of trade are more often used to stifle competition, discourage mobility, and slow growth. They are commonly included at little or no cost in employment contracts and invoked in post-employment correspondence, regardless of enforceability. In practice, they are frequently used to threaten or deter competition, delay onboarding, and increase business costs, as both prospective-employee firms and workers must seek legal advice on validity and associated risks. Reform should focus on removing anti-competitive restraints reducing legal and financial uncertainty and easing pressure on workers at a time that is already often a stressful period of career transition.

Definition and scope

- 6 VivCourt considers that non-compete clauses should be defined narrowly to exclude legitimate protections such as confidentiality obligations or gardening leave. The ban should extend to contractors and other non-employee relationships where similar risks of restraint exist.
- 7 Reforms should apply to all workers, including high-income earners. Non-competes harm mobility and competition at all levels, not just low- and middle-income earners. Highly skilled workers often command a higher salary and are engaged in innovative, productive, and dynamic roles. It is precisely these areas where mobility and productivity should be encouraged. Accordingly, reforms looking to promote competition should apply universally.

Support for ban on non-competes and non-solicitation clauses for all workers

- 8 *Complete ban*: VivCourt supports a complete ban including for high-income earners.
- 9 *Workforce mobility*: Evidence cited in the consultation paper suggests non-competes harm mobility and wage growth for all workers. They stifle the economy, place undue stress on workers engaged in businesses they would prefer to leave, reduce productivity, and increase disputes and use of legal and tribunal systems increasing taxpayer cost.
- 10 *Skill degradation*: employees restrained from working in their chosen vocation will face challenges in developing and maintaining their skills and expertise. This is detrimental to the worker and the economy at large.
- 11 *Economic impact*: Skilled workers drive innovation, productivity, and knowledge transfer. Mobility strengthens Australia's competitiveness against markets that already prohibit non-competes, such as California and some European jurisdictions.
- 12 *Legitimate business concerns*: protection of intellectual property, confidential information, and client relationships can and should be managed through alternative legal mechanisms outside the employment relationship.

- 13 *Employment risk*: The absence of non-competes lowers the real and perceived risk for potential employees in moving between firms. It allows individuals to 'try before they buy' - to test whether a company's culture, role, or working environment is the right fit - without fear of being locked out of the industry if the position proves unsuitable. This benefits workers and employers as those who remain are likely more committed, engaged, and aligned with the organisation's values.
- 14 *Non-solicitation clauses*: VivCourt supports the removal of non-solicitation clauses. Informal professional and social networks mean that contact between former colleagues, clients, etc is often inevitable. Non-solicitation clauses create unnecessary fear and uncertainty for workers, restricting normal social interactions and collaboration, while doing little to protect legitimate business interests. VivCourt considers them harmful and ineffective.
- 15 VivCourt accepts that client and co-worker non-solicitation clauses may be necessary where confidentiality protections are not sufficient, if that is deemed the case VivCourt considers they should be:
 - a. limited in duration (preferably no more than 3 months); and
 - b. restricted in scope to clients or employees with whom the individual had direct dealings.
- 16 This would balance legitimate interests against unnecessary restraints on labour mobility.

Enforcement and Compliance

- 17 The Fair Work Ombudsman could oversee education and enforcement, with penalties to align with other *Fair Work Act* contraventions and allow for payment to the aggrieved party in terms of costs to ensure a significant enough deterrent is present for frivolous litigation, breaches, and intimidation.

Duration and geographic constraints

- 18 If restraints are to remain permitted, they should be strictly limited in:
 - a. *duration*: no more than 3 months; and
 - b. *geographic scope*: limited to the jurisdiction where the employee directly engaged with clients or colleagues.
- 19 Broader geographic or multi-year restraints are disproportionate and anti-competitive.

International competitiveness

- 20 Global competition in financial services is intense. Restrictive non-competes reduce Australia's active talent pool. Reform will enhance the competitiveness of the Australian market. Some proponents of such provisions may claim that a ban will force them to prioritise offshore recruitment and operations. In our experience, this is overstated. VivCourt has remained globally competitive while trading from Australia without restraints. Alignment with jurisdictions such as California and parts of Europe, which already ban non-competes in the employment context, will also strengthen Australia's attractiveness as a hub for skilled workers and investment.

LEGISLATIVE LANGUAGE

- 21 VivCourt supports legislative drafting modelled on the Californian Business and Professions Code 16600, which provides to the effect of:

Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind if to that extent void.

- 22 Proposed *Fair Work Act 2009* (Cth) language:

- (1) *Except as provided in this Part, a term of a contract of employment, or of any related agreement, by which a worker is restrained from engaging in a lawful profession, trade, or business of any kind, is void to that extent.*
- (2) *Without limiting subsection (1), a term is void to the extent that it purports to restrain a worker, after termination of employment, from:*
 - a. *accepting employment with another person; or*

- b. performing work in a lawful profession, trade, or business;
or
- c. establishing or participating in a business undertaking.
- (3) This section does not affect the validity of contractual terms that:
- a. protect confidential information; or
- b. protect intellectual property.

Transitional arrangements

23 Reforms should apply universally from commencement with existing offending clauses deemed unenforceable following a grace period of 6 to 12 months.

CONCLUSION

24 VivCourt urges the Government to implement reforms that promote work mobility, foster innovation, and preserve only those protections necessary to safeguard legitimate business interests. VivCourt stands as a working example of an employer that has succeeded globally without relying on non-compete or non-solicitation clauses and would welcome the opportunity to engage further with Treasury as policy development continues.