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A NEW ERA FOR WORKER MOBILITY AND COMPETITION? AUSTRALIAN GOVERNMENT'S PROPOSED BAN ON NON-COMPETE CLAUSES AND OTHER RESTRAINTS

As foreshadowed in its 2025-2026 budget, the Australian Government has now released a consultation paper proposing an outright ban on the use of non-compete clauses in some contexts and sweeping reforms relating to other restraints in labour contracts. For interested parties wishing to make submissions to the consultation, submissions are due on 5 September 2025. Importantly, the Australian Government is not currently proposing changes to restraints of trade outside of the employment context.

The proposed changes, which will be made to the *Fair Work Act 2009* (Cth) **(Fair Work Act)** and the *Competition and Consumer Act 2010* (Cth) **(CCA)**, aim to boost job mobility, wage growth, and productivity by banning the use of non-compete clauses for most workers and closing "loopholes" that potentially allow other anti-competitive practices in the labour market. These reforms mark a significant shift in the regulation of employment restraints in Australia and signal a new era for employers, employees, and businesses navigating the Australian labour market.

Summary of key changes proposed for consultation

Continuing its far-reaching competition law reform and productivity agenda, the Australian Government is poised to introduce extensive reforms to certain types of restraints of trade and other anti-competitive conduct in the employment context. The key proposals the Australian Government is seeking feedback on includes:

- **Non-compete clauses** – the scope of any outright ban on non-compete clauses, who will be covered by the ban, enforcement options, and possible exemptions to any prohibition on their use.

- **Non-solicitation of former clients** – whether the use of client non-solicitation clauses should be restricted in any way (e.g, duration, type of activity, scope of clients).
- **Non-solicitation of former co-workers** – whether co-worker non-solicitation clauses should be banned, and possible exceptions to any prohibition on their use.
- **Explicit prohibition of both wage-fixing agreements and no-poach agreements** – the form and details of any explicit ban on no-poach and wage-fixing agreements, potential penalties and enforcement options, and possible exceptions to any prohibition on their use.

Each of these key changes are discussed in greater detail below.

Non-compete clauses

Non-compete clauses restrict a worker (employee or independent contractor) from working for a competitor or establishing a competing business. These clauses are usually drafted by reference to a particular geographic area and specific time period after a worker finishes their engagement.

At present 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 (and state legislation in NSW), which enables businesses to restrain the post-employment activities of their employees where that restriction is reasonable and goes no further than necessary to protect a "legitimate business interest". This has led to an acceptance over time that sometimes it is necessary to prevent a worker from competing as a means to prevent the misuse of confidential information or protect the client relationships of a former employer.

Notably, Australia's law on restraints of trade does not differentiate between non-compete clauses and other forms of restraint. Accordingly, the Australian Government is seeking to enact a clear ban, similar to that of the US Federal Trade Commission **(FTC)** and other State legislation in the USA, to provide certainty and reduce the compliance burden for businesses and workers.

The key details for the proposed ban on non-compete clauses include:

- **Scope of workers affected** – Employees earning less than the high-income threshold outlined in the Fair Work Act ($183,100 for FY25-26), which is currently ~91% of workers across Australia. Treasury is still considering whether to extend the scope to employees earning more than the high-income threshold, and whether it should extend the scope to independent contractors.
- **Prohibition to apply to broad employment relationship** – 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 employer and employee, including deeds separate to the employment agreement, and workplace policies (whether written, or oral).

- **Scope of prohibition** – The proposed prohibition broadly targets restrictions on a worker's mobility, including restrictions on seeking or accepting work, or operating a competing business, after the conclusion of the workers' employment. The definition recognises that the restriction on a worker's mobility could occur in three key ways: "prohibitions", "penalties" and/or "functions to prevent". The prohibition is intended to only capture restrictions on mobility that apply after the worker's current employment concludes.
- **Enforcement** – Treasury is considering giving a wide range of parties standing to commence proceedings, including: affected employees, unions, employer organisations, Fair Work Inspectors and potentially third parties such as prospective employers.
- **Penalties** – Treasury is also considering making the use of these clauses subject to civil penalties if included in employment contracts. This is to address the claimed "chilling effect" where unenforceable clauses are considered to nevertheless deter workers from moving jobs.
- **Exemptions** – Exemptions to the ban are proposed to be limited to circumstances of overriding public interest, such as national security (e.g, former Australian defence staff engaging in work for foreign militaries or governments).
- **Timing** – The ban is expected to take effect prospectively from 2027.
- **Text of the prohibition** – Treasury is consulting on whether the FTC definition is appropriate for the Australian context and whether any specific contractual terms should be explicitly included or excluded from the statutory definition.

