Australian Government
The Treasury

Competition Review

Impact Analysis:

Reforms to non-compete clauses and other worker restraints

October 2025

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Executive Summary

Overview

Non-compete clauses and other restraints of trade have become a common feature of employment agreements in Australia. By their design, they restrict an employee's freedom to work after they leave their current job. Such clauses have been largely governed by the common law, which has traditionally presumed that these clauses are unenforceable as they are contrary to the public interest. Despite this presumption, these clauses have grown in prevalence across the labour market, in part through the proliferation of standard form contracts, and they are now used well beyond the narrow circumstances in which these clauses have been tolerated by the common law.

There is increasing evidence that this overuse is harming the Australian economy by dampening job mobility even in instances where these clauses are unlikely to be legally enforceable. This reflects the natural risk aversion of many employees who are wary of changing jobs and exposing themselves to legal action. This chilling effect is hampering workers from moving to better-paying and more productive jobs, or negotiating better wages and conditions in their current role.

By harming job mobility and wages growth, these clauses distort the allocation (or matching) of workers, harming productivity, business dynamism, innovation and competition. This impact analysis considers several reform options that address these issues, with the objective that reform boosts productivity, real wages and business dynamism, while minimising additional regulatory complexity and burden on businesses. This can be achieved by ensuring that the proposed reforms strike an appropriate balance between businesses, workers and the public.

Background and stakeholder consultation

On 23 August 2023, the Australian Government announced that non-compete clauses and other worker restraints would be an area of policy considered by Treasury's Competition Review Taskforce (the Review). The objective of the Review was to look at Australia's 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.

The government released an Issues Paper for public consultation between 4 April and 31 May 2024. A diverse group of stakeholders provided submissions detailing the impact of non-compete and other restraint clauses on workers, businesses and the economy.

On 25 March 2025, the Treasurer announced a commitment to ban non-compete clauses for workers 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 no-poach or wage-fixing agreements.

The government released a second paper for public consultation between 25 July and 5 September 2025 to consult on the technical implementation details of the above reforms. The paper also consulted on whether further possible changes were needed to non-compete clauses for high-income workers, non-solicitation clauses, and the restraint of trade doctrine more broadly, amongst other things.

Reform options considered

In response to the growing domestic and international evidence and the feedback from formal and informal stakeholder consultation, 3 options for reform were considered in depth, including the status quo (Option 1). Option 2 would introduce a partial ban of restraint clauses, and Option 3 would introduce a full ban of all restraint clauses in employment arrangements.

- Option 1: Status quo – This option would maintain the existing common law approach in regulating non-compete clauses and other employment restraints of trade. The common law would still regulate the use and enforceability of these clauses with post-employment restraints of trade presumed to be void and unenforceable, unless they are reasonably necessary and proportionate to protect the legitimate interest of the employer. However, consistent with the discussion above, the status quo option factors in continued excessive use of such clauses and the consequential flow-on effects to workers and the broader economy.
- Option 2: Partial ban of employment restraints of trade (preferred option) – This option targets the restraints of trade which are most harmful to workers and the economy, while retaining some flexibility for businesses to use limited restraints in certain circumstances. This option would:
  - ban the use of non-compete clauses for low- and middle-income employees
  - ban the use of co-worker non-solicitation clauses
  - ban the use of no-poach and wage-fixing agreements, and
  - limit the use of remaining restraints of trade, particularly non-compete clauses for high-income employees and client non-solicitation clauses.
- Option 3: Full ban of all employment restraints of trade – This option includes a full ban on the use of non-compete clauses co-worker and client non-solicitation clauses, for all national system workers. It also includes a ban on no-poach and wage-fixing agreements.

The reforms in Option 2 or 3 would be bolstered by the following ancillary measures to raise awareness, avoid unintended effects, and improve compliance:

- Educational campaign – This would provide educational support to inform workers and businesses about the limited circumstances and extent to which non-compete clauses can be enforced.
- Statutory exemptions – This would provide a narrow exemption for restraint clauses that serve a national security purpose or public sector integrity purpose.
- Penalties – This would include legislating civil penalties on the use of illegal or unenforceable restraint clauses.

1. What is the policy problem you are trying to solve and what data is available?

Problem Statement:

Non-compete clauses and other worker restraints are a common feature of employment agreements originally permitted for the purposes of protecting a narrow set of business interests, including trade secrets or other confidential information. There has been an increased use of these clauses, to the point where they are now commonplace across all sectors and income levels in Australia. This proliferation has been shown, through a growing body of international and Australian-specific evidence, to unfairly limit worker mobility and suppress wages, with broader economic costs to productivity, innovation and competition.

Part I: Reforming post-employment restraint clauses

The restraint of trade doctrine

In Australia, restraint of trade clauses are governed by the common law restraint of trade doctrine, with the partial exception of New South Wales (NSW).[1] At common law, restraint clauses are presumed to be against the public interest and therefore void and unenforceable unless they are reasonably necessary to protect a 'legitimate' business interest.[2] This test will be applied to the particular facts and circumstances of the worker-employer relationship and ultimately only determined by a court. In broad terms, the courts' application of the common law proceeds on a pragmatic, discretionary basis, recognising the need to balance worker freedom with legitimate employer interests.

In a dispute between a business and a worker, courts will consider the nature and extent of the business interest to be protected and whether the scope of restriction the business wants imposed is reasonable including its geographic area, duration and activities which the restraint seeks to control. This assessment does not typically consider the worker's interests,[3] but may take account of the amount of compensation received by the worker[4] and if the restraint operates to prevent the person from earning a living or having reasonable alternative employment opportunities.[5] There are few decided cases in which an otherwise valid restraint has been struck down as being against the public interest.[6]

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[1] *The Restraints of Trade Act 1976* (NSW) (ROTA) modifies the common law rules where the employment contract is subject to the laws of NSW.

[2] Note that in NSW, the ROTA differs from the common law by presuming that a restraint of trade is valid to the extent to which it is not against public policy: ROTA s 4(1) .

[3] A Fell & E Rudz, Employee Non-Compete Restraints: Resolving Uncertainty, 2023, pp. 1257-1261.

[4] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Cot Pty Ltd* (1973) 133 CLR 288

[5] A Fell & E Rudz, Employee Non-Compete Restraints: Resolving Uncertainty, 2023, pp. 1257-1261.

[6] D Heydon, The Restraint of Trade Doctrine, 2018, p. 199.

Legitimate business interests

In deciding whether a restraint protects a legitimate business interest, the courts have held that an employer is not entitled to protection against mere competition by a former worker.[7] Interests considered 'legitimate' by courts include:[8]

- protection of trade secrets or other confidential information.
- protection of client information and customer relationships.
- protection of a stable workforce (a more recent addition).[9]

Cascading clauses

Under the current common law doctrine, the courts may sever the parts of a restraint that make it unreasonable to allow the remainder of the restraint to be upheld. Over time, this has led to the proliferation of 'cascading' clauses and created significant uncertainty for workers and businesses in understanding the scope of the restraint (see Box 1).

Box 1: 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) 5 years;

(b) 2 years;

(c) 1 year;

(d) 6 months;

(e) 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.

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[7] *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717; 71 NSWLR 9.
[8] A Stewart, Stewart's Guide to Employment Law, 2021, pp. 320-321.
[9] Professor J Riley Munton, Submission to the Competition Review's Issues Paper, 2024, p. 3.

For a worker bound by a cascading non-compete clause, without going to court, they cannot know which of the restraints will be found to be reasonable and which are unreasonable and unenforceable. Therefore, the common law incentivises businesses to draft broad restraints with the expectation that courts 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 workers from seeking different employment.

Enforcement of restraint clauses in practice

In practice, the enforcement of a restraint clause generally starts with the business warning the worker of the presence of the restraint clause upon resignation or termination, or when the business considers that a worker has breached the restraint or is about to do so. Even though some restraints may be too broad to be permitted by law, some businesses may still attempt to enforce them.

Workers can challenge a restraint in court on the basis that it is unenforceable. However, the financial cost of seeking legal advice and the uncertainty associated with legal action can be, and often is, prohibitive. Research in the United States of America suggests that both a worker's belief about the possible enforceability of the clause, and their belief about the likelihood of legal action and the cost that entails that can influence their behaviour.[10]

Stakeholders noted that for employees the cost of opposing an injunction at interlocutory proceedings (i.e. proceedings prior to a final court hearing) is between $50,000 and $150,000, depending on the complexity of the case. If the case goes to a final hearing, parties could expect to pay around $300,000 at a minimum and in excess of $700,000 in some cases. These figures are broadly consistent with estimates of the cost of legal action in earlier research.[11] Even if successful, workers are unlikely to have their full legal costs paid by the business, reducing the incentive to challenge a restraint.

Businesses may also strategically commence proceedings in court, which can provide an impetus for negotiations and a basis for the parties to seek out of court settlements. Employment practitioners expressed that enquiries about restraints of trade are common but rarely continue beyond initial letters or reminders to workers as typically workers adjust their behaviour to avoid further escalation.

Most cases do not go to a full contested trial and are often decided on an urgent interlocutory basis (e.g. an interlocutory injunction).[12] At the interlocutory stage, there is a lower evidentiary burden than at a formal trial as the courts are making urgent and provisional decisions, until the final hearing and determination. Courts ask whether there is a serious issue to be tried and if so, whether the balance of convenience favours granting the injunction. The latter requires the employer establishing whether damages are an adequate remedy and that if the injunction was refused the employer would suffer a greater injury than a worker would suffer if the injunction was granted.[13] Stakeholders expressed of those restraint of trade matters which escalate to engaging barristers, fewer than half proceed to court, and only half of those cases reach interlocutory stage and seldom proceeded to full trial.

The lower evidentiary burden at an interlocutory injunction due to delay and costs has been a subject of criticism, as it can practically act as the final determinant of the matter.[14] There are few cases which proceed to trial where they can be fully contested on the merits.[15] If the employer makes an arguable

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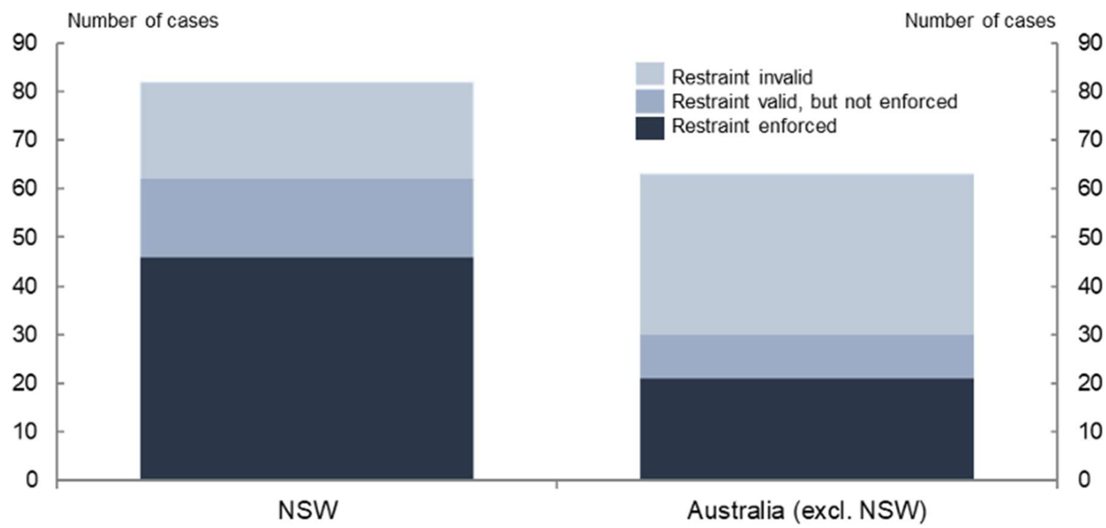
[10] JJ Prescott, E Starr & D Bishara, The Behavioural Effects of (Unenforceable) Contracts, 2020, p. 6.
[11] C Arup et al., Restraints of Trade: The Legal Practice, 2013, p. 18.
[12] C Arup et al., Restraints of Trade: The Legal Practice, 2013, p. 12.
[13] See *Hartleys Limited v Martin* [2002] VSC 301 at [24]-[46] for a more detailed discussion on requirements.
[14] I Ross, Non-compete clauses in employment contracts: the case for regulatory response, 2024, pp. 8–9; C Arup et al., Restraints of Trade: The Legal Practice, 2013, pp. 10–11; J Riley, Sterilising Talent: A Critical Assessment of Injunctions Enforcing Negative Covenants, 2012.
[15] I Ross, Non-compete clauses in employment contracts: the case for regulatory response, 2024.

case, the balance of convenience test tends to favour employers since courts generally do not consider damages awarded after the event an adequate remedy.[16]

Despite this, one Australian study found that out of 145 judgments including interlocutory applications between 1989 and 2012, 53.8 per cent of employers were unsuccessful in enforcing a restraint (see Figure 1).[17]

Figure 1: Enforceability of restraints of trade in Australian courts, 1989 to 2012



Source: Treasury calculations from data in H Chia & I Ramsay, Employment Restraints of Trade: An Empirical Study of Australian Court Judgments, 2016.

Of these unsuccessful cases, 67.9 per cent involved a finding that the restraint was invalid. In the remaining 32.1 per cent of cases, the restraint was valid, but not enforced, for example because the employer suffered no damage, or the worker did not in fact breach the restraint. Excluding NSW (where the court is permitted to rework a restraint to be enforceable), Australia-wide employers were unsuccessful in 66.7 per cent of cases, with the restraint being found invalid in 78.6 per cent of unsuccessful cases. Recent findings from research conducted by Herbert Smith Freehills Kramer (HSFK) found similar rates of unenforceability. Between January 2010 to September 2022, courts struck down a non-compete clause as unenforceable or contrary to public policy in just under half of the 123 litigated cases of this period.[18]

The high number of cases with unenforceable restraints may suggest that businesses and workers are unclear as to what is a reasonable restraint. Although the courts do provide an avenue for businesses and workers to determine the restraint in dispute, it is at significant cost (both financial and non-financial) which may limit its effectiveness in practice. Data is not available for the much larger number of restraint clauses that affect worker mobility and outcomes without any interaction with the court system.

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[16] C Arup et al., Restraints of Trade: The Legal Practice, 2013, pp. 10–11.

[17] H Chia & I Ramsay, Employment Restraints of Trade: An Empirical Study of Australian Court Judgments, 2017, p. 300.

[18] HSKF, 'Australia: Breaking the chains – ACCC Review of non-compete and no-poach provisions in employment contracts', HSFK website, 27 March 2023.

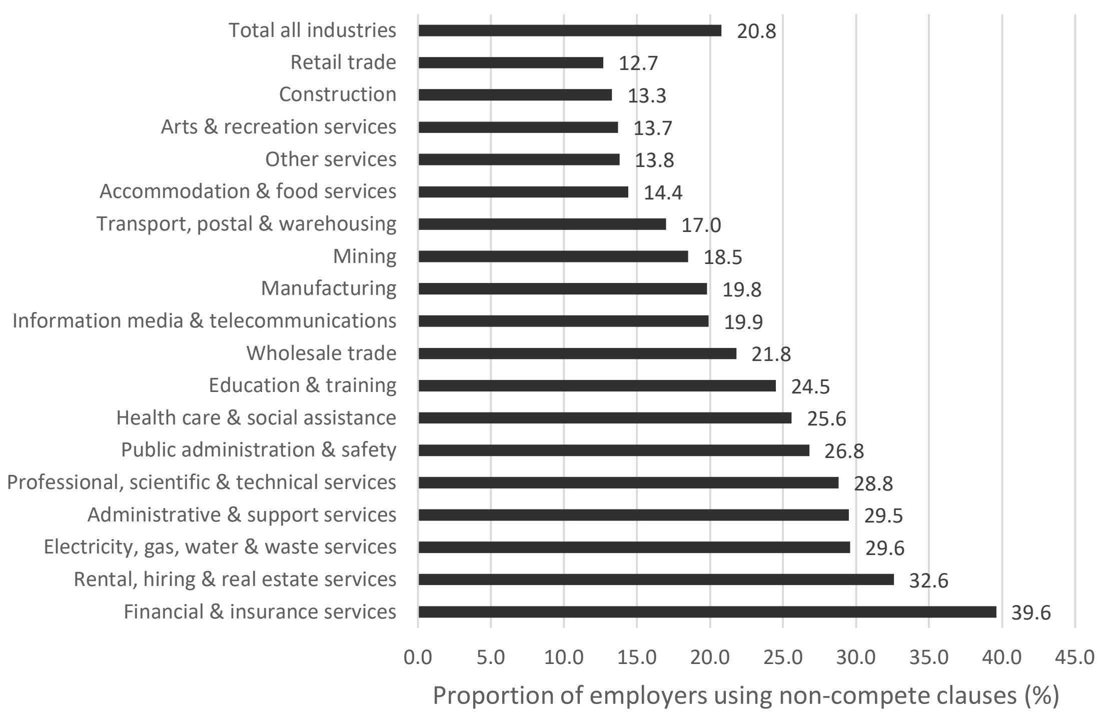
Prevalence of restraint clauses in Australia

The use of restraint of trade clauses has proliferated in Australia, especially in low-paid occupations. According to Australian Bureau of Statistics (ABS) data released in 2024, 46.9 per cent of Australian business were using some type of restraint clause.[19] ABS data indicates that the use of restraint clauses is widespread across industries, with results also suggesting that the use of these clauses has increased in the past 5 years.[20]

Non-compete clauses

According to recent surveys from the ABS and the e61 Institute, approximately 1 in 5 workers (3 million) are subject to a non-compete clause.[21] These surveys show that non-compete clauses are used across all industries and business sizes, but are most common in the finance, real estate, professional services and healthcare sectors (see Figure 2).[22]

Figure 2: Prevalence of non-compete clauses in Australia, by industry



Source: ABS (February 2024), Restraint Clauses, Australia, 2023, 2024.

