



Electrical Trades Union

Reform to non-compete clauses and other restraints on workers

September 2025

Submission regarding the Consultation Paper

5 September 2025

About the ETU

The Electrical Trades Union of Australia (ETU)¹ is the principal union for electrical and electrotechnology tradespeople and apprentices in Australia, representing more than 67,000 workers around the country.

The ETU's membership has significant concentrations in the resources, construction and power industries, although it is spread throughout the economy including the manufacturing, tourism, entertainment, business equipment and defence support industries.

A typical ETU member is a highly skilled electrotechnology worker who has completed at least a four-year apprenticeship and is subject to ongoing training, certification, licensing and development requirements.

When ETU members finish employment unreasonable restraint of trade clauses, especially non-compete provisions, can significantly limit their ability to secure alternative work in the trade. This undermines their job mobility, restricts their capacity to earn a living, and creates avoidable delays in re-entering the workforce. Given the need for a highly mobile and skilled electrical workforce, particularly in the context of the energy transition, such clauses operate against the public interest. The ETU strongly supports reform to ensure that these unjustified contractual restraints do not prevent our members from applying their skills where they are most needed.

Acknowledgement

In the spirit of reconciliation, the ETU acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples today.

¹ Being a division of the CEPU, a trade union registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

The ETU welcomes the opportunity to respond to the Treasury's consultation on proposed reforms to non-compete clauses and other restraints on workers.

For too long, non-compete clauses and related restraints have been used by employers to limit workers seeking better employment opportunities despite often being legally unenforceable or lacking justification. Further, the ETU has observed the increasing use of these clauses among workers in the electrical trades and related industries.

These clauses operate not only as a deterrent to job mobility but also as a mechanism to suppress wages and weaken bargaining power. The economic and social harm caused by non-compete clauses is not confined to low- and middle-income workers. High-income workers, particularly in the skilled trades and technical fields that make up the ETU's membership, can be equally impacted. The ETU therefore supports the Government's proposal to ban non-compete clauses for employees earning below the high-income threshold but also urges further reform to expand this ban to all workers, regardless of income level.

At a minimum, the ETU strongly recommends that any reform extend the ban to all employees covered by a modern award or enterprise agreement. Most workers in skilled trades and technical fields are covered by a modern award or enterprise agreement, even if they earn above the high-income threshold. This distinguishes them from high-income professional employees, who are generally not covered by an award or enterprise agreement and who typically have stronger individual bargaining power due to their commercially astute skillsets, networks and career profiles. By contrast, contract negotiations for skilled tradespeople are typically conducted on a pro forma basis, often without recourse to legal advice, with employment conditions largely regulated by the applicable industrial instrument. There is also potential ambiguity as to whether post-employment restraints fall within the meaning of "matters pertaining to the employment relationship" and thus may not be amenable to enterprise bargaining. In such circumstances, workers covered by enterprise agreements may be peculiarly vulnerable to restraints, believing that so many core conditions are regulated other than through their employment contracts. The ETU therefore strongly supports further reform to the current proposal to ensure that unjustified contractual restraints do not prevent any of its members, regardless of income, from applying their skills where they are most needed.

Recommendation

The ETU supports the Government's proposal to ban non-compete clauses for employees earning below the high-income threshold but urges further reform to expand this ban to all workers, regardless of income level. At a minimum, the ETU strongly recommends that any reform extend the ban to all employees covered by a modern award or enterprise agreement.

Response to Consultation Paper:

The consultation paper seeks feedback on 6 topics and includes 33 consultation questions. The ETU does not seek to respond to every question but will focus on those most relevant to its members and their experiences across the electrical, construction, manufacturing, and maintenance sectors.

QUESTIONS:

3. The Ban on Non-Compete Clauses for Low- And Middle-Income Workers:

3.1 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?**

No comment at this time.

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

No comment at this time.

3.2 Scope of Workers Affected

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

No comment at this time.

- 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?**

The high-income threshold is an inadequate measure on its own and should not be the sole basis for determining who is protected from non-compete clauses. The ETU proposes an alternative approach, consistent with the threshold used for unfair dismissal protections under section 382 of the *Fair Work Act*.

