



Australian Government  
The Treasury



**Competition**  
Review

# Reform to non-compete clauses and other restraints on workers

Consultation paper

25 July 2025



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# Consultation process

## Request for feedback and comments

This consultation paper seeks information and views to support the Government's reforms to non-compete clauses and related restraints that restrict workers from moving to higher paying jobs. This includes feedback on policy details to support the implementation of the announced reforms, as well as views on whether complementary reforms to non-solicitation clauses and non-compete clauses for high-income workers are needed.

Questions are included throughout this paper to guide stakeholder feedback. You are invited to answer some or all of the questions, or to comment on each of the issues more broadly.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a word or RTF format. An additional PDF version may also be submitted.

## Publication of submissions and confidentiality

All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless you indicate that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain confidential should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

## Closing date for submissions: 5 September 2025

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# 1. Introduction

On 25 March 2025, the Treasurer announced a ban on non-compete clauses for employees earning less than the high-income threshold in the *Fair Work Act 2009* (the Fair Work Act). Complementary reforms were also announced to close loopholes in the *Competition and Consumer Act 2010* (the Competition and Consumer Act) that may currently allow businesses to make anti-competitive agreements that cap wages or conditions, or prevent staff from being hired by competitors. The Treasurer foreshadowed the need for further consultation on important policy details for these announcements, and on potential additional reforms to other restraints on employees, including those earning above the high-income threshold. These reforms are expected to take effect from 2027.

The Government's announcement was informed by the findings of the Competition Review (the Review), as well as stakeholder submissions to the Review, and the growing body of domestic and international evidence and research on this subject. These clauses have broad economic effects, with increasing evidence that they suppress competition in the labour market, and consequently reduce Australia's wage growth and productivity.

Investigating the use and effects of non-compete clauses and related restraints on workers in Australia was one of the first priorities of the Review. The government announced the Review in August 2023 to look at competition laws, policies and institutions to ensure they remain fit-for-purpose for the modern economy, focussing on reforms that would increase productivity, reduce the cost of living and increase real wages.

Non-compete clauses, by their design, restrict an employee's opportunity to work after they leave their current job. Although the common law has long started with the presumption that these clauses are unenforceable because they are contrary to the public interest, there is increasing evidence supporting the fact that these clauses are harming the economy. These clauses dampen job mobility, even when they are not legally enforceable, since employees may believe they cannot change jobs. This affects their ability to move to a better-paying and more productive job, or to negotiate for better wages and conditions in their current role.

Limiting job mobility does not just hurt the affected workers, but also the entire economy. Improved job mobility promotes a flexible, more dynamic labour market, by improving the allocation of labour to more productive firms. This helps drive productivity for businesses and gives them improved access to a skilled workforce.<sup>1</sup> A worker's ability to move to a better job is a key source of entrepreneurship and innovation in the economy, including by enabling the creation and expansion of businesses.<sup>2</sup> This is crucial for increasing competition in the economy, which drives down prices for all consumers.

Recent quantitative evidence shows the prevalent use of restraint clauses among businesses in Australia,<sup>3</sup> and the indiscriminate use of these clauses among lower-income workers, who are particularly affected by the threat of legal action.<sup>4</sup> Modelling from the Productivity Commission in

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<sup>1</sup> Treasury, *Working Future: The Australian Government's White Paper on Jobs and Opportunities*, 2023.

<sup>2</sup> 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.

<sup>3</sup> Australian Bureau of Statistics (ABS) (February 2024), *Restraint Clauses, Australia, 2023*, ABS website, 2024.

<sup>4</sup> 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.

2024 estimated that reforms to limit the unreasonable use of restraint of trade clauses, specifically non-compete clauses, has the potential to increase GDP by 0.2 per cent (\$5.14 billion).<sup>5</sup>

## 1.1. What we have learned since the Issues Paper

The Government released an Issues Paper on non-compete and other restraint of trade clauses for public consultation between 4 April and 31 May 2024. Submissions to this Issues Paper provided extensive feedback, highlighting the impacts of non-compete clauses across the economy. This feedback, coupled with new academic research, strongly suggests that there is a need for reform, due to the growing prevalence of these clauses and evidence of their tangible harms to workers and the Australian economy.

Overall, most stakeholders agreed with the Australian Bureau of Statistics (ABS) and the e61 Institute's recent findings that the use of restraint clauses has proliferated where there was limited justification for their use, especially in low-paid occupations.<sup>6</sup> Many stakeholders, particularly legal experts, advocated for many of the reforms considered in the Government's Issues Paper, especially the ban on non-compete clauses for lower-income workers. Other stakeholders highlighted the importance of taking a nuanced approach to reforming the use of worker restraints, such as tailoring them for specific circumstances.

### 1.1.1. There is a growing prevalence of unreasonable non-compete clauses

In Australia, the use of restraint of trade clauses is growing, particularly non-compete clauses. According to ABS data released in 2024, 46.9 per cent of Australian businesses were using some type of restraint clause, with over one in five businesses using a non-compete clause.<sup>7</sup> The data indicates the use of non-compete clauses is widespread across industries, with results also suggesting that the use of restraint of trade clauses have increased in the past five years.<sup>8</sup>

Further, a recent study done by the Queensland University of Technology (QUT) found that 25 per cent of small- and medium-sized enterprises currently had post-employment restraint clauses in place,<sup>9</sup> consistent with recent evidence from the ABS, the e61 Institute and international evidence.

For example, in the United States (US), nearly one in five workers are subject to a non-compete clause,<sup>10</sup> while in the United Kingdom (UK), around 30 per cent of workers are impacted by these clauses.<sup>11</sup> Recent research from the Organisation for Economic Co-operation and Development (OECD)

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<sup>5</sup> Productivity Commission, *National Competition Policy: modelling proposed reforms, study report with appendices*, 2024, pp. 124–127.

<sup>6</sup> ABS (February 2024), *Restraint Clauses, Australia, 2023*, ABS website, 2024; D Andrews & B Jarvis, 'The ghosts of employers past: how prevalent are non-compete clauses in Australia?', *e61 Institute Micro Note*, 2024.

<sup>7</sup> ABS (February 2024), *Restraint Clauses, Australia, 2023*, ABS website, 2024.

<sup>8</sup> ABS (February 2024), *Restraint Clauses, Australia, 2023*, ABS website, 2024.

<sup>9</sup> P McDonald, A Stewart, D van den Broek & C Kennon, 'Locked In or Left Out: Assessing the Impact of Post-Employment Restraints in Australia', *QUT Centre for Decent Work and Industry Report*, 2025, p. 33.

<sup>10</sup> US Federal Trade Commission (FTC), *FTC Announces Rule Banning Noncompetes* [media release], US Government, 23 April 2024.

<sup>11</sup> UK Competition and Markets Authority (CMA), *CMA research report on competition and market power in UK labour market* [media release], UK Government, 25 January 2024.

also highlights that the widespread use of non-compete clauses in other OECD countries has similar economic consequences as Australia, in terms of reduced job mobility, wages and market dynamism.<sup>12</sup>

Community legal centres in Australia supported the claim that non-compete clauses were prevalent among low-paid workers, even in circumstances where the clause would be unlikely to be upheld by a court as enforceable.<sup>13</sup> Legal experts have suggested that this practice has been supported by the inclusion of restraint clauses in ‘boilerplate’ or standardised employment contracts.<sup>14</sup>

### 1.1.2. The current law is failing to protect competition and job mobility

In Australia, there is no comprehensive national statutory framework for non-compete clauses. Instead, they are governed by the common law on restraints of trade, which has only ever supported businesses in restraining the post-employment activities of their employees where that restriction is reasonable and goes no further than is necessary to protect a legitimate business interest. This has led to the common law over time accepting the need to prevent a worker from – in exceptional circumstances – moving to, or starting a, competing business, as a means to prevent the misuse of confidential information or client relationships of a former employer.

Stakeholders expressed widespread concerns that the common law doctrine that determines whether a restraint of trade can be enforced is not working adequately. A major concern of stakeholders is that the enforceability of restraints is often unable to be tested due to the prohibitive and disproportionate costs of litigation. This creates a ‘chilling effect’ on an employee’s ability to move jobs, as employees may feel they need to stay in an unfavourable job, rather than face the risk of potential court action because of a breach of a restraint of trade or potential unemployment. Stakeholders noted that the odds can be stacked against employees, who are often prevented by courts from starting a new job while legal proceedings are underway, so long as the business can satisfy the relatively low threshold required to get a temporary injunction. This temporary injunction can ultimately be determinative, due to the delays and costs involved in proceeding to a final court decision.

Legal academics noted that the scope of ‘legitimate business interests’ has expanded further within Australia than other common law jurisdictions. The inclusion of the right of a business to protect their stable workforce, in addition to confidential information and customer relationships, has supported new restraints on recruiting former co-workers, harming worker mobility. In addition to the expanded scope of interests, stakeholders suggested that there is an increasing tendency to uphold the enforceability of non-compete clauses, without due regard to the public interest in worker mobility and competition.

Stakeholders also highlighted concerns with the proliferation of ‘cascading clauses’, where employers deliberately draft overly broad restraints through sub-clauses. This approach allows the courts to sever the unreasonable sub-clauses, without invalidating the entire clause in the employment contract. However, this leaves employees at a disadvantage when attempting to navigate contractual terms. This concern is exacerbated in NSW by the partial modification of the common law from the *Restraints of Trade Act 1976* (NSW) (NSW Restraints of Trade Act).

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<sup>12</sup> D Andrews & A Garner, ‘Five facts on non-compete and related clauses in OECD countries’, *OECD Economics Department Working Papers*, 2025, no. 1833.

<sup>13</sup> Legal Aid NSW, *Submission to the Competition Review’s Issues Paper*, 2024; Employment Rights Legal Service, *Submission to the Competition Review’s Issues Paper*, 2024; Circle Green, *Submission to the Competition Review’s Issues Paper*, 2024; Youth Law Australia, *Submission to the Competition Review’s Issues Paper*, 2024; NT Working Women’s Centre, *Submission to the Competition Review’s Issues Paper*, 2024.

<sup>14</sup> Professor W van Caenegem & C Douglas, *Submission to the Competition Review’s Issues Paper*, 2024, p. 1; Professor J Riley Munton, *Submission to the Competition Review’s Issues Paper*, 2024, p. 2.

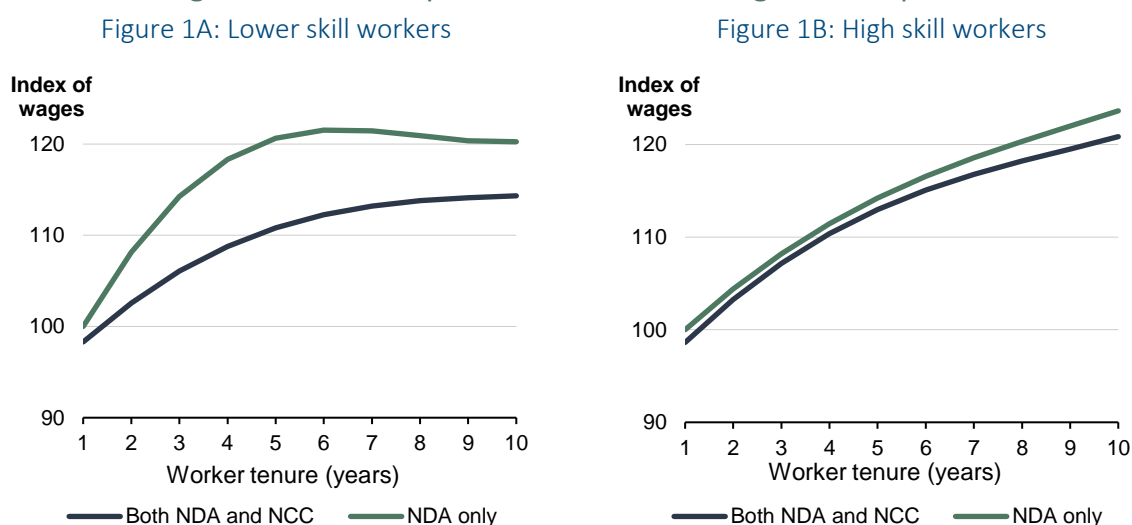
The uncertainty and cost disproportionately harm lower-income workers, supporting the need for especially strong protections against the use of restraint clauses. In contrast, higher-income workers, particularly executives, may be better placed to navigate this uncertainty when negotiating and contesting the validity of a restraint.