While the use of non-compete clauses has traditionally been reserved for senior and higher-income workers, these clauses are increasingly featuring as a 'boilerplate' clause in the employment contract templates of many lower-paid workers.[23] The e61 Institute survey found that non-compete clauses

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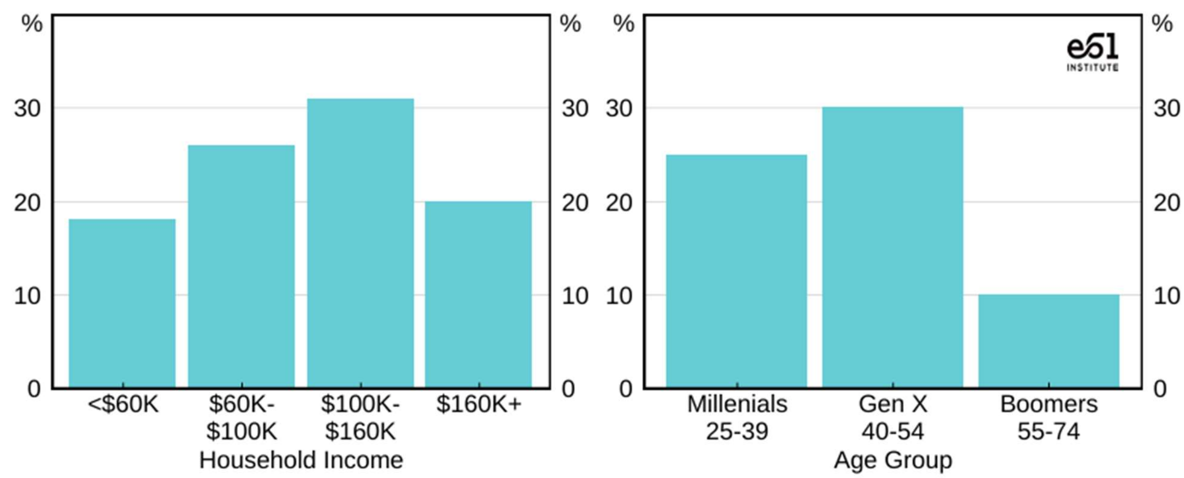
[19] ABS (February 2024), Restraint Clauses, Australia, 2023, 2024.
[20] ABS (February 2024), Restraint Clauses, Australia, 2023, 2024.
[21] ABS (February 2024), Restraint Clauses, Australia, 2023, 2024; D Andrews & B Jarvis, The Ghosts of Employers Past: How Prevalent Are Non-Compete Clauses in Australia?, *e61 Institute,* 2023.
[22] ABS (February 2024), Restraint Clauses, Australia, 2023, 2024.
[23] W van Caenegem & C Douglas; J Riley Munton, Submissions to the Competition Review's Issues Paper, 2024.

were prevalent across age groups and income levels, with 18 per cent of households earning under $60,000 and around 25 per cent of households earning between $60,000–$100,000 being subject to these clauses (see Figure 3).[24] This finding was supported by the anecdotal experience of several community legal centres, noting that most of their clients were lower-income workers seeking legal advice on the enforceability of their non-compete clauses.[25]

Figure 3: Prevalence of non-compete clauses across different societal groupings



Source: D Andrews & B Jarvis, The Ghosts of Employers Past: How Prevalent are Non-compete Clauses in Australia, e61 Institute, 2023.

Non-solicitation clauses

According to the 2024 ABS survey, around 25 per cent of businesses use client non-solicitation clauses. Among these, approximately 70 per cent of these businesses include these clauses in the employment contracts of more than three-quarters of their workforce.[26] Co-worker non-solicitation clauses are used by 18 per cent of businesses, and of those, 67 per cent of businesses using them for more than three-quarters of their workforce.[27] These survey results closely aligned with those of a recent study by the Queensland University of Technology (QUT), which also found similar rates of non-solicitation clause usage amongst small- and medium-sized enterprises (see Figure 4).[28]

[24] D Andrews & B Jarvis, The Ghosts of Employers Past: How Prevalent Are Non-Compete Clauses in Australia?, *e61 Institute,* 2023.

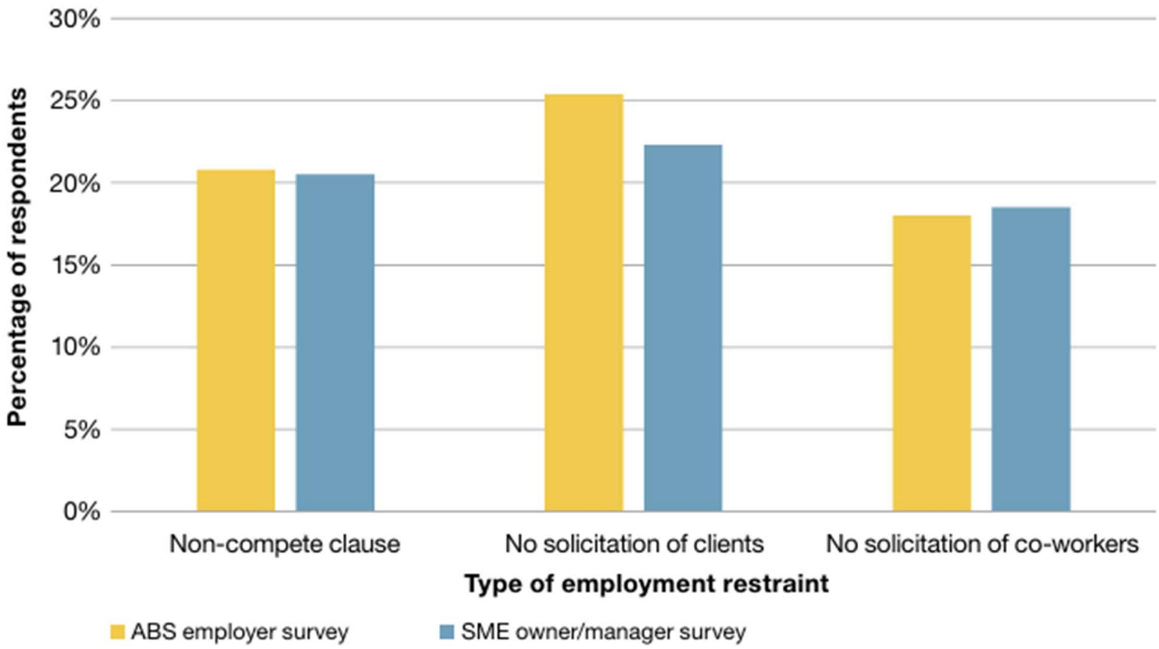
[25] Legal Aid NSW; Employment Rights Legal Service; Circle Green; Youth Law Australia; NT Working Women's Centre, Submissions to the Competition Review's Issues Paper, 2024.

[26] ABS (February 2024), Restraint Clauses, Australia, 2023, 2024.

[27] ABS (February 2024), Restraint Clauses, Australia, 2023, 2024.

[28] 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,* 2025.

Figure 4: Proportion of enterprises reporting use of restraint clauses



Source: 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, 2025

Impacts of restraint clauses

There is a growing body of domestic and international research which measures the impacts of non-compete clauses. This includes evidence on the effects on worker mobility and wages but also broader impacts on business investment, innovation and competition. While non-solicitation clauses may be considered less restrictive than non-compete clauses, in some circumstances non-solicitation clauses can still have comparable impacts on workers. However, similar data collection and empirical research on the impacts of non-solicitation clauses has not been prioritised. This section therefore focuses on the evidence on the effects of non-compete clauses.

Chilling effect on workers

As highlighted in Part 1, there is significant uncertainty around the enforceability of non-compete clauses.[29] Some legal experts argue that this uncertainty favours businesses, as workers have less bargaining power and lack the financial resources to bear the costs of litigation.[30] Other experts argue that this uncertainty illustrates the fairness of the common law, as it allows courts to balance employer and employee interests on a case-by-case basis.[31] However, this view ignores the 'chilling effect' of these clauses on worker behaviour. That is, even if a non-compete clause is unlikely to be

[29] I Ross, Non-compete clauses in employment contracts: the case for regulatory response, 2024, pp. 3–7.
[30] C Arup et al., Restraints of Trade: The Legal Practice, 2013, pp. 17–21.
[31] I Neil & N Saady, The Reasonableness of Restraints: An Analysis of the Enforcement of Post-Employment Restraints, 2018, p. 102

upheld by a court, it can still exercise an 'in terrorem' effect where the mere threat of legal action can be enough to secure worker compliance with the restraint.[32]

This chilling effect may also have uneven impacts on different cohorts of workers. For instance, one study found in US states with stricter non-compete clauses enforcement, women were less likely than men to leave their jobs and start a rival business.[33] The study suggested that this could be explained by the fact that women may be more risk-averse than men, and therefore may be less willing to violate unenforceable non-compete clauses.[34] Anecdotal evidence from community legal centres noted a similar disproportionate impact on lower-income and employer-sponsored visa workers, as they often lack the financial resources to challenge a restraint and face greater risks when doing so.[35]

Research from the US finds that, even where non-compete clauses are made unenforceable, they continue to be widely used and maintain a chilling effect on workers.[36] For example, 29.3 per cent of Californian workplaces use non-compete clauses for all employees, while 45.1 per cent of Californian workplaces use them for any employees, despite non-compete agreements being unenforceable under California state law.[37] This may suggest that worker decisions around non-compete clauses are driven by their beliefs about legal risks, rather than the actual enforceability of these clauses, and that employers may exploit these misconceptions.[38]

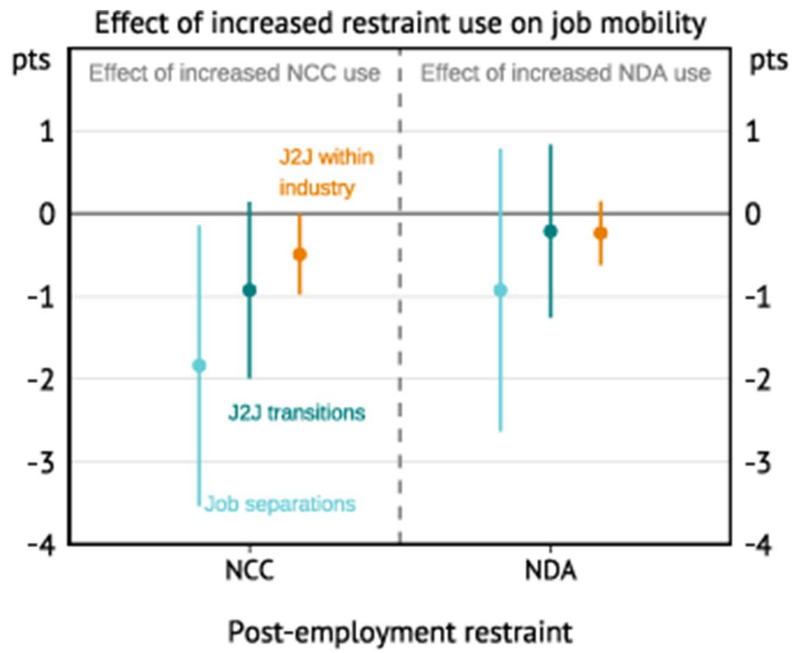
Worker mobility

There is evidence that non-compete clauses reduce worker mobility, even in jurisdictions where these clauses are unenforceable. This means these clauses likely contribute to an inefficient allocation of labour across the economy, as workers are forced to remain in jobs that mismatch their skills and experience.

Analysis from the e61 Institute reveals that an increase in the use of non-compete clauses is associated with a subsequent decline in job mobility in Australia.[39] Between 2021–2023, workers at firms that had increased their non-compete clause usage were 1.8 percentage points less likely to leave their jobs, and 0.9 percentage points less likely to move directly to another job (see Figure 4). In contrast, an increase in the use of non-disclosure agreements (NDAs) is not associated with a statistically significant decline in job mobility.

[32] I Ross, Non-compete clauses in employment contracts: the case for regulatory response, 2024, pp. 6–7;
[33] M Marx, Employee Non-compete Agreements, Gender, and Entrepreneurship, 2020, p. 17.
[34] M Marx, Employee Non-compete Agreements, Gender, and Entrepreneurship, 2020, p. 17; C Eckel & P Grossman, Men, Women and Risk Aversion: Experimental Evidence, 2008.
[35] Circle Green; Legal Aid NSW, Submissions to the Competition Review's Issues Paper, 2024.
[36] JJ Prescott, E Starr & D Bishara, The Behavioural Effects of (Unenforceable) Contracts, 2020.
[37] A J.S. Colvin & H Shierholz, Non-compete agreements, 2019, pp. 5–6.
[38] JJ Prescott, E Starr & D Bishara, The Behavioural Effects of (Unenforceable) Contracts, 2020, p. 6.
[39] J Buckley, E Rankin & D Andrews, Non-compete clauses, job mobility and wages in Australia, *e61 Institute,* 2024.

Figure 4: Impacts of restraint clauses on job mobility in Australia, 2021–2023



Source: J Buckley, E Rankin & D Andrews, Non-compete clauses, job mobility and wages in Australia, e61 Institute, 2024.

This research also showed that an increase in the use of non-compete clauses resulted in workers spending longer periods out of employment when controlling for several observable characteristics of workers and firms.[40] Specifically, the relative probability of workers spending at least 6 months out of employment between jobs increased by just over 2 percentage points for employees of firms that had increased their use of non-compete clauses. This effect was primarily driven by high-skill workers, who were 4 percentage points more likely to spend time out of work when leaving a firm with higher non-compete clause usage.

International evidence reveals a similar impact of non-compete clauses on worker mobility. One 2018 US study observed that workers received relatively fewer job offers and lower job mobility in states and industries with a greater incidence of enforceable non-compete clauses.[41] Research conducted in 2023 on Italian workers also showed a reduction in job mobility, even in jurisdictions where they are not enforceable, as they increased the perceived legal risk of breaching their employment contract.[42] Another US study found that workers with non-compete clauses tended to stay 3 months longer with their existing employer.[43]

Recent Treasury analysis linking the 2024 ABS survey to administrative data suggests that non-compete clauses could also be distorting the behaviour of workers when they change jobs. This work found that workers leaving firms with high non-compete clause usage were 2.1 percentage points more likely to switch industries than those leaving firms that do not use these clauses.[44] This may

[40] J Buckley, E Rankin & D Andrews, Non-compete clauses, job mobility and wages in Australia, *e61 Institute,* 2024, pp. 4–6.
[41] E Starr et al., Mobility constraint externalities, 2018, p. 18.
[42] T Boeri et al., Non-compete Agreements in a Rigid Labour Market: The Case of Italy, 2023.
[43] B Gopal, X Li & L Rawling, Do Non-Compete Agreements Help or Hurt Workers? Evidence from the NLSY97, 2024, p. 30.
[44] Treasury analysis of ABS data, 2025.

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. A similar effect was observed in a study on the career trajectories of US inventors, which found that stronger enforcement of non-compete clauses increased the likelihood of job switching to more distant product markets, with 1.5 per cent of inventors doing so each year.[45] Using patents and citations as a proxy, the study also found that inventors were 30 per cent less productive when they switched industries due to a non-compete clause.[46]

Wages

The impact of non-compete clauses on wages is complex. Businesses may pay higher initial salaries (i.e. a 'wage premium') and provide workers with more training to compensate for the restraint. On the other hand, non-compete clauses may limit a worker's wage growth within a firm or their ability to seek higher wages at rival firms. By restricting worker mobility, non-compete clauses can reduce workers' bargaining power as they are less able to leverage the credible threat to leave the business when they are negotiating for a wage increase.

Some research has suggested that workers may receive a 'wage premium' for signing a non-compete clause. For example, one study of US physicians' wages found that non-compete clauses increase the annual rate of earnings growth by an average of 8 percentage points in each of the first 4 years of a job, with a cumulative effect of 35 percentage points after 10 years.[47] Another study found that US workers who learned of a non-compete clause before accepting the job offer received 9.7 per cent higher earnings relative to those without a restraint.[48] A further study of executive-level employees in the US found that workers with a non-compete clause had 13 per cent higher wages than their unrestrained peers, but experienced 1 per cent lower wage growth per year over the first 10 years of tenure.[49] In some cases, these wage premia may reflect the bargaining power of highly skilled workers.

Recent Treasury analysis linking survey and administrative data found no systematic evidence that non-compete clauses are associated with a 'wage premium' in Australia. Evidence from the e61 Institute supports the claim that non-compete clauses suppress wages in Australia. This research found that worker at firms with a high use of non-compete clauses are paid around 4 per cent less on average, compared to workers without a restraint.[50] The evidence also highlighted that non-compete clauses had a stronger negative wage impact for lower-skilled workers compared to their high skill counterparts (see Figure 5), consistent with the evidence of wage premia among physicians and executives in the US.

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[45] C Mueller, Non-compete Agreements and Labor Allocation Across Product Markets, 2023, p. 2.
[46] C Mueller, Non-compete Agreements and Labor Allocation Across Product Markets, 2023, p. 18.
[47] K Lavetti et al., The Impacts of Restricting Mobility of Skilled Service Workers, 2020, p. 3.
[48] Starr et al., Noncompete Agreements in the US Labor Force, 2021, p. 12.
[49] Shi L, 'Optimal regulation of noncompete contracts', *Econometrica*, 2023, 91(2), p 427
[50] J Buckley, E Rankin & D Andrews, Non-compete clauses, job mobility and wages in Australia, *e61 Institute,* 2024, p. 6.

Figure 5: Non-compete clause use and wage-tenure profile

Figure 5A: Lower skill workers

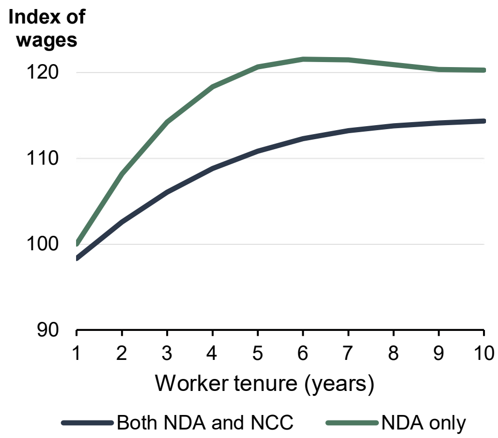
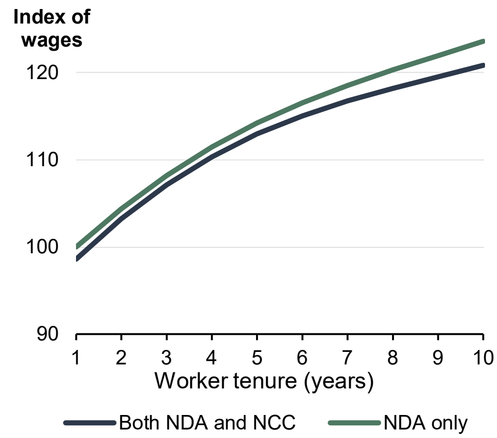


Figure 5B: High skill workers



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.

There is a significant body of international research which shows a similar association between non-compete clauses and lower wages. One US study found that stricter enforceability of non-compete clauses was associated with approximately a 2 per cent reduction in earnings for the average worker.[51] This study also found that a change in enforceability in one US state indirectly affected the earnings and mobility of workers located in adjacent states, suggesting that the labour market impacts of non-compete clauses extend beyond those directly bound by them.[52] This may suggest that non-compete clauses shape regional labour market dynamics, potentially affecting mobility and wage growth even in jurisdictions where enforceability remains unchanged. Moreover, businesses often bundle together confidentiality clauses, non-solicitation clauses and non-compete clauses for workers with access to valuable information. One 2024 study found that US workers bound by all of these restraints earn 3–7 per cent less than those with only NDAs.[53]

Recent bans on non-compete clauses in other jurisdictions have also served as useful 'natural experiments' for assessing their impacts (see Table 1).

[51] M S Johnson et al., The Labor Market Effects of Legal Restrictions on Worker Mobility, 2023, p. 2.

[52] M S Johnson et al., The Labor Market Effects of Legal Restrictions on Worker Mobility, 2023, p. 2–3.

[53] N Balasubramanian et al., Employment restrictions on resource transferability and value appropriation from employees, 2024, p. 2522.

Table 1: Evidence on impacts of non-compete clause bans in international jurisdictions

Jurisdiction	Year	Policy	Estimated impact
Oregon, USA	2008	Ban on non-compete clauses for low-wage workers. [54]	Hourly wages increased by around 2–3 per cent. Job-to-job mobility increased by 12–18 per cent.
Hawaii, USA	2015	Ban on non-compete and non-solicitation clauses for tech workers. [55]	Earnings of new hires increased by around 4 per cent. Aggregate worker wages (including those without a restraint) increased by 0.7 per cent. Worker mobility increased by 11 per cent.
Austria	2006	Ban on non-compete clauses for lower-earning workers. [56]	No detectable effect on overall earnings growth rates. Around 2 per cent increase to annual job-to-job transition rate.

