

5 September 2025

Via Electronic Mail: CompetitionTaskforce@treasury.gov.au

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

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

Dear Competition Taskforce:

MFA¹ appreciates the opportunity to further submit comments in response to the Australian Government's request for information and views on its reforms to non-compete clauses and related restraints, including feedback on policy details to support the implementation of the announced reforms, as well as views on whether complimentary reforms to non-solicitation clauses and non-compete clauses for high-income workers are needed.² MFA represents the global alternative asset management industry. Institutional investors—like pension plans, university endowments, charitable foundations, and other institutional investors—rely on MFA members to diversify their investments, manage risk, and generate attractive returns throughout the economic cycle.

The presence of restrictive covenants in the alternative asset management industry is unique, not simply because the industry largely consists of highly-specialised, high-income workers, but because of the intellectual property and proprietary interests which they protect and the contractual terms on which they are offered. Accordingly, restrictive covenants in the alternative asset management industry are distinguishable from those that are often the focus of broad-based academic studies on the use of non-compete clauses. Our responses below reflect the legal and commercial aspects of restrictive covenants frequently found in the alternative asset management industry. We have not responded to every question posed by the Consultation Paper, and the broader policy concerns which informed our feedback to the 2024 Issues Paper, while still relevant, are not repeated here.

Section 3, Question 2: "Should any specific kinds of common contractual terms be explicitly included or excluded from [the non-compete clause] definition?"

¹ Managed Funds Association (MFA), based in Washington, D.C., New York City, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest it, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 fund manager members, including traditional hedge funds, private credit funds, and hybrid funds, that employ a diverse set of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors diversify their investments, manage risk, and generate attractive returns throughout the economic cycle.

² AUSTRALIAN GOVERNMENT, THE TREASURY, COMPETITION REVIEW, REFORM TO NON-COMPETE CLAUSES AND OTHER RESTRAINTS ON WORKERS: CONSULTATION PAPER (July 2025) ("**Consultation Paper**").

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We support the Government’s reasoning that certain clauses governing the payment of discretionary awards, or awards determined according to a pre-determined vesting schedule, are not penalty clauses within the scope of the non-compete clause definition. “These bonuses are often used to attract and retain talented staff, and are not used to penalise former employees for competing.”³ We also support the Government’s view that the non-compete clause definition should “not affect notice periods or ‘gardening leave’”. However, we disagree with the suggestion that similar restrictive covenants may be brought within the scope of the non-compete clause definition merely because the terms on which they are offered continue to apply—still, only to discretionary awards—on a post-employment basis.

Specifically, we believe that employee forfeiture-for-competition provisions, in which employees voluntarily agree that in exchange for receiving *additional* benefits (usually deferred cash payments or a financial instrument akin to equity), they will forfeit that benefit if they choose to join a competitor before the expiration of a defined period, are not “non-compete clauses” as contemplated by the Consultation Paper. Rather than restrict employee choice over where and when to work, these agreements give employees multiple choices: (1) they can choose whether to accept the agreement in the first place; and if they do, then (2) they can then choose whether to refrain from competing and receive additional (often handsome) financial benefit, or they can choose to compete and forego that benefit.

By contrast, non-compete clauses affirmatively prohibit, penalise, or function to prevent an employee from competing with their employer for a period of time following the termination of employment. The same is simply not true of forfeiture-for-competition agreements. Forfeiture-for-competition agreements are not enforceable through injunctive relief, do not prohibit employees from competing and remaining in their chosen profession, and do not deprive the public of the employees’ services. In fact, the clarity provided by forfeiture-for-competition agreements often works to the benefit of employees, who can negotiate with their new employers for higher compensation to mitigate the forfeited compensation. New employers in the alternative asset management industry often agree to backfill the forfeited compensation, thus fostering employee mobility. Moreover, forfeiture-for-competition agreements do not require invocation of equitable relief for enforcement, whereas non-compete clauses are typically enforced through requests for injunctions or specific performance.

Therefore, employees have an initial choice of whether to accept an agreement whereby they can later choose to: remain employed and obtain the contingent benefit(s); or, no matter the reason for termination, either go to a non-competitor and keep the benefit(s) or go to a competitor and forfeit the benefit(s). Even in the case of forfeiture, employees can negotiate to have a new employer make up for what is forfeited—*i.e.*, even after termination for whatever reason, the employee still has a choice. And, in the unlikely case of any resulting dispute, the complainant need not invoke courts’ equitable powers.

