



MTAA Submission

Reform to Non-Compete Clauses and Other Restraints on Workers

Treasury – Consultation Paper

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Introduction

This submission is filed on behalf of the Motor Trades Association of Australia (MTAA) in response to the Reform to Non-Compete Clauses and Other Restraints on Workers Consultation Paper (Consultation Paper). MTAA is a strong supporter of measures that, in practice, improve Australia's declining productivity – and in the context of continued acute skill shortages in the automotive industry, assist job mobility and deliver sustainable wage outcomes. MTAA is therefore grateful for the opportunity to provide feedback on The Treasury's consultation.

Whilst strongly supportive of productivity improving measures, MTAA opposes the proposed reform measures contained in the Consultation Paper and notes the absence of objective evidence provided in support of the contention that a ban on non-compete clauses will achieve productivity increases in the Australian economy. Indeed, MTAA considers the proposed reforms antithetical to achieving improved productivity and competition outcomes in practice as the proposed bans are unnecessary and unfairly punitive. They are also likely to result in an increased unwillingness of employers to invest in training and sharing of confidential and commercially sensitive information with its workforce.

MTAA is particularly concerned that the proposed reforms to non-compete clauses and other restraints on workers appear to be prefaced on a number of bald assumptions, including that non-compete clauses reduce job mobility and suppress wages; and that only high-income employees should be legitimately subject to non-compete clauses (and other restraints). MTAA submits that both assumptions lack credibility. In the former, a reliance on experimental data¹ and claimed correlations² do not equate to causal evidence. Regarding the latter, such a view demonstrates a fundamental lack of understanding of how the vast majority of Australian workplaces, particularly those operated by small businesses, operate in practice.

Accordingly, MTAA endorses the previous submissions made by a number of stakeholders that have questioned the lack of objective justification for the proposed reform³ and that, as a result, have called for reforms to be focused on education and codification of the existing Australian common law.⁴

About the MTAA

As the national automotive industry body, MTAA represents the unified voice of Australia's automotive industry, identifying and monitoring issues across all sectors, advising governments on industry impacts and trends, and actively participating in the development of sound public policy. Our focus encompasses the retail motor trades and the Australian vehicle fleet. We represent over 15,000 businesses ranging from dealers to repairers, tow truck operators to service station businesses and every automotive retail business in between. These organisations make up a critical backbone of the Australian economy, selling, servicing, repairing, refuelling and maintaining Australia's 21.2 million strong motor vehicle fleet. Together, the sector contributes approximately \$39.35 billion to Australia's GDP annually.

¹ Australian Bureau of Statistics (ABS) (February 2024), [Restraint Clauses, Australia, 2023](#), ABS website, 2024.

² D Andrews, M Brennan & J Buckley, [‘The ties that bind: five facts on post-employment restraints in Australia’](#), *e61 Institute Research Note*, 2024, no. 12.

³ See, eg, ACCI Submission to the Treasury Issues Paper on Non-Compete Clauses and Other Restraints (ACCI Submission); AiGroup Submission Competition Taskforce – The Treasury – Non-Competes and other Restraints – response to Issues Paper (Ai Group Submission), 31 May 2024; Business Council of Australia, Submission to Treasury on non-competes and other restraints (BCA Submission), May 2024; Herbert Smith Freehills Response to Treasury's issues paper on non-competes and other restraints (HSF Submission), 31 May 2024.

⁴ *Ibid.*

Our feedback

1. Provide an effective alternative for employers to protect their legitimate business interests

MTAA does not accept the Consultation Paper's proposition that non-compete clauses reduce job mobility and suppress wages.⁵ MTAA also notes that no objective evidence has been shown to demonstrate the claimed causation, including the claimed 'chilling effect'⁶ such terms have on employees, seemingly relied upon to explain the dearth of court cases seeking to enforce such terms.

MTAA notes that the vast majority of Australian businesses are operated by small and medium-sized businesses, who typically lack the resources necessary to enforce their legitimate business interests – whether through restraint clauses, or otherwise – through the courts. In practice, they are on a similar footing as employees, regarding their capacity to pursue such matters through the courts.