Under this approach, protection would extend to any worker covered by a fair work instrument (e.g. modern award or enterprise agreement), regardless of their income level. This would more accurately reflect workers' individual negotiating power and avoid arbitrary exclusions based solely on income. It would also ensure that the mobility and wages skilled tradespeople and other employees subject to collective bargaining, whose skillsets are vital to the economy, and are not unfairly restricted simply because they earn above the threshold.

- 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?**

No comment at this time.

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

No comment at this time.

3.3 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? Please consider the following matters in your feedback:***

- (a) the type of penalty***
- (b) the magnitude of the penalty, and***
- (c) the circumstances in which the penalty should apply.***

The inclusion of an unlawful non-compete clause in an employment contract should be treated as a civil penalty offence, regardless of whether the clause is enforced. Many employers routinely include unenforceable restraint clauses in standard contracts, which have a significant chilling effect on workers by deterring them from seeking alternative employment due to the fear of legal action.

To effectively deter this practice, the ETU supports a penalty regime modelled on similar terms to the Pay Secrecy provisions in the *Fair Work Act*. Specifically:

- Clauses that contravene the ban should be legally void;
- Employers should be prohibited from including such clauses in contracts or other instruments; and
- Civil penalties should apply for any breach of this prohibition.

This approach would discourage employers from misusing template contracts and protect workers from undue legal and financial risk.

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

No comment at this time.

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

Affected employees, employee representatives and registered unions should have standing to bring proceedings for breaches of the ban on non-compete clauses.

Affected employees and/or their representatives must have the ability to enforce their rights directly, particularly where the inclusion or attempted enforcement of a non-compete clause has impacted their employment opportunities, earnings, or career mobility.

Unions should also be able to act on behalf of their members or in their own right. Non-compete clauses often raise collective issues, affecting multiple workers under similar contract terms. Union involvement allows these disputes to be addressed without exposing individual workers to risk, especially where they remain employed and fear retaliation.

This approach will ensure more effective oversight and enforcement of the ban, particularly in industries where standardised contracts are widely used and use of non-compete clauses is widespread.

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?*

No comment at this time.

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?*

See response below at question 12.

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

There must be a quick, low-cost, and accessible mechanism to resolve disputes and provide remedies for workers impacted by non-compliant non-compete clauses.

The Fair Work Commission should have the power to:

- determine whether a non-compete clause is prohibited under the ban;
- clarify the enforceable scope of a clause, if any; and
- void unlawful clauses and impose penalties on employers where appropriate.

Granting such powers to the FWC would ensure timely resolution, reduce legal costs for workers, and mitigate the chilling effect these clauses have on job mobility, even when unenforceable. Many workers are deterred from challenging clauses due to high legal costs and uncertainty.

As previously suggested, these provisions should be crafted in a manner like the approach taken to Pay Secrecy clauses in the *Fair Work Act*, where:

- prohibited clauses are void;
- employers are barred from including them in contracts; and
- civil penalties apply for breaches.

The Fair Work Ombudsman should have a role in investigating breaches, initiating enforcement actions, and providing education and guidance to employers and employees. New compliance tools, including proactive audits and penalty notices, may be needed to ensure employers comply with the ban.

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 granted broad powers to vary or declare void unfair contract terms, specifically including restraint clauses. These powers should be modelled on the *Industrial Relations Act 1996* (NSW), Chapter 2, Part 9, which enables the Commission to address unfair or unreasonable contract provisions.

At a minimum, the FWC should have the authority to:

- Invalidate or modify non-compete clauses that contravene the statutory ban or are otherwise unfair; and
- Provide binding determinations on the enforceability and scope of such clauses.

3.4 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)?

No comment at this time.

3.5 Transitional Arrangements

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

No comment at this time.

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

The ban should apply immediately upon commencement, including to non-compete clauses in existing employment contracts. To ensure clarity and compliance, employers should be required to provide written notice to all affected employees confirming that any pre-existing non-compete clause is void and of no effect.