Forfeiture-for-competition agreements also serve additional legitimate employment interests. Not only do they create vehicles through which employees can obtain (often significant) additional compensation, but they also serve to help protect valuable trade secrets, promote workforce stability and the associated benefits to customers, promote

³ Consultation Paper, at 8.

compliance and associated disciplinary efforts, and encourage investment in existing employees who have incentives not to compete. Forfeiture-for-competition agreements also conserve judicial resources, while at the same time not limiting mobility, and, therefore, do not raise concerns that enforcement fails to strike the right balance “with respect to the public interest against competition and the particular harm on an employee of an extended period without work.”⁴

Because forfeiture-for-competition agreements provide for additional compensation for the associated agreement, as a practical matter, they almost always involve more highly-specialised, high-income employees who not only make the choice to enter these agreements voluntarily in the first place, but they also do, in fact, later negotiate with new, competitive employers to compensate them for any amount forfeited as a result of accepting the competitive employment. Accordingly, we encourage the Government to specify that the scope of the non-compete clause definition excludes employee forfeiture-for-competition agreements as neither penalty provisions nor post-employment restraints.

Section 3, Question 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?”

We recommend that the determination of whether an employee falls above or below the high-income threshold be modified to *include* bonuses and incentive-based payments. In the United States, many of the twelve jurisdictions that prohibit non-compete clauses for “low wage earners” include bonuses and commissions in the determination of whether an employee falls above or below the jurisdictions’ thresholds. For example, Colorado, Illinois, Maryland, Virginia, Washington State, and Washington, D.C., have varied definitions of “earnings” or “compensation” all of which include bonuses and commissions.⁵ Moreover, in each of these jurisdictions, the thresholds fall well below the Australian high-income threshold as an absolute value and, further, because many of these jurisdictions’ thresholds are computed on the basis of *total* compensation (as opposed to the *base* compensation-basis proposed by the Government). This approach acknowledges that high-income employees, particularly in the alternative asset management industry, often earn significant portions of their compensation from bonuses and commissions.

Section 3, Question 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?”

We recommend that the high-income threshold be applied by taking an employee’s average earnings, including bonuses and incentive-based payments, over the three years (or such lesser time as the employment lasted) immediately preceding the termination of employment. Averaging earnings over three years provides greater certainty

⁴ Consultation Paper, at 35.

⁵ See COLO. REV. STAT. 8-2-113(2)(c)(I) (2024), 820 ILL. COMP. STAT. 90/5 (2021), MD. CODE ANN., LAB. & EMPL. § 3-716(a)(1)(i)(2)(C) (2024), VA. CODE ANN. § 40.1-28.7:8(A) (2025), WASH. REV. CODE § 49.62.010(1) (2024), D.C. CODE § 32-581.01(3) (2022).

and affords greater fairness, considering the variability of bonuses and incentive-based payments, to both employers and high-income employees.

Section 3, Question 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?”

We believe that the imposition of penalties in this context is counterproductive. The public mandate that non-compete clauses are unenforceable is sufficient for the purpose of curbing the negative economic effects among the population of employees below the high-income threshold. Penalties would create a cause of action where an otherwise void and unenforceable non-compete clause results in no lost compensation or other damages.

Section 3, Question 9: “Which parties should be able to commence proceedings for a breach of the ban on non-compete clauses and why?”

We also believe that allowing third parties standing to commence proceedings for a breach of the ban on non-compete clauses is counterproductive. Providing standing to other parties, particularly other competitive employers that intend to hire an employee, would encourage bounty-hunting in Australian courts, wasting judicial resources, by profit-seeking entities. We are unaware of any jurisdiction which permits third parties to commence proceedings for a breach of a restriction on non-compete clauses, beyond affording the employee a private right of action to enforce the restrictions through injunctive relief or the recovery of actual damages.

Section 3, Question 16: “How should the ban apply to non-compete clauses contained in existing contracts after commencement?”