### 1.1.3. Non-compete clauses are harming workers and the Australian economy

Non-compete clauses reduce job mobility and suppress wages. Since the Issues Paper consultation, the international consensus on the economic effects of non-compete clauses has been strengthened by additional econometric and experimental research in the US and Europe. This evidence has led to increased scrutiny by the OECD and an increasing number of jurisdictions imposing additional restrictions on the use of non-compete clauses. Microdata from the ABS' 2023 survey on the use of restraint clauses by employers has supported research by Treasury on testing whether similar relationships between non-compete clauses, wages and job mobility can be found in the Australian context.<sup>15</sup>

Treasury's analysis supports claims that non-compete clauses affect job mobility, with evidence suggesting that employees leaving firms with high non-compete clause usage are 2.1 percentage points more likely to switch industries than those leaving firms that do not use these clauses. This may indicate that non-compete clauses are contributing to a less efficient labour allocation, by diverting job switchers away from industries which best match their skills and experience.

Figure 1: Non-compete clause use and wage-tenure profile



**Note:** These figures compare the difference in wages over time for workers at businesses that use non-competes for most of their workforce, compared to workers at businesses that only use non-disclosure clauses (that do not prevent job mobility). High skill jobs (Figure 1B, typically requiring a university degree) are compared to all other jobs (Figure 1A). Wages are indexed for each skill group.


**Source:** Treasury calculations based on e61 Institute 'Non-compete clauses, job mobility and wages in Australia', ABS data.

Research by the e61 Institute found that employees at firms with a high use of non-compete clauses are paid around 4 per cent less on average, compared to workers without non-compete clauses.<sup>16</sup> The evidence also highlighted that there were different associations between high- and lower-skilled

<sup>15</sup> ABS (February 2024), [Restraint Clauses, Australia, 2023](#), ABS website, 2024.

<sup>16</sup> J Buckley, E Rankin & D Andrews, 'Non-compete clauses, job mobility and wages in Australia', e61 Institute Research Note, 2024, p. 6.





workers. It found that lower-skill workers with non-compete clauses experienced slower wage growth (see Figure 1A above) and reduced job mobility, while high-skill workers spent more time in between jobs when leaving firms with high use of non-compete clauses.<sup>17</sup>

These findings support the need to restrict the use of non-compete clauses for low- and middle-income workers. While some business groups recognised the broader productivity and competition harms for other businesses and the broader economy from indiscriminate use of non-compete clauses preventing the recruitment of talented staff, other businesses were concerned about the economic effects of removing an effective way in which businesses could protect their legitimate interests. One area of strong consensus though was support for preserving well-drafted and targeted confidentiality clauses, which often serve to remind workers of their obligations in not using specified information that they were entrusted by a previous employer, in connection with their future employment.<sup>18</sup>

While stakeholders generally acknowledged that non-solicitation clauses can harm worker mobility and third parties, there may be circumstances that justify their continued use as a less disruptive restriction on a worker's post-employment opportunities.<sup>19</sup>

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<sup>17</sup> J Buckley, E Rankin & D Andrews, 'Non-compete clauses, job mobility and wages in Australia', *e61 Institute Research Note*, 2024, pp. 5–8.

<sup>18</sup> Dr I Ross & Professor A Stewart, *Submission to the Competition Review's Issues Paper*, 2024, pp. 10–11; Herbert Smith Freehills, *Submission to the Competition Review's Issues Paper*, 2024, pp. 9–11; Australian Industry Group (Ai Group), *Submission to the Competition Review's Issues Paper*, 2024, pp. 15–16; Australian Chamber of Commerce and Industry (ACCI), *Submission to the Competition Review's Issues Paper*, 2024, pp. 20–21; Law Council of Australia (LCA), *Submission to the Competition Review's Issues Paper*, 2024, pp. 18–19; Council of Small Business Organisations Australia (COSBOA), *Submission to the Competition Review's Issues Paper*, 2024, pp. 3–4.

<sup>19</sup> ACCI, *Submission to the Competition Review's Issues Paper*, 2024, pp. 18–20; LCA, *Submission to the Competition Review's Issues Paper*, 2024, pp. 17–18; Professor J Riley Munton, *Submission to the Competition Review's Issues Paper*, 2024, p. 7.

## 2. Scope and purpose of consultation

As announced by the Treasurer, the Government is undertaking additional consultation on non-compete clauses and restraints of trade in employment. This includes consultation to inform the implementation of the announced ban on non-compete clauses for employees earning below the high-income threshold in the Fair Work Act, and to close loopholes that allow no-poach and wage-fixing agreements in the Competition and Consumer Act. It also includes consultation on whether further reforms should be made to the use of non-compete clauses for high-income workers and the use of non-solicitation clauses, and whether changes are required to clarify the use of restraints on concurrent employment for part-time and casual workers.

In considering the design of the announced reforms, and whether any additional reform is necessary, the focus will be on how options boost productivity, real wages and business dynamism, while minimising regulatory complexity and burden on businesses.

Consistent with public comments on the Issues Paper, the Government is not proposing changes to restraints of trade outside of employment (e.g. in the sale of a business), or changes to the use of confidentiality clauses in employment.

This consultation paper addresses these issues in turn, in the following structure:

- Section 3 consults on details necessary to implement the ban on non-compete clauses, including:
  - how a non-compete clause should be defined in statute
  - who the ban should cover, including the application of the high-income threshold, and whether independent contractors should be included
  - how the ban will be effectively enforced, including the appropriate penalties, defences and the roles of the Fair Work regulators
  - whether limited statutory exemptions are required on public interest grounds
  - what transitional arrangements are required to support businesses and workers when the ban comes into effect.
- Section 4 considers whether additional reforms are required to the use of post-employment restraints, such as:
  - what restriction, if any, should be placed on the use of non-compete clauses for high-income employees
  - what restriction, if any, should be placed on the use of client and co-worker non-solicitation clauses
  - how the common law doctrine should apply to any permitted non-compete or non-solicitation clause, including whether changes or clarifications are required.
- Section 5 considers restraints *during* employment, consulting on whether any change is required to clarify how restrictions on concurrent employment should apply to part-time or casual employees.
- Finally, Section 6 consults on details necessary to implement the ban on no-poach and wage-fixing agreements in the Competition and Consumer Act, including whether any exemptions should apply.

## 3. The ban on non-compete clauses for low- and middle-income workers

### 3.1. Definition of a non-compete clause

The Government has announced a ban on non-compete clauses for workers earning below the Fair Work Act's high-income threshold. For the 2025–26 financial year, the high-income threshold is set at \$183,100. Non-compete clauses broadly seek to restrict workers from seeking or accepting alternate employment, or starting or operating a business. These clauses can take different forms: either expressly requiring that workers not compete, or having the practical effect of restricting where workers can work – without expressly saying so.

Australia's law on restraints of trade does not differentiate non-compete clauses from other types of restraints. The ban will therefore require a clear definition to provide certainty and reduce the compliance burden for businesses and workers.

As a starting point, the US Federal Trade Commission (FTC) definition of a non-compete clause<sup>20</sup> could be adopted or adapted for an Australian context (see Box 1 below). Having considered a range of definitions across other jurisdictions (including in Ontario, Washington and Germany), Treasury's view is that the FTC definition appropriately covers the range of formats in which a non-compete may appear, without going so far as to cover all restraints of trade in employment.

#### Box 1: US FTC definition of non-compete clause

A term or condition of employment that either **prohibits** a worker from, **penalises** a worker for, or **functions to prevent** a worker from:

- a) Seeking or accepting work with a different person where such work would begin after the conclusion of the employment that includes the term or condition
- b) Operating a business after the conclusion of the employment that includes the term or condition.

[The] term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.

The FTC definition broadly targets restrictions on a worker's mobility, including restrictions on seeking or accepting of work, or in operating a business, which would begin after the workers' current employment concludes. The definition recognises that the restriction on a worker's mobility could occur in three key ways: 'prohibitions', 'penalties' and/or 'functions to prevent'. Each of these are discussed further below, including how they might apply in the Australian context.

The FTC definition only captures restrictions on mobility that apply *after* the worker's current employment concludes. This post-employment dimension is important to ensure that the ban is appropriately targeted, and does not apply to terms and conditions of employment that attract and retain staff. If required, changes to restraints on concurrent employment would be dealt with separately (see Section 5 of this paper).

Consistent with the FTC definition, the ban on non-compete clauses would not be limited to just the *contract* of employment, but would instead cover the broad employment *relationship* between the

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<sup>20</sup> US FTC, '[Non-Compete Clause Rule](#)', *US Government Federal Register*, 2024, 89(89): pp. 38361–38366.

employer and employee, including deeds separate to the employment agreement, and workplace policies (whether written, or oral).

### 3.1.1. Clauses that prohibit future employment

Non-compete clauses are commonly expressed as prohibiting an employee from working for a competitor or starting a competing business, and apply for specific periods of time, or to geographic areas (see Box 2 below). Employers may then seek damages or an injunction for breach of contract, if the employee does not comply with the prohibition.

#### Box 2: Example of a prohibition

The employee agrees that for a period of one year after the termination of their employment, they will not, without the prior consent of the employer:

- a) Engage in, be employed by, or provide services to any business that competes with the employer within a 20km radius of the employer's place of business, or
- b) Operate any business that would be in competition with the employer within the same area or period.

### 3.1.2. Clauses that penalise employees for future employment

Non-compete clauses may also take the form of a penalty on an employee, with the penalty being conditional on the employee working for a competitor or starting a competing business. Penalties imposed on employees can include, for example, broad liquidated damages clauses, or adverse financial consequences (see Box 3 below).

Penalty clauses may forfeit a bonus or other employment benefit which the employee was previously paid, had accrued or may be paid in the future, because the employee began competing. A bonus not paid would not be considered a penalty if, consistent with the business' standard practice, it was awarded on a discretionary basis, or only to employees who were employed at the relevant vesting date. These bonuses are often used to attract and retain talented staff, and are not used to penalise former employees for competing.

A clause would also not be a penalty merely because it sought to recover a specific and reasonable investment that the employee had agreed would be payable, if they terminated the employment relationship before a particular date (sometimes referred to as a 'training repayment agreement'). Such arrangements, often relating to employer support for further study or occupational certification, can be common in certain industries.

#### Box 3: Examples of a penalty

##### Example A – liquidated damages

If the employee engages in any business or accepts employment with a competitor that operates in the same or similar field as the employer, within one year after termination and within a 20km radius, the employee agrees to pay the employer damages of \$25,000.

##### Example B – forfeiting accrued commissions or bonuses due to competing

If the employee engages in a competing business or accepts employment with a competitor that operates in the same or similar field as the employer, within one year after termination and within a 20km radius, the employee forfeits commissions or bonuses that would have been paid if the employee had resigned and not worked for a competitor.

### 3.1.3. Clauses that function to prevent future employment

The FTC definition also applies to clauses that function to prevent workers from seeking or accepting new work, or operating a business after their employment ends. It safeguards against employers drafting a clause in a way that would otherwise avoid the ban, but nonetheless achieve the same objective of restricting the employee's mobility.

Existing employee duties under common law, equity or statute that may extend beyond employment, would be unaffected. In general, targeted and well-drafted non-disclosure and non-solicitation clauses would also not be captured in this definition, as outlined in the examples below (see Box 4).

The FTC noted that its definition would not cover terms and conditions of employment that applied only during employment, such as notice periods, since these terms are not a post-employment restriction.<sup>21</sup> The same definition adopted in Australia would not affect notice periods or 'gardening leave', where workers remain employed and are remunerated as usual. Existing employment law would continue to apply to the use and any limits on notice periods and 'gardening leave', so long as the employment relationship was considered to continue. Since the employees are fully compensated, the business has the appropriate incentives to use these clauses reasonably.

#### Box 4: Functions to prevent future employment

Whether a clause functions to prevent future employment would depend on the circumstances. It is intended to apply narrowly, and thus it would generally be clear whether a clause functioned to prevent employment, rather than merely preventing the use of confidential information or solicitation of clients while working for a competing business.

##### Example where a clause may function to prevent

An employee works in a customer management and sales role in a highly specialised market, supplying sustainment for an Australian Defence Force weapons project. The employee has a clause that purports to restrict them from roles which involve soliciting or working with officials in the Department of Defence or Defence Force for one year post-employment.

Since the employee's role within the business is to manage their relationship with Defence officials, this restriction functionally prevents the employee from working within their profession at all. The employee would be unable to start a competing business or work for a competing business that sold equipment to Defence. As a result, the clause may function to prevent their future employment and would be considered a non-compete clause.

##### Example where a clause does not function to prevent

An employee is introduced by their employer to a specific group of international suppliers that the employer has identified as providing high-quality components after years of research and trial and error. Given the large number of potential suppliers of similar components, it is assumed that the identity of these specific suppliers may be confidential. The employee agrees to not solicit or work with these identified suppliers for 2 years post-employment.

Although high-quality suppliers in the specific industry may be very important, the employee only knows the identity of these suppliers from their employer and is not restricted from starting a new business or working for a competitor, including from conducting their own research to identify other high-quality suppliers. As a result, it is less likely that the employee is functionally prevented from post-employment within that industry.