Business training, investment and innovation

There is mixed evidence on the impact of restraint clauses on firm-level training, investment and innovation.

Restraint clauses can encourage businesses to invest in productivity-enhancing activities such as worker training by resolving the 'hold-up problem'.[57] Without restraint clauses, firms may be reluctant to invest in skills development for workers due to the risk that the worker leaves to a competitor and takes the investment—and a potential competitive advantage—with them. By reducing the likelihood of workers joining rival firms, non-compete clauses give businesses greater confidence that their investment will be retained and therefore enable a more efficient level of investment in human capital. Further, research from the US examined how labour mobility restrictions affect firms' investment decisions. It found that in incumbent knowledge firms, an increase in enforceability of non-compete clauses increased investment in physical capital by 39 per cent.[58]

Some research supports this theory, as some studies have found that an increase in the enforceability of non-compete clauses was associated with more employee training. One 2018 study linked non-compete clauses to a 14.7 per cent increase in employer-sponsored training.[59] However, this study does not distinguish between core training (i.e. training required to perform job duties), and advanced training (i.e. training with potential to increase productivity beyond the baseline requirements for job

[54] M Lipsitz & E Starr, Low-Wage Workers and the Enforceability of Noncompete Agreements, 2021.
[55] N Balasubramanian et al, Locked in? The enforceability of covenants not to compete and the careers of high-tech workers, 2020.
[56] S Young, Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria, 2024, p. 2.
[57] J Barnett & T Sichelman, The Case for Noncompetes, 2020, p. 970.
[58] J S Jeffers, The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship 2023, p. 31.
[59] E Starr, Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete 2018, p. 14; E Starr, JJ Prescott & N D Bishara, Noncompete Agreements in the U.S. Labor Force, 2021.

performance).[60] For example, because non-compete clauses can push workers to switch industries, businesses may end up hiring less experienced staff who require more basic training, rather than investing in the development of existing employees' skills. As a result, it remains unclear whether the observed increases in training reflect productivity gains, losses, or no net change. Another UK study found a strong correlation between the prevalence of non-compete clauses and training investment.[61] In contrast, a different US study found no significant effect of non-compete clauses on formal measures of employer-sponsored training.[62]

Another view is that non-compete clauses can have a net negative effect on innovation because of their impact on worker mobility. By preventing workers from starting their own business or moving between firms, evidence suggests that these clauses can reduce knowledge spillovers and innovation across the economy. One US study found that patents filed after an increase in the enforceability of non-compete clauses were 32.5 per cent less valuable and also less exploratory (i.e. more reliant on in-house firm knowledge), despite having no impact on firm-level research and development investment.[63] Similarly, another US study found that an increase in the enforceability of non-compete clauses reduced citation-weighted patenting—a proxy for innovation—by 16–18 per cent over the following 10 years.[64] This study also found that while non-compete clauses had a positive effect on the level of investment in research and development and other intangible assets, the net impact on innovation of these clauses was substantially negative.[65]

Business dynamism and competition

Non-compete clauses can reduce business dynamism and competition by restricting worker mobility and limiting the flow of knowledge across firms. Limiting worker mobility inhibits the diffusion of skills and ideas, which are critical to entrepreneurship sand the formation of new businesses. These effects not only entrench incumbent firms but can also lead to higher market concentration and increased consumer prices.

Studies in the US have shown that non-compete clauses can hinder entrepreneurship and new business creation. For example, one 2023 study found that the stricter enforcement of non-compete clauses decreases new business formation by 3.1 per cent.[66] An earlier 2022 study showed that weakening the enforceability of these clauses boosted entrepreneurial activity, though for lower-wage workers it increased the creation of unincorporated businesses, which are typically less innovative.[67] Additional research found that stronger enforcement of non-compete clauses was linked to fewer within-industry spinouts, while having no effect on spinouts outside the industry.[68] Modelling from the

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[60] US FTC, Non-compete Clause Rule, 2024, pp. 283–284.

[61] J Alves et al., Labour market power: New evidence on Non-Compete Agreements and the effects of M&A in the UK, 2024, p. 22.

[62] B Gopal, X Li & L Rawling, Do Non-Compete Agreements Help or Hurt Workers? Evidence from the NLSY97, 2024, p. 30.

[63] Z He, Non-compete Agreements, Innovation Value and Efficiency, 2024, pp. 3–4.

[64] M Johnson, M Lipsitz & A Pei, Innovation, Inventor Mobility, and the Enforceability of Noncompete Agreements, 2023, p. 2.

[65] M Johnson, M Lipsitz & A Pei, Innovation, Inventor Mobility, and the Enforceability of Noncompete Agreements, 2023, p. 25.

[66] M Johnson, M Lipsitz & A Pei, Innovation, Inventor Mobility, and the Enforceability of Noncompete Agreements, 2023, p. 25.

[67] E Can & F M. Fossen, The enforceability of non-compete agreements and different types of entrepreneurship: evidence from Utah and Massachusetts, 2022, p. 4.

[68] E Starr, N Balasubramanian & M Sakakibara, Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms, 2017.

US Federal Trade Commission (FTC) estimated that a nationwide ban on non-compete clauses would lead to new business formation growing by 2.7 per cent annually, resulting in more than 8,500 additional new businesses created each year.[69]

Non-compete clauses may also increase market concentration and raise consumer prices, however there is limited research on this. One study found that a decrease in the enforceability of non-compete clauses resulted in reduced firm concentration, with a by 10 per cent reduction in enforceability causing prices to fall on average by 4.3 per cent.[70] Similarly, drawing on research that non-compete clauses reduce new business formation and therefore may contribute to market concentration and increased consumer prices, the US FTC estimated that banning these clauses could lower healthcare costs – an industry where these clauses are prevalent – by up to US$194 billion over the next 10 years.[71]

Part II: Closing loopholes in the Competition and Consumer Act

Exceptions within the Competition and Consumer Act

Part IV of the Competition and the Consumer Act covers restrictive trade practices including cartel conduct and other anti-competitive behaviour. Part IV contains an exception for certain anti-competitive agreements, including one for matters related to the 'remuneration, conditions of employment, hours of work or working conditions of employees.'[72]

The rationale for this exception has been these matters are typically governed by common and employment law because labour markets are treated differently to markets for goods and services.[73] The effect of this exception and other aspects of the legislation is that the Australian Competition and Consumer Commission (ACCC) currently do not have jurisdiction to police restrictive trade practices in agreements pertaining to the working conditions for employees. Consequently, even if 2 competitors make a no-poach or wage-fixing agreement, the ACCC may not be able to take enforcement action.

Prevalence of no-poach and wage-fixing agreements

It is difficult to estimate the prevalence of either no-poach or wage-fixing agreements in the economy as these agreements are often made in secret and may be unwritten. Even if not unlawful, businesses have an incentive to avoid publicising these arrangements, so there is limited evidence of their use. However, these agreements are more likely to exist where there are relatively few employers (that is, the transaction costs to collude are lower), which are also likely the labour markets where workers may already face issues arising from concentrated business market power.

An unpublished Treasury review of 150 of the publicly available franchise agreement templates on the Franchise Disclosure Register found that around half contained a no-poach agreement (see Box 2). Similarly, major franchises such as McDonald's, Bakers Delight and Domino's reported using no-poach

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[69] US FTC, FTC Announces Rule Banning Noncompetes [media release], 23 April 2024.
[70] N Hausman & K Lavetti, Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes, 2021, p. 262.
[71] US FTC, FTC Announces Rule Banning Noncompetes [media release], 23 April 2024.
[72] Competition and Consumer Act 2010 (Cth) ss 51(2)(a), (aa).
[73] I Harper et al., Competition Policy Review Final Report, 2015, p. 67.

clauses as a standard term in their franchise agreements in Australia, preventing franchisees from hiring workers from other stores within the chain.[74]

Box 2: Example of no-poach agreement in a franchise template agreement

The Franchisee agrees and declares that it will not hire or employ or otherwise engage employees of the National Franchisor or the Franchisor or other [Company's] franchisees or induce such employees to leave their employment during the Term and for a period of 12 months thereafter.

International data on the prevalence of no-poach agreements is also limited, however some evidence exists on their use in franchises. A 2016 US study of franchising agreements for 156 of the largest franchise chains and found that around 58 per cent of them contained no-poach restrictions.[75] No-poach agreements were more common in low-wage and high-turnover industries.[76] The study also found that no-poach agreements were becoming increasingly common, with their prevalence amongst the largest 45 franchisors rising from 36 per cent in 1996 to 53 per cent in 2016.[77] There have been several recent high-profile cases involving no-poach and wage-fixing agreements as overseas regulators in the US, the European Union and the United Kingdom have increased their scrutiny of collusive labour market practices.[78]

No-poach and wage-fixing agreements can suppress wages and result in an inefficient allocation of labour

The Organisation for Economic Co-operation and Development (OECD) considers collusion, typically in the form of no-poach and wage-fixing arrangements, to be the most detrimental anti-competitive practice in labour markets.[79] Businesses coordinating to set wages or to not compete for workers effectively increases their market power and deprives workers of new job opportunities. This can also create a 'lock-in' effect on workers, specifically highly specialised workers, by reducing the expected wage of the best alternative employer and reducing their bargaining power to negotiate for higher wages.

In addition, no-poach agreements can suppress a worker's freedom to move to a role with a different employer that is a more suitable match and a more productive allocation of their labour. This limits the reallocation of labour to its most productive use, reducing overall labour market efficiency. Wage-fixing agreements work analogously by suppressing the potential gains from moving jobs, reducing the incentive for workers to search for more productive roles. These restrictions can lead to a misallocation of labour across the economy, where workers remain in roles that they are mismatched

[74] A Leigh, How uncompetitive markets hurt workers, 2023.
[75] A Krueger & O Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector, 2018, p. 1.
[76] A Krueger & O Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector, 2018, p. 18–20.
[77] A Krueger & O Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector, 2018, p. 7.
[78] US Department of Justice, Jury Convicts Home Health Agency Executive of Fixing Wages and Fraudulently Concealing Criminal Investigation [media release], 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], 13 July 2022.
[79] OECD, Competition Issues in Labour Markets, 2020, p. 28.

to, resulting in lower output per worker. While such agreements may reduce business turnover costs, they ultimately constrain aggregate economic output by distorting efficiency of job matching in the labour market.

One justification for no-poach and wage-fixing agreements is that they may provide employers an incentive to invest more into employee training. A no-poach agreement limits the number of prospective employers for a given worker, decreasing the likelihood they will depart their current employer. These agreements reduce the incentive for business' risk of losing their investment in training staff however the agreements reduce the incentive for businesses to share the returns of their high investment in human capital across the labour market augmenting the returns from these investments.[80]

However, despite these benefits to employers, wage-fixing agreements are widely acknowledged as anti-competitive on the basis that they artificially reduce workers' wages and decrease competition between employing businesses. This may result in reduced output or less innovation.[81] The standardisation of wage levels also reduces the strategic uncertainty that characterises competition and may promote price coordination in the downstream markets.[82]

There are few empirical studies on their impacts of no-poach and wage-fixing agreements however there have been recent legal cases highlighting their effects. An emerging body of research demonstrates that no-poach agreements limit hiring competition among employers and therefore suppress wages.[83] Research investigating the impact of no-poach agreements in Silicon Valley businesses estimated a 5.6 per cent reduction in worker salaries, with stock bonuses and ratings of job satisfaction also negatively impacted.[84] Further, in 2015, a US court awarded each worker affected by a no-poach agreement between Adobe, Apple, Google and Intel US$5,770 as part of the class action settlement.[85] No-poach agreements can also have detrimental effects on workers in lower paid industries. In the fast-food franchise sector in the US, studies have shown the removal of these agreements was estimated to have increased average wages of job postings for roles in the affected businesses by 5–6 per cent and increased the overall earnings of workers in those businesses by around 4 per cent.[86]

[80] Autoridade de Concorrencia, Labour market agreements and competition policy – Issues Paper, 2021.
[81] J M Taladay & V Mehta, Criminalization of wage-fixing and no-poaching agreements, 2017.
[82] Konkurrensverket (Swedish Competition Authority), Joint Nordic report – Competition and Labour Markets, 2024.
[83] F Lafontaine, S Saatvic & M Slade, No-Poaching Clauses in Franchise Contracts: Anticompetitive or Efficiency Enhancing?, 2023.
[84] M Gibson, Employer Market Power in Silicon Valley, 2024, p. 3.
[85] Re: High-Tech Employee Antitrust Litigation [2015] D.D.C 11-CV-02509.
[86] F Lafontaine, S Saatvic & M Slade, No-Poaching Clauses in Franchise Contracts: Anticompetitive or Efficiency Enhancing?, 2023; B Callaci et al., The Effect of Franchise No-Poaching Restrictions on Worker Earnings, 2023, p. 14.

2. What are the objectives, why is government intervention needed to achieve them, and how will success be measured?

Reforms should boost productivity, real wages and business dynamism, while minimising regulatory complexity and the burden on businesses

As mentioned in Question 1, there is growing domestic and international evidence that the use of non-competes and other restraint of trade clauses are harming workers and the Australian economy. Non-compete clauses and other restraint of trade clauses reduce job mobility and supress wages. Evidence indicates that businesses tend to have relatively greater bargaining power with few workers attempting to negotiate additional compensation in exchange for signing the non-compete clause. Under the current market-led approach, this has led to the inefficient and inequitable allocation of non-compete clauses across the Australian economy, hampering innovation and stifling inclusive growth by restricting job mobility, business dynamism, wages and productivity. A level of government intervention is needed to address the relative imbalance in bargaining power between workers and businesses, while improving job mobility, productivity, and labour market competition.

Additionally, there is the risk that implementation might create regulatory complexity that could disproportionately burden businesses. The design and implementation of possible reforms aims to reduce the burden by minimising any complicated requirements and ensuring businesses have adequate time to transition to the new changes.

Government intervention is required as the status quo does not strike the right balance between the public, worker and business interest

The increasing prevalence of unreasonable and complex non-compete clauses and other employment restraints of trade no longer balances the interests of the public, workers and businesses. This has led to flow on effects, through decreased job mobility, harming Australia's economy. After public consultation on the Issues and Consultation Paper and extensive research of domestic and international literature, there is now compelling evidence for reforming the regulatory approach to non-compete and other restraint of trade clauses.

Although there is merit to businesses using non-compete clauses to protect their legitimate interests, the current framework unfairly favours employers at the expense of workers' freedom to move, ability to earn higher wages and the public interest. The current approach to enforcing non-compete clauses under the common law also creates significant uncertainty for both workers and businesses. This uncertainty, alongside the proliferation of cascading clauses and high litigation costs, can discourage workers from challenging potentially unenforceable and unreasonable non-compete clauses. Businesses can benefit from the deterrent "chilling" effect even when it is unlikely the non-compete clause would be enforced by a court. Stakeholders have expressed concerns that the common law doctrine is no longer working adequately with concerns that the enforceability of restraints is often unable to be tested due to the prohibitive and disproportionate costs of litigation.[87]

Many restraint of trade clauses are not negotiated comprehensively due to an imbalance in bargaining power – some workers may not be aware of the clause, or the impact of the restraint on their future, and therefore are not compensated appropriately. Even when both businesses and workers have a mutually beneficial agreement, the interests of third parties are not considered in this exchange. For example, consumers are impacted when workers are restrained from starting their own business, while other businesses are hindered from engaging the talents or skills of the restrained worker.

Proposed reforms are coherent with recent changes to employment and competition law

The proposed reforms build on recent changes to Australia's competition laws and policies, and to Australia's national workplace relations system.

In recent years, there have been numerous legislative amendments to the Fair Work Act to increase worker entitlements, improve workplace protections and empower the Fair Work Commission. These include, but are not limited to:[88]

- The *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* which empowered the Fair Work Commission to set minimum standards for 'employee-like' workers (e.g. employee-like workers in the gig economy), amended the definition of casual employment, introduced the right to disconnect for employees, and increased civil penalties under the Fair Work Act.
- The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* which introduced new regulations for labour hire employees, criminalised intentional underpayment of employees' wages and entitlements, and expanded the anti-discrimination framework to protect employees subjected to family and domestic violence.
- The *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* which expanded the National Employment Standards to include the right to superannuation, provided greater flexibility for employees to use unpaid parental leave, and clarified existing protections for migrant workers.

The government has also passed amendments to the Competition and Consumer Act to improve competition and promote consumer rights. These include, but are not limited to:

- *Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024* which replaced the existing voluntary framework for merger review with one mandatory and suspensory administrative system for acquisitions.
- Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Act 2024 which added a new designated complaints framework to be administered by the ACCC.
- *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* which increased existing penalties for anti-competitive conduct and strengthened the existing unfair contract terms regime.

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[87] Issues paper stakeholder submission
[88] Fair Work Ombudsman, Australia's industrial relations timeline, 2024.

These legislative reforms demonstrate the government's ability to successfully amend Australia's workplace relations and competition laws. In particular, the ban on pay secrecy clauses in employment contracts[89] shows that the government has experience in banning or restricting specific clauses in employment contracts. As no-poach and wage-fixing agreements are similar to the existing prohibitions relating to cartels and other anti-competitive collusive conduct, there is precedence for legislative amendments to the Competition and Consumer Act to regulate this type of activity.

Measuring the impact of reform

Public	Employees	Business
• Gross Domestic Product • Knowledge spillovers and innovation • Entrepreneurship and new business formation • Consumer prices	• Job mobility • Wage growth • Labour productivity	• Financial and regulatory burden • Business profitability • Availability of legal tools to protect interests • Firm investment

Any reforms to non-competes and other restraint clauses will need to ensure the interests of the public, workers and businesses are appropriately balanced. Question 4 will assess these reforms based on several metrics.

These metrics align with the government's objective to ensure any reforms to non-compete clauses boost productivity, real wages and business dynamism while minimising regulatory complexity and burden on businesses. In evaluating the reforms in Question 4 and 6, the preferred reform option should discourage the use of unreasonable non-compete clauses, while increasing job mobility and providing businesses with the flexibility to protect their legitimate interests. Workers should have the freedom to move jobs, set up new firms, and innovate across the economy, while businesses should be allowed to protect their legitimate interests when they genuinely serve the public interest.

[89] *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*

3. What policy options are you considering?

Based on domestic stakeholder feedback and domestic and international evidence, three potential reform options are considered:

- Option 1: Status quo
- Option 2: Partial ban of employment restraints of trade (Preferred option)
- Option 3: Full ban of employment restraints of trade.

At a minimum, the reform options requiring legislation (Options 2 and 3) include the government's announced commitment to ban non-compete clauses for low- and middle-income workers and to ban no-poach and wage-fixing agreements.

Options 2 and 3 also include similar enforcement tools, including civil remedies, to improve compliance. Both options also consider exemptions and could be complemented with education and support which will assist workers and businesses to transition to the reforms or better understand the current common law system.

Table 2 below sets out different policy options for non-compete clauses and other restraint of trade clauses as there isn't a unique policy solution for each restraint clause. This can be attributed to the fact that there are different factors to consider for each restraint clause therefore requiring a potentially different policy response. Therefore, the 3 overarching options presented (including retaining the status quo) are each a collection of different individual policy responses for each type of restraint clause. These individual policy elements are not necessarily mutually exclusive and are not contingent on one another. The options therefore represent a potential grouping of policy responses, however some of the benefits of each option could be achieved by implementing only some elements, or from choosing a different combination of policy responses to each restraint clauses from across the 3 options. These key elements have been informed by extensive stakeholder feedback, domestic and international evidence. Domestic and international evidence and stakeholder feedback suggests that combining these individual policy elements can lead to a more holistic response to strike the right balance between the public, worker and business interests.