We support the Government’s existing framework that the ban of non-compete clauses for low wage earners will apply prospectively from 2027 to employment contracts made or varied after the start date. We believe that the validity of existing non-compete clauses should be preserved, because existing non-compete clauses reflect a voluntary agreement, based on settled expectations and reliance interests as to the enforceability of non-compete clauses at the time executed, and were often supported by consideration, such as additional compensation.

Section 4, Question 1: “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?”

We continue to believe that changes to the use of non-compete clauses for high-income employees are not needed. We also continue to believe, as discussed in our feedback to the 2024 Issues Paper, that the Government should further study market-standard practices in specific industries *in Australia* before reaching a policy prescription. As a threshold matter, the Consultation Paper relies heavily on data from the United States. Such data may be inapposite for a variety of reasons, including the significant legal differences between (i) the interaction of the United States’ sometimes-preclusive, sometimes-minimum standard-setting patchwork of federal and divergent state laws and Australia’s Fair Work Act and its associated laws (collectively, the “national workplace relations system” or “Fair Work

system”); (ii) the United States’ employment-at-will doctrine and Australia’s termination requirements; and (iii) employee classification in either country, among other reasons.⁶

Moreover, much of the employment landscape in the United States from which the Consultation Paper takes support has changed. A United States federal court has vacated the Federal Trade Commission’s “Non-Compete Clause Rule” as unlawful.⁷ Certain jurisdictions have found it more prudent to set forth the conditions under which restrictive covenants are presumptively valid, rather than the conditions under which restrictive covenants are strictly not permitted.⁸ These developments rely, in part, on the finding that there is generally a “lack of evidence” to support the “cho[ice] to impose such a sweeping prohibition—that prohibits entering or enforcing virtually all non-competes—instead of targeting specific, harmful non-competes...”⁹ Further, jurisdictions have found that “predictability in the enforcement of contracts...encourages investment,” “optimal levels of information sharing and training and development,” and “fulfills an important state interest.”¹⁰

That said, one of the few Australia-specific studies available—research by the non-partisan economic research institute, e61 Institute—“suggests that the negative effect on wages over time for high-skill employees in firms that use non-compete clauses is not as pronounced as the substantial effect on lower-skilled occupations. These high-skill occupations make up a substantial proportion of all employees earning above the high-income threshold.”¹¹ Coupled with the pro-competitive effects of reasonable non-compete clauses around which employers and high-income employees voluntarily contract, we encourage the Government to not make any changes to the use of non-compete clauses for high-income employees.

Reasonable non-compete clauses for highly-specialised, high-income employees protect the most significant proprietary information, trade secrets, special business relationships (customers, vendors, etc.), confidential business

⁶ See Ian Neil SC & Nicholas Saady, *The Reasonableness of Restraints: An Analysis of the Enforcement of Post-Employment Restraints*, 46 ABLR 99, 112 (2018) (“Examples from foreign jurisdictions are cited to justify the non-enforcement of restraints in Australia...However, such hypotheses neglect the vicissitudes of the Australian labour market that make it unique from other economies, such as Australia’s occupation dispersion, level of market competition and geographical location. For example, comparisons with the non-enforcement of restraints in California are imprudent because Australia is more geographically isolated than California, has roughly half its population and produces approximately \$1 trillion less gross domestic product.”).

⁷ *Ryan LLC v. Fed. Trade Comm’n*, No. 3:24-CV-00986-E (N.D. Tex. Aug. 20, 2024).

⁸ See, e.g., Florida Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act, Ch. 2025-213, 2025 Fla. Laws 2 (to be codified at FLA. STAT. §§ 542.41-542.45).

⁹ *Ryan LLC*, at *24.

¹⁰ FLA. STAT. § 542.42 (2025).

¹¹ Consultation Paper, at 22.

plans, pricing or bidding strategies, and other confidential and valuable business information.¹² The protection of confidential information promotes innovation by “increas[ing] the returns to research and development.”¹³ Innovation and business development take large amounts of time, money, and trial and error. If the result of that investment is to have a highly-specialised, high-income employee with confidential information poached by a competitor (who was unwilling to invest its own resources), it would reduce the incentive for businesses to make similar investments in the future.