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<sup>21</sup> US FTC, '[Non-Compete Clause Rule](#)', *US Government Federal Register*, 2024, 89(89): pp. 38361–38366.

### Consultation questions

1. How should a non-compete clause be defined in the Fair Work Act? Is the FTC definition appropriate for an Australian context?
2. Should any specific kinds of common contractual terms be explicitly included or excluded from this definition?

## 3.2. Scope of workers affected

The ban on non-compete clauses for employees earning below the high-income threshold will be implemented through amendments to the Fair Work Act, given its application to workplaces, and the relationship between employers and employees. While non-compete clauses commonly exist in employment contracts, they may also exist in workplace instruments (such as enterprise agreements, or individual flexibility arrangements), which underpin these contracts. These instruments may therefore also need to be reviewed.

While the reforms would apply to employees, Treasury is also interested in stakeholder views on whether independent contractors should be covered, especially where their role and conditions are comparable to an employee.

### 3.2.1. Coverage of the Fair Work Act

The coverage of the Fair Work Act is complex, and it does not include all employees in Australia. This is because the constitutional authority of the Fair Work Act is derived from multiple heads of power, including the corporations power as defined in section 51(xx) of the Australian Constitution (the Constitution), and referrals of power from the states under section 51(xxxvii) of the Constitution.

As a result, the Fair Work Act and its associated laws (collectively known as the ‘national workplace relations system’, or the ‘Fair Work system’), cover most Australian workplaces and most employees (including full-time, part-time and casual employees).<sup>22</sup> In May 2025, there were an estimated 10,720,800 employees covered by the Fair Work system (85.9 per cent of all employees).<sup>23</sup> Figure 2 provides an overview of employees covered by the Fair Work system.

For the majority of the Fair Work Act, whether someone is an ‘employee’ is determined by reference to an interpretive principle that examines the real substance, practical reality and true nature of the working relationship.

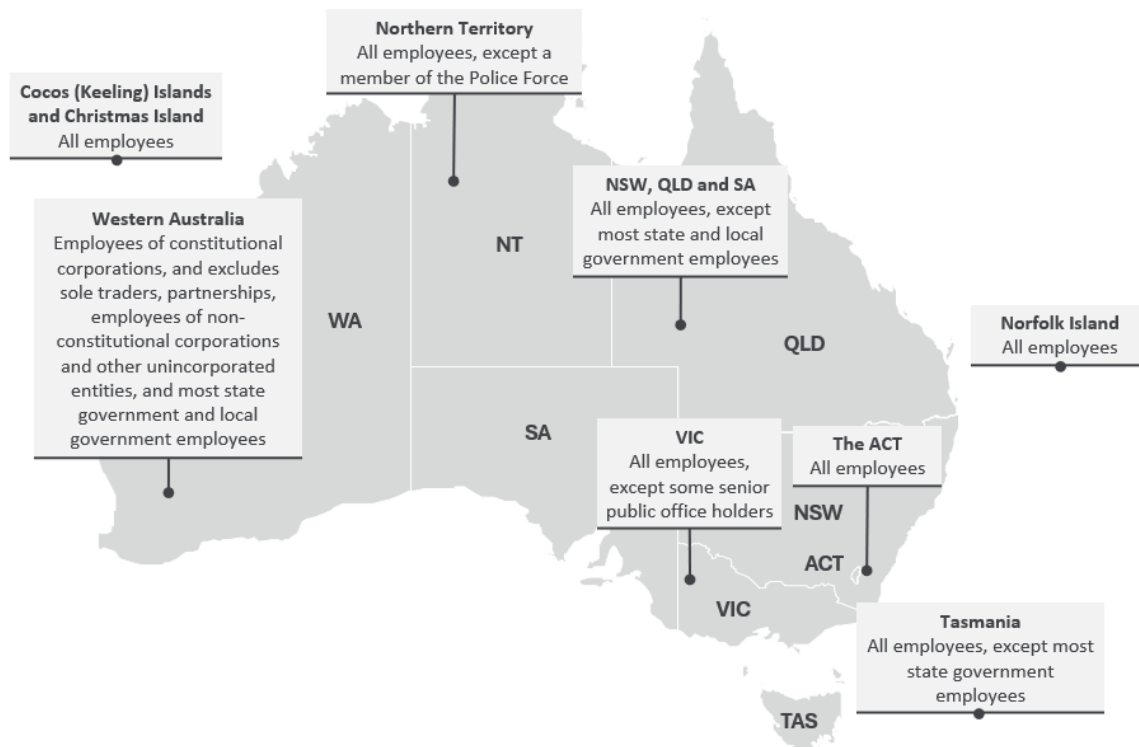
Employees who are not covered under the Fair Work system are regulated by the relevant state industrial relations systems. However, there are some Parts of the Fair Work Act that have universal coverage, applying to all workers. For example, the stop sexual harassment provisions of the Act (Part 3-5A Prohibiting Sexual Harassment at Work) apply broadly to all workers, not just employees, as a result of reliance on the external affairs power of the Constitution.

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<sup>22</sup> For an overview of which employees are covered see: <https://www.fwc.gov.au/apply-or-lodge/who-australias-national-workplace-relations-system-covers>

<sup>23</sup> ABS (May 2025), *Labour Force, Australia, Detailed*, ABS website, 2025; ABS (May 2018), *Employee Earnings and Hours*, unpublished Datalab.

**Figure 1: General coverage of the national system**



**Source:** Department of Employment and Workplace Relations

### Workers other than employees

Workers who are not employees include independent contractors and sole traders, unpaid volunteers, and unpaid trainees and interns through a school, university or institution. In response to the Issues Paper, some stakeholders submitted that some independent contractors should have restrictions on non-compete clauses applied to them, given that some perform work that resembles employment, and that as a matter of common law, are subject to similar principles as those applied to post-employment restraints.<sup>24</sup>

Workers engaged as independent contractors are ‘self-employed’ and may operate their own business. They provide services for another business or person and are engaged through a contract *for* services (as opposed to employees who are engaged under a contract *of* service). Independent contractors usually negotiate their own fees and working arrangements, can work for more than one client at a time, and can delegate or subcontract work to other contractors. In general, independent contractors are not entitled to a mandatory safety net of minimum workplace entitlements, but can access some protections in relation to their services contracts.

<sup>24</sup> See for example: Dr I Ross & Professor A Stewart, *Submission to the Competition Review’s Issues Paper*, 2024.

These protections include access to:

- Remedies for unfair contract terms under multiple jurisdictions, including the Fair Work Act,<sup>25</sup> *Independent Contractors Act 2006* (Cth) and the Competition and Consumer Act.<sup>26</sup>
- Minimum standards orders: the Fair Work Commission can set minimum standards for two groups of independent contractors – ‘employee-like workers’ performing digital platform work, and ‘regulated road transport contractors’.<sup>27</sup>
- A consent-based framework, allowing collective agreements to be made between a registered organisation and either a road transport business or a digital labour platform operator, which provide terms and conditions for employee-like workers or regulated road transport contractors.<sup>28</sup>

### Consultation questions

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

### 3.2.2. Low- and middle-income employees

The ban would apply to employees earning less than the high-income threshold in the Fair Work Act. This group of employees are generally recognised as having less bargaining power to negotiate or remove non-compete clauses from an employment agreement, and have less capacity to absorb a loss of income between jobs if they are restrained from working.

The high-income threshold is provided in section 333(1) of the Fair Work Act and is calculated using the method prescribed at regulation 2.13 of the *Fair Work Regulations 2009*. The high-income threshold has certain functions under the Fair Work Act, including the following:

- it operates as a limit on an employee’s eligibility to access unfair dismissal protections where they are not covered by an award or enterprise agreement<sup>29</sup>
- it provides a mechanism for determining unfair dismissal compensation caps (where compensation is limited to the lesser of 26 weeks’ pay or half the high-income threshold)
- a modern award will not apply to an employee with a guarantee of annual earnings above the high-income threshold<sup>30</sup>

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<sup>25</sup> For more information see: <https://www.fwc.gov.au/issues-we-help/independent-contractor-disputes-about-unfair-contract-terms>

<sup>26</sup> For more information see: <https://www.accc.gov.au/business/selling-products-and-services/contracts>

<sup>27</sup> For more information see: <https://www.fwc.gov.au/work-conditions/regulated-worker-and-contractual-chain-standards>

<sup>28</sup> For more information see: <https://www.fwc.gov.au/work-conditions/collective-agreements/about-collective-agreements>

<sup>29</sup> *Fair Work Act 2009* (Cth) s 382(b)(iii).

<sup>30</sup> *Fair Work Act 2009* (Cth) s 47(2).



- the limitations on fixed term contracts do not apply to employees earning above the high-income threshold.

Determination of whether an employee falls above or below the high-income threshold is based on their 'earnings', defined in section 332(1) of the Fair Work Act. This includes wages, any payments that are guaranteed in advance, salary-sacrificed amounts, and the agreed value of non-monetary benefits (such as a company car),<sup>31</sup> and excludes items like superannuation contributions, reimbursements, payments which cannot be determined in advance (such as bonuses, incentive-based payments), and overtime (unless the overtime is guaranteed).<sup>32</sup>

Approximately 91 per cent of workers across Australia have earnings below the high-income threshold, however not all of these workers are covered by the Fair Work Act.

There is a separate contractor high-income threshold in the Fair Work Act, which is currently set by regulation to the same amount as the employee high-income threshold.

### Applying the high-income threshold

The high-income threshold is currently set at \$183,100 for the 2025–26 financial year and is indexed annually on 1 July. In applying the high-income threshold to the ban on non-compete clauses, consideration will need to be given to the point at which the threshold should be applied to a worker's earnings, such as the time that the contract for employment is entered into or the time at which the restraint is activated.

The high-income threshold is calculated at a specific point in time for several provisions of the Fair Work Act. For example:

- For unfair dismissal protections, the high-income threshold is applied at the time of dismissal. Certain employees whose annual rate of earnings exceeds the threshold at that time are excluded from accessing unfair dismissal protections under the Fair Work Act.
- For exceptions from limitations on fixed-term contracts, the high-income threshold is applied at the time the contract is entered into. If the employee's annualised salary exceeds the threshold at that time (with the threshold pro-rated for part-time employees and contracts less than 12 months), the exception applies.

In considering whether the threshold should apply at the time the contract is entered into, it may also be necessary to consider whether it should be reapplied at any time, such as upon variation of an employment contract, to account for additional complexities where, for example:

- an employee's remuneration regularly changes
- an employee moves from full to part-time work, or vice-versa, which results in them moving above or below the high-income threshold<sup>33</sup>
- indexation increases the high-income threshold above the earnings of an employee who may otherwise be subject to a non-compete clause.

<sup>31</sup> Non-monetary benefits are defined at s 332(3) in the *Fair Work Act 2009* (Cth).

<sup>32</sup> *Fair Work Act 2009* (Cth) s 332(1).

<sup>33</sup> There is a method for calculating the high-income threshold for the purposes of the fixed term contracts framework at regulation 2.14 of the *Fair Work Regulations 2009* (Cth) which accounts for the number of hours the employee works (at the time the contract is entered into).

## Box 5: Application of the high-income threshold

### Examples of when an employee's earnings can be assessed as above the high-income threshold

#### Example 1

An employee is required to attend a 30-minute meeting before every workday, which their employer pays as overtime. As the overtime payments can be determined in advance, the 2.5 hours of overtime per week are included in the calculation of the employee's earnings. These overtime payments lift the employee's earnings above the high-income threshold.

#### Example 2

An employee receives a base salary that is below the high-income threshold. However, their employer provides them with a fully maintained vehicle. The employee uses the vehicle for private purposes only. The proportion of private usage of the vehicle is counted as earnings which in addition to their base salary lifts their earnings above the high-income threshold.

### Examples of when an employee's earnings can be assessed as below the high-income threshold

#### Example 1

An employee receives a base salary of \$170,000 and a yearly bonus of \$20,000 which can be paid out at the discretion of their employer. The yearly bonus is excluded from the employee's earnings for the purposes of applying the high-income threshold, as the bonus cannot be determined in advance because their employer reserves the right to alter or discontinue the bonus plan.

#### Example 2

An employee receives an annual travel allowance from their employer which if counted would lift their earnings above the high-income threshold. However, the employee only uses the allowance for work travel and this amount is excluded from the employee's earnings as only personal use of the travel allowance could be included as earnings. This means the employee remains below the high-income threshold.

## Consultation questions

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?
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?

### 3.2.3. Non-compete clauses in fair work instruments

All employment relationships are underpinned by a contract of employment, which sets out the terms and conditions of employment. However, this contract may be further supplemented by a fair work instrument. The term 'fair work instrument' does not apply to the contract of employment itself.