MTAA therefore rejects the inference that attempts to reasonably dissuade or disincentivise employees from breaching their reasonable contractual duties to their employer are akin to an 'in terrorem' clause. Such clauses are not inherently against good public policy, particularly where no effective alternative means for enforcing legitimate business interests are available.

Rather than being prohibited, the solution is to provide employers with an alternative effective low/no cost means of enforcing their legitimate business interests in respect to bad actors, so that non-competes and other restraints do not need to be relied upon.

MTAA submits that both the important and legitimate role played by non-compete clauses and other restraints and the lack of current practical alternatives has been acknowledged by the legal fraternity in earlier submissions:

*'Non-compete clauses and similar restraints provide an important buffer, to mitigate the risk of a former employee of disclosing confidential information...'*⁷

*'We note that the general law provides some limited protection through the equitable duty of confidence. However it is important for businesses to have an appropriate means of protecting their confidential information, and preventing or restricting former workers from using that information while employed elsewhere, or from disclosing that information to a new employer or other party.'*⁸

*'A prevalent concern among many employers, echoed by our clients, is the scarcity of alternative mechanisms for employers to safeguard their commercially sensitive information in the absence of restraint clauses.'*⁹

MTAA notes that no solution to this problem has been proposed in the Consultation Paper – which is particularly disappointing as the proposed reforms will effectively remove this mechanism without

⁵ Consultation Paper, 4.

⁶ Ibid., 3.

⁷ Law Council of Australia submission to The Treasury Competition Taskforce Non-competes and other Restraints Issues Paper (June 2024), [66].

⁸ Ibid., [77].

⁹ HSF Submission, [3.5].

replacement in respect to the vast majority of Australian employees. Accordingly, if the intention is to proceed with the proposed reform, this should only occur after an effective alternative means for employers to enforce their legitimate business interests has been provided and implemented – with sufficient time to establish whether this obviates the need for the reforms proposed.

MTAA submits that the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) is well placed to perform this role of providing an effective no/low cost and timely means of resolving disputes about the enforceability or validity of non-compete clauses. In this regard, MTAA notes that the ASBFEO already holds ADR powers and processes and is better placed to making an assessment regarding legitimate business interest.

Recommendations

- > **Provide an effective no/low cost and timely means for employers to enforce their legitimate business interests before seeking to implement the proposed reforms**
- > **Task the ASBFEO with the role of resolving disputes about the enforceability or validity of non-compete clauses**

2. If proposed reforms are adopted, exempt small business employers

MTAA notes that the adverse impact on employers of this lack of effective no/low cost means to enforce their legitimate business interests, disproportionately falls on smaller businesses. Smaller business employers often rely on non-compete and other post-employment restraints as the sole means of preventing 'theft' of confidential and proprietary information by employees.

MTAA relies on its previous submissions to The Treasury,¹⁰ in support of the need to recognise the special circumstances of small businesses.

Accordingly, and at a minimum, in the event that the proposed reforms proceed, MTAA submits that smaller businesses must be excluded.

Consistent with submissions made to the Fair Work Ombudsman Review into the Small Business Employer Definition,¹¹ MTAA submits that the relevant small business employer definition for this exclusion should be set at 'less than 50 employees'.¹²

Recommendations

- > **Exempt small businesses of less than 50 employees from the proposed reforms**

¹⁰ MTAA Submission to The Treasury Payday Super – Exposure Draft (April 2025).

¹¹ Fair Work Ombudsman Review of the Fair Work Act 2009 definition of 'Small Business Employer' (July 2025).

¹² Motor Trades Organisations Submission to the Fair Work Ombudsman's Review of the Fair Work Act 2009 definition of 'Small Business Employer' – Consultation Paper (7 March 2025).

3. The proposed FDC-based definition is arbitrary and capricious

MTAA does not support the defining of a non-complete clause under the *Fair Work Act 2009 (FW Act)*. If a definition were to be included, MTAA submits that it should be a codification of the well-established common law principles that already apply in Australia. MTAA notes that this position is consistent with a significant number of interested parties in earlier consultations.