It is contemplated that Option 2 or 3 would be implemented via legislative amendments to the Fair Work Act and the Competition and Consumer Act. The coverage of these Acts will affect the scope of reform. For instance, it is expected that only employees and/or workers of national system employers (within the meaning of the Fair Work Act) would be affected by reforms in the Fair Work Act, with universal coverage of all Australian workers dependent on legislative action by States and Territories.

Table 2: Elements of reform to restraint clauses considered:

Reform area / issue	Possible policy elements	Details
Non-compete clauses for employees *below* the high-income threshold ($183,100)	Status quo (Option 1)	This would allow non-compete clauses for employees *below* the high-income threshold ($183,100) to continue to proliferate in employment contracts with no restrictions except for the common law which requires businesses and workers to go to court to determine the enforceability of the restraint.
	Full ban (Options 2 and 3)	This would introduce a full ban on non-compete clauses for employees earning below the Fair Work Act's high-income threshold (currently set at $183,100, indexed annually on 1 July).
Non-solicitation clauses (co-workers)	Status quo (Option 1)	This would continue to allow non-solicitation clauses restricting former employees from contacting or recruiting their former co-workers to join their new employer, or from any actions that could cause former co-workers to leave the company.
	Full ban (Options 2 and 3)	This would introduce a full ban on the use of co-worker non-solicitation clauses through amendments to the Fair Work Act. Former employees would not be restricted from contacting former co-workers from a former employer.
No-poach and wage-fixing agreements	Status quo (Option 1)	For no-poach agreements, there would be no restrictions for two or more businesses to agree to refrain from actively recruiting or hiring each other's workers. For wage-fixing agreements, there would be no restrictions for two or more businesses to agree to set a cap on wages and employment conditions for their workers with no restrictions. Both agreements can be explicit or implicit and generally occur without the knowledge of affected workers.
	Full ban (Options 2 and 3)	This would introduce a full ban on the use of no-poach and wage-fixing agreements. This would involve proscribing the making of or giving effect to agreements between businesses that restricted the recruitment of employees ('no-poach agreements') or set a cap on wages or employment conditions ('wage-fixing agreements'). This conduct would likely be prohibited *per se* and not depend on whether the conduct had the effect or likely effect of substantially lessening competition.
Restrictions to remaining restraints	Status quo (Option 1)	This would allow non-compete clauses for employees *above* the high-income threshold ($183,100) and client non-solicitation clauses for all workers to continue to proliferate in employment contracts with no restrictions beyond the common law. There would be no restrictions on how these clauses are drafted in employment contracts so they continue to be drafted in a cascading clause format i.e. overlapping duration, geographical limits, which currently

		requires businesses and employees to go to court to determine the exact parameters of the restraint.
	Clarify and strengthen common law (Options 2 and 3)	This reform would involve codifying the existing common law doctrine of restraint of trade, including the existing presumption that a restraint is presumed unenforceable unless it goes no further than necessary to protect a legitimate business interest. It would also ban the use of 'cascading clauses' and prevent courts from 'reading down', or partially 'severing', a restraint of trade clause. A clause would be invalid unless it specified a single geographic area and duration period, to improve both business and employee understanding of the scope of a purported restraint.
	Duration limit on non-compete clauses for high-income earners and/or client non-solicitation clauses (Option 2)	This reform would make a non-compete clause or client non-solicitation clause invalid if it applied for too long. For example, a maximum duration of 6 months from the date of notice could be imposed. It would prevent businesses from using a non-compete clause or client non-solicitation clause that purports to last for excessive periods and provide some certainty of when they are unenforceable.
	Full ban of non-compete clauses and client non-solicitation clauses (Option 3)	This would introduce a full ban on non-compete clauses for employees earning above the high-income threshold, as well as all client non-solicitation clauses, subject to any statutory exemptions that may be applied.

Option 1 – Status quo

This option would maintain the existing common law approach in regulating non-compete clauses and other restraint of trade clauses. The common law would still regulate the use and enforceability of these clauses with post-employment restraints of trade presumed to be void and unenforceable, unless they are reasonably necessary and proportionate to protect the legitimate interest of the employer.[90]

'Legitimate' interests include the (a) protection of trade secrets or other confidential information; (b) protection against solicitation of clients with whom the former worker had some personal connection; and (c) protection against key staff being recruited by former colleagues. The rule of severance and 'cascading' or 'laddered' clauses would continue to be used in employment contracts. There would continue to be some regulatory inconsistency between jurisdictions as the *Restraints of Trade Act 1976* (NSW) (ROTA) would still apply to non-compete clauses for workers where the governing law of their employment contract is NSW.[91]

Option 2 – Partial ban of employment restraints of trade (Preferred option)

This option would implement a combination of the reform options in Table 2. While these options are treated as a holistic option, the elements are not contingent on each other to produce benefits or address the policy problem. Each could be implemented individually and still achieve some degree of the benefit of this option as set out in response to Question 4 below. This option comprises:

- the announced ban on non-compete clauses for employees below the high-income threshold
- the announced ban on no-poach and wage-fixing agreements
- a ban on co-worker non-solicitation clauses
- reforms to limit remaining restraints of trade, specifically:
  - codifying and strengthening the common law doctrine
  - a ban on the use of cascading clauses
  - a statutory duration limit for non-compete clauses for employees *above* the high-income threshold and client non-solicitation clauses

Full ban on the use of non-compete clauses for employees below the high-income threshold

This option would fully ban the use of non-compete clauses for employees below the Fair Work Act's high-income threshold (currently set at $183,100, indexed annually on 1 July) with civil penalties for businesses who include them in employment contracts after the commencement of the reforms. This option would apply prospectively to non-compete clauses in new and varied employment contracts.

As part of this option, a definition of a non-compete clause will provide certainty and reduce the compliance burden for employers and employees. The US FTC definition could be used as a starting

[90] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.
[91] Some employers outside NSW choose to apply NSW law to the employment contract.

point, however final drafting should align with the Fair Work Act, using established terms recognised in Australian jurisprudence to ensure clarity, consistency, and ease of application.

Full ban on the use of no-poach and wage-fixing agreements

This option would fully ban no-poach and wage-fixing agreements with penalties under the Competition and Consumer Act, consistent with existing prohibitions relating to cartel conduct.

The proposal would prohibit businesses from making or giving effect to any contract, arrangement or understanding that restricts the recruitment of each other's employees ('no-poach agreements'), or sets a cap on wages and employment conditions ('wage-fixing agreements'). Additional technical amendments would also be made so that these agreements are sanctionable more broadly under Part IV of the Competition and Consumer Act without undermining the exception in section 51(2) that permits collective agreement making by employees (among other matters).

As part of this element, narrow exemptions would be considered, such as where the agreements serve an ancillary purpose to a function that is pro-competitive or in the public interest, so long as affected workers were appropriately involved in the agreement.

Collective wage negotiations, either under the Fair Work Act, under relevant state legislation, or through centralised public sector wage-setting processes, would also be exempt.

Full ban on the use of co-worker non-solicitation clauses

This would ban clauses which prevents employees from hiring their former colleagues once they move to another business or to start their own business (co-worker non-solicitation clauses). While these clauses do not limit the mobility of the employees as explicitly as non-compete clauses, they do limit the job mobility of their colleagues who are not party to the agreement.

A full ban on the use of co-worker non-solicitation would also be applied prospectively and take effect from 2027. This ban is analogous to the ban on no-poach and wage-fixing agreements, where both clauses share similarities where third parties who are not party to the clause or agreement are restricted unfairly.

Restricting the use of remaining restraints of trade

Duration limit

This would implement a maximum duration limit of 6 months on the use of non-compete clauses for employees above the high-income threshold as well as all client non-solicitation clauses.

Under a maximum duration limit option, the common law would still apply to non-compete clauses and client non-solicitation clauses, including allowing the courts to determine their enforceability in line with reasonableness and proportionality to protect legitimate business interests and the public interest. Restraint periods that are less than the maximum may still be deemed unreasonable for certain employees and circumstances by the courts.

Ban on the use of 'cascading clauses'

This element would ban the use of 'cascading clauses' by requiring businesses to specify a single reasonable duration limit and geographic nexus that is required to protect the business' legitimate interests. This "one-shot rule" would void the entire clause if any part was in a cascading format.

Codification of restraint of trade doctrine

The element would involve clarifying that the existing restraint of trade doctrine that applies at common law — including the presumption of unenforceability — continues to apply where restraints of trade in employment are not otherwise prohibited under the reforms.

Option 3 – Full ban across all restraint of trade clauses

This option would ban the use of non-compete clauses for all national system employees, co-worker and client non-solicitation clauses, no-poach and wage-fixing agreements, and restraints on concurrent employment, all subject to any statutory exemptions that may apply. This option would apply prospectively to all restraint of trade clauses in employment contracts entered into or varied after commencement. This would also require legislative amendments to the Fair Work Act and the Competition and Consumer Act.

Education and enforcement under Options 2 and 3

Educational Campaign

There is general consensus amongst stakeholders that there should be further education available to employees and businesses about the limited circumstances and extent to which restraints can be enforced. Currently, there are limited educational resources on the use of restraints of trade provided by government. By incorporating additional educational resources, businesses would better understand which restraints are unreasonable, dissuading them from including such clauses in future employment contracts. Employees would better understand their employment conditions, which could partially reduce some of the "chilling effect" observed in Australia.

The educational campaign could include developing a suite of educational resources to assist employees and businesses to understand and comply with the ban, including but not limited to media releases, webpage updates, educational resources such as fact sheets and guides, social media posts and providing guidance via existing info lines and community outreach activities. While some education and training could be provided within existing resources as part of the regular operations of regulators, the reach and comprehensiveness of these educational materials could be scaled subject to government funding decisions, dependent on budget prioritisation.

Statutory Exemptions

Public sector exemptions will complement both Options 2 and 3. Given the definition of non-compete covers any term in the employment relationship which captures clauses that prohibit or prevent a worker seeking to start new employment or a new business, there may be a need to exempt specific instances where this captures unintended clauses and requirements. A specific example identified through consultation is a narrow exemption for government officials to manage risks to national security, defence or public sector integrity.

Further, narrow exemptions would apply for the bans on no-poach and wage-fixing agreements in Options 2 and 3 which would include joint ventures, secondments, labour hire firms, professional sporting leagues and workplace instruments under the Fair Work Act, including multi-employer bargaining arrangements.

Penalties

Civil remedy provisions in the Fair Work Act would enable enforcement of options 2 and 3 and employees, businesses, registered organisations, or the Fair Work Ombudsman could commence proceedings through a court with appropriate jurisdiction.

The following could be subject to civil penalties under the Fair Work Act:

- Non-compete clauses for employees below the high-income threshold
- Non-compete clauses or non-solicitation clauses that fail to meet a minimum standard e.g. where the clause exceeds the duration limit of 6 months for employees earning above the high-income threshold.

The ban on no-poach and wage-fixing agreements in Options 2 and 3 could be enforced by civil and/or criminal penalties in line with penalties for similar conduct in the Competition and Consumer Act. 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 and can still cause significant harm. The proposed policy options will ensure they receive similar treatment under the law as other forms of anti-competitive conduct. For example, cartel conduct attracts criminal sanctions. Criminal sanctions for serious cartel conduct were introduced on the grounds that they are a more effective deterrent than financial penalties alone.[92]

[92] Parliament of the Commonwealth of Australia, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 Explanatory Memorandum*, 2008, clause 2.2.

4. What is the likely net benefit of each option?

Cost-benefit analysis methodology follows international best practice

The methodology of the cost-benefit analysis below is informed by approaches adopted in overseas jurisdictions that have considered reforms to non-compete clauses. This analysis incorporates elements from the US FTC's measurement of the regulatory impact of banning non-compete clauses and the UK's Impact Analysis of a proposed reform to limit the duration of non-compete clauses. These examples come from jurisdictions with similar legal frameworks with respect to restraints of trade and can be considered as appropriate to be used as a general benchmark for this impact analysis. However, although both the US and UK present some quantified results, it should be noted that the benefits and costs identified below are difficult to precisely quantify in the Australian context, particularly the estimates of aggregate net benefits.

Options 2 and 3 have both been designed to be adapted within Australia's existing legal frameworks and economic environment. However, it should be noted that interactions between the different economic factors, for example between labour mobility, innovation and investment in training, would be difficult to quantify as a net benefit or cost as they are highly complex and may depend on the specific context of an industry/sector. Therefore, the cost-benefit analysis for the presented options is qualitative. The analysis draws on existing domestic and international evidence, and stakeholder feedback to identify the potential benefits and costs.

The overall net benefits from Options 2 and 3 are summarised in Table 3. Options 2 and 3 are expected to provide broad economic benefits such as increased job mobility, average wages, labour productivity and innovation.

The analysis also includes domestic modelling from the Productivity Commission and international evidence on the impacts of reforming non-compete clauses and other restraints of trade clauses. The Productivity Commission conducted Computable General Equilibrium (CGE) modelling on the impacts of the National Competition Policy reforms, including the impacts of non-compete clauses on the Australian economy, such as the effects on Gross Domestic Product (GDP), Consumer Price Index (CPI) and government revenue at the Commonwealth and State and Territory level.[93] Modelling from the Productivity Commission estimated that reforms to limit the unreasonable use of restraint of trade clauses, specifically non-compete clauses, has the potential to increase annual GDP by 0.2 per cent ($5.14 billion).[94]

Option 1 – Status quo

The status quo, including statistics on the prevalence, benefits, and harms of restraints of trade, is outlined in Question 1. In summary, non-compete clauses are becoming increasingly prevalent in

[93] Whilst the Productivity Commission has not modelled the economic impact of fully banning non-compete clauses, their results should be interpreted as a lower-bound estimate for the discussion that follows under Option 3- Full Ban.

[94] Productivity Commission, *National Competition Policy: modelling proposed reforms, study report with appendices*, 2024, pp. 124–127.

Australia with adverse impacts on job mobility and wages.[95] Maintaining the status quo could potentially lead to increasingly worse economic outcomes as this trajectory of increasing prevalence continues. The international literature indicates that non-compete clauses harm productivity growth, business dynamism, innovation, and competition.[96] The common law would still regulate the use and enforceability of restraints of trade, continuing to create significant uncertainty and discouraging employees from challenging unreasonable restraints in court.

Maintaining the status quo would also result in the continuation of the 'chilling effect'. A worker's fear of being taken to court (or otherwise sanctioned), as well as their financial incapacity to challenge unreasonable restraints, would continue to make them reluctant to consider moving jobs even when it was in their own interests, with reduced job mobility continuing to harm the broader economy.

Option 2 – Partial ban of employment restraints of trade [Preferred option]

Full ban on the use of non-compete clauses for employees below the high-income threshold.

Banning non-compete clauses for low- and middle-income employees would help reduce their prevalence and provide certainty on the enforceability of non-compete clauses for these employees and businesses. However, businesses may need to rely more on less restrictive restraints to protect legitimate interests, such as NDAs or providing better wages and working conditions to retain employees.

Internationally, some jurisdictions have fully banned non-compete clauses, including four US states – California, Minnesota, North Dakota, and Oklahoma. In Europe, Austria made non-compete clauses unenforceable for workers who had signed their contract after March 2006 and whose earnings were below the median wage at the time of 2,100 euros per month. In 2015, non-compete clauses were regulated further in Austria, with their use restricted to the top 25 per cent of earners. A study of the 2006 ban found that the change increased job transitions between firms in the same narrowly defined industries by 6.4 per cent.[97] This is consistent with non-compete clauses mainly restricting transitions between firms that are competitors. The study also found that the ban disproportionately increased job switches to higher-quality firms based on wage and non-wage measures (e.g. job security and average earnings), and that it increased job transitions with wage increases substantially more than job transitions with wage decreases.[98] These two results provide evidence that non-compete clauses hurt lower-income workers by preventing them from switching to jobs with better pay and conditions. Under the preferred Option, Treasury would expect to see an analogous increase to the mobility of lower-income workers in Australia, given that Austria has similar prevalence of non-compete clauses –

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[95] J Buckley, E Rankin & D Andrews, Non-compete clauses, job mobility and wages in Australia, *e61 Institute,* 2024.

[96] Treasury, Non-Competes and Other Restraints: Understanding the Impacts on Jobs, Business and Productivity – Issues Paper, 2024.

[97] S Young, Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria, 2024, p. 3.

[98] S Young, Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria, 2024, p. 3.

affecting around 30 per cent of low-income workers prior to the reform.[99] However, estimating the exact magnitude of the increase in worker mobility is challenging, given key differences between the two countries such as their labour market structures, geographic size and population density, and legal systems, among other things.

Some business groups, such as the BCA, ACCI and Ai Group, strongly opposed a blanket ban on non-compete clauses for low- and middle-income employees, arguing that it lacks a strong evidence base, does not sufficiently acknowledge the advantages of the common law (i.e. case-by-case assessment, fact-specific, flexibility), and that it would harm businesses.[100] Unions, community legal centres, and several legal academics[101] supported a low- to middle-income ban, with some stakeholders (e.g. the ACTU) calling for it to be extended to higher-income employees.[102]

Full ban on the use of no-poach and wage-fixing agreements

It is well established in the international literature that no-poach and wage-fixing agreements reduce competition in labour markets and downstream product markets with adverse effects on worker mobility, wage growth, economic growth, innovation, and investment.[103] US studies have shown that removing no-poach agreements in the fast-food franchise sector was estimated to have increased average wages of job postings for roles in the affected businesses by 5–6 per cent and increased the overall earnings of workers in those businesses by around 4 per cent.[104] Given the broadly similar economic contexts, banning no-poach and wage-fixing agreements in Australia would be expected to have similar positive impacts on wages and worker mobility. However, the opaque nature of these firm-to-firm agreements, and consequent lack of reliable data, make it hard to provide precise estimates. If such agreements are widespread in low-wage sectors, the impact could be comparable to or even greater than that observed in the US. On the other hand, if they are relatively uncommon, the aggregate effect may be more modest. Labour market regulation differences between the US and Australia (e.g. minimum wage and unionisation levels) may also limit the applicability of the US findings.

Many peak business groups opposed the ban on no-poach and wage-fixing agreements, stating that there is limited evidence of the existence of these agreements in Australia and that further regulation would add unnecessary complexity with minimal benefit.[105] In contrast, several unions supported banning these agreements, citing the harms that these agreements cause, particularly to workers.[106] On balance, banning no-poach and wage-fixing agreements would likely deliver economic benefits that outweigh the costs of the reform. While some businesses may face uncertainty in determining whether they qualify for a narrow exemption (e.g. a joint venture), the gains to labour mobility and

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[99] S Young, Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria, 2024, p. 3.

[100] BCA; ACCI; Ai Group, Submissions to the Competition Review's Issues Paper, 2024.

[101] ACTU; ANMF; Legal Aid NSW, Circle Green; Dr Iain Ross & Prof Andrew Stewart, Submissions to the Competition Review's Issues Paper, 2024.

[102] ACTU, Submission to the Competition Review's Issues Paper, 2024.

[103] J M Taladay & V Mehta, 'Criminalization of wage-fixing and no-poaching agreements', Competition Policy International, 2017; Konkurrensverket (Swedish Competition Authority), Joint Nordic report – Competition and Labour Markets, 2024; M Gibson, Employer Market Power in Silicon Valley, 2024, p. 3.