A contract of employment cannot provide terms or conditions of employment that are less than the legal minimum entitlements set out in the National Employment Standards (NES), or in most cases, by a relevant enterprise agreement or modern award or other fair work instrument. However, this does not prevent an employment contract from including a non-compete clause.

This section deals with common fair work instruments that apply to the employment relationship (that is, modern awards, enterprise agreements, and workplace determinations).<sup>34</sup> Certain independent contractors may also have fair work instruments applicable to them, such as an ‘employee-like minimum standards order’. These cohorts of workers are discussed above in Section 3.2.1.

## Awards

There are no non-compete clauses in modern awards. A modern award is a legal document that outlines minimum terms and conditions of employment, including minimum pay rates. It covers relevant employers and employees for a particular industry or type of job. Modern awards are created, varied or revoked by the Fair Work Commission, either on its own initiative or, depending on the type of application, by an employee or organisation that is covered by the modern award, or an organisation that is entitled to represent their interests (e.g. a union).

## Enterprise agreements

While non-compete clauses can be included in an enterprise agreement and there is some evidence of their use in these agreements,<sup>35</sup> it is questionable whether they have any legal effect. Despite this, there is a risk they may still have a ‘chilling effect’ on workers in practice as the employees covered by the enterprise agreement could assume that the non-compete term is valid.<sup>36</sup>

An enterprise agreement sets out employment terms and conditions but applies to a specified employer or employers and their employees performing work covered by the enterprise agreement. Enterprise agreements can only commence operation if agreed, in a ballot, by a majority of employees who vote, and it is approved by the Fair Work Commission. Once in operation, enterprise agreements apply to all existing and future employees within the scope of the agreement until the agreement is replaced or terminated.

In approving an enterprise agreement, the Fair Work Commission must be satisfied that the agreement does not include ‘unlawful terms’ as defined by section 194 of the Fair Work Act. Unlawful terms have no effect. Non-compete clauses are not ‘unlawful terms’ for the purposes of section 194.

Enterprise agreements may be made about ‘permitted matters’. The inclusion of clauses that are not about ‘permitted matters’ in a proposed enterprise agreement does not prevent the Fair Work Commission from approving the enterprise agreement but the clauses would have no effect. Permitted matters are those that pertain to the employer–employee relationship, the employer–union relationship, terms about deductions from wages, or terms about how the agreement will operate.

Stakeholders noted that it is not clear whether non-compete clauses are ‘permitted matters’ given the general need for such agreements to deal with (existing) employment relationships, and not those that have come to an end.<sup>37</sup>

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<sup>34</sup> *Fair Work Act 2009* (Cth) s 12.

<sup>35</sup> Dr I Ross, ‘Non-compete clauses in employment contracts: The case for regulatory response’, *Tax and Transfer Policy Institute Working Paper*, 2024, no. 4, pp. 11–16.

<sup>36</sup> Dr I Ross, ‘Non-compete clauses in employment contracts: The case for regulatory response’, *Tax and Transfer Policy Institute Working Paper*, 2024, no. 4, p. 16.

<sup>37</sup> Dr I Ross & Professor A Stewart, *Submission to the Competition Review’s Issues Paper*, 2024, p. 9.

## Individual Flexibility Arrangements

Both modern awards and enterprise agreements are required to have flexibility terms that permit employers and employees to make Individual Flexibility Arrangements (IFAs). An IFA is a written agreement between an employer and employee that varies the effect of certain clauses in their modern award or an enterprise agreement. An IFA may only vary the effect of clauses specified in the flexibility clause used in the relevant enterprise agreement. Under a modern award, an IFA may vary the effect of clauses that relate to arrangements for when work is performed, such as working hours, overtime rates, penalty rates, allowances and leave loading.

Depending on the particular flexibility term in the modern award or enterprise agreement, it is possible that an IFA could contain a non-compete clause. If an IFA is made, the employee must be better off overall with the IFA than without it, compared to their award or enterprise agreement at the time the IFA was made.

### Consultation questions

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

## 3.3. Enforcement

In announcing the ban on non-compete clauses, the Government committed to further consultation on policy details including penalties, which requires a broader examination of the enforcement framework for the ban. This includes consideration of the type and severity of penalties that may apply, who can commence proceedings and the roles of the Fair Work Ombudsman and Fair Work Commission.

### 3.3.1. Penalties

Penalties may be important in addition to provisions that make affected non-compete clauses unenforceable, so that these clauses are not included in employment contracts at all. Research from the US finds that, even where non-compete clauses are banned, they continue to be widely used and maintain a ‘chilling effect’ on workers.<sup>38</sup>

Under the Fair Work Act, the Federal Court of Australia (FCA) and the Federal Circuit and Family Court of Australia (FCFCOA) (Division 2) may impose orders against individuals or companies found to have contravened certain provisions in the Fair Work Act. These orders can include:

- *Civil penalties* – A civil penalty is when the court makes an order to require a person to pay an amount of money as a penalty in civil proceedings. Civil penalty amounts range up to 60 penalty units (currently \$19,800) per contravention and 600 penalty units (currently \$198,000) for serious contraventions for an individual, with higher penalties applying for companies. Under the Fair Work

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<sup>38</sup> JJ Prescott, E Starr & D Bishara, ‘[The Behavioural Effects of \(Unenforceable\) Contracts](#)’, *Journal of Law, Economics, and Organization*, 2020, 36(3): pp. 633–687; A J.S. Colvin & H Shierholz, ‘[Non-compete agreements](#)’, *Economic Policy Institute*, 2019. This paper finds that 29.3 per cent of Californian workplaces use non-competes for all employees, while 45.1 per cent of workplaces use them for any employees.

Act, civil penalties are commonly imposed for breaches that include underpayment of wages, failure to provide payslips, unlawful termination, adverse action, or breaches of workplace instruments.

- *Criminal penalties* – Criminal penalties are also available under certain provisions in the Fair Work Act. These are more significant than civil penalties and can include fines up to 25,000 penalty units (currently \$8.25 million) or a maximum 10 years in prison. Criminal penalties apply to intentional wage underpayments.

### Consultation questions

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.

### 3.3.2. Defences

Where penalties are available for certain contraventions of the Fair Work Act, there may also be defences against the application of those penalties, however defence provisions are relatively rare under the Fair Work Act. For example, the Fair Work Act provides a defence for an employer accused of misrepresenting employment as an independent contractor arrangement, known as ‘sham contracting’. This defence is established if the employer can show that they ‘reasonably believed’ they were correct in classifying a worker as an independent contractor.<sup>39</sup> It may be necessary to consider the need for defences to the ban on non-compete clauses, particularly in the context of any exemptions that might also be considered.

### Consultation questions

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

### 3.3.3. Commencing proceedings

The Fair Work Act allows various parties to commence proceedings in the Fair Work Commission, FCA and FCFCOA, and apply to have orders issued. Who can commence proceedings depends on the type of matter and where it is heard.

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<sup>39</sup> *Fair Work Act 2009* (Cth) s 357(2).

Giving a range of parties standing to commence proceedings recognises that the actions of a party can have broader implications that affect the rights or interests of parties beyond those immediately involved in the matter. It can also help with general deterrence and improve overall compliance, particularly where those other parties possess more resources and information than any individual claimant may.

For example, proceedings for enforcement of a Fair Work Commission order for reinstatement or compensation in relation to an unfair dismissal claim can be lodged with the FCA, FCFCOA or an eligible State or Territory court by:

- a person affected by the contravention (e.g. the employee who has not been reinstated or compensated)
- a union (e.g. which the employee is a member of, and who has an interest in ensuring the legal rights or its members are upheld)
- an employer organisation (e.g. which the employer is a member of and who has an interest in ensuring the legal rights or its members are upheld)
- a Fair Work Inspector (who has a public interest in ensuring compliance with the Fair Work Act).

Providing standing to other parties, such as other businesses that intend to hire an employee bound by a non-compete clause, would recognise the cost imposed on this third party as a result of the restraint. Providing standing to employee organisations to commence proceedings could also assist in supplementing the work of regulators in enforcing laws, including the Fair Work Ombudsman.

### Consultation questions

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

### 3.3.4. Fair Work Ombudsman

The Fair Work Ombudsman is the independent regulator for Australia's national workplace relations system. The Fair Work Ombudsman's statutory functions are outlined in section 682 of the Fair Work Act. They include promoting and monitoring compliance with Australian workplace laws, providing education and assistance to employers and employees, and enforcing compliance with the Fair Work Act and related Fair Work instruments, such as a modern awards and enterprise agreements.

Given the ban will be legislated in the Fair Work Act, the Fair Work Ombudsman would be responsible for developing educational resources to assist employees and employers to understand and comply with the new changes. The Fair Work Ombudsman would also typically have a role enforcing compliance with provisions that are designated as civil remedy provisions in the Fair Work Act. This can include using statutory enforcement tools which can assist in promoting compliance with the Fair Work Act, like infringement notices, compliance notices and entering into enforceable undertakings. The Fair Work Ombudsman can also seek penalties for contraventions of civil remedy provisions in the Fair Work Act through the FCA, the FCFCOA and eligible State and Territory courts.

Given the role of the Fair Work Ombudsman, there is scope to consider what level of support the workplace community would need to implement the proposed ban on non-compete clauses, as well as what regulatory tools the Fair Work Ombudsman should have its disposal to address non-

compliance in this context. Consistent with existing practice, it is expected that if the Fair Work Ombudsman was to have an enforcement role in relation to the ban, it would take a risk-based and intelligence-led approach to monitoring, investigation and promoting compliance with the new provisions.

### Consultation questions

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?
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?

### 3.3.5. Fair Work Commission

The Fair Work Commission is Australia's national workplace relations tribunal. The Fair Work Commission sets minimum wages, makes awards and approves enterprise agreements. The Fair Work Commission uses mediation, conciliation and arbitration to help resolve workplace disputes, including about unfair dismissal, general protections and fixed-term contracts, and certain independent contractor disputes.

Where a matter cannot be resolved by the Fair Work Commission, it may be able to proceed to court.

Depending on the final policy parameters for the ban, the Fair Work Commission could have some role in resolving disputes arising between parties in relation to non-compete clauses. This could include, for example, disputes about whether:

- a contractual clause constitutes a non-compete clause as defined
- a non-compete clause can be included in a contract or enforced due to application of the high-income threshold
- an exemption applies to a specific circumstance.

### Consultation questions

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

## 3.4. Limited statutory exemptions

The Government's intention is that the ban on the use of non-compete clauses for low- and middle-income employees will have a broad application across Australian workplaces. This is necessary for the

ban to lift wages and make Australia's economy more dynamic. This also provides employees and businesses with certainty about when clauses can and cannot be used. However, stakeholder feedback noted that there may be legitimate, exceptional circumstances, where there is an overriding public interest in retaining the use of non-compete clauses.

The Government is therefore consulting on if there should be some limited statutory exemptions to the ban to avoid unintended consequences. Exemptions may be permanent, temporary or time-based, or only accessible upon application. However, they should always be targeted, balanced against the primary objectives of the legislation, and in the public interest.

As a starting point, Treasury notes that there are some statutory restrictions on post-employment conduct, such as offences prohibiting former Australian defence staff from engaging in work for foreign militaries or governments.<sup>40</sup> This reform is not intended to interfere with these statutorily established prohibitions on post-employment conduct.

Beyond restraints resulting from statute, the ban could also include specific statutory exemptions in the Fair Work Act where there is an overwhelming public interest in doing so. The justification for these restraints being exempt from the ban would need to be grounded in a clear, and substantial risk to the public interest, such as potential impacts on national security or the integrity of core public functions. These could align with other exemptions currently found in the Fair Work Act and the Competition and Consumer Act.<sup>41</sup> The risk to the public interest would need to outweigh the harms that non-compete clauses create for affected employees and the public interest in productivity and competition.

### Consultation questions

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)?

## 3.5. Transitional arrangements

The ban of non-compete clauses is expected to apply prospectively from 2027 to employment contracts made or varied after the start date. However, consideration will also need to be given to whether and how the ban should apply to non-compete clauses in existing employment contracts, and what arrangements could apply to support a transition to the ban.

Transitional arrangements could apply from the start date and take different forms depending on the specific issue and objective to be achieved, but can include:

- 'Grace periods' during which penalties will not apply.
- Requirements for employers to inform employees that their non-compete clause is no longer enforced.

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<sup>40</sup> *Defence Amendment (Safeguarding Australia's Military Secrets) Act 2024* (Cth).

<sup>41</sup> See for example *Fair Work Act 2009* (Cth) ss 333S, 527M.



- Provisions clarifying how existing rights (such as previously agreed employment contracts or workplace instruments) will be preserved or affected over time.
- Education and support programs to help businesses adapt to proposed reforms and better educate workers on their rights and responsibilities.