MTAA is opposed to the proposed importation of the United States Federal Trade Commission definition. Relevantly, MTAA notes that this definition has been struck down by a Texas federal court (*Ryan LLC v. Federal Trade Commission*) for reasons that included that it exceeded the FTC's authority and was 'arbitrary and capricious'.

Of particular relevance to the approach taken to date by The Treasury in relation to the proposed reforms, the Texas federal court found that:

*'... The Commission's lack of evidence as to why they chose to impose such a sweeping prohibition—that prohibits entering or enforcing virtually all non-competes—instead of targeting specific, harmful non-competes, renders the Rule arbitrary and capricious...In sum, the Rule is based on inconsistent and flawed empirical evidence, fails to consider the positive benefits of non-compete agreements, and disregards the substantial body of evidence supporting these agreements.'*¹³

In addition to being rejected in its own jurisdiction, the proposed definition is also entirely inappropriate to the Australian context which lacks an avenue for trade secret owners to sue for misappropriation akin to the United States federal Defend Trade Secrets Act 2016.

As previously noted by the Law Council of Australia:

*'... It is worth noting that, unlike in other duties such as the United States, Australia does not have a legislative regime for the protection of trade secrets. Of the mechanisms available to Australian businesses, non-compete clauses and similar contractual restraints are usually the simplest to enforce.'*¹⁴

Further, MTAA notes that the proposed discarding of the current approach to restraint clauses, that considers reasonableness in the individual circumstances, with a blunt 'one size fits all' approach is antithetical to improving productivity and competition.

In addition to its disproportionate impact on smaller businesses, the proposed changes are likely to reduce business investment in innovation and result in an increased tendency for businesses to reduce both information sharing and high quality training. In the midst of current elevated skills shortages in industries such as automotive,¹⁵ MTAA considers the proposed reforms all the more concerning.

MTAA therefore reiterates its call for any definition to be framed on 'reasonableness', consistent with well-established common law principles currently operating in Australia, rather than the currently proposed arbitrary and capricious approach.

¹³ Ryan LLC v. Federal Trade Commission, No. 3: 2024cv00986 – Document 211 (N.D. Tex. 2024), 24.

¹⁴ Law Council of Australia (n 7), [63].

¹⁵ See, eg, Jobs and Skills Australia, 2024 Occupations Shortage List – Key Findings and Insights Report (14 October 2024), 15.

Recommendations

- > **Define any prohibition in terms of ‘reasonableness’ in accordance with existing Australian common law principles**

4. The proposed high-income threshold is misguided and inappropriate

MTAA opposes the proposed high-income threshold and submits that it provides a poor proxy for a test of the reasonableness of a (non-compete) restraint. As established above, this is particularly the case for smaller businesses who have flatter organisational structures in which a greater proportion of employees – including those on lower incomes – have access, including electronically, to the types of confidential and commercially sensitive information that is reasonably subject to non-compete and other employment-related restraints. Small businesses are not little big businesses.

In the event that an income-based threshold is to be introduced, MTAA submits that the high-income threshold provided in the *FW Act* should not be adopted.

MTAA notes that the most recent ABS figures show that the mean Australian salary is \$104,520,¹⁶ with the median Australian salary significantly less. MTAA notes that in an article published in March 2025, the Grattan Institute found that more than three-quarters of Australian workers earn less than the average full-time wage, with the typical full-time worker actually earning \$90,416.¹⁷

The current high-income threshold under the *FW Act* is \$183,100, with this figure excluding compulsory superannuation contributions and non-guaranteed earnings, such as commissions, incentive-based payments, bonuses and non-guarantee overtime.¹⁸ MTAA notes that this exclusion impacts industries such as automotive, where the remuneration of highly paid employees typically include a significant non-guaranteed, performance-based component.

MTAA recommends that any income-based threshold be based on the median Australian wage and include those earnings (highlighted above) that are currently excluded from the high-income threshold definition under the *FW Act*. As noted earlier, any income-based threshold should also exclude small businesses.