Proposed FTC definition of a non-compete:

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; or

b. Operating a business after the conclusion of the employment that includes the term or condition.

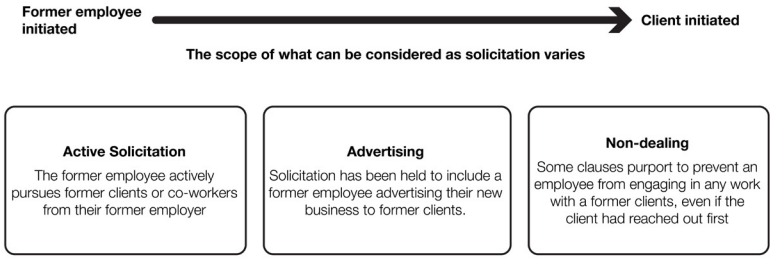
[The] term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.

Notably, the Australian Government is not proposing changes to restraints of trade outside of the employment context. Restraints (such as post-transaction restraints) are subject to exemptions from liability under certain provisions of the CCA (including cartel provisions). Such restraints are typically included in sale documents and are intended to prevent the seller from engaging in actions that could damage the target business's reputation or harm its

relationships with customers, employees or suppliers post-transaction. An example is a non-compete clause restraining the seller from engaging in activities that directly compete with the target business for a specified period, or in a specified area or region where the target business competes.

Non-solicitation clauses (customers and co-workers)

Non-solicitation clauses restrict former workers from "soliciting" former clients or customers, business contacts (e.g, suppliers) or co-workers after ceasing engagement. Often these are contacts that have been facilitated by the employer to increase or consolidate its network and improve services. Non-solicitation clauses are generally used by businesses to improve workforce stability and protect client relationships. Recent cases have shown the broad spectrum of what can be considered as solicitation.



Treasury is consulting on multiple reform options in relation to both co-worker and client non-solicitation clauses. Treasury's intention is to curtail the use of these clauses insofar as they restrict the freedom of third parties which are not bound by the non-solicitation clause but not interfere with any obligations of confidentiality imposed on the worker, including any obligations to protect trade secrets, business methods or process information or information relating to the client.

Proposed changes may see client non-solicitation clauses subject to specific duration limits (e.g, 3-12 months), clearer definitions of "solicitation", and restrictions that only apply to clients with whom the employee has had direct dealings rather than the employer's entire client base (echoing the common law developments in this regard). It is unlikely that a full ban on client non-solicitation clauses would be adopted.

Co-worker non-solicitation clauses may be prohibited entirely or subject to stringent limitations, on the basis that they restrict the freedom of third parties and that maintaining workforce stability is not considered a legitimate business interest warranting protection beyond what can be achieved through competitive employment terms and conditions.

No-poach and wage-fixing agreements

Wage-fixing and no-poach agreements are arrangements between competing businesses that restrict competition in labour markets by either setting caps on wages and employment conditions (wage-fixing) or agreeing not to recruit or hire each other's employees (no-poach). These arrangements are

1. Such provisions may otherwise amount to cartel provisions or anti-competitive arrangements, because they usually prevent or restrict the vendor from engaging in competition in certain markets for a specified period.

"cartel-like" in that they fix pricing for the acquisition of labour or allocate labour resources. Unlike traditional post-employment restraints which are mutually agreed as between an employer and employee (e.g, non-compete, non-solicitation, non-disclosure), wage-fixing and no-poach agreements are typically made without the knowledge or consent of the affected workers and seek to limit staff turnover and suppress worker wages between firms that compete in similar labour markets.