Transitional arrangements have been used in recent amendments to the Fair Work Act. For example, the reforms to pay secrecy clauses commenced from 7 December 2022, but included a 6-month ‘grace period’ to give employers time to review and remove pay secrecy clauses from their employment contract templates, without being subject to penalties because of a breach. Pay secrecy clauses in existing contracts entered into before 7 December 2022 continued to have effect until the contract was varied.

### Consultation questions

15. What transitional arrangements are required to support workers, and business compliance with the ban?
16. How should the ban apply to non-compete clauses contained in existing contracts after commencement?

## 4. Other reforms to employee restraints of trade

This section considers potential reforms for non-compete clauses for employees earning above the high-income threshold (high-income employees). It also considers potential reforms to restrict the use of client and co-worker non-solicitation clauses, and whether any broader changes are required to clarify how the doctrine of restraint of trade should continue to apply.

While results of the Issues Paper consultation identified initial concerns about the productivity and competition impacts of unreasonable use of these clauses, the rationale for intervention may be more nuanced compared to the harmful use of non-compete clauses among low- and middle-income workers. As such, the Government has not yet made a decision on whether reform is required. This section seeks responses to whether any change from the status quo is required, and if so, what the appropriate reform should be.

### 4.1. Non-compete clauses for high-income employees

The Government committed to consult on the need for any changes to the use of non-compete clauses for high-income employees. Some stakeholders supported a full ban of non-compete clauses, including for these employees. However, feedback from other stakeholders suggested that the balancing of the public interest and the interests of business may require a more flexible approach for high-income employees, as they are better equipped to negotiate and navigate the constraints such agreements impose.<sup>42</sup>

Research by the e61 Institute (as shown in Figure 1B in Section 1) 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.<sup>43</sup> These high-skill occupations make up a substantial proportion of all employees earning above the high-income threshold. Despite this, striking the correct balance for high-income employees could yield substantial economic benefits, as individual highly skilled employees can significantly improve the productivity and innovation of entire organisations, and materially improve the overall level of competition within a market.

Non-compete clauses also harm third parties absent from the negotiating table, including businesses that could more productively employ the restrained worker, and consumers who may face higher prices due to the reduced possibility and effectiveness of competition.<sup>44</sup> In their submissions, legal academics argued that the common law is not adequately addressing these broader anti-competitive effects,<sup>45</sup> and therefore proposed that their use should be limited.

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<sup>42</sup> COSBOA, *Submission to the Competition Review's Issues Paper*, 2024, p. 2; Managed Funds Association (MFA), *Submission to the Competition Review's Issues Paper*, 2024, p. 4; LCA, *Submission to the Competition Review's Issues Paper*, 2024, pp. 10–11.

Employees that earn above the high-income threshold are excluded from modern award coverage and unfair dismissal protections because they can 'negotiate their own arrangements and do not require the same level of safety net protection as lower paid employees'; see: Parliament of the Commonwealth of Australia, *Fair Work Bill 2008 Explanatory Memorandum*, 2008, regulation 103.

<sup>43</sup> J Buckley, E Rankin & D Andrews, 'Non-compete clauses, job mobility and wages in Australia', *e61 Institute Research Note*, 2024, p. 6.

<sup>44</sup> L Shi, 'Optimal Regulation of Noncompete Contracts', *Econometrica*, 2023, 91(2): pp. 425–463; M Lipsitz & M J. Tremblay, 'Noncompete Agreements and the Welfare of Consumers', 2021.

<sup>45</sup> Professor W van Caenegem & C Douglas, *Submission to the Competition Review's Issues Paper*, 2024, pp. 5–6; Professor J Riley Munton, *Submission to the Competition Review's Issues Paper*, 2024, pp. 3–5; Dr I Ross & Professor A Stewart, *Submission to the Competition Review's Issues Paper*, 2024, p. 2.

This section considers two potential options for high-income workers if reform is required. The first is to extend the ban on non-compete clauses to these employees. The second option is to introduce statutory limitations to non-compete clauses, which could include mandatory compensation, duration limits, or both. Treasury is seeking stakeholder views on which option appropriately balances the interests of employees, businesses and the broader public.

#### 4.1.1. Option 1: Full ban

This option would extend the announced ban on non-compete clauses to those earning above the high-income threshold, subject to any statutory exemptions that may be applied.

A full ban would provide legal certainty to employees and businesses that employees cannot be restricted from moving to another job or setting up a rival company. Businesses could rely on other mechanisms, such as staffing retention strategies (e.g. better pay and conditions) and alternative protections (e.g. confidentiality agreements), which are more targeted and are less harmful to the economy. Trade unions and community legal centres expressed support for a full ban, noting the ‘chilling effect’ of clauses on worker mobility, concerns that the common law does not appropriately consider the public interest, and the availability of less restrictive alternative clauses for businesses.<sup>46</sup>

Business stakeholders generally argued that a full ban would go too far noting there are circumstances, particularly for employees earning above the high-income threshold, where a non-compete clause may be the only practical and efficient way to protect their legitimate interests.<sup>47</sup>

Stakeholders also noted that a ban could lead to unintended consequences. This could include an increase in litigation in other areas as businesses seek to protect their interests through avenues such as intellectual property law or through claims under the *Corporations Act 2001* (Cth) (the Corporations Act).<sup>48</sup> Stakeholders noted that litigation in these other areas is often more complex and expensive for both parties. Despite these concerns, evidence from the US suggests that trade secret litigation could actually decrease over the long-run, using data following bans on non-compete clauses at the state-level.<sup>49</sup> Another possibility is that employees previously compensated for a non-compete clause could be made worse off by a ban if employers were to move towards deferred compensation models.<sup>50</sup>

Full bans on the use of non-compete clause are rare in comparable jurisdictions globally. In the US, four states (California, Minnesota, North Dakota and Oklahoma) have banned all non-compete

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<sup>46</sup> Australian Council of Trade Unions (ACTU), *Submission to the Competition Review's Issues Paper*, 2024; Australian Nursery and Midwifery Federation (ANMF), *Submission to the Competition Review's Issues Paper*, 2024; Legal Aid NSW, *Submission to the Competition Review's Issues Paper*, 2024; Women's Legal Services Australia, *Submission to the Competition Review's Issues Paper*, 2024; Circle Green, *Submission to the Competition Review's Issues Paper*, 2024; Youth Law Australia, *Submission to the Competition Review's Issues Paper*, 2024; JobWatch, *Submission to the Competition Review's Issues Paper*, 2024.

<sup>47</sup> Business Council of Australia (BCA), *Submission to the Competition Review's Issues Paper*, 2024, p. 9; Tech Council of Australia, *Submission to the Competition Review's Issues Paper*, 2024, p. 4; Ai Group, *Submission to the Competition Review's Issues Paper*, 2024, pp. 11–12.

<sup>48</sup> Ai Group, *Submission to the Competition Review's Issues Paper*, 2024, p. 9; Herbert Smith Freehills, *Submission to the Competition Review's Issues Paper*, 2024, p. 7; Professor W van Caenegem & C Douglas, *Submission to the Competition Review's Issues Paper*, 2024, p. 12; Australian Financial Markets Association (AFMA), *Submission to the Competition Review's Issues Paper*, 2024, p. 4.

<sup>49</sup> B Greenwood, B Kobayashi & E Starr, ‘Can You Keep a Secret? Banning Noncompetes Does Not Increase Trade Secret Litigation’, *Donald G. Costello College of Business at George Mason University Research Paper*, 2024, pp. 3, 23.

<sup>50</sup> MFA, *Submission to the Competition Review's Issues Paper*, 2024, p. 4; AFMA, *Submission to the Competition Review's Issues Paper*, 2024, pp. 3–4.

clauses. Several other US states (e.g. Ohio, Arizona, Illinois, Tennessee) have also recently introduced bills to legislate a ban.<sup>51</sup> At the federal level, the FTC issued a nationwide rule on 23 April 2024 to ban non-compete clauses.<sup>52</sup>

#### 4.1.2. Option 2: Statutory limitations

This option would impose statutory limitations on the use of non-compete clauses for high-income employees. Two alternative limitations are suggested: mandatory compensation and/or duration limits. Treasury is seeking feedback on these statutory limitations, and whether either one would be sufficient or whether both would be required. Businesses would still be required to ensure that non-compete clauses are reasonably necessary to protect their legitimate interests and are not contrary to public policy, as this option would not displace other common law requirements for a valid restraint.

##### Mandatory minimum compensation

Several stakeholders, including academics and legal experts, expressed support for requiring a mandatory minimum level of compensation for restrained employees for the duration of the restraint.<sup>53</sup> As this would only set a minimum, business and employees would be expected to continue to negotiate higher levels of compensation based on their circumstances.

Imposing mandatory compensation could be expected to significantly reduce the prevalence of non-compete clauses because it ensures businesses face an appropriate and proportionate burden for the protection of their interests. This would discourage businesses from using non-compete clauses as a standard contract term and instead reserve their use for situations where they truly protect a legitimate and valuable interest. It would also ensure that the broader economic costs of non-compete clauses are considered, and partially covered, by the business in deciding whether to use these clauses.

Business stakeholders did not support mandatory compensation because of the costs it would impose on employers. They also raised concerns that small businesses would be unfairly disadvantaged as these employers are less likely to be in a financial position to use non-compete clauses.<sup>54</sup> This could have the perverse outcome where larger businesses are conferred a competitive advantage over smaller businesses since they can afford to use non-compete clauses to protect their interests.

Compared to a full ban, the labour productivity improvements from increased worker mobility would be less, but by providing businesses with greater flexibility, non-compete clauses could continue to be used where they protect valuable and highly productive business interests, while discouraging their widespread use. Businesses would also retain more incentives to innovate and invest in employees compared to a full ban.

Compared to all other options (including the status quo), mandatory compensation would place an additional financial and administrative burden on businesses. In addition, to ensure the appropriate

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<sup>51</sup> Economic Innovation Group (EIG), *State Noncompete Law Tracker*, EIG website, 2025, accessed 3 July 2025.

<sup>52</sup> US FTC, *FTC Announces Rule Banning Noncompetes* [media release], US Government, 23 April 2024. Note: this ban was subsequently overturned in a district court on the basis that the FTC lacked the statutory authority to issue the rule. See: *Ryan LLC v FTC* [2024] US Dist Ct, ND Tex.

<sup>53</sup> LCA, *Submission to the Competition Review's Issues Paper*, 2024; C Parkin, *Submission to the Competition Review's Issues Paper*, 2024; Professor W van Caenegem & C Douglas, *Submission to the Competition Review's Issues Paper*, 2024.

<sup>54</sup> COSBOA, *Submission to the Competition Review's Issues Paper*, 2024, pp. 2–3; Ai Group, *Submission to the Competition Review's Issues Paper*, 2024, p. 11.

balance is achieved, the following policy settings would need to be closely considered before implementation:

### **Level of compensation**

As noted above, the compensation level would seek to limit the inclusion of non-compete clauses in standardised employment contracts while also ensuring that businesses bear an appropriate share of the costs of these clauses to employees and the economy. Of 11 jurisdictions identified by Treasury with statutory minimum compensation, 8 have set it within the range of 40 to 60 per cent.<sup>55</sup>

The rate should be set high enough that it disincentivises the inclusion of unreasonable and unnecessary non-compete clauses and appropriately compensates restrained workers for their loss of earnings and depreciation of human capital, but not so high as to make it unaffordable to protect reasonable and valuable legitimate interests.

The mandatory compensation level alone is unlikely to target all harmful non-compete clauses in the economy. There are still likely to be some non-compete clauses that are disproportionately harmful to competition. These non-competes would still be subject to a reasonableness test, which includes an assessment of whether the public interest justifies their use, and they will be prohibited if they are determined to be unreasonable.

### **Other considerations**

If this option were adopted, consideration would be given to whether businesses should be able to remove a non-compete clause if no longer necessary, and how this would affect their liability to pay compensation. This could include allowing a business to unilaterally remove the restraint. However, businesses should not be able to benefit from the ‘chilling effect’ of including a non-compete clause, only to remove the restraint when it becomes apparent that a worker was not going to move to a competitor, and thereby avoid any financial consequence. One option could be to require payment for some minimum period after the removal of the restraint if the employee leaves, regardless of whether the business retains the right to enforce the non-compete clause.

Treasury is also seeking views on the structure of payments if this option were pursued. Payments could be required as a lump sum (either at the start or end of the restraint), or as regular instalments paid similar to a salary. Other factors for consideration include administrative simplicity and the need to recoup damages if contract breaches occur.