[104] F Lafontaine, S Saatvic & M Slade, No-Poaching Clauses in Franchise Contracts: Anticompetitive or Efficiency Enhancing?, 2023; B Callaci et al., The Effect of Franchise No-Poaching Restrictions on Worker Earnings, 2023, p. 14.

[105] BCA; Ai Group; ACCI, Submissions to Treasury's Consultation Paper [unpublished], 2025.

[106] ACTU; Australian Services Union (ASU); United Workers Union (UWU), Submissions to Treasury's Consultation Paper [unpublished], 2025.

worker wages would far exceed these costs. Arguments against the ban which cite the limited evidence of the prevalence of these agreements overlook the principle that labour market collusion, like other forms of cartel conduct, should be prohibited in any case due to the economic harm it causes.

Prohibiting these agreements under the Competition and Consumer Act would also bring Australia's competition law in line with other key jurisdictions, such as the US, European Union, United Kingdom and Canada where these agreements are illegal under anti-trust and competition laws. In these jurisdictions, businesses engaging in no-poach and wage fixing agreements are subject to civil penalties as well as criminal prosecution. Competition regulators in these jurisdictions have also brought successful cartel prosecutions against businesses for no-poach and wage-fixing agreements. These jurisdictions have recognised that maintaining and encouraging competition among employers results in higher wages and salaries and better employment opportunities for employees.

Full ban on the use of co-worker non-solicitation clauses

Co-worker non-solicitation agreements purport to prevent employees from hiring their former colleagues once they move to another business or to start their own business. As detailed in response to Question 1, co-worker non-solicitation clauses are used by 18 per cent of Australian businesses, and of those, 67 per cent of businesses using them for more than three-quarters of their workforce.[107] While these clauses do not limit a worker's mobility as explicitly as non-compete clauses, they do limit the job mobility of their colleagues who are not party to the agreement.

These clauses restrict both the rights of the former employees to recruit former co-workers, as well as the opportunities of remaining co-workers to pursue future opportunities.[108] Despite being affected by their colleague's co-worker non-solicitation clause, co-workers are not compensated for the restraint imposed as they are not party to the agreement. A ban on co-worker non-solicitation clauses is expected to increase worker mobility, though this impact is likely to be more modest compared to the ban on non-compete clauses for lower-income workers. This is because co-worker non-solicitation clauses are less restrictive as they do not prevent individuals from changing jobs generally, as they only constrain the worker from moving to businesses that a former co-worker with one of these clauses has established or moved to. They are also somewhat less prevalent than non-compete clauses, implying fewer workers would be affected overall. Nonetheless, a ban would have a net positive impact on worker mobility in Australia.

These restraints may also impact business dynamism and competition in the economy. For example, restricting the worker's access to former co-workers when starting their own business may hamper new business growth. Overseas research finds that co-workers help facilitate the creation of new firms by founders[109] and new firms created by former workers tend to survive longer when hiring co-workers.[110] By banning these co-worker non-solicitation clauses, the reform would remove a barrier to worker mobility, particularly in sectors where informal networks play a key role in business

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[107] ABS (February 2024), Restraint Clauses, Australia, 2023, 2024.

[108] I Ross, Non-compete clauses in employment contracts: the case for regulatory response, 2024; J Riley, 'No "Poaching"? Why Not? A Reflection on the Legitimacy of Postemployment Restrictive Covenants', Commercial Law Quarterly, 19(1), 2005, p. 3–8.

[109] R Agarwal , B A Campbell, A M Franco & M Ganco, , 'What do I take with me?: The Mediating Effect of Spin-Out Team Size and Tenure on the Founder-Firm Performance Relationship', *Academy of Management Journal,* vol. 59, no. 3, 2016.

[110] V Rocha, A Carneiro & C Varum, 'Leaving Employment to Entrepreneurship – The Value of Co-worker Mobility in Pushed and Pulled-driven Startups', *Journal of Management Studies,* vol. 55, no. 1, 2018.

formation and growth. This would support the creation of new firms, improve job matching, and enhance the dynamism of the labour market.

Businesses use these clauses to promote the stability of the workforce by reducing turnover and associated costs. Some business groups were therefore strongly opposed to potential reforms for co-worker non-solicitation clauses, arguing that the common law is appropriate, and that these clauses do not harm worker mobility as they only restrict former employees from actively soliciting or poaching co-workers, not from moving jobs.[111] The latter claim, however, overlooks the fact such clauses restrict the natural movement of workers across businesses, especially in industries where informal networks play a key role. By stopping this recruitment, these clauses have the effects of preventing workers from moving to roles that better match their skills and preferences. Further, while banning these clauses may increase turnover costs for some incumbent businesses in the short term, these costs are likely to be outweighed by the broader economic benefits described above, such as increased worker mobility, business dynamism and competition.

Several experts have raised concerns about the common law's protection of stability of the workforce as a legitimate business interest.[112] Although businesses may wish to improve workforce stability, stakeholders have stated that it is inappropriate to do this through restrictive contractual terms, and that businesses should instead use other, less restrictive ways of achieving this stability.[113] This includes by providing attractive employment conditions to retain staff, as well as notice periods in employment contracts which give them sufficient time to recruit replacement staff. Unions and community legal centres also supported a ban for these clauses highlighting their restrictions on job mobility and career progression.[114]

Restricting the use of residual restraints of trade

Duration limits

A 6-month duration limit on the use of non-compete clauses for high-income employees

Research by the e61 Institute suggests that the negative effect on wages over time for high-skill employees in firms that use non-compete clauses is not as pronounced as the substantial effect on lower-skilled occupations.[115] One explanation for this could be that high-skill workers at businesses that use non-compete clauses have higher wages growth as the result of increased training received earlier in their tenure. However, the researchers noted that they did not have necessary data on worker training to test this hypothesis.[116] Another explanation could be that lower-skilled workers may

[111] BCA; Ai Group; ACCI; COSBOA; TCA, Submissions to Treasury's Consultation Paper [unpublished], 2025.
[112] Prof A Stewart & Dr I Ross; Prof W van Caenegem; Prof J Riley Munton; LCA, Submissions to Treasury's Consultation Paper [unpublished], 2025.
[113] Prof J Riley Munton, Submission to the Competition Review's Issues Paper, 2024 p. 8.
[114] ACTU; Electrical Trades Union (ETU); ASU; UWU; Circle Green; Legal Aid NSW, Submissions to Treasury's Consultation Paper [unpublished], 2025.
[115] J Buckley, E Rankin & D Andrews, Non-compete clauses, job mobility and wages in Australia, *e61 Institute,* 2024, p. 8.
[116] J Buckley, E Rankin & D Andrews, Non-compete clauses, job mobility and wages in Australia, *e61 Institute,* 2024, p. 7.

benefit more from using outside offers to negotiate higher wages compared to higher-skilled workers, so non-compete clauses may disproportionately restrict their wage growth.[117]

Noting this evidence, limiting the duration of non-compete clauses for employees above the high-income threshold may be a more balanced approach when compared to a full ban in Option 3. Striking the correct balance for these employees could yield substantial economic benefits, as individual highly skilled employees can significantly improve the productivity and innovation of an entire organisation and improve the overall level of competition within a market. A maximum duration limit of 6 months may also reduce litigation on the permissibility of non-compete clauses which would give employees freedom to move to more productive jobs.

Analysis of all Supreme or Federal Court level final decisions in Australia regarding the reasonableness of the duration of non-compete clauses between 2016–2023 found that 6-month restraints (or longer) were likely unenforceable against non-senior employees, but likely upheld against senior employees.[118] Restraints of 12 months were enforced against senior employees roughly half of the time, depending heavily on the specific circumstances.[119] Restraints of 24 months were mostly judged to be unenforceable, even against senior employees, unless a high bar was met.[120] The findings of this study are featured in the table below:

Table 3: Reasonableness of duration of non-compete restraints by number of months

Duration of restraints (months)	Number of restraints	Number reasonable	Number unreasonable	Percentage reasonable (%)
24	5	0	5	0
12	10	5	5	50
9	1	0	1	0
6	7	6	1	87.5

Source: A Fell & E Rudz,, Employee Non-Compete Restraints: Resolving Uncertainty, 2023, pp. 1279.

Business and industry groups strongly opposed specific reforms to non-compete clauses for higher-income employees, including duration limits.[121] These stakeholders argued that the common law provides flexibility to assess the reasonableness of restraint clauses on a case-by-case basis for higher-income workers. They also noted higher-income workers generally have greater bargaining power to negotiate their employment arrangements, and that their roles often involve legitimate business interests (e.g. confidential information) that warrant protection. This view, however, does not acknowledge that the common law in practice is a source of uncertainty for some workers. This uncertainty may discourage workers from pursuing legitimate employment opportunities, contributing to a broader ‘chilling effect’ on mobility, as discussed in Question 1. Such effects can undermine the intended flexibility of the common law and raises questions about its adequacy as a safeguard for all

[117] J Buckley, E Rankin & D Andrews, Non-compete clauses, job mobility and wages in Australia, *e61 Institute,* 2024, p. 7.
[118] A Fell & E Rudz, Employee Non-Compete Restraints: Resolving Uncertainty, 2023, pp. 1279-1282.
[119] A Fell & E Rudz, Employee Non-Compete Restraints: Resolving Uncertainty, 2023, pp. 1279-1282.
[120] A Fell & E Rudz, Employee Non-Compete Restraints: Resolving Uncertainty, 2023, pp. 1279-1282.
[121] BCA; Ai Group; ACCI; Managed Funds Association (MFA) COSBOA, Submissions to Treasury’s Consultation Paper [unpublished], 2025.

workers. In contrast, other stakeholders expressed that if bans were not extended to higher-income employees, then some combination of statutory limits would be appropriate, such as duration limits.[122] However, business groups opposed duration limits, arguing that statutory limits are too inflexible and could prevent restraints that are reasonable in certain circumstances from being enforced.[123] This option was further discussed above in Question 3.

A 6-month duration limit on the use of client non-solicitation clauses

While client non-solicitation clauses may be considered less restrictive than non-compete clauses for workers, they can still have negative effects on job mobility. Businesses in smaller, concentrated markets often have long-standing history and entrenched customer relationships spanning across the entire community due to the limited geographic area they serve. In these scenarios, non-solicitation clauses may function similarly to non-compete clauses, effectively prohibiting former workers from engaging with clients associated with the business. This may result in affected workers choosing to stay due to the barriers to mobility, relocate to find new employment or seek work in another industry.

Client non-solicitation clauses may also have impacts on the third-party client, leaving them worse off in some instances. Client non-solicitation clauses can restrict the competition in product markets if former workers cannot approach former clients – clients may receive better price offerings or higher quality goods or services if the former worker could compete for that client business. Clients may also have special needs that only the particular worker understands, such as in the care and support sector, and the client may not feel comfortable establishing this relationship with another person.

However, non-solicitation clauses may provide some protection to businesses to support the development of valuable worker-client relationships. There are circumstances where the investment of the business in the client relationship could justify imposing a temporary restraint period to provide the business with time to attempt to secure their client relationships before the ex-employee can seek to appropriate their connection with a client for the benefit of a competitor. 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.[124] Data collated by HSFK shows that between 2010 and 2022, approximately 50 non-solicitation clauses were deemed to be valid by the courts, with more than half of these cases involving restraint periods of 12 months or greater.[125]

Business groups opposed any reforms to client non-solicitation clauses.[126] These groups argued that non-solicitation clauses do not restrict worker mobility, and that the common law already strikes the right balance between the interests of businesses, workers and the public. They also noted the lack of evidence to justify regulatory intervention. Several financial services stakeholders emphasised the role that such clauses play in supporting business viability, helping to protect investments in client relationships and maintain commercial continuity.[127]

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[122] ACTU; Law Council of Australia, Submissions to Treasury's Consultation Paper [unpublished], 2025.
[123] BCA; ACCI; Ai Group; TCA; MFA, Submissions to Treasury's Consultation Paper [unpublished], 2025.
[124] Prof A Stewart & Dr I Ross, Submissions to Treasury's Consultation Paper [unpublished], 2025.
[125] HSKF, 'Australia: Breaking the chains – ACCC Review of non-compete and no-poach provisions in employment contracts', HSFK website, 27 March 2023. NB: This data does not distinguish between client and co-worker non-solicitation clauses.
[126] BCA; Ai Group; ACCI; TCA; COSBOA; Pharmacy Guild of Australia, Submissions to Treasury's Consultation Paper [unpublished], 2025.
[127] AFMA; MFAA; ASIFMA, Submissions to Treasury's Consultation Paper [unpublished], 2025.

In contrast, other stakeholders – including unions and community legal centres – supported either banning or restricting client non-solicitation clauses.[128] Several community legal centres noted the disproportionate impact of such clauses on lower-income workers, particularly as they are often vaguely worded and in some cases are used by employers to threaten legal action, even if the employee is not actively soliciting or approaching clients.[129] Similar to the chilling effect of non-compete clauses, this threat of legal action may dissuade workers from seeking alternative work if it involves clients in the same geographic area or industry – such as in regional/remote areas – where overlapping client bases are common and employment options are limited. Some stakeholders, including the ASU and the ANMF, supported banning these clauses in the care and support sector, particularly under the NDIS, where such clauses may prevent people with a disability from being able to freely choose their preferred care provider.[130]

Banning ‘cascading clauses’

The increasing prevalence of cascading clauses has raised valid concerns with stakeholders. Recent Circle Green data found how common cascading clauses have become, appearing in around 1 in 4 restraint matters and are often used to obscure enforceability.[131] Stakeholders have argued that its use has created greater uncertainty for businesses and employees and is contributing to the ‘chilling effect’ on workers.[132] The use of cascading clauses also shifts the burden of determining the validity to courts which can be costly for businesses and employees. Therefore, a ban on cascading clauses would reduce uncertainty and ambiguity. It would also ultimately help reduce time-consuming litigation regarding the enforceability of post-employment restraints.

Codification of restraint of trade doctrine

The common law doctrine attempts to balance the complex and conflicting interests of the public, business and workers. However, evidence from legal experts suggests that the implementation of the restraint of trade doctrine in practice may generate uncertainty that can harm both parties without furthering either the public interest or protecting legitimate business interests.[133] 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.

The codification of the restraint of trade doctrine would ultimately help increase clarity and certainty for employers and employees. Although, the benefits and costs are unquantifiable the intent of the reform is not primarily to benefit the wider economy but rather help reduce regulatory burden for businesses and employees.

Option 3 – Full ban across all restraint of trade clauses

A full ban across all clauses 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

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[128] ACTU; UWU; Employment Rights Legal Service (ERLS); Legal Aid NSW; Circle Green, Submissions to Treasury’s Consultation Paper [unpublished], 2025.
[129] Circle Green; Legal Aid NSW, Submissions to Treasury’s Consultation Paper [unpublished], 2025.
[130] ACTU; ASU, ANMF; UWU; ERLS, Submissions to Treasury’s Consultation Paper [unpublished], 2025.
[131] Circle Green Submission to Treasury’s Consultation Paper [unpublished], 2025.
[132] ACTU; COSBOA; LCA; ETU; ASU; NTWWC; Circle Green; WLC; Legal Aid NSW; Prof J R Munton; Prof W van Caenegem; Dr I Ross & Prof A Stewart, Submissions to Treasury’s Consultation Paper [unpublished], 2025.
[133] Dr I Ross & Prof A Stewart; Prof W van Caenegem & C Douglas; Submissions to the Competition Review’s Issues Paper, 2024.

on other mechanisms, such as staffing retention strategies (e.g. better pay and conditions) and alternative protections (e.g. confidentiality agreements and intellectual property law), which are more targeted tools to protect their legitimate interests.

Some stakeholders – particularly unions and community legal centres – have expressed strong support to fully ban non-compete clauses, noting the "chilling effect" on worker mobility and their assertion that the current law and practice relating to these clauses does not strike an appropriate balance between the interests of the broader public, workers and businesses.[134]

However, a full ban of restraint of trade clauses may be too restrictive for businesses in certain circumstances. This option may not provide adequate flexibility and may place greater regulatory burden on businesses, especially for small businesses. A full ban may disproportionately disadvantage small businesses in certain industries and may have detrimental impacts on business investment and confidence. Further, many businesses will need to adapt their employment contracts and other relevant Fair Work Instruments, which may prove administratively burdensome or complex, which might be costly for small businesses. Business groups strongly opposed extending the lower-income ban on non-compete clauses to higher-income employees, noting that alternative mechanisms are inadequate to protect legitimate business interests.[135]

The expected economic impacts are considered in greater detail below:

Analysis of individual costs and benefits from Option 2 and Option 3

The following section summarises the anticipated economic impacts from the reform options in Options 2 and 3 compared to the status quo (Option 1). Where possible, the measurement of individual costs and benefits are based on domestic data and international evidence, including empirical studies using analogous reforms to restraints of trade in other jurisdictions.

Benefit: Increase in job mobility

Restraints of trade, by definition, limit the future employment opportunities of current workers. Where a worker complies with the terms of a non-compete clause (irrespective of its enforceability), they will not commence a new job with a competitor until the restraint period has elapsed. Where cascading clauses are used, this can often be a period of more than one year.

This cost of compliance, together with the potential costs of challenging the enforceability of a restraint in court, reduce the expected benefits to current employees from moving to a new job. This results in some workers remaining in their current job who would, in the absence of a restraint, have moved to a more productive or otherwise better-suited job. Restraints of trade have no effect on workers who happen to be matched to their most productive and preferred job. Similarly, workers who correctly believe a restraint will not be enforced are currently uninhibited in their job mobility and will not be affected by a policy change. In other words, the uncertainties of enforcement combined with workers' natural risk aversion operate to hamper job mobility. Consistent with this, studies from the US suggest that merely making restraint clauses unenforceable is not sufficient,[136]

[134] ACTU; ETU, ANMF; UWU, Submissions to Treasury's Consultation Paper [unpublished], 2025.
[135] BCA; Ai Group; TCA; ACCI, Submissions to Treasury's Consultation Paper [unpublished], 2025.
[136] E Starr, JJ Prescott and N Bishara, 'The Behavioural Effects of (Unenforceable) Contracts', Journal of Law, Economics, and Organization 36, no. 3 (2020).

and that additional steps including education and easily-understood reforms (such as blanket bans) can be important in giving workers the confidence to switch jobs.

This effect is most clear for non-compete clauses, which are the broadest restriction on post-employment activities. Although empirical evidence on the impact of client non-solicitation clauses is more scarce, these clauses operate in a qualitatively similar way on job mobility, resulting in the loss of potential productivity and earning potential of a worker in a future job. Co-worker non-solicitation clauses impede the job mobility of groups of workers who would otherwise be more productive together. Workers may not realise that they are being harmed by the existence of a co-worker non-solicitation clause, a no-poach agreement or a wage-fixing agreement that has been made without their knowledge. These agreements stop potential prospective employers from recruiting the worker, or otherwise reduce the ability of the prospective employer from offering more attractive employment conditions.