The suggestion that an employee with access to confidential and commercially sensitive proprietary information, on a retainer of \$180,000 and earning \$300,000 in commissions per annum, should not be subject to reasonable non-compete and other employment-related restraints is, in MTAA's view, totally without merit.

¹⁶ Australian Bureau of Statistics (May 2025), [Average Weekly Earnings, Australia](#), ABS Website, accessed 4 September 2025.

¹⁷ Grattan Institute, [What do Australians earn and own? Grattan Institute's 2025 Budget cheat sheet might surprise you](#), 23 March 2025

¹⁸ *Fair Work Act 2009 (Cth)* s 332.

Recommendations

- > **If an income threshold is to be used, it should be based on the average Australian full-time wage and include non-guaranteed earnings**

5. The proposed penalties and compensation are unfair and disproportionate

MTAA submits that the proposed penalties and compensation are both unfair and disproportionate and should not be implemented. Rather, the focus must be on educating employers and employees on the reasonableness and lawfulness of restraints, including the responsibilities of employees with respect to confidential and commercially-sensitive information.

If penalties are to be implemented, they should be civil and limited to a maximum of 60 penalty units, as well as apply to employees who have acted in bad faith by contravening the terms of reasonable employment restraints.

Similar to the approach taken to the introduction of the fixed-term contract provisions of the *FW Act*,¹⁹ any penalties should apply prospectively to restraint clauses entered into from a certain date, following a multi-year transitional period and the successful implementation of legislative amendments providing employers with an effective alternative low/no cost means of enforcing their legitimate business interests.

In addition to the proposed small business exemption, MTAA submits that other exemptions that are justified on strong public policy grounds, are those that go to 'reasonableness' in accordance with the existing Australian common law.

If these exemptions are not prescribed as part of the definition, they should be available to employers as a defence.

Further, and consistent with the apparent premise behind the proposed reforms, a penalty should only be applicable if it can be demonstrated that the employee reasonably believed that the employer was going to enforce the restraint and was materially disadvantaged as a result.

Recommendations

- > **If penalties are to be introduced, they must apply prospectively, with appropriate exemptions, and with penalties also applicable to employees who act in bad faith**

¹⁹ Ibid., Part 2-9, Division 5.

6. Role for the Fair Work Commission (FWC)

Whilst MTAA does not support the proposed reforms, if the FWC is to have a role, it should be limited to assisting parties in resolving disputes over the reasonableness and enforceability of the relevant restraints via conciliation and consent arbitration.

MTAA notes that the FWC currently performs this function in a number of areas – with its general protections jurisdiction being the most analogous to the proposed reform.

However, as noted above, MTAA submits that a better approach would be for the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to perform this role, given that the ASBFEO already holds ADR powers and processes and is better placed to making an assessment regarding legitimate business interest.

Recommendations

- > **If the FWC is to have a role, it should be limited to resolving disputes over the reasonableness of restraints via conciliation and consent arbitration**

7. Role for the Fair Work Ombudsman (FWO)

Whilst MTAA does not support the proposed reforms, if the FWO is to have a role, it should be limited to providing education on the reasonableness and enforceability of the relevant restraints. This would include advising employers and employees on the FWC's role in dispute resolution, in the event that the recommendation is implemented.

Recommendations

- > **If the FWO is to have a role, it should be limited to educating employers and employees on the reasonableness and enforceability of restraints**

8. Other legislative reform

If legislative reform is being contemplated to address legislative loopholes, including in relation to wage-fixing agreements, these should address the current enterprise agreement approval process as well as those arrangements that facilitate wage-fixing agreements in practice.

In relation to the enterprise agreement approval process, concerns raised in the Consultation regarding 'permitted matters' should be addressed by closing the current loophole that enables the FWC to approve enterprise agreements containing matters not pertaining to the employment relationship. MTAA is not aware of any sound public policy grounds for enabling enterprise agreements to contain such non-permitted and unenforceable terms. MTAA therefore recommends that ss 186 and 187 of the *FW Act* be amended to require the FWC be satisfied that the substantive terms of the agreement relate to both permitted and lawful matters.