### **Duration limits**

This option would impose a statutory limitation on the duration of a non-compete clause (a duration limit). Imposing a duration limit would prevent businesses from using non-compete clauses that purport to last for excessive periods and provide some certainty of when they are unenforceable. This may reduce litigation on the permissibility of non-compete clauses which would help employees move to new jobs.

A duration limit would be simpler for businesses and employees to apply than a mandatory compensation regime and would impose fewer direct costs on businesses. However, limiting the duration alone is unlikely to incentivise employers to reduce their use of non-compete clauses

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<sup>55</sup> These jurisdictions are: Belgium, Denmark, Finland, Germany, Netherlands (legislation introduced), Romania, Massachusetts, Oregon. Other jurisdictions include Norway and Washington (up to 100 per cent compensation), and Poland (25 per cent compensation).

because there is no cost attached to their use. This would likely result in more modest improvements to worker productivity when compared to mandatory compensation.

Some business stakeholders argued that duration limits are overly prescriptive, failing to account for exceptional cases where longer restraints are necessary to protect legitimate interests.<sup>56</sup> They submitted that the current common law approach allows courts to exercise discretion and account for the specific circumstances. For example, a CEO may have access to sensitive strategic information that justifies a significantly longer restraint period than that of a mid-level manager.

Under the duration limit option, the intention would be for non-compete clauses to still be unenforceable under the common law unless considered to be reasonable and in the public interest. Therefore, restraint periods that are less than the maximum may still be deemed unreasonable for certain employees and circumstances. This would be strengthened by potential requirements to draft the restraint period of a clause more reasonably (considered below in Section 4.3).

### Potential limit

Treasury has considered international examples of duration limits. In 2023, the UK Government proposed introducing a maximum duration of 3 months, although it is yet to introduce legislation.<sup>57</sup> Other jurisdictions (e.g. Belgium, Denmark, Finland, Norway, Netherlands, Massachusetts, Oregon) have set a statutory limit of 12 months alongside a mandatory compensation regime. Germany, Romania, Poland and China have all set a higher duration limit of 24 months.

A duration limit that is too short could undermine the effectiveness of non-compete clauses in protecting legitimate business interests. Stakeholders submitted that the 3-month maximum proposed in the UK may be too restrictive and that it would effectively amount to a prohibition as this period would likely be consumed by litigation if it occurs.<sup>58</sup> On the other hand, setting the limit too long would provide little or no benefit to employees compared to the current state of the common law, which stakeholders have criticised as not appropriately considering the negative consequences of these clauses to affected employees and the economy.

### Calculation of the restraint period

If a duration limit were implemented, the maximum permissible duration of a non-compete clause could be calculated from the date at which notice of the end of employment is given by the employee or employer. This restriction would not change existing rules or standards for permissible lengths of notice periods, including periods of ‘gardening leave’ where an employee remains employed and remunerated but is directed not to work. Instead, such periods after the date that notice was given would reduce the maximum restraint period.

From the date an employee gives notice, businesses can impose controls to manage sensitive information and relationships, including directing employees not to perform their ordinary duties (subject to the terms of their employment agreement) or seeking to enforce the restraint period.

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<sup>56</sup> Ai Group, *Submission to the Competition Review’s Issues Paper*, 2024, pp. 12–13; BCA, *Submission to the Competition Review’s Issues Paper*, 2024, p. 14.

<sup>57</sup> UK Department for Business and Trade, *Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment*, UK Government, 2023.

<sup>58</sup> LCA, *Submission to the Competition Review’s Issues Paper*, 2024, p. 12; C Parkin, *Submission to the Competition Review’s Issues Paper*, 2024, p. 4; Professor W van Caenegem & C Douglas, *Submission to the Competition Review’s Issues Paper*, 2024, p. 14.

### Box 6: Example of duration period of 12 months

An employee manages important customer relationships at a business. As part of their employment contract, the employee is required to provide 3 months' notice before resigning. The employee has a non-compete clause for the maximum duration of 12 months. On 1 January, the employee provides notice of their resignation.

After giving notice, the employee is directed to spend one month handing over important customer files to a coworker, and then directed not to attend work for 2 months but continues to be paid their full salary. After the 3-month notice period expires, the worker complies with the terms of the non-compete clause, seeking a temporary job in an adjacent industry. On 1 January the following year, the employee is allowed to commence a new job within their industry.

### Consultation questions

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?
2. If mandatory compensation were adopted what should be the minimum compensation required?
3. If a duration limit were imposed, what would be the most appropriate maximum duration?

## 4.2. Non-solicitation clauses for clients and co-workers

Non-solicitation clauses aim to prevent workers from hiring former co-workers (co-worker non-solicitation) and approaching or providing a service to former clients and suppliers once they leave a business (client non-solicitation clauses).

Non-solicitation clauses are generally used by businesses to improve workforce stability and protect client relationships. Compared to a non-compete clause, an appropriately drafted non-solicitation clause imposes a less severe burden on the employee, who may still start a business or work for a competitor so long as they do not solicit work from clients or entice former co-workers to work for a competitor. However, non-solicitation clauses do directly affect third parties—the co-workers and clients—who are not party to the agreement. Because the rationale behind client and co-worker non-solicitation clauses differs, each may require a different policy approach.

A key issue with both client and co-worker non-solicitation clauses is that the definition of solicitation can be vague and hard to distinguish in practice. In considering any reforms to these clauses, it is important to consider what should fall into the scope of solicitation.

If any restrictions were to be made to non-solicitation clauses, the intent would be to not impact any obligations of confidentiality on the worker, including any obligations to protect trade secrets, business methods or process information or information relating to the client.

## Box 7: What are non-solicitation clauses?

Non-solicitation clauses can restrict former workers from ‘soliciting’ former clients (or customers) or other business contacts (for example, suppliers), or co-workers. However, recent cases have shown the broad spectrum of what can be considered as solicitation.

Former employee initiated  Client initiated

The scope of what can be considered as solicitation varies



### Case law examples

*Australian Clinical Labs Pty Ltd v Glew* [2019] FCAFC 124

A former employee was found to have breached their non-solicitation clause by engaging with former clients by actively urging them to leave the former employer and sign up to the former employee’s new business.

*Planet Fitness Pty Ltd v Brooke Dunlop & Ors* [2012] NSWSC 1425

The NSW Supreme Court held the former employee provided a clear opportunity through online advertising for clients to engage first and move to another business. The former employee was ordered to cease advertising as it was considered as attempting to solicit clients from the former employer.

*Koops Martin Financial Services Pty Ltd v Reeves* [2006] NSWSC 449

The NSW Supreme Court held that, although the former employee had not enticed clients away from the employer or revealed confidential information, he had accepted instructions and performed work for a former client, and that this was validly restrained by a restraint clause.

### 4.2.1. Client non-solicitation clauses

Client non-solicitation clauses can have adverse impacts on competition, consumer choice and job mobility, especially within industries with a high level of direct customer interaction. Importantly, they restrict a client’s ability to freely choose a product or service from the provider they would prefer. In smaller, concentrated markets businesses will often have long-standing client relationships where these clauses can function similarly to non-compete clauses by effectively prohibiting former employees from engaging with any clients associated with the business.

Business stakeholders generally support client non-solicitation clauses as they protect valuable client connections, particularly for small businesses. Stakeholders highlighted these restraints can provide incumbent businesses the ability to protect and increase investment in their client relationships. It can provide a level of trust between employers and employees that supports business continuity through the preservation of existing relationships between business and clients.



Under the common law, client solicitation has ranged from former employees actively seeking to solicit former clients, to clients engaging with former employees first. This lack of clarity creates uncertainty around what interactions are prohibited under a non-solicitation clause.

The impact of client non-solicitation clauses varies across industries. Stakeholders highlighted concerns about the use of these clauses for employees particularly in the healthcare and broader care and support sector where client relationships may be especially important for the client to receive an appropriate level of care. For example, stakeholders raised specific concerns where the choice of care and continuity of support can be extremely important to people with disabilities. The National Disability Insurance Scheme (NDIS) is designed to give people with a disability the right to choose who delivers their support and how their support services are delivered and obliges providers to act with respect for this right.<sup>59</sup> An NDIS participant may prefer specific carers with whom they have developed rapport and trust. The carer may also have developed unique insights about the participant's needs and condition over time, which may be disrupted if the client is forced to change carer. Similar concerns have been raised by stakeholders in the private medical practice, primary health and aged and home care sectors.<sup>60</sup>

### Reform options

Treasury is seeking stakeholder views on whether to restrict client non-solicitation clauses, and if so, what limits would be appropriate. A full ban on client non-solicitation clauses may be too restrictive for businesses and may not provide the appropriate balance for employers and employees.

A potential reform option could instead be to impose a duration limit on the use of client non-solicitation clauses from the date that the worker gives notice. Within that period, an employer would have adequate time to secure relationships with their clients before the recently departed employee could actively entice the client to move to a competing business.

This option acknowledges that, although a business does not have a right to dictate who a client could engage with, it may be unfair for a former employee to use the information and access obtained while employed to entice clients away before the business has any reasonable opportunity to attempt to maintain the customer's patronage. This would justify at least a short period calibrated to provide a reasonable time for the business to take active steps to retain their clients while not preventing the former employee from starting a new business at all.

Legal academics have suggested 3 months as a reasonable duration as it would still provide employers adequate time to invest and strengthen their client relationships without impeding on consumer choice.<sup>61</sup> Data collated from Herbert Smith Freehills found that between 2010 and 2022, 50 non-solicitation clauses were deemed to be valid by the courts, where more than half of these cases had duration limits of 12 months or greater.<sup>62</sup> A duration limit that goes beyond 12 months could be too long as it may appropriately balance the interests of the former employee and client.

International examples have shown a range of duration limits for client non-solicitation clauses. In Germany, non-solicitation clauses cannot exceed a duration of 2 years.<sup>63</sup> Whereas France has

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<sup>59</sup> NDIS Commission, *Guide: The NDIS Code of Conduct for providers*, 2024.

<sup>60</sup> ANMF, *Submission to the Competition Review's Issues Paper*, 2024, pp. 14–15.

<sup>61</sup> Dr I Ross & Professor A Stewart, *Submission to the Competition Review's Issues Paper*, 2024; Professor J Riley Munton, *Submission to the Competition Review's Issues Paper*, 2024.

<sup>62</sup> Herbert Smith Freehills (HSF), *Australia: Breaking the chains – ACCC Review of non-compete and no-poach provisions in employment contracts*, HSF website, 27 March 2023. This data does not distinguish between client and co-worker non-solicitation clauses.

<sup>63</sup> L&E Global, *Restrictive Covenants in Germany*, L&E Global website, 2024.

implemented a limit that ranges between 6 months to 2 years.<sup>64</sup> Denmark has also placed restraints on non-solicitation of clients that is only enforceable after 6 months of employment and for a maximum of 12 months with minimum compensation also included. However, the clause only applies to customers that had direct contact with the former employee in the previous 12 months.<sup>65</sup>

Separate to any restriction on the appropriate duration of a non-solicitation clause, it is also relevant to consider what activities amount to solicitation, and should therefore be possible to restrain. A starting position could be for solicitation to include any active steps of the former employee to interact with a client in an effort to entice them away, while explicitly excluding restrictions on passive interactions of merely dealing with former clients (i.e. where the interaction is entirely client-initiated). Certain activities, such as advertising, may depend on the circumstances of the case.

Similarly, any reform would need to consider whether a valid solicitation clause could include clients of the business with which the former employee had not had a relationship. Limiting non-solicitation to only those clients with direct contact would ensure the restraint is focussed on the kind of information and relationships that the former employee actually had access to while they were employed.

### Consultation questions

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).

## 4.2.2. Co-worker non-solicitation clauses

### Definition

Co-worker non-solicitation clauses, sometimes referred to as ‘non-recruitment’ terms, are contractual terms that prohibit a departing employee from inviting or recruiting their former co-workers to join them at their new job, or from doing anything that could cause those former co-workers to leave the company. These clauses are often accompanied by time limits. Like non-compete clauses, there is no clear definition of what amounts to a co-worker non-solicitation clause.

### Box 8: Example of a co-worker non-solicitation clause

A personal assistant was employed to support 2 senior employees of a company. This assistant had knowledge of the company’s managed funds, administrative arrangements for managing funds and contact with the company’s clients.

When the senior employees decided to leave the company and start a competing business, the personal assistant soon followed. The original business claimed that these senior employees had breached their employment contract relating to an express covenant stating that they ‘each not entice key employees to terminate his or her employment.’

At an interlocutory hearing, the Court found sufficient grounds to support a temporary injunction from the assistant commencing the new job on the basis that the assistant may have been a key employee of the original company.

<sup>64</sup> DWF Group, *Restrictive Covenants – key considerations for employers in France*, DWF Group website, 2022.