This approach ensures workers are fully informed of their rights and helps prevent employers from continuing to rely on unenforceable clause.

4. Other Reforms to Employee Restraints of Trade

4.1 Non-Compete Clauses for High-Income Employees

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?

The ETU supports a full ban on non-compete clauses, including for high-income earners. Non-compete clauses harm all workers, regardless of pay, they restrict job mobility, suppress wages, and stifle

competition across all income levels.

At a minimum, the ban should apply to high-income employees who remain covered by a modern award or enterprise agreement, such as skilled tradespeople. Despite higher earnings, these workers often have limited individual bargaining power and should receive the same protection as lower-paid workers.

Legitimate employer interests, such as intellectual property, confidential information, or client relationships can be protected through narrow, targeted legal provisions without relying on broad non-compete clauses.

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

Where non-compete clauses are permitted, direct compensation must be mandatory, for example, by placing the worker on paid gardening leave for the duration of the restraint.

As a minimum, compensation should be based on a formula similar to that used for workers compensation: the average earnings over the past 6–12 months, inclusive of commissions, allowances, and other regular payments. This ensures the worker is not financially disadvantaged while being restricted from seeking alternative employment.

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

Any permitted non-compete clause should be limited to a maximum of 6 months.

4.2 Non-Solicitation Clauses for Clients and Co-Workers

4. *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).*

No comment at this time.

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?*

Co-worker non-solicitation clauses are never legitimate. They unjustly restrict workers' freedom of association and employment choice and serve no valid business purpose.

These clauses are inherently anti-competitive, discourage job mobility, and operate primarily to protect employer interests at the expense of workers' rights. Staff retention should be achieved through fair wages and good working conditions, not through contractual restraints on worker relationships.

4.3 Other Requirements for Valid Restraint Clauses

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

No. Cascading restraint clauses should not be permitted. They are inherently ambiguous, overreaching, and deliberately complex, often covering excessive time periods or geographic areas.

These clauses are rarely the product of genuine negotiation and are primarily designed to intimidate workers rather than establish reasonable protections. Their complexity creates legal uncertainty, discouraging employees from seeking alternative employment even when the clause is likely unenforceable.

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

No comment at this time.

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

Yes. Employers should be required to clearly identify the specific legitimate interest they seek to protect when including any restraint clause.

However, to be effective, this requirement must be rigorously enforced. Without proper oversight, there is a risk that employers will rely on generic or pro forma justifications that offer no real transparency or accountability.

9. *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?*

Workforce stability should never be used as a justification for a non-compete clause. Retaining staff is not a legitimate basis for restricting workers' freedom to seek alternative employment. Employers should focus on improving workplace conditions and remuneration, rather than imposing contractual restraints.

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

Yes. Any employer-initiated termination should automatically void any post-employment restraint clause. A worker who has been dismissed should not be further restricted in their ability to seek new employment.

5. *Restraints On Concurrent Employment*

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

No comment at this time.

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

Restraints on concurrent employment are often justified on different grounds, such as work health and safety, conflicts of interest, or the duty of fidelity and may require a distinct regulatory approach from general restraint of trade provisions.

Any reform should recognise that low-income workers must have an absolute right to engage in multiple jobs to sustain their livelihood. Blanket restraints are inappropriate in these cases and disproportionately affect the most vulnerable workers.

6. No-Poach and Wage-Fixing Agreements

- 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?***

No-poach and wage-fixing agreements constitute cartel behaviour and should attract significant civil penalties and, where appropriate, criminal penalties in line with existing provisions under the Competition and Consumer Act.

Private blacklists, including ERMS systems, should be prohibited. These unregulated tools enable employers to share informal and often discriminatory information, to exclude workers particularly union members or injured employees from future employment.

Where background checks are legitimately required (e.g., in child protection), they should be publicly regulated under transparent legal frameworks, not managed through private, unaccountable systems. The failure of current protections to prevent blacklisting highlights the need for targeted legal reform and enforcement to address this systemic problem.

- 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?***

No comment at this time.

- 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?***

No comment at this time.