MTAA notes that consistent with the submissions of other employer stakeholders,²⁰ it is not aware of any evidence supporting a ban on no-poach and wage-fixing agreements in the Australian context. However, to the extent that such wage-fixing agreements are facilitated in practice, MTAA notes the Consultation Paper's reference to the current exemption under Part IV of the *Competition and Consumer Act 2010 (Cth)* (CCA) for matters relating to remuneration, conditions of employment, hours of work or working conditions of employees. In particular, MTAA submits that despite the Consultation Paper's claim to the contrary,²¹ in practice, multi-employer (and similar industry 'pattern') bargaining agreements serve to set a *cap*, rather than *floor*, on wages.

MTAA notes that in addition to providing a mechanism to facilitate such arrangements, there is ample evidence of the use of such wage-fixing agreements in practice. In both cases, a small number of employers are able to lawfully collude, through reaching agreement with a union, to determine the rates of pay that will apply within an industry. For example, MTAA notes that prior to its temporary suspension in November 2024, the Queensland Government's Best Practice Industry Conditions (BPIC) is claimed to have delivered an increase in the minimum pay of the average construction worker on Queensland civil projects to more than \$200,000 a year – with former Queensland Premier Steve Miles quoted as saying that '*the terms and conditions in the BPICs represent the prevailing EBA rates in the industry.*'²²

MTAA understands that similarly generous 'CFMEU Pattern EBA' conditions apply in other states, including New South Wales and Victoria, – with media reports in October 2024 claiming that more than 620 bosses had signed up to the latest 'CFMEU 21 per cent pay deal in Victoria'.²³ A cursory examination of the FWC website suggests that this figure has risen to over 1100 pattern agreements set in the same terms – again prescribing wage outcomes of over \$200,000 per annum.

MTAA submits that the Consultation Paper's claim that such one-size-fits-all industry agreements are a transparent way to set a *floor* on wages – and therefore not a form of wage-fixing – is simply untenable. This is regardless of whether made with a union as a multi-employer agreement or a single-enterprise agreement in 'pattern' terms. MTAA notes that the inherent interchangeability of

²⁰ See, eg, ACCI Submission, Ai Group Submission, BCA Submission (n 3).

²¹ Consultation Paper, 41.

²² Marin-Guzman, D. (11 April 2024). [More Queensland construction workers to get at least \\$200k a year](#). *Australian Financial Review (Online)*.

²³ Hannan, E. (8 October 2024). [More than 620 bosses sign CMFEU pay agreements](#). *The Australian (Online)*.

these two forms of wage-fixing arrangements was recently highlighted when it was revealed that almost all the employers that signed up to the first multi-employer agreement covering air-conditioning manufacturers in New South Wales are now seeking to exit the deal due to a rival union convincing them to sign onto that union's 'pattern' agreement, in return for allegedly blocking access of others from building sites.²⁴

Accordingly, MTAA recommends that if any changes are to be made to the CCA, it should start with removing the current exemption from these multi-employer and industry 'pattern' bargaining agreements, given they appear to be the only objectively verifiable examples of wage-fixing arrangements operating in the Australian context. This is particularly the case given the *FW Act* currently provides for protected industrial action to be taken to lawfully coerce employers into accepting these unproductive and anti-competitive arrangements.

MTAA does not support any other amendments to the CCA, nor the Corporations Act – noting that any future reform discussion on concurrent employment restraints would indeed require consideration of complex matters, including Australian employers' expanding work health and safety (WHS) responsibilities, to ensure that it does not result in unintended consequences.

Recommendations

- > **Amend the Fair Work Act to require the FWC to be satisfied that the substantive terms of an enterprise agreement relate to both permitted and lawful matters**
- > **If changes to Part IV of the Competition and Consumer Act are to be implemented, these should be limited to removing the current exemption in respect to multi-employer and industry 'pattern' bargaining agreements**

²⁴ Marin-Guzman, D. (31 August 2025). [Multi-employer bargaining faces double blow as deals collapse](#). *Australian Financial Review (Online)*.

Contact

Daniel Hodges

Executive Manager – Workplace Relations & Industry Policy, VACC

M 0429 644 820

E dhodges@vacc.com.au

mtaa.com.au