<sup>65</sup> D Andrews & A Garner, ‘Five facts on non-compete and related clauses in OECD countries’, *OECD Economics Department Working Papers*, 2025, no. 1833, p. 16.

## Impact of co-worker non-solicitation clauses

Co-worker non-solicitation clauses limit job mobility but not as severely a non-compete clause. However, it also impairs the freedom of other workers, who are not a party to the clause and who are therefore not compensated for the restriction, to move to their preferred and most productive job, reducing their bargaining power and potential wages. In circumstances where restrained employees may start their own businesses, these clauses can limit access to networks of potential staff the former employee knows they would be most productive with. This can have adverse impacts on job switching and business dynamism which are key sources of productivity, entrepreneurship and innovation. Legal academics have supported restricting these clauses due to their unfairness.<sup>66</sup>

Some stakeholders have supported the expansion of the common law to protect the stability of a business' workforce. Businesses operating in tight labour markets may use these clauses to help protect staff turnover. In contrast, other stakeholders criticise the merits of this expansion, arguing business should not have any special right in preventing staff from leaving where those employees do not present a risk to confidential information or client relationships. Further, they noted that there are fairer and less restrictive means to achieve workforce stability, including better pay and conditions and improving workplace culture to retain workers.

Overall, the use of co-worker non-solicitation clauses and the restrictions implemented can be broadly deemed as anti-competitive. It can unnecessarily restrict workers from moving to another job and can disadvantage businesses by reducing their ability to hire talent.

## Reform option

A potential reform option could be to implement a full ban on the use of co-worker non-solicitation clauses, analogous with the announced ban on 'no-poach' agreements (outlined in more detail in Section 6), unless statutory exemptions applied. Both no-poach agreements and co-worker non-solicitation clauses share similarities where third parties who are not party to the clause or agreement are restricted unfairly.

Some legal academics have argued that businesses should not have a special interest, protected by the courts, in protecting a stable workforce beyond what can be achieved through attractive terms and conditions of employment.<sup>67</sup> In consulting on the appropriate reform for these clauses, Treasury is interested in views on why courts should protect a business' interest in workforce stability with a restraint, and in what circumstances.

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<sup>66</sup> Dr I Ross & Professor A Stewart, *Submission to the Competition Review's Issues Paper*, 2024, p. 7; Professor J Riley Munton, *Submission to the Competition Review's Issues Paper*, 2024, p. 8.

<sup>67</sup> Professor J Riley Munton, *Submission to the Competition Review's Issues Paper*, 2024, p. 3.

## Consultation questions

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?

### 4.3. Other requirements for valid restraint clauses

In the sections above, this paper contemplates circumstances where a post-employment restraint may still be lawfully imposed on an employee as part of an employment relationship. Depending on the final policy reforms adopted, this could include:

- Where a narrow exemption to the ban may apply to a non-compete clause for a low- or middle-income employee (see Section 3.4),
- A non-compete clause for an employee earning above the high-income threshold, or
- A client or co-worker non-solicitation clause applying to any employee.

These clauses would continue to be subject to the existing common law presumption that the clause is invalid on the basis that it is contrary to public interest. An employer would still have the onus to establish that a proposed restraint goes only so far as is reasonably necessary to protect a legitimate business interest. An employee could then claim the restraint remains nonetheless contrary to the public interest. This presumption and process for determining validity could be codified in statute to increase clarity and certainty.

As noted above, the common law doctrine attempts to balance the complex and conflicting interests of the public, business and workers. However, evidence from stakeholders suggests that the implementation of the restraint of trade doctrine *in practice* has allowed for unnecessary uncertainty that can harm both parties without furthering either the public interest or protection of legitimate business interests. Modest changes to the common law doctrine could be considered to reduce the prevalence of expensive disputes and litigation to resolve uncertainties with the existing drafting of restraints.

This section outlines options for requirements that restraints of trade agreed in employment would need to satisfy before they could be considered valid, including:

- Prohibiting ‘cascading’ restraint clauses by requiring businesses to specify a single reasonable duration limit and geographic nexus that is required to protect the business’ legitimate interests, or
- Requiring restraint clauses to specify the legitimate business interest to be protected by a restraint.

This paper also seeks views on whether other changes should be made to clarify or amend the restraint of trade doctrine.

These reform options would apply to non-compete clauses and non-solicitation clauses that would not be banned by the reforms contemplated above and which would be agreed as part of an employment relationship. It would not apply to non-disclosure clauses or other legal post-employment obligations on employees, or to non-compete clauses or non-solicitation clauses that apply outside of employment (e.g. in the context of the sale of business).

### 4.3.1. Removing ‘cascading’ clauses

Under the current common law doctrine, the courts may sever one part of a restraint that makes it unreasonable to allow the remainder of the restraint to be upheld. This is referred to as the ‘blue pencil doctrine’. Over time, this has led to the proliferation of ‘cascading’ clauses and created significant uncertainty for workers and businesses, leaving both parties not knowing what scope might be enforceable (see Box 9). This can exacerbate the ‘chilling effect’ as workers may be concerned that the broadest formulation of the restraint may apply, while businesses may nonetheless change business practices on the basis that the narrowest restraint may apply.

#### Box 9: Example of a cascading clause

To reasonably protect the goodwill and the legitimate business interests of the Company, during the **Restraint Period** and within the **Restraint Area** (referred to below), you will not...

**Restraint Period** means, from the date of termination of your employment:

- (a) 10 years;
- (b) 5 years;
- (c) 2 years;
- (d) 1 year;
- (e) 6 months;
- (f) 3 months.

**Restraint Area** means:

- (a) Australia;
- (b) The State or Territory in which you are employed at the date of terminations of your employment;
- (c) The metropolitan area of the capital city in which you are employed at the date of termination of your employment;
- (d) a 20-kilometre radius from the business;
- (e) a 5-kilometre radius from the business.

Each restraint contained in this Deed (resulting from any combination of the wording [above]) constitutes a separate and independent provision, severable from the other restraints.

The NSW Restraints of Trade Act permits the courts to add new words to narrow the scope of the restraint to make the clause reasonable and enforceable. Although this law has reduced the prevalence of cascading clauses in NSW, employers are less incentivised to draft targeted restraints knowing that the courts can ‘read down’ the clause without needing to actively sever parts of the clause.

Stakeholders noted that both the common law and the NSW Restraints of Trade Act provide incentives for businesses to draft broad restraints with the expectation that judges will sever or modify the unreasonable elements of the clause to make the remainder of the restraint enforceable and that the restraint will still deter employees. Workers may be unlikely to challenge unreasonable clauses as they lack the knowledge and resources to commence legal proceedings.

One way to address this issue could be to introduce a ‘one-shot rule’ to limit the use of cascading clauses, since the inclusion of multiple potential duration periods and geographic areas promotes uncertainty and increases the prospects of expensive litigation.

A ‘one-shot rule’ could be implemented in a number of ways. A simple approach, and one which would directly target the prevalence of these uncertain clauses, would be to invalidate the entire restraint if it specifies intentionally overlapping duration periods and/or geographic extents. In the example in Box 9 above, the entire restraint would be invalid and unenforceable under this version of the rule.

An alternative approach would be to interpret a restraint as if only the narrowest of the cascading clauses applied. In the example above, this would allow, at most, a 3-month restraint within a 5-kilometre radius from the business (if that were reasonable under the broader common law doctrine).

In either case, businesses and employees would be able to update the clause to increase or reduce the coverage as the employment relationship evolves. The rule would also not apply to periods or locations that are only incidentally overlapping. For example, a geographic nexus for a valid restraint could include an area described by a radius around office locations an employee works in. These areas may overlap if the offices are near each other. This is different to specifying two radii of different length around the same office.

Although other components of restraint clauses may also be severable (such as an enumerated list of potential competitors or restrained activities), the use of cascading clauses in these circumstances does not appear to be as prolific or result in as much uncertainty for businesses and workers as cascading geographic areas or time periods.

### Consultation questions

6. Should restraints with cascading duration periods and geographic extents be allowed?
7. Should severability of other parts of restraint clauses be limited in other ways?

#### 4.3.2. Requirement to specify the legitimate business interest

The courts currently determine that the non-compete clause is valid and enforceable if the employer has “a legitimate protectable interest” and the restraint is no more than reasonably necessary to protect said interest. Legitimate interests identified by courts include:

- a) protection of trade secrets or other confidential information;<sup>68</sup>
- b) protection against solicitation of clients with whom the former worker had some personal connection;<sup>69</sup> and
- c) protection against key staff being recruited by former colleagues.<sup>70</sup>

In general, most businesses are expected to already identify and control employees’ use of confidential information (including post-employment), and to explain the reasons and extent to which client relationships are subject to a cooling-off non-solicitation period after an employee resigns.

Codifying this requirement would provide greater certainty to both parties about the substance and proportionality of a restraint clause. Over time, this would be expected to reduce the prevalence of

<sup>68</sup> *Pioneer Concrete Services Ltd v Galli* [1985] VR 675 at 710–11 per Crockett, Murphy and Ormiston JJ; *Lindner v Murdock’s Garage* (1950) 83 CLR 628 (*‘Lindner’*), 633 per Latham CJ.

<sup>69</sup> *Lindner* at 633–4 per Latham CJ.

<sup>70</sup> *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717 at [55].

restraint clauses that are not proportionate to the interest being protected and reduce the need for litigation. It may also lower the cost of litigation, by narrowing the pleadings the employer could rely on to defend the validity of the restraint clause. A non-compete clause that purported to only protect client relationships would likely be disproportionate to a non-solicitation clause of the similar length.

### Consultation questions

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

### 4.3.3. Other clarifications or amendments to the common law

Although stakeholders generally recognised that the common law attempts to strike a balance between workers and businesses, other issues with the restraint of trade doctrine were raised during consultation which could be addressed through legislation, including:

- Whether the compensation of employees for a restraint is sufficiently considered when a court determines whether to uphold a restraint,
- Whether the scope of legitimate interests, which has expanded within Australia to include an interest in a stable workforce (permitting co-worker non-solicitation clauses) is appropriate,
- Whether the threshold for the use of injunctions generally, and interlocutory injunctions specifically (which would prevent a worker from moving to a competitor during the court proceedings) are appropriate with respect to the public interest against competition and the particular harm on an employee of an extended period without work, and
- Whether the common law is clear how a restraint would be enforced where an employment relationship has been breached, or where an employee has been made redundant.

### Consultation questions

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

## 5. Restraints on concurrent employment

In addition to post-employment restraints, employers may seek to prevent employees from engaging in certain activities that may compete or interfere with their employment or engagement. However, these clauses (often referred to as an ‘exclusive service’ clause) may be broad enough to purport to prevent employees from holding any secondary employment, freelance or consulting work or operating a new business, even if that activity is unrelated to their primary role. They may also seek to restrict volunteer activity. These clauses are generally unrelated to post-employment non-compete clauses in contracts and instead are an extension of pre-existing common law duties of fidelity, loyalty, good faith and confidentiality.

Part-time and casual employees can be particularly impacted by restraints of trade that apply during employment. Part-time and casual engagements can result in the underutilisation and underemployment of workers, where employees may have capped hours, or employers are unable to afford staff being rostered on for more hours. As a result, some casual and part-time employees need to work multiple jobs to earn an adequate income. Similar to the post-employment restraints of trade, the power imbalance between the worker and employer and the potentially insecure nature of these types of employment, decreases the likelihood these workers will challenge the validity of any applicable restraint of trade clause applying during their employment.

### 5.1. Issues Paper feedback

There was no clear consensus among stakeholder submissions to the Issues Paper to support banning restraint clauses that apply during employment for full-time employees. Stakeholders broadly agreed, however, that it is fair for an employer to contract the exclusive services of a full-time employee. Some stakeholders suggested that the common law could also be supplemented by a test of ‘reasonableness’, which should consider things like the nature of the role, seniority and remuneration of the employee, the nature of the industry in which they work, and the nature of the secondary employment.<sup>71</sup>

Stakeholder views were varied on how, if at all, restraints during employment for part-time and casual employees should be regulated.

Some stakeholders argued that it is not appropriate for a part-time or casual worker to be restrained to one employer, noting that these workers may need the ability to seek additional work to supplement their income. Stakeholders also noted that employers are already able to protect legitimate business interests through the use of other contractual mechanisms, such as confidentiality clauses. Subsequently, this led to some stakeholders arguing that restraints of trade that apply to part-time and casual employees should be prohibited or limited.

On the other hand, business stakeholders and some legal representatives argued that banning or reforming restraints for part-time or casual employees should continue to be left to the common law to regulate. Courts have generally found that more junior employees, and those engaged on less than full-time hours, will have successfully discharged the duties of fidelity, loyalty and good faith if they have worked “according to their ability for their stipulated hours” and what they do in their free time is not their employer’s concern.<sup>72</sup> The most vulnerable employees, some argue, are therefore already

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<sup>71</sup> ACTU, *Submission to the Competition Review’s Issues Paper*, 2024, p. 17.