Moreover, absent the ability to rely on restrictive covenants for their high-income employees, businesses would be forced to keep confidential information compartmentalised or siloed, stifling the flow of valuable information and ideas that support innovation and bring value to customers.¹⁴ When consistently enforced, reasonable non-compete clauses reduce the incentive of competitors to engage in free-riding behavior and lead “to increases in firm-sponsored training, riskier [research and development] investments, and increases in firm value and the likelihood of acquisition.”¹⁵ Indeed, employers are more likely to spend resources on workforce development when they do not fear that highly-specialised, high-income employees may immediately take those skills and know-how to a competitor.¹⁶ Reasonable non-compete clauses can solve this “holdup problem,” which emerges when employers forgo making certain investments in their workforce knowing that employees would be able to subsequently quit and appropriate the value of the investment.¹⁷ “[B]y discouraging worker attrition before the firm has had the time to recoup the cost of its upfront investment,” such agreements encourage “mutually beneficial” investments.¹⁸

Courts have long recognised that lesser restraints—including non-disclosure, non-solicitation, or non-dealing restraints—are inadequate where the employer has legitimate interests in protecting customer connections and confidential information and the employee is inextricably linked to client development and privy to the most proprietary information and trade secrets of the employer. The reasonableness of the employer’s interests is often understood by

¹² See Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 64 (2021) (noting that “the incidence of noncompete[] [agreements] is much higher among those who report possessing some type of trade secret or valuable information.”).

¹³ John McAdams, *Non-Compete Agreements: A Review of the Literature* at 3 (Fed. Trade Comm., Working Paper, Dec. 31, 2019).

¹⁴ *Id.* at 13 (“The bulk of the empirical literature finds that workers signing non-compete agreements, or workers who reside in areas with a higher incidence of NCAs, receive more training, more access to information, and more access to client lists.”).

¹⁵ Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 535 (2016).

¹⁶ See Starr et al., *Noncompete Agreements in the U.S. Labor Force* (“Focusing...on those who learn of their noncompete before they accept their job offer, our most saturated model indicates that these employees have 9.7%...higher earnings, are 4.3 percentage points more likely to have information shared with them..., are 5.5 percentage points more likely to have received training in the last year..., and are 4.5 percentage points more likely to be satisfied in their job...relative to those employees without a noncompete.”).

¹⁷ See *id.* (“Moreover, our evidence that employees with early notice of a noncompete are compensated—with higher wages, more training, information, and job satisfaction—is compatible with theories that identify noncompetes as a solution to a holdup problem...”).

¹⁸ McAdams, *Non-Compete Agreements: A Review of the Literature* at 6.

“the *likelihood* and *extent* of harm to their interests.”¹⁹ For example, courts have recognised that non-disclosure agreements alone may be insufficient to protect employers’ interests as enforcement against and proof of breach is challenging.²⁰ Similarly, courts have recognised that “the significance of the confidential information obtained by the employee, or the significance of the customers with whom the employee has a connection,” is an important consideration in the reasonableness of a non-compete clause.²¹ These principles should be maintained for high-income employees, the role, reputation, or skill of which are frequently inseparable from employers’ legitimate interests in protecting customer connections and confidential information.

Reasonable non-compete clauses for high-income employees also allow businesses to grow and preserve their goodwill. A business that relies on its most highly-specialised, high-income employees to obtain customers is at risk of its employees appropriating the business’ goodwill. Reasonable non-compete clauses help preserve employer goodwill by incentivising highly-specialised, high-income employees not to compete with their employers by using the same benefits that their employers have bestowed upon them—including the use of their employers’ brands to develop a customer base.

Section 4, Question 2: “If mandatory compensation were adopted what should be the minimum compensation required?”

We continue to believe that changes to the use of non-compete clauses for high-income employees are not needed. However, to the extent that the Government is determined to pursue mandatory compensation, we believe that compensation based on base salary for the restraint period is the fairest and most administrable option. This approach also aligns with practices in other jurisdictions.

¹⁹ Andrew Fell & Elizabeth Rudz, *Employee Non-Compete Restraints: Resolving Uncertainty*, 46(4) UNSW L.J. 1252, 1263 (2023).