A full ban on employment restraints of trade would remove these barriers to job mobility. A ban on non-compete and co-worker non-solicitation clauses on workers in the tech sector in Hawaii was found to increase job mobility for these workers by 11 per cent.[137] Similarly, a ban on non-compete clauses for low-income workers in Oregon was found to increase job mobility by 17 per cent for affected workers.[138] Reforms to non-compete clauses in Austria and the Netherlands were also found to increase worker mobility.[139]

There is also some evidence that, in addition to harming job mobility for workers with a non-compete clause, these clauses can also harm mobility in the broader labour market. A US study showed that in states and industries with a higher incidence and enforceability of non-compete clauses, workers, including those without a non-compete clause, received relatively fewer job offers, had reduced job mobility and experienced lower wages.[140] The study suggests this is explained by the increased uncertainty generated by non-compete clauses and asymmetries of information in labour markets, which increases recruitment and search costs for hiring businesses and workers.

As noted in Question 1 above, the negative impacts on labour mobility of unenforceable non-compete clauses are particularly acute among already-systemically disadvantaged cohorts, including women, lower-income workers and employer-sponsored visa workers. Vulnerable workers, particularly lower-income workers, are more likely to benefit from simple and easily-understood reforms that prohibit the inclusion of restraint clauses entirely (such as the reforms in Options 2 and 3), rather than relying on educational materials to navigate the complex common law status quo in Option 1.

The sign and magnitude of reform impacts can also be measured by comparing workers with non-compete clauses to a similar cohort of workers without non-compete clauses. A US study looking at a dataset of executive-level workers found that executives with a non-compete clause were 1.8 percentage points less likely leave the firm annually.[141] Using the 2023 ABS Survey data, the e61 Institute estimated that workers at firms that increased their use of non-compete clauses had reduced job-separation probability of 1.8 percentage points compared to workers at firms that did not change their use of non-compete clauses.[142] Job-to-job transitions were also estimated to be lower by 0.9

[137] Balasubramanian et al, 'Locked in? The enforceability of covenants not to compete and the careers of high-tech workers', 2022.
[138] Lipsitz M & Starr E, 'Low-wage workers and the enforceability of noncompete agreements', 2021.
[139] OECD, 'Five facts on non-compete and related clauses in OECD countries', 2025; Young, 'Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria', 2024.
[140] E Starr et al., 'Mobility constraint externalities', Organization Science, 2018, 30(5), p 18.
[141] Shi L, 'Optimal regulation of noncompete contracts', *Econometrica*, 2023, 91(2), 425-463.
[142] Buckley et al, 'Non-compete clauses, job mobility and wages in Australia', e61 Institute, 2024, p 5.

percentage points (a 10% drop), driven mostly by a decline in within-industry job-to-job transitions.[143] This is consistent with Treasury analysis of the same data which estimated that workers in firms with a high use of non-competes were 2.1 percentage points more likely to switch industries than workers leaving firms without non-competes.[144]

Stakeholder suggestions of providing additional education material while otherwise retaining the status quo is unlikely to materially improve job mobility, given the complexities of the common law restraint of trade doctrine, the lack of financial resources or confidence of many workers to challenge a clause in court, combined with workers' natural risk aversion of exposing themselves to legal risk as noted above. The increases in job mobility observed from international reforms, and the observed differences in job mobility between workers with and without a non-compete clause, is a useful starting point for the expected benefit of reform in Australia. Option 3 is expected to have the most significant increase in job mobility out of any reform options, since all employment restraints of trade being considered for reform would be banned. This impact would likely be larger than the impacts from merely banning non-compete clauses. Option 2 would have a similar, but smaller, increase in job mobility relative to Option 3. This is because client non-solicitation clauses and non-compete clauses for high-income workers would still be permitted in certain circumstances. Mobility for workers affected by these clauses would still be expected to increase due to proposed duration limits on these clauses and due to the prohibition on cascading clauses (which is expected to provide additional certainty to workers and would be expected to result in shorter restraint periods in employment contracts). While empirical evidence supports the existence of a mobility impact on high-income workers, these workers may have a smaller increase in job mobility than those on lower incomes, since these workers are more likely to have the resources to challenge court enforcement or to afford a period of underemployment.

In the year ending February 2025, the ABS estimate that job mobility was at 7.7%, with 1.1 million people changing jobs within the year.[145] Based on the international and domestic evidence, it is possible that job mobility could increase by around 10-20%, or about 1-2 percentage points, for employees covered by the Fair Work Act. Option 2 would be expected to have at least 90% of the expected increase in job mobility in Option 3.

Benefit: Increase in wages and labour productivity

Workers voluntarily leave jobs for many reasons, including to retire, study, travel or for family reasons. Most workers, however, move to seek a better job. In the year ending in February 2025, the ABS estimated that, of the 1.2 million workers who voluntary left a job, over 800,000 (around two-thirds) moved due to either poor employment conditions in their current job, to have a career change or get a better job, or to start their own business.[146] Although there are many factors and employment conditions that can influence a worker's choice of employment, an important motivation can be to earn a higher wage. This is consistent with research from the e61 Institute that reported that workers who switch jobs have wage gains 9 percentage points higher than workers who stayed at their existing job.[147] For a worker on a typical salary, this represents a pay rise for job switchers $5,700 larger than the pay rise for the equivalent job stayer.[148]

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[143] Buckley et al, 'Non-compete clauses, job mobility and wages in Australia', e61 Institute, 2024, p 5.
[144] Unpublished Treasury calculations on ABS microdata.
[145] Australian Bureau of Statistics (February 2025), Job mobility, ABS Website.
[146] ABS (February 2025), Job mobility.
[147] Wong A, 'Climbing the wage ladder: linking job mobility and wages', e61 Institute, 2024, p4.
[148] Wong A, 'Climbing the wage ladder: linking job mobility and wages', e61 Institute, 2024, p4.

According to economic theory, workers should be able to negotiate for wages up to the value of their productive potential. A prospective employer may therefore be able to offer higher wages for several reasons, including because the prospective employer is generally more productive than the previous firm, or because the specific job match between the worker's skills and the new job's requirements. Therefore, a job offer with higher wages will reflect a more productive allocation of labour across the economy. Due to incomplete information, and changing skills and demand for skills, individual workers may need to make several job transitions over their career to find and remain in their most productive job. As a result, barriers to job mobility impair this productive reallocation of labour and therefore harm the potential wages growth of workers.

Barriers to job mobility may further contribute to reduced wages growth by reducing the bargaining power of employees when negotiating for higher wages in their current job. A worker would be expected to remain at their current employer so long as they were offered a wage at least as much as the next best alternative employer, net of any costs from moving job. By imposing a cost on moving job from either compliance with a restraint period or from costly litigation and legal advice, a current employer does not need to offer pay rises as high as they would in a more competitive labour market. In this scenario, workers would face slow wage growth and, after several years, would no longer be paid in line with their productivity, even if the current job was a highly suitable and productive match.

As established above, non-compete clauses are a substantial barrier to job mobility, and empirical evidence supports that these clauses reduce wages by both denying workers the opportunity to move, and by reducing the bargaining power of workers that remain at their existing employers.

When non-compete clauses and co-worker non-solicitation clauses were banned for tech-workers in Hawaii, the average growth in earnings of all new hires in the tech sector rose by 4.2 per cent, while the wages of all workers in the sector (including those that didn't move and those without non-compete clauses) rose by 0.7 per cent.[149] A ban on non-compete clauses for hourly workers in Oregon was found to increase the wages of all hourly workers by 2–3 per cent on average, including those without non-compete clauses.[150] These findings are supported in cross-sectional analysis of workers with non-compete clauses (or workers in US states with higher enforcement of non-compete clauses) with similar workers without the same restraint effect.[151] A recent study comparing the enforceability of restraints within and across all states in the US over a 24 year period extrapolated that a full ban on non-compete clauses could increase wages by between 3.5–13.7 per cent.[152]

Another study of executive-level employees with non-compete clauses, who could be expected to have legal resources to challenge a restraint, observed them to have lower wage growth over time than peers without restraints.[153] Workers with a combination of restraints, such as a non-compete clause and a confidentiality clause, are observed to have slower wages growth when compared to workers with just confidentiality clauses, supporting evidence that confidentiality clauses, while protecting a business' intellectual property, are not a barrier to job mobility and bargaining power.[154]

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[149] Balasubramanian et al, 'Locked in? The enforceability of covenants not to compete and the careers of high-tech workers', 2022.

[150] Lipsitz M & Starr E, 'Low-wage workers and the enforceability of noncompete agreements', 2021.

[151] Balasubramanian et al, 'Locked in? The enforceability of covenants not to compete and the careers of high-tech workers', 2022.

[152] Johnson M, Lavetti K & Lipsitz M, 'The Labor Market Effects of Legal Restrictions on Worker Mobility', NBER Working Paper Series, December 2024.

[153] Shi L, 'Optimal regulation of noncompete contracts', p 427.

[154] N Balasubramanian, E Starr & S Yamaguchi, 'Employment restrictions on resource transferability and value appropriation from employees', Strategic Management Journal, 2024, 45(12), p2519-2547.

This last methodology was adopted to measure the impact of restraint clauses in Australia. In Australia, workers with a non-compete clause almost always have another restraint clause, usually a non-disclosure clause.[155] Not all businesses need a restraint of trade to operate successfully; they may not provide employees the level of access to sensitive information such as intellectual property and client relationships that could support an enforceable restraint of trade. Businesses that currently use a non-compete clause would still be expected to require a confidentiality clause to support their legitimate interest in protecting their intellectual property. As such, comparing the wage outcomes of workers with a non-compete clause with those with only a non-disclosure clause may be the most appropriate comparison. Using ABS and ATO microdata, the e61 Institute estimated that workers at firms that use non-compete clauses extensively are paid 4 per cent less on average than similar workers at similar firms that only use non-disclosure clauses.[156] For a worker on median wages, this is equivalent to an annual penalty of more than $500. This effect is particularly pronounced for lower-skill workers (those in jobs that do not usually require a bachelor's degree or higher), with a 6.9 per cent wage penalty compared to workers with only confidentiality clauses.[157] The research suggested that this effect may be driven primarily by slower wages growth over time,[158] which could suggest that firms with non-compete clauses offer market wages but face fewer competitive pressures to raise wages once workers are employed. While some stakeholders highlighted that workers within certain industries are appropriately compensated for a restraint clause,[159] research by Treasury's Competition Taskforce did not find evidence of this compensation on average[160]

It is more difficult to estimate the wage impact of reform to other restraints of trade, due to their more nuanced or covert impact on job mobility. For example, it would be difficult to identify the wage impact from a co-worker non-solicitation clause, since the clause would be present in the contract of one employee but is more likely to affect the mobility and wages of their colleagues.

There is some evidence of the impact of no-poach agreements on wages. One study looked at the prevalent use of no-poach agreements for the employees of franchised restaurants, where individual franchisees of the same brand were prevented from competing for workers from other franchisees within the same brand. This study found that the removal of these no-poach agreements was estimated to have increased average wages of job postings for roles in affected businesses by 5–6 per cent and increased the overall earnings of workers in those businesses by around 4 per cent.[161] Horizontal (or 'nakedly' anti-competitive) no-poach agreements among Silicon Valley tech businesses were estimated to result in a 5.6 per cent reduction in worker salaries, with stock bonuses and qualitative ratings of job satisfaction of also negatively affected.[162] As part of the $435 million settlement agreement in relation to enforcement against a no-poach agreement between these tech firms, affected workers were awarded damages of $5,770 each.[163] Expert testimony and subsequent academic calculations suggest that the actual impact on each affected worker could have been significantly higher. Due to the absence of information on the prevalence of no-poach agreements in Australia outside of the franchise context (where Treasury analysis of data available on the Franchise

[155] ABS, 'Restraint Clauses, Australia, 2023'
[156] Buckley et al, 'Non-compete clauses, job mobility and wages in Australia', e61 Institute, 2024, p 6.
[157] Buckley et al, 'Non-compete clauses, job mobility and wages in Australia', e61 Institute, 2024, p 7.
[158] Buckley et al, 'Non-compete clauses, job mobility and wages in Australia', e61 Institute, 2024, p 7.
[159] Australian Financial Markets Association (AFMA) Submission to Treasury Issues paper, 2024.
[160] Unpublished Treasury calculations on ABS microdata.
[161] A Krueger and O Ashenfelter, 'Theory and Evidence on Employer Collusion in the Franchise Sector', NBER Working Paper Series, 2018.
[162] Gibson, M. *Employer Market Power in Silicon Valley*, Upjohn Institute Working Paper 24-398, March 2024.
[163] Re: High-Tech Employee Antitrust Litigation [2015] D.D.C 11-CV-02509.

Disclosure Register suggests that up to one half of franchise agreements available may have contained a no-poach clause), it is not possible to estimate the impact of prohibiting these agreements.

Both Option 2 and 3 are expected to improve the productive allocation of labour in the economy. 2024 modelling by the Productivity Commission of restricting the use of non-compete clauses suggested labour productivity could be increased by around 0.24 per cent in industries with a high intensity of non-compete clause use, and a 0.14 per cent increase for industries with a lower-intensity use of non-compete clauses. This was estimated by conservatively extrapolating the best available international evidence into Australia. Therefore, Options 2 and 3 could improve wages and labour productivity by more than was modelled by the Productivity Commission. Consistent with other international evidence, there may be broader spillover effects in the broader labour market as well. Option 3 is expected to have the most significant impact in wages and labour productivity, even though high-income workers may be more capable of negotiating compensation for restraints under the status quo and may therefore have a smaller wage penalty (as a proportion of their counterfactual wage) than lower-paid workers.

Benefit: Increase in innovation and knowledge diffusion

A critical view of non-compete clauses is that they harm innovation through reductions in job mobility. Under this view, greater worker mobility not only improves the worker's own productivity (and consequently wages) by permitting them to start a new business or move between businesses within the same industry, but also improves the sharing of general industry knowledge, know-how and innovation within the industry.[164] Removing barriers and facilitating workers to move to roles where they are more productive, including by creating new businesses, is crucial for long-term productivity growth. Entrepreneurship is a major driver of innovation and productivity, and younger businesses contribute disproportionately to job creation.[165]

Another study found that an increase in enforcement of non-compete clauses was associated with an increase in investment in intangible assets of 8.1 per cent, but a reduction in the number of new patents of 16–19 per cent over 10 years, with no reduction in patent quality or an increase in the use of trade secrets.[166]

Measuring the long-term impact on innovation of a specific policy change to the use of non-compete clauses can be challenging. One seminal study considered the relative success of the Silicon Valley technology hub over a comparable hub in Massachusetts and argued that it could be explained by the unenforceability of non-compete clauses in California. Critics of this study have highlighted the use of other mechanisms in California to protect innovation and questioned causation given the economic, legal and technological differences between the 2 hubs over the period.[167]

By banning the use of non-compete clauses for around 90% of employees covered by the Fair Work Act (those earning below the high-income threshold), and by banning the use of co-worker non-solicitation clauses, Option 2 will facilitate the productive re-allocation of workers and knowledge

[164] O Lobel, 'Noncompetes, human capital policy & regional competition', The Journal of Corporation Law, 2021, 45(4), pp 936-942.

[165] OECD, 'Start-ups and innovative entrepreneurship', OECD Science Technology and Innovation Outlook 2016, OECD, 2016.

[166] Johnson et al. 'Innovation and the enforceability of non-compete agreements'. See also J Jeffers, 'The Impact of Restricting Labour Mobility on Corporate Investment and Entrepreneurship', 2023.

[167] R Gilson, 'The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete', New York University Law Review, 1999, 74(3):575:629; but see: J Barnett and T Sichelman, 'The Case for Noncompetes', The University of Chicago Law Review, 2020, 87(4), pp 978-1008.

diffusion across most of the economy. This is expected to promote more efficient use of intangible investment in research and development. Confidentiality clauses will be unaffected, and workers can continue to be encouraged to stay with productive firms through attractive remuneration and employment conditions.

Since many workers in cutting-edge research roles may earn above the high-income threshold, Option 3 would be expected to increase innovation and knowledge diffusion by more, including per worker, than Option 2. The exact magnitude of this benefit, and particularly the economic consequences of innovation, cannot be reliable quantified in the Australian context with available data.

Benefit: Increase in entrepreneurship and business formation

The direct consequence of a non-compete clause is that it hinders competition among businesses by disincentivising workers from leaving their current job, creating a barrier to the entry of new businesses and the expansion of existing businesses. Access to workers with relevant skills are a key component of a business's ability to enter a market and expand. A non-compete clause provides a first mover advantage to incumbent businesses, and later businesses may struggle to attract relevant workers if they are subject to a non-compete clause.

Studies from the US have shown that start-ups are less likely to form in states with more strict enforcement of non-compete clauses, and that these start-ups struggle to hire and grow, and innovate less.[168] However, the recent ABS restraint clause survey[169] suggests employers may not have experienced significant barrier in attracting talent due to the use of non-competes. When businesses were asked if potential workers had turned down their job offer because of a non-compete clause with their existing employer, 82.3 per cent of businesses responded "no". However, some care is required as this would not factor in the missed opportunity of potential employees who did not apply due to the "chilling effect" on mobility from their non-compete clause.

In addition to hampering the acquisition of talented and experienced staff to grow new businesses, non-compete clauses may also therefore distort capital allocation and investment incentives, with investors more favouring incumbent businesses who have a more stable workforce and protections against competition from new entrants. This may affect the valuation of new businesses and their access to capital to support their growth.

No-poach and wage-fixing agreements may support the entrenchment of market share of the firms colluding together, which may affect the overall competitive process in a given market and harm the prospects of new entrants; but new entrants who are not party to these agreements are currently free to recruit staff at market rates (subject to restraints of trade that apply to these workers currently). Co-worker non-solicitation clauses hamper the ability of new businesses to grow and attract staff, while client non-solicitation clauses may affect the initial profitability of new businesses.

When estimating the economic impacts of a proposed ban on non-compete clauses across the United States, the US Federal Trade Commission estimated that new business formation would increase by 2.7–3.2%. The higher estimate was derived from a study looking at higher-tech firms specifically.[170]

An increase in firm dynamism is expected to represent, on average, a more productive reallocation of resources from incumbent businesses, some of which may contract or exit.

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[168] M Johnson, M Lipsitz and A Pei, 'Innovation and the enforceability of non-compete agreements', National Bureau of Economic Research NBER) Working Paper, 2023.
[169] ABS, 'Restraint Clauses, Australia, 2023'.
[170] US FTC, 'Non-Compete Clause Rule', US Government Federal Register, 2024, 89(89): pp. 38471.

Under Option 2, non-compete clauses would remain available under certain conditions for high-income workers, which would continue to affect the ability for these workers to start or move to new and growing businesses. Similarly, certain client non-solicitation clauses would remain available, which would be expected to affect business formation in industries where client relationships are particularly important. Consequently, these benefits would be more fully realised under Option 3.

Cost: Reduction in investment in physical and human capital

Worker mobility has the potential to present a 'hold-up problem' that can prevent the business from efficiently investing in their workers.[171] As a worker acquires more general or industry-specific information (instead of information that is uniquely valuable to the business), they become more productive and of greater value to competing businesses which can reap the rewards without the costs of undertaking the investment in training. In some contexts, workers may prefer to self-fund their training (e.g. TAFE or university) in return for a higher wage, avoiding any hold-up of investment.[172] By suppressing this mobility, non-compete clauses may encourage businesses to provide more training to workers. This can also be observed in alternative employment conditions, such as training repayment agreements, where businesses support workers in further study or certification that may have general or industry-wide applicability, in return for a commitment to either repay part of the cost of support or continue to work with the business for a specified period.

In addition to supporting business incentives to invest in workers' human capital, non-compete clauses may also encourage investment in other intangible and physical capital by increasing barriers to healthy competition and new firm entry.