Currently, the CCA contains exemptions from cartel liability for agreements relating to "remuneration, conditions of employment, hours of work or working conditions of employees". The precise application of this exemption is unclear as it has never been tested in the courts. This exemption was originally intended to facilitate collective bargaining and protect legitimate industrial relations activities and scope for this type of activity has significantly increased since the reinvigoration of multi-employer enterprise bargaining in 2024, which involves multiple employers agreeing to minimum wages for workers across an industry. However, it arguably permits businesses to collude on employment matters outside of the regulated collective bargaining framework. It does not obviously apply to no-poach agreements.

While the exemption has not been judicially tested there is a perceived risk it could be used to shield anti-competitive conduct in the labour market. Accordingly, the proposed reform seeks to close this perceived loophole and ensure that such agreements are treated as serious anti-competitive conduct, analogous to price-fixing or market allocation. Any proposed ban on these types of conduct is intended to operate independently of the current cartel and anti-competitive conduct provisions in Part IV of the CCA.

Penalties and enforcement mechanisms still under consultation with Treasury seeking stakeholder input on whether breaches should attract civil penalties, criminal penalties consistent with existing cartel provisions, or both. The Australian Competition and Consumer Commission **(ACCC)** will be responsible for enforcing the new prohibition, including conducting investigations, and seeking penalties through the courts. The reform is intended to operate prospectively, with the ban expected to take effect from 2027. Notably, businesses may still face sanctions if they give effect to a wage-fixing or no-poach agreement after this date, even if the agreement was entered into before the commencement of the ban. These measures are intended to bring Australia in line with international best practice and ensure that collusion in the labour market is subject to the same level of scrutiny and sanction as other forms of cartel conduct.

The proposed reforms will incorporate carefully targeted statutory exemptions to ensure that legitimate and publicly beneficial business arrangements are not inadvertently captured. Exemptions under consideration include collective bargaining agreements (such as multi-employer agreements that are transparent and allow worker input), joint ventures, and certain secondment or labour hire arrangements where restraints are essential to the arrangement's effectiveness. Additionally, professional sports leagues may be exempt for

salary caps and similar mechanisms integral to competition integrity. Businesses may also seek ACCC authorisation for wage-fixing and no-poach agreements that would otherwise breach competition law, where it can be demonstrated that the public benefits of the of the agreements outweigh the public detriment.

Significant impact on businesses

Depending on the final form of the ban, the proposed reform will likely have a significant impact on employers and businesses, including:

1. Employers and businesses will not be able to rely on non-compete clauses in their employment contracts for employees (and potentially independent contractors) earning below the relevant designated high-income threshold. In addition to being unenforceable, any use or reliance on such clauses will likely be subject to civil penalties in line with other contraventions in the Fair Work Act.
2. Increasing focus for employers on protecting their legitimate business interests will be by way of well-drafted and targeted employment contract provisions protecting their confidential information and intellectual property (including after employment ends) and considering proactive use of data protection technology to ensure confidential information is not exfiltrated and is returned on exit. As noted above, the proposed ban on the use of non-competes is in relation to outright prohibitions, penalties and "functions to prevent" post-employment activities of ex-employees. A well-drafted non-disclosure clause ensures that ex-employees are not prevented from pursuing employment opportunities with competing businesses, whilst protecting the employers' "legitimate business interests" – this is so long as the confidentiality clause does not function to prevent employment, rather than merely preventing the use of confidential information or solicitation of clients while working for a competing business.
3. The use of "cascading clauses" (i.e, multiple overlapping durations or geographies) for restraints may well come to an end. Treasury is considering whether to:
    a. implement a "one-shot rule" which would invalidate a restraint in its entirety if it specifies intentionally overlapping duration periods and/or geographic extents; or
    b. in the alternative, interpret a restraint as if only the narrowest of any cascading clauses applied.
4. The uncertainty of whether price-fixing or no-poach arrangements between competitors will be at an end. Businesses engaging in such collusive conduct will be exposed to significant penalties.
5. Employers considering the use of financial incentives on exit and for retention, such as garden leave periods and retention bonuses.

2. According to the current common law doctrine, courts can separate sections of a restraint that are considered unreasonable, permitting the remaining portions to stand. This practice has contributed to the increase of "cascading clauses" over time which are fairly unique to Australia.

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