²⁰ Neil SC & Saady, *The Reasonableness of Restraints: An Analysis of the Enforcement of Post-Employment Restraints* at 106 (“Another deficiency in post-employment restraints protecting business connections was highlighted by the Full Federal Court (Keane CJ, Griffiths and Fothergill JJ) in *Pearson*, which explained that ‘the protection afforded by the non-solicitation and confidentiality provisions is unlikely to be perfect given the difficulties of proof of breach.’”); see also Fell & Rudz, *Employee Non-Compete Restraints: Resolving Uncertainty* at 1263 (“The argument that breaches of lesser restraints are more difficult to prove can be understood as concerned with the likelihood of harm. The greater ease of enforcing a non-compete restraint makes it more likely to be effective in preventing the employee from using confidential information or customer connections. The fact, also mentioned in *Littlewoods*, that it is difficult to distinguish confidential and non-confidential information creates an increased risk of inadvertent use of disclosure if the employer [*sic*] is permitted to work in competition with the employer.”).

²¹ Fell & Rudz, *Employee Non-Compete Restraints: Resolving Uncertainty* at 1264 (“Turning to the *extent* of harm, in justifying the addition of a non-compete restraint, a number of cases refer to the significance of the confidential information obtained by the employee, or the significance of the customers with whom the employee has a connection. This is arguably the meaning of Edelman J’s references in *Emeco International Pty Ltd v O’Shea [No 2]* to the ‘confidentiality of information’ and the ‘extent of [the employer’s] customer connection interest’ to justify an additional non-compete restraint. If the extent of the harm to the employer would be greater, this points in favour of the reasonableness of an additional non-compete restraint, which is more likely to be effective in preventing this harm than lesser restraints.”).

Section 4, Question 3: “If a duration limit were imposed, what would be the most appropriate maximum duration?”

We believe that a duration limit is unsuitable for the wide variety of circumstances in which non-compete clauses apply. The reasonableness of non-compete clause’s duration should be assessed on a case-by-case basis, with due consideration given to the employee’s role and the employer’s legitimate interests in protecting customer connections and confidential information.²² For example, many non-compete clauses have durations of up to two years, whereas some highly-specialised, high-income employees agree to durations of up to four years.

Section 4, Question 5: “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?”

We believe that the potential reform option to implement a full ban on the use of co-worker non-solicitation clauses is inappropriate, because co-worker non-solicitation clauses protect legitimate business interests, such as maintaining a stable workforce, without limiting job mobility. Co-worker non-solicitation clauses allow employees to join a competitor, including firms where former colleagues are employed, without restricting employee choice over where and when to work.

[Co-worker non-solicitation clauses] do not prevent individual staff members leaving their employer and following another employee’s departure. They are still able to do this. Restraints only prevent an ex-employee from soliciting or ‘poaching’ employees. As such, balance is struck between respecting an employee’s freedom to choose their employer and an employer’s interest in protecting their workforce from an ex-employee’s improper conduct.²³

The potential reform option to implement a full ban on the use of co-worker non-solicitation clauses would unfairly enable competitors to poach valuable employees which remain at their former employer or enable “team moves,” appropriating confidential information a team of employees may possess.

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We appreciate the opportunity to submit our comments in response to the Government’s request for feedback and comments, and we would be pleased to meet with the Competition Taskforce to discuss our comments. If your staff

²² Neil SC & Saady, *The Reasonableness of Restraints: An Analysis of the Enforcement of Post-Employment Restraints* at 101 (“[T]here are two significant cases where restraints longer than two years in duration have been held enforceable...[A]fter having regard to the circumstances of each case, the enforced duration of each restraint was justified. First, in *Genesys Wealth Advisers Ltd v Miles* both the New South Wales Supreme Court, Court of Appeal and High Court upheld a 30-month restraint on a financial advisor. This period was held to be justified because the restrained employee was a managing director who had significant access to confidential information and strong connections with the firm’s financial services clients. Secondly, in *Pearson v HRX Holdings Pty Ltd* a two-year restraint was held to be reasonable. This was because the restrained employee was the chief operating officer of his former employer, had extensive knowledge of the former employer’s clients and operations to render him the ‘human face of the business’, held shares in his former employer, and was remunerated for 21 months of the two-year restraint period.”).

²³ *Id.* at 107.

have questions or comments, please do not hesitate to contact Joseph Schwartz, Vice President and Senior Counsel, at jschwartz@mfaalts.org.

Respectfully submitted,

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