Overseas, the net impact of non-compete clauses on training, investment and innovation has been contested. Proponents argue that non-compete clauses are important for investment in skills and training, once any theoretical potential 'hold-up' problem has been addressed by a non-compete clause.[173] A similar economic argument is used to justify intellectual property protections which provide an exclusive right to benefit from a creation for a defined period of time as necessary to encourage investment.[174]

It is difficult to measure the net impact of the potential positive benefit from increased investment and the negative impact from the restriction in the flow of ideas. If workers would receive training in their job regardless of non-compete clause (for example because other more targeted restraints are available), then the argument for using non-compete clauses to support investment diminishes.

Similarly, if workers funded their own training, or drove innovation in the business using their own built-up experience and relationships, restrictions to the mobility of this human capital and expertise from the use of non-compete clauses would unnecessarily impede business productivity. However, if businesses would hold back sharing information or training workers without a non-compete clause, then the potential argument for them increases. These effects may be different across industries, businesses and even within businesses.

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171 J McAdams, 'Non-Compete Agreements: A Review of the Literature', Federal Trade Commission, United States Government, 2019, p 6.

172 G Becker, Human Capital, 3rd edn, University of Chicago Press, 1993, pp 29-51.

173 J Barnett and T Sichelman, 'The Case for Noncompetes', The University of Chicago Law Review, 2020, 87(4), p 970. See also: J McAdams, 'Non-Compete Agreements: A Review of the Literature', p 6.

174 Starr, 'Noncompete Clauses: A Policymaker's Guide through the Key Questions and Evidence'; See also: O Lobel, Talent Wants to be free, Yale University Press, 2013, p 32.

Several studies have looked at US states that enforce non-compete clauses differently to examine observable differences in training and investment. One study found that, when comparing a state where non-compete clauses are not enforceable to a state with average enforcement, business-provided training was higher by 14.7 per cent but wages were lower by approximately 4 per cent.[175] Removing restraints of trade may result in more of the cost of training being borne by employees. However, consistent with economic theory, workers would be more capable of increasing their earnings in line with the increased productivity from training, resulting in the better targeting and matching of training with the most efficient use of the workers' skills.

Removing barriers to mobility would be expected to result in a reduction in the value of capital investment by incumbent businesses. Since some of this investment is estimated to be above the efficient or competitive value of investment, the productivity impact of this reduction in investment will be mixed. Similarly, while investment by incumbent businesses is expected to fall, investment by new and growing businesses is expected to grow.

When proposing the full ban on non-compete clauses, the US FTC estimated that business investment at incumbent firms would fall by between 0–7.9%.[176] As noted above, this is expected to partially represent a transfer from incumbent businesses to new firms.

Option 2 is expected to result in a smaller reduction in investment than under Option 3, since the most senior employees in firms (which may play a more central role in firm investment decision making) may still have non-compete clauses in certain circumstances.

Cost: Reduction in business profitability

A corollary of the more efficient reallocation of labour across the economy from reduced barriers to mobility is that capital will also be more efficiently allocated. This is consistent with a redistribution of activity and profitability from less-productive, incumbent businesses to more-productive new or existing businesses. As part of this adjustment, there may be temporary costs associated with firms that contract or wind up as they are exposed to more competition. However, output and profitability is expected to increase in aggregate in line with higher aggregate productivity. Businesses that had relied most heavily on non-compete clauses to suppress their workers' wages or otherwise provide an anti-competitive edge will face the largest adjustment.

As touched on above, the reforms are expected to have a mixed impact on profitability across firms. Incumbent businesses currently using non-compete clauses intensively are more likely to observe a fall in profitability if they were otherwise less productive. Higher-performing businesses that attract job-switching workers, including new businesses, will be more likely to experience higher profits by attracting new staff. The difference in impacts on business profits between Option 2 and Option 3 is also unclear. However, broadly Option 2 is likely to involve less pronounced adjustments among firms who disproportionately engage high-income workers or who rely on client non-solicitation clauses.

Benefit: Reduction in inflation and consumer prices

Non-compete clauses and other restraints of trade in employment may harm the competitive process in downstream product markets by both distorting the productive allocation of labour within firms, and by restricting supply via barriers to the entry and expansion of competitors. By definition, non-

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[175] E Starr, 'Consider This: Training, Wages and the Enforceability of Covenants not to Compete', Sage Publications, 2019, 72(4): 783-817, p 793.

[176] US FTC, 'Non-Compete Clause Rule', US Government Federal Register, 2024, 89(89): pp. 38471.

compete clauses only have an economic effect in markets where, in the absence of a non-compete compete, there would be more than one competing firm. As a result, the increased market output from higher labour productivity would be expected to result in lower prices (assuming demand for the good did not change). The entry and growth of new businesses staffed by the former workers of incumbent businesses should increase competition and supply, lowering consumer prices partly at the expense of reduced economic rents of existing businesses. This supply benefit would occur even in circumstances where a new firm had the same productivity as the incumbent firm.

Empirical evidence of the impact of reform on non-compete clauses is relatively limited, but supports the claim that reform is expected to reduce consumer prices. Within the healthcare industry in the US, a study comparing the enforceability of non-compete clauses on doctors across US states found that a 10 per cent increase in the enforceability of non-compete clauses was associated with a 4.3 per cent increase in prices for the relevant services.[177] Applying this research, the FTC estimated that a ban on non-compete clauses across the US was expected to reduce the prices of physician services by 3.5 per cent (reducing spending on healthcare by up to US$194 billion over 10 years).[178]

In Australia, the Productivity Commission modelled the economic impact of removing unreasonable non-compete clauses. This modelling indicated that an increase in labour productivity of 0.2 per cent was expected to reduce consumer prices by 0.1 per cent (in addition increasing GDP by $5.1 billion).[179] As discussed in greater detail below, the PC's modelling may represent a conservative estimate of the potential labour productivity improvement from Options 2 and 3, and hence the reduction in consumer price from improved productivity may be higher under these options. The impact on prices from increased competition from firm dynamism is not explicitly considered by the PC modelling.

While it may not be appropriate to extrapolate results from the US healthcare industry to Australia, the empirical study supports the claim that banning non-compete clauses could reduce consumer prices within markets. The impact on prices from Option 2 may be limited in certain markets, such as healthcare, where a substantial proportion of businesses may employ workers with earnings above the high-income threshold.

Benefit: Reduction in legal uncertainty and litigation

The uncertain enforceability of restraints of trade currently imposes burdensome costs on businesses and workers. Stakeholders informed Treasury that parties may incur costs between $50,000 and $150,000 merely to contest an interlocutory injunction, and potentially in excess of $700,000 if the case goes to a final hearing.[180] Businesses hiring someone who may be subject to a restraint clause may also be joined to these court proceedings, even if they did not know about the restraint before hiring the worker. The NSW ROTA increases the likelihood that even an invalid restraint will be rendered enforceable, which further increases the risk that a new employer and a former employee may be made to bear costs, even where the business enforcing the restraint is responsible for its uncertainty.

Options 2 and 3 address this do varying degrees. For low- and middle-income earners, both options remove this cost for parties and gives a new business certainty when they hire a new worker that they

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[177] Hausman N & Lavetti K, 'Physician practices organization and negotiated prices: evidence from state law changes', American Economic Journal: Applied Economics, 2021, 13(2), 258-296.

[178] US FTC, 'Non-Compete Clause Rule', US Government Federal Register, 2024, 89(89): pp. 38478.

[179] Productivity Commission, 'National Competition Policy: modelling proposed reforms – Study report with appendices', 2024, p25.

[180] Stakeholder evidence to Treasury, published in 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity Issues Paper', April 2024, 14.

will not potentially be subject to costly litigation. The codification and strengthening of the common law, including banning cascading clauses, will also allow more accurate legal advice in cases where restraints are still permitted to ensure that businesses and workers can appropriately assess legal risks. Option 3, by rendering more restraint clauses invalid, will further reduce costly litigation.

Some stakeholders suggested that this reduction in restraint of trade litigation costs would be offset by a larger increase in intellectual property litigation, which is argued to be more time-consuming and costly than litigating a non-compete. While available data does show that the average number of trade secret cases was highest among states with a ban on non-competes, this concern is not supported when measuring the volume of cases on a per capita basis.[181]

Considering only cases that proceed to judgement, each year approximately 10 restraint of trade cases are finalised. If each of these cases had an interlocutory injunction, and then cost each party $700,000 for the contested trial, Option 3 would save up to $17 million per year in unnecessary litigation costs. This conservative estimate does not account for cases with more than 2 litigants (for example where the new employer is also joined as a party), and does not capture the many cases each year that stakeholders noted are settled or abandoned part-way through. Option 2 would achieve a similar benefit, as the majority of restraints would no longer be enforceable. Even for those still enforceable, the increased clarity of the common law and the certainty created from banning cascading clauses would decrease the cases taken to trial, and would reduce the cost of any litigation by narrowing the issues in dispute.

Net Benefit: Impact on Gross Domestic Product (GDP)

Modelling by the Productivity Commission in 2024 estimated the economy-wide impact from reform to restrict the use of unreasonable non-compete clauses in the economy. As a proxy for the effect of reform, the PC applied the findings of the US study by Johnson, Lavetti and Lipsitz which estimated that increasing the enforceability of non-compete clauses from the 25th percentile of enforceability among US states currently to the 75th percentile would reduce the average workers' wages in the economy by around 2 per cent.[182] In extrapolating these finding to their general equilibrium model in Australia, the PC assumes that we would observe a productivity increase of just 10 per cent, or 0.2 per cent on average, of the wage increase estimated in the US study. Industries with a high intensity of non-compete use have a different (higher) productivity impact than low-intensity industries. The PC estimated that this change would increase GDP by up to $5.1 billion and reduce consumer prices by 0.1 per cent.[183]

As a sensitivity analysis, the PC noted that if there was a productivity increase equal to 10 per cent of the 4 per cent wage penalty estimated by the e61 Institute between workers in firms that use non-compete clauses and similar workers in firms without non-compete clauses, the economic impact would be roughly double of the $5.1 billion GDP impact that was published.[184] The PC notes that applying this finding would be more consistent with the potential labour productivity increases from a complete ban on non-compete clauses (rather than a reduction in non-compete enforceability that was modelled).

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[181] Giri A, Dang A & McKiernan M, 'Trade secret disputes in a world without noncompetes: a brief exploration', American Bar Association Business Law Section, 2024.

[182] Johnson et al, 'The labor market effects of legal restrictions on worker mobility', NBER.

[183] Productivity Commission, 'National Competition Policy: modelling proposed reforms – Study report with appendices', 2024, p121-2.

[184] Productivity Commission, 'National Competition Policy: modelling proposed reforms – Study report with appendices', 2024, p127.

Experimental cross-jurisdictional comparison by the OECD of the enforceability of non-compete clauses supports conclusions that Australia's status quo restraint of trade doctrine is comparable to the average enforceability of non-competes in the United States.[185] As a result, the finding from Johnson, Lavetti and Lipsitz that banning all non-compete clauses could result in an increase in wages of 8.6 per cent (at the midpoint of their estimate) could conceivably also be used as a proxy for the impact in Australia of Option 3. Noting the PC's finding that increases in labour productivity were modelled to have a relatively linear impact on GDP and consumer prices,[186] the GPD impact of an improvement in labour productivity of just 10% of the wage impact estimated in the US may be commensurately larger than the $5.1 billion figure published by the PC.

Comparing the Productivity Commission modelling to the options considered here is not straightforward. As a proxy for reform, the PC modelled the impact of an increase in labour productivity, which they estimated to be the consequence of a reform that removed only unreasonable non-compete clauses. As a result, the PC does not model the impact of other consequences of reforms considered in Options 2 or 3, such as a fall in training and investment by incumbent businesses from removing all non-compete clauses for low- and middle-income workers, by imposing a duration limit on non-compete clauses for high-income workers, or by fully banning all restraints of trade in employment. The PC also does not specifically separate the source of the increase in labour productivity, whether by an increase in knowledge diffusion or innovation, improvements in the allocation of labour and capital, or from firm dynamism more generally.

As a result, it may therefore be appropriate to consider the GDP and consumer price impact modelled by the Productivity Commission as a conservative estimate of the impact of an improvement in labour productivity from Options 2 or 3, while not accounting for the GPD impacts from the possibly reduced investment in training or capital. It does also not incorporate the economic impacts (if any) of distributional impacts between workers and businesses, or between incumbent and new businesses. Since there was mixed evidence of the sign and magnitude of these other impacts, and of the net economic effect of these impacts, it is expected that Options 2 and 3 represent a significant net benefit to the economy.

Dynamics: economic impact over time

The Productivity Commission's GDP impacts represent impacts in equilibrium are not expected to be realised immediately after the commencement of reform.

From commencement, businesses will be unable to enter into or enforce an anti-competitive no-poach or wage-fixing agreement. If the reforms to restraints of trade in employment contracts apply prospectively as expected, the enforceability of these restraints for existing workers will be determined under the existing common law doctrine (as in the status quo Option 1) until they change jobs or vary their existing employment contract. Most workers under the Fair Work Act are expected to have employment contracts affected by the reforms within 5-10 years of commencement. This includes workers entering the labour market. These workers will have reduced barriers to job mobility. Compared to a counterfactual where these workers would have had a non-compete clause, they will

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[185] Gallindo-Rueda F, 'Knowledge flows and the mobility of skilled employees; an international perspective on the role of non-compete agreements and their legal enforcement, OECD; in Hermansen M, 'Anti-competitive and regulatory barriers in the United States labour market', OECD Economics Department Working Papers No. 1627.

[186] Productivity Commission, 'National Competition Policy: modelling proposed reforms – Study report with appendices', 2024, p126-7.

be more likely to leave their current job if a more productive opportunity arises, or if their current employer does not offer remuneration at least as good as their next best employment opportunity.

This means that wages growth from improved bargaining power for employees staying within firms is expected to grow as soon as workers move onto an employment contract that is affected by the reforms, while the wage benefit from the more productive allocation of labour will be realised once workers change employers for the second time after 2027.

Other economic impacts, including the impacts from reduced litigation, and business incentives to invest in training and capital, will be realised progressively in line with the proportion of employment contracts that are affected by the reforms and would, in the absence of reform, have included a non-compete clause.

Regulatory Burden Estimate

Table 4: One-off direct familiarisation cost

Change in Costs ($ million)	Individuals	Business	Community Organisations	Total Change in Cost
Option 2	$ 0	$46.4 million	$ 0	$46.4 million
Option 3	$ 0	$16.3 million	$ 0	$16.3 million

One-Off Direct Familiarisation Cost to Understand the Reforms

Under both Option 2 and 3, it is assumed that businesses will incur an initial administrative cost to familiarise themselves with these policy reforms and how they will impact their use of non-compete clauses in future employment contracts. This familiarisation would consist of the relevant employee(s) reading and understanding the new requirements and any accompanying guidance, considering the implications on the business, and, if necessary, consulting with other relevant employees (e.g. line managers).

Based on the estimates used by the UK Department of Business and Trade for their Impact Assessment on non-compete clauses, it is assumed that this familiarisation will be completed by the Corporate Manager / Director in small businesses, as they are less likely to have a dedicated HR function, and one HR Manager / Director and three HR Administrative Assistants in medium and large businesses.[187] The UK Impact Assessment assumes that people will take 60 minutes to understand the impacts of requiring a statutory limit, but only 30 minutes to understand the implication of fully banning non-compete clauses. The UK Impact Assessment further notes that this 30-minute assumption has been commonly used in previous UK Impact Assessments relating to employment policies (e.g. the National Living Wage in 2016, Employment Rights (Miscellaneous Amendments) Regulations 2019, and Agency Employees (Amendment) Regulations 2019). Likewise, Treasury has decided to use the same assumptions for the time taken for businesses to familiarise themselves with Option 2 or 3. As option 2 incorporates elements of a statutory limit and a ban for different clauses, the time used will total 90 minutes.

[187] The United Kingdom Department for Business and Trade, Impact Assessment Restricting the Use of Non-Compete Clauses, 2023.

Publicly submitted Australian salary figures on Glassdoor.com gives the mean hourly pay of a Corporate Manager / Director as $77.88, HR Manager / Director as $65.87, and HR Administrative Assistants as $38.97.[188]

Table 5: Individual(s) responsible for familiarisation, time taken and average hourly wage

Business size	Person responsible for understanding the policy reforms	Time taken per person	Average hourly wage
Small	1 x Corporate Manager / Director	Option 2: 90 minutes Option 3: 30 minutes	$ 77.88
Medium and Large	1 x HR Manager / Director		$ 65.87
	3 x HR Administrative Assistants		$ 38.97

To calculate the familiarisation costs outlined above, the number of businesses using non-compete clauses in Australia is multiplied by the average hourly wage of individual(s) responsible for familiarisation and multiplied by the time taken to familiarise themselves with the new requirements.

For the 2024–25 financial year, there were 925,758 employing small businesses[189] and 73,403 employing medium and large businesses.[190] The 2023 ABS Survey on Restraint Clauses reveals the use of non-compete clauses across different business sizes. Noting that the ABS Survey on Restraint Clauses has more disaggregated data than the 2025 ABS Counts of Australian Businesses between businesses employing 20 to 49 workers and firms with 50 to 199 employees, the response rate has been averaged to calculate how many (a) businesses employing between 20 and 199 workers are using non-compete clauses (roughly 29.75%) and (b) businesses employing between 200 or more workers are using non-compete clauses (roughly 38.7%).

Table 6: Reported Non-Compete Use by Business Size

Business Size	Yes (%)	No (%)	Unsure (%)
0 - 19	20.2	67.0	12.8
20 - 49	26.6	63.4	10.0
50 - 199	32.9	54.7	12.4
200 - 999	37.4	46.5	16.0
1000 +	40.0	41.0	19.0

188 Glassdoor, Salaries, 2025.
189 The ABS defines small business as an actively trading business employing 19 or less people.
190 ABS, Counts of Australian Businesses, including Entries and Exits, 2024.

Under Option 2, it is estimated that the one-off familiarisation cost is $46.4 million, including $38.2 million for small businesses, $7.5 million for medium businesses, and $0.7 million for large businesses.

Under Option 3, it is estimated that the one-off familiarisation cost is $16.3 million, including $12.7 million for small businesses, $3.3 million for medium businesses, and $0.3 million for large businesses.

Ongoing reduction in regulatory burden from legal certainty

Further, as reforms are expected to reduce uncertainty on the enforceability of non-compete and other restraint of trade clauses this may also lead to reduced legal litigation costs for businesses. The preferred option will create new original jurisdiction for the Federal Court of Australia (FCA) and the Federal Circuit and Family Court of Australia (FCFCoA), in relation to restraint of trade matters. There is limited data in relation to the current number of restraint of trade matters in State and Territory Courts – noting that some matters settle or may not be reported – and it is therefore unclear what a quantitative impact will have once reforms are implemented.

Treasury heard from stakeholders that costs of opposing an injunction at interlocutory proceedings is between $50,000 and $150,000, depending on the complexity of the case. If the case goes to a final hearing, parties could expect to pay around $300,000 at a minimum and up to $700,000 in some cases.

However, these numbers are based on publicly reported decisions, therefore the calculated average may not reflect an accurate estimate of restraint of trade litigation in Australia.

Methodology used to estimate costs to Individuals

Under Options 1 and 2, no additional regulatory burdens are expected to be placed upon individuals.

Methodology used to estimate costs to Community Organisations

Under Options 1 and 2, community organisations are not directly affected.