<sup>72</sup> ACCI, *Submission to the Competition Review’s Issues Paper*, 2024, p. 25.



sufficiently protected by the common law, although it is unclear whether employees understand the law as it applies to these clauses, giving rise to concerns of a ‘chilling effect’.

A further consideration is that the public may have an interest in permitting employers some control over certain secondary employment, even for part-time or casual workers. This includes circumstances where the secondary activity would give rise to a conflict of interest, or where the restraint actually protects competition by preventing secondary employment that could facilitate cartel conduct.

## 5.2. Reform considerations

Treasury is seeking views on whether the Government should restrict the use of concurrent employment restraints, while not displacing any existing duties under the common law, equity or statute (such as sections 182 and 183 of the Corporations Act). Noting stakeholder feedback, a ban on concurrent employment restraints for full-time employees would likely be unreasonable for business. Instead, it may be preferable that these restraints be subject to the existing common law, with a possible clarification that the employer may not unreasonably withhold consent.

Stakeholder feedback regarding workers engaged on less than full-time hours suggests that there are valid reasons to limit the use of restraints during employment for these workers. Though these workers may be protected by the common law, given the nature of their engagement and practical considerations they are less likely to challenge such clauses. Further, restraining these workers from pursuing other employment can prevent them from achieving their full productive capacity.

One option may be to limit restrictions on concurrent employment to circumstances where the secondary employment would conflict with the proper performance of the employee’s duties in their primary job, or otherwise present a conflict of interest.

However, addressing these concerns would require consideration of complex matters, which could result in unintended consequences. These include, for example, whether and how the high-income threshold should apply for an employee with multiple jobs.

Whether or not limitations are applied to restraints on concurrent employment, the intent would remain that confidentiality obligations would not be affected, including any obligations to protect trade secrets, business methods or processes, or client information.

### Consultation questions

1. Are there any other considerations or potential unintended consequences if restraints on concurrent employment were to be regulated beyond the common law?
2. If there were to be restrictions on these restraints, how should they be implemented?

## 6. No-poach and wage-fixing agreements

Alongside reforms to non-compete clauses and non-solicitation clauses, the Government announced that it will close loopholes in the competition law that may allow businesses to make no-poach and wage-fixing agreements. 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.

The OECD recognises these forms of collusion to be among the most detrimental anti-competitive practices in labour markets.<sup>73</sup> This is supported by a substantial body of international evidence showing that no-poach and wage-fixing agreements suppress wages, reduce economic output and stifle innovation.<sup>74</sup> In response, advanced economies such as the US, the European Union, the UK and Canada have increased scrutiny and imposed sanctions on employers involved in these practices.<sup>75</sup>

Legal academics, unions and community legal centres supported a ban on these agreements in their submissions to the Issues Paper on the principle that agreements which restrict the employment prospects of non-parties should be unenforceable.<sup>76</sup> Business stakeholders argued there was no evidence to support a ban, noting limited evidence of their widespread use in Australia.<sup>77</sup>

No-poach and wage-fixing agreements are analogous to supplier allocation or price-fixing cartels. These agreements, like other kinds of cartel conduct, may be made in secret but can still cause significant harm. The Government's announced reforms will ensure they receive similar treatment under the law as other forms of anti-competitive conduct. This section discusses the implementation of this reform, seeking stakeholder views on penalties, transition arrangements and possible limited statutory exemptions.

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<sup>73</sup> OECD, '[Competition Issues in Labour Markets](#)', *OECD Roundtables on Competition Policy Paper*, 2020, p. 28.

<sup>74</sup> See for example: A Krueger & O Ashenfelter, '[Theory and Evidence on Employer Collusion in the Franchise Sector](#)', *National Bureau of Economic Research Working Paper*, 2018, no. 24831; R Davis et al., '[No-poach agreements – Closing the enforcement gap](#)', *Concurrences On-Topic*, 2023, no. 4; M Gibson, '[Employer Market Power in Silicon Valley](#)', *IZA Institute of Labor Economics Discussion Paper*, 2021, no. 14843; F Lafontaine, S Saattvic & M E. Slade, '[No-poaching Clauses in Franchise Contracts, Anticompetitive or Efficiency Enhancing?](#)', 2023; B Callaci et al., '[The Effect of Franchise No-Poaching Restrictions on Working Earnings](#)', *IZA Institute of Labor Economics Discussion Paper*, 2023, no. 16330.

<sup>75</sup> See for example: US Department of Justice, [Jury Convicts Home Health Agency Executive of Fixing Wages and Fraudulently Concealing Criminal Investigation](#) [media release], US Government, 14 April 2025; European Commission, [Commission fines Delivery Hero and Glovo €329 million for participation in online food delivery cartel](#) [media release], 2 June 2025; UK Competition and Markets Authority, [Anti-competitive behaviour relating to freelance labour in the production and broadcasting of sports content](#) [media release], UK Government, 13 July 2022; Competition Bureau Canada, [Enforcement guidelines on wage-fixing and no-poaching agreements](#), Government of Canada, 2023.

<sup>76</sup> ACTU, [Submission to the Competition Review's Issues Paper](#), 2024, p. 18; LCA, [Submission to the Competition Review's Issues Paper](#), 2024, pp. 20–21; Legal Aid NSW, [Submission to the Competition Review's Issues Paper](#), 2024, pp. 35–36; Professor J Riley Munton, [Submission to the Competition Review's Issues Paper](#), 2024, pp. 9–10.

<sup>77</sup> BCA, [Submission to the Competition Review's Issues Paper](#), 2024, p. 12; ACCI, [Submission to the Competition Review's Issues Paper](#), 2024, p. 8.

## 6.1. Overview of the current law

Part IV of the Competition and Consumer Act covers restrictive trade practices which includes cartel conduct (Division 1) and other anti-competitive provisions (Division 2).<sup>78</sup>

Division 1 prohibits individuals from making or giving effect to a “contract, arrangement or understanding” that contains a cartel provision in the form of either (1) price-fixing; (2) restricting outputs in the production and supply chain; (3) allocating customers, suppliers or territories; or (4) bid-rigging.<sup>79</sup> Division 2 prohibits a broad range of other anti-competitive conduct, including “concerted practices” which “substantially lessen competition” (SLC), secondary boycotts, the misuse of market power, exclusive dealing and resale price maintenance, among other things.

### Box 10: Explanation of key competition law terms

#### ‘Contract, arrangement or understanding’

Not defined in the Competition and Consumer Act. Courts have determined this to be a broad range of consensual dealings.<sup>80</sup> Can include a formal contract but usually takes a more subtle form such as a shared, implicit understanding about how each business will act.

#### ‘Concerted practice’

A form of cooperation between businesses that falls short of a formal agreement but knowingly substitutes practical cooperation for the uncertainty of competition.<sup>81</sup> For further information refer to the Australian Competition and Consumer Commission’s [Guidelines on concerted practices \(2018\)](#).

#### ‘Substantially lessen competition’ (SLC)

Broadly construed it is any practice that interferes with the competitive process in a meaningful way by deterring, hindering or preventing competition.<sup>82</sup> The SLC test is a long-standing feature of Australia’s competition law regime.

Part IV of the Competition and Consumer Act has several exemptions, including one for matters related to “remuneration, conditions of employment, hours of work or working conditions of employees.”<sup>83</sup> The rationale for this exemption is that these matters are typically governed by common and employment law because labour markets are treated differently from markets for goods and services.<sup>84</sup> The perverse outcome from this is that this may allow businesses to collude with each other on employment matters outside of the collective bargaining regime in Australia.

<sup>78</sup> Note that the Competition Codes of the states and territories extend the operation of Part IV of the Competition and Consumer Act to all persons in Australia. See: *Competition Policy Reform (New South Wales) Act 1995*; *Competition Policy Reform (Victoria) Act 1995*; *Competition Policy Reform (Queensland) Act 1995*; *Competition Policy Reform (South Australia) Act 1995*; *Competition Policy Reform (Western Australia) Act 1995*; *Competition Policy Reform (Tasmania) Act 1995*; *Competition Policy Reform (Northern Territory) Act 1995*; *Competition Policy Reform (Australian Capital Territory) Act 1995*.

<sup>79</sup> *Competition and Consumer Act 2010* (Cth) s 45AA.

<sup>80</sup> *ACCC v Leahy Petroleum Pty Ltd* [2007] FCA 794, at [24].

<sup>81</sup> Parliament of the Commonwealth of Australia, [Competition and Consumer Amendment \(Competition Policy Review\) Bill 2017 Explanatory Memorandum](#), 2017, clause 3.19.

<sup>82</sup> ACCC, [Guidelines on concerted practices](#), 2018, p. 8.

<sup>83</sup> *Competition and Consumer Act 2010* (Cth) ss 51(2)(a), (aa).

<sup>84</sup> Professor I Harper et al., [Competition Policy Review Final Report](#), 2015, p. 67.

## 6.2. Implementing the announced reform

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. Amendments may also be required to the definition of 'Services' in the Competition and Consumer Act, as it relates to this new prohibition.

The ban will be prospective and will take effect from 2027. Businesses may still be sanctioned if they give effect to a no-poach or wage-fixing agreement after this date, even if the agreement was made before 2027. As the independent statutory authority that enforces the Competition and Consumer Act, the Australian Competition and Consumer Commission (ACCC) will be responsible for investigating breaches and educating businesses about the reform to help prevent these agreements.

Most forms of anticompetitive conduct in Part IV attract civil pecuniary penalties. The calculation of the maximum penalty is the greater of:

- \$50 million,
- the value of the benefits derived from the conduct multiplied by three, or
- 30 per cent if the business' adjusted turnover during the breach turnover period (if the value of the benefit obtained cannot be calculated).<sup>85</sup>

In addition, cartel conduct also attracts criminal sanctions. For businesses, this may result fines, calculated using the above formula.<sup>86</sup> Individuals acting on behalf of a business face potential imprisonment for up to 10 years and/or a fine "not exceeding 2,000 penalty units."<sup>87</sup> Criminal sanctions for serious cartel conduct were introduced on the grounds that they are a more effective deterrent than financial penalties alone.<sup>88</sup>

Treasury is seeking stakeholder views on whether no-poach or wage-fixing agreements warrant both civil and criminal sanctions, or if a civil penalty regime is more appropriate.

### 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?

## 6.3. Limited statutory exemptions

The Government is consulting on possible exemptions to the proposed ban, in recognition of the fact that some legitimate, publicly beneficial businesses transactions or collaborations require restraints on

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<sup>85</sup> *Competition and Consumer Act 2010* (Cth) ss 45AJ, 45AK and 76(1A) items 1, 3. Under s 82 of the *Competition and Consumer Act 2010* (Cth), private parties can also seek injunctive relief.

<sup>86</sup> *Competition and Consumer Act 2010* (Cth) ss 45AF, 45AG.

<sup>87</sup> *Competition and Consumer Act 2010* (Cth) s 79(1)(e)(ii).

<sup>88</sup> Parliament of the Commonwealth of Australia, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 Explanatory Memorandum*, 2008, clause 2.2.

competition to make them efficient, or even possible (i.e. ‘ancillary restraints’). This could include circumstances where the process is sufficiently transparent, and the workers have an adequate opportunity to influence the agreement. Some potential exemptions are discussed below.

- **Collective bargaining agreements**, such as multi-employer bargaining agreements, will be exempt from the ban. These agreements are a transparent way to set a *floor* on wages—not a *cap*—and they are also subject to a legislatively controlled process with appropriate safeguards such as worker input.
- **Joint ventures** are already exempt as a form of cartel conduct provided it is reasonably necessary to undertake the joint venture, and that the joint venture is not carried out for the purpose of SLC.<sup>89</sup> This exemption would likely be extended under this reform.
- **Secondment arrangements** could also be exempt from the ban. No-poach agreements enable secondments because they allow businesses to temporarily lend their employees to other businesses, while minimising the risk of losing their employees entirely.
- **Labour hire firms** that rely on no-poach agreements may be exempt from the ban because these agreements stop businesses from directly hiring workers who have been contracted to them by a labour hire provider. Without these agreements, businesses could bypass the labour hire provider, avoiding ongoing fees and the costs of recruitment and training.
- **Professional sports leagues** have been raised as a possible exemption because they rely on collusive agreements (e.g. a salary cap) to maintain a competitive balance between teams.
- **ACCC authorisation** can be sought by businesses in limited circumstances to get an exemption for conduct that may breach competition law. The ACCC only authorises conduct that would not SLC or is in the public interest.

## 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?

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<sup>89</sup> *Competition and Consumer Act 2010* (Cth) ss 45AO, 45AP.