5. Who did you consult and how did you incorporate their feedback?

On 23 August 2023, the Australian Government announced that non-compete and related clauses in employment contracts would be considered by government.[191] The government's Employment White Paper Roadmap, released in September 2023, reiterated the government's intent to investigate non-compete clauses and identify potential reforms if necessary.[192] Following this, on 25 March 2025 the government announced a commitment to ban non-compete clauses for low- and middle-income workers and reforms to other restraints of trade clauses.

The government has ensured that extensive stakeholder consultation and engagement has remained at the forefront as these policies were developed and finalised. This has been demonstrated through early stakeholder engagement, an issues paper and options paper consultation, and consistent stakeholder meetings with the Competition Taskforce Review's expert panel, employee and employer representatives, industry experts and legal academics.

Early Stakeholder Engagement and Webinar

In October 2023, Treasury and e61 Institute jointly hosted an online webinar on "Non-Compete Clauses: Prevalence, Impact and Policy Implications". The invitation-only event was conducted under Chatham House Rules with 43 participants attending, including domestic and international stakeholders. Treasury has published the presentation and high-level summary of the discussion on the website for stakeholder's visibility.

Between September 2023 and March 2024, Treasury undertook targeted engagement with various stakeholder groups – including 24 domestic stakeholders and four international government agencies – to better understand the potential issues with the use of non-compete clauses and related restraint of trade clauses. These stakeholder groups included international experts, academics, legal practitioners, employer and employee representatives, and government departments and agencies.

Stakeholder feedback from the webinar and early stakeholder engagement informed the development of the Issues Paper and options to reform non-compete clauses.

[191] Treasury, A More Dynamic and Competitive Economy, 2023.
[192] Working Future: The Australian Government's White Paper on Jobs and Opportunities (treasury.gov.au)

Issues Paper and Questionnaire

The government released an Issues Paper on 'Non-Compete Clauses and Other Restraints' for full public consultation between April and May 2024 (see Attachment B for the list of public submissions). The Issues Paper:

- Outlined policy concerns related to non-compete clauses and other restraints of trade between workers and businesses, and no-poach and wage-fixing agreements between businesses; and
- Discussed the evidence in Australia and overseas on the prevalence of these clauses and their impact on workers, businesses, and the broader community; and
- Sought feedback from stakeholders as to whether reforms are needed, and if so, what policy options should be implemented.

The Issues Paper collated an extensive and wide range of domestic and international evidence, including quantitative sources and legal research, that supported the credible link observed in the US between non-compete clauses, the chilling effect on job mobility and associated macroeconomic concerns. It was informed by experiences in Australia and overseas, including targeted engagement with lawyers, business groups, unions, think tanks, international organisations, and relevant national and international government agencies.

The government also invited questionnaire responses from workers and employers on the use and prevalence of non-competes and other restraint of trade clauses (see Attachment A for an analysis of the questionnaire responses).

Targeted stakeholder engagement – including multiple stakeholder roundtables and bilateral meetings – were held to gather diverse perspectives from workers, business, and other experts on restraints of trade.

The government received 47 submissions, 363 responses to the worker questionnaire, 64 responses to the employer questionnaire and held multiple targeted stakeholder roundtables and bilateral meetings to seek more information about non-compete clauses and other restraints of trade clauses. All non-confidential submissions can be found on the Treasury website.

Feedback on the Policy Options

The feedback received from the public consultation on the Issues Paper has informed the government's consideration as to whether reforms are needed, and if so, what options could be designed and developed.

In their submissions to the Issues Paper, stakeholders identified numerous options to reform non-compete clauses. Their feedback has been used to inform the understanding of the policy problem set out in Question 1, and to develop the 3 options as described in Question 3.

Non-compete clauses

- Unions and community legal centres expressed strong support to fully ban non-compete clauses due to the chilling effect on workers and the available alternatives for businesses.[193]

[193] ACTU; ANMF; Circle Green; ERLS; Job Watch; Legal Aid NSW; WLSA; and Youth Law Australia Submissions to the Competition Review's Issues Paper, 2024.

- Contrastingly, the Law Council, legal scholars and various unions, professional associations and business groups expressed support for more limited reform, such as restricting the use to high-income earners, requiring compensation, and/or imposing time limits.[194]
- The majority of business groups support favoured the status quo based on the fact that the existing rebuttable presumption of unenforceability generally achieves the right result and that there is insufficient evidence to suggest restraints negatively impact the economy.[195]

Non-solicitation clauses

- For client non-solicitation clauses, legal academics and community legal centres (Legal Aid NSW, Circle Green & Youth Law Australia) expressed support for reforms such as a duration time limit. Business stakeholders expressed support to maintain the status quo, as these clauses protect valuable client connections.[196] COSBOA noted that non-solicitation clauses were used to protect small businesses from clients being poached and is often seen as more of a deterrent effect.[197]
- For co-worker non-solicitation clauses, legal academics and Legal Aid NSW expressed strong support for banning the use of these clauses.[198] Business stakeholders expressed support for maintaining the status quo noting that co-worker non-solicitation clauses protect both the workforce and financial stability of a business.[199]

No-poach and wage-fixing agreements

- Business stakeholders argued there was a lack of evidence to support reform. ACCI, ARA and the FCA also argued for the status quo of no-poach and wage-fixing agreements within franchise agreements and joint venture partnerships.[200]
- Legal academics, unions and community legal centres supported reforms stating that it should be impermissible to enforce such agreements that limit employment prospects of a person who is not party to the agreement.[201] The LCA also expressed support for a ban, noting they are anti-competitive however there should be exceptions to cooperating businesses that are not in competition.[202]

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194 Dr I Ross & Prof A Stewart; Prof J R Munton; Prof W van Caenegem & C Douglas; ASA; AHRI; AWCC; CPSU; HSF; HireUp; LCA; Marrickville Legal Centre; NTWWC; Pharmacy Guild of Australia; Tech Council of Australia; Submissions to the Competition Review’s Issues Paper, 2024.

195 ACCI; AFMA; AIG; ARA; BCA; COSBOA; HSF; Immutable; Tech Council of Australia; Submissions to the Competition Review’s Issues Paper, 2024.

196 Prof A Stewart & Dr I Ross; Prof J R Munton; Legal Aid NSW; Circle Green; Youth Law Australia; HireUp; Submissions to the Competition Review’s Issues Paper, 2024.

197 COSBOA; Submissions to the Competition Review’s Issues Paper, 2024.

198 Prof A Stewart & Dr I Ross; Prof J R Munton; Legal Aid NSW; Submissions to the Competition Review’s Issues Paper, 2024.

199 ACCI; AFMA; BCA; COSBOA; Submissions to the Competition Review’s Issues Paper, 2024.

200 BCA; ACCI; ARA: FCA; Submissions to the Competition Review’s Issues Paper, 2024.

201 Prof J R Munton; Prof W van Caenegem and C Douglas; ACTU; ANMF; Legal Aid NSW; Submissions to the Competition Review’s Issues Paper, 2024.

202 LCA; Submissions to the Competition Review’s Issues Paper, 2024.

Restraint of trade common law doctrine

- Legal academics, unions and community legal centres highlighted issues around the uncertainty created by the common law and the increasing prevalence of cascading clauses.[203]

Consultation paper

In March 2025, the government announced the decision to ban non-compete clauses for low- and middle-income workers and no-poach and wage-fixing agreements. The government committed to consult on policy details, including exemptions, penalties and transition arrangements. It would also consult further on co-worker and client non-solicitation, non-compete clauses for high-income workers.

The government released a consultation paper on 'Reform to non-compete clauses and other restraints on workers' for full public consultation between 25 July 2025 and 5 September 2025 (see Attachment C for the list of public submissions). The paper consulted 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
  - Enforcement of the ban, including penalties, defences and the roles of the Fair Work regulators
  - Whether limited statutory exemptions are required
  - What transitional arrangements are required to support businesses and workers.
- Whether additional reforms are required to the use of post-employment restraints, such as:
  - Non-compete clauses for employees above the high-income threshold
  - 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.
- Whether any change is required to clarify how restrictions on concurrent employment should apply to part-time or casual employees
- 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.

The consultation paper builds on the existing and new domestic and international evidence on restraint clauses, and incorporated feedback received from the 2024 Issues Paper, the Competition Expert Panel and other various stakeholders. The collation of this evidence helped develop the proposed options recommended in the consultation paper.

[203] Australian Society of Authors; LCA; Tech Council of Australia; ANMF; ACTU; Marrickville Legal Centre; NTWWC; WLSA; Youth Law Australia; Prof A Stewart & Dr I Ross; Prof J R Munton; Prof W van Caenegem & C Douglas; Submissions to the Competition Review's Issues Paper, 2024.

Feedback on the consultation paper

The government received 67 submissions that highlighted different perspectives ranging from employees, businesses and industry peak bodies, law firms, government agencies, unions, legal academics, and community legal centres. The evidence and feedback received has helped inform government on specific policy details for the bans and feedback on potential reform options for the residual restraints.

Low- and middle-income ban on non-compete clauses

- Business groups and industry peak bodies noted that the use of the high-income threshold is too high and excludes employees in lower-paid roles who still have access to sensitive commercial information.[204] However, the LCA supported the use of the threshold noting the benefits of consistency and certainty when implementing the ban.[205] In terms of the scope of coverage, stakeholders also expressed support to exclude independent contractors highlighting that they are covered by other legal protections.[206]
- Stakeholders expressed support for civil penalties as a deterrent to carry out the ban, with the LCA highlighting that the penalty regime 'should be proportionate and consistent with other Fair Work Act contraventions.'[207]

Non-compete clauses for high-income employees

- Business groups and industry peak bodies expressed strong support for no further reform arguing that the common more law is adequate. Concerns were raised about overregulation, competitive disadvantage for small businesses and a need for evidence.[208]
- Legal academics, community legal centres and unions supported a ban however if it were not extended for high-income employees there was support for some combination of mandatory compensation of varying levels and duration limits ranging from 6-24 months.[209] This feedback was incorporated to consider the appropriate duration limits for high-income employees.

Non-solicitation clauses

Client non-solicitation clauses

- Business groups and industry peak bodies were strongly opposed to reforms arguing that the common law strikes the right balance, these clauses do not restrict employee mobility, and are

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[204] BCA; ACCI; HSFK; AIG; KWM; TCA; PGA; MFA; ASIFMA; AFMA; RCSA; AIMA; AREEA; NRA; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[205] LCA; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[206] BCA; TCA: AIG; ACCI; PGA; COSBOA; HSFK; KWM; ASBFEO; ARA; CPA: HIA; MFAA: MBA; Prof W van Caenegem; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[207] ACTU; ETU; UWU; LCA; NTWWC: NRA: Circle Green; Legal Aid NSW; JobWatch; ABA; WLC; ERLS; Dr I Ross & Prof A Stewart; Prof J R Munton; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[208] BCA; AIG; ACCI; HSFK; TCA: COSBOA; KWM; MFA: ASIFMA; AFMA; AIMA; AREEA; CPA; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[209] ACTU; ETU; NTWWC: UWU; ANMF; Professionals Australia; JobWatch; WLC; Prof W van Caenegem; Dr I Ross & Prof A Stewart; Submissions to Treasury's Consultation Paper [unpublished], 2025.

essential for protecting client relationships.[210] Noting that maintaining the status quo is essential and the clauses is key in safeguarding customer connections and investment in training.[211]

- There was strong support from legal academics, community legal centres and unions to ban or restrict client-non solicitation clauses.[212] COSBOA and HSFK suggested that if there were reforms, a duration limit of between 12-24 months for businesses would be reasonable.[213] However, a legal academic argued that a maximum duration should reflect a reasonable time (i.e. 2-3 months) it takes for an employer to re-establish client relationships.[214] Overall, this feedback helped inform that a full ban may not be the best option and that a duration limit could be a more balanced approach.

Co-worker non-solicitation clauses

- Business stakeholders were strongly against any reforms arguing that the common law is adequate and that these clauses do not prevent job mobility.[215] It was also argued that these clauses also prevent unfair competitive advantages by stopping ex-employees from targeting valuable employees, balancing employee freedom and employers' interest in protecting their workforce.[216]
- Many community legal centres, legal academics and unions expressed support for reforms highlighting that these clauses restrict job mobility and the lack of a clear legal basis.[217] They noted that staff retention should be achieved through fair wages and improved working conditions.
- However, there was some support for a limited use for high-income employees with support to ban or restrict for lower-income employees. The LCA noted that if they were to be allowed it should only be for 3-6 months and only apply to senior employees.[218]

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[210] BCA; AIG; ACCI: HSFK; TCA; COSBOA; PGA; KWM; ASBFEO; FAAA; AFMA; AREEA; APA; CPA; AHRI; Mable; MFAA; Martha Travis People Innovators; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[211] BCA; AIG; ACCI; HSFK; TCA: COSBOA; PGA; KWM; ASBEFEO; FAAA: AFMA; AREEA: APA; CPA; AHRI; Mable; MFAA; Martha Travis People Innovators; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[212] ACTU; LCA; NTWWC; ANMF; Circle Green; UWU; Legal Aid NSW: ERLS; JobWatch; WLC; Prof J R Munton; Dr I Ross & Prof A Stewart; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[213] COSBOA; HSFK; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[214] Prof J R Munton; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[215] BCA; AIG; ACCI; HSFK; TCA; COSBOA; KWM; MFA; AFMA; AIMA; AREEA: Martha Travis People Innovators; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[216] BCA; AIG; ACCI; HSFK; TCA; COSBOA; KWM; MFA; AFMA; AIMA; AREEA: Martha Travis People Innovators; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[217] ACTU; ETU; ASU; NTWWC: Circle Green; UWU; WLC; LCA; JobWatch; Legal Aid NSW; Dr I Ross & Prof A Stewart; Prof J R Munton; Prof W van Caenegem; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[218] LCA; Submissions to Treasury's Consultation Paper [unpublished], 2025.

Ban on the use of no-poach and wage-fixing agreements

- There was support from legal academics, community legal centres and unions for the ban and expressed support for both criminal and civil penalties applying if these agreements are considered cartel conduct under Part IV.[219]
- There was support from COSBOA, KWM, ACCC, LCA and ABA for clear statutory exemptions and transparent exemption processes to avoid a chilling effect on public interest agreements.[220]

Restraint of trade common law doctrine

- Business groups were against banning cascading clauses arguing that they are presumed enforceable if reasonable and concerns around uncertainty were overstated.[221] However, there was support from legal academics, unions and community legal centres to ban cascading clauses due to the uncertainty they create.[222]

Other stakeholder engagement

The government also consulted many prominent researchers in the field, both in Australia and overseas. They include Professor Joseph Stiglitz, Professor Norman Bishara, Professor Natarajan Balasubramanian, Dr Greg Kaplan, Professor Flavio Menezes, Professor Petr Sedlacek, Professor Evan Starr, Dan Andrews and Professor Andrew Stewart. Preliminary results were presented to some academics, and these discussions were used to refine the framework, methodology and analysis.

The Competition Review Expert Advisory Panel (the Panel) was also conducted on the Issues Paper and the Options presented in the Impact Analysis. The Panel features leading experts from business, government, law and economics, who have been appointed to support and advise government. Each member of the Panel offers insights and perspectives from their deep experience with competition related issues. The membership includes Dr Kerry Schott AO (Panel Chair); Dr John Asker; John Fingleton CBE; David Gonski AC; Sharon Henrick; Rod Sims AO; and Danielle Wood.

Treasury has also worked closely and consulted with other agencies to develop these three options, including their pathway for reforms and feasibility. This includes the Department of Employment and Workplace Relations on amendments to the Fair Work Act, and the Australian Competition and Consumer Commission on the Competition and Consumer Act. Agencies' feedback on the viability of the options and interactions with other legislation has been invaluable in designing these reforms.

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[219] ACTU; KWM; LCA; ETU; ACCC; NTWWC: UWU; Legal Aid NSW: JobWatch; Prof J R Munton; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[220] COSBOA; KWM; ACCC: LCA; ABA: Submissions to Treasury's Consultation Paper [unpublished], 2025.

[221] BCA; AIG; ACCI; PGA; HSF: AREEA: QLD & ACT Law Society; Submissions to Treasury's Consultation Paper [unpublished], 2025.

[222] ACTU; COSBOA; LCA; ETU; ASU; NTWWC: Circle Green; WLC; Legal Aid NSW; Prof J R Munton; Prof W van Caenegem; Dr I Ross & Prof A Stewart; Submissions to Treasury's Consultation Paper [unpublished], 2025.

Future Consultation on the Exposure Draft Legislation and Implementation

Once the government has made their decision on the above options, further consultation on the Exposure Draft legislation and any amendments to the Fair Work Act and Competition and Consumer Act will be undertaken. This will allow stakeholders to raise concerns with the specific operation and implementation of the preferred reform option, as well as help reduce unintended consequences or interactions with other legislation.

6. What is the best option from those you have considered and how will it be implemented?

Option 2 is considered as the preferred option

Both Options 2 and 3 are expected to have substantial positive impacts for the Australian economy. Option 2 is preferred as it boosts productivity and improves the competitive process compared to the status quo, while imposing minimal additional regulatory burden and costs on businesses. This aligns with the government's economic reform priorities. It provides employees greater freedom to move jobs but ensures fairness for businesses to still use some restraints reasonably. Option 2 is a balanced and targeted approach for all individual elements discussed in Question 3. The preferred option presents policy responses that addresses specific harms manifesting across the economy. Treasury supports the implementation of the entirety of Option 2 however, a key benefit of a more balanced approach is that each reform element could be gradually legislated, and not simultaneously.

Option 2 is more targeted than Option 3 – providing businesses with the freedom and flexibility to use non-compete clauses for high-income employees and client non-solicitation clauses when reasonable and necessary to protect their legitimate interests. In contrast, Option 3 does not provide any flexibility to businesses as non-compete clauses and other restraints are completely banned. Treasury does consider that there are some limited circumstances where non-compete clauses are necessary to protect legitimate business interests and banning non-compete clauses in these circumstances could have detrimental impacts on business investment and confidence.

Option 2 may have smaller allocative efficiency gains in the labour market, given that higher-income employees will continue to be bound by non-compete clauses for a certain duration period. As discussed in Question 4, although GDP, job mobility, labour productivity, innovation and entrepreneurship will increase under Option 2, the effects may be smaller than Option 3.

Although the efficiency gains, from enhanced mobility and competition, may be lower under Option 2, this reform provides businesses with greater incentive and freedom to invest in human capital, as well as tangible and intangible assets. As businesses are still given flexibility to freely protect their legitimate interests under Option 2, the international experience suggests that firm investment will increase compared to Option 3. Option 2 would also partially address the hold-up problem by allowing some businesses to use reasonable non-compete clauses to ensure they can recoup their investment in training and upskilling their workers.

Legislative amendments to the Fair Work Act and the Competition and Consumer Act will be required for implementation

The preferred option will require amendments to the Fair Work Act and the Competition and Consumer Act, as well as potential legislation and participation by states and territories. Treasury will work closely with other agencies and the states and territories to facilitate the smooth implementation of these reforms and ensure regulatory consistency across jurisdictions.

Amendments will apply to employees covered by the Fair Work Act and may be found to be inconsistent with relevant sections of the ROTA. Section 109 of the *Constitution* provides that Commonwealth laws will prevail in the event of any inconsistency with State laws. However, the ROTA would still apply in some limited circumstances, including for workers not covered by the Fair Work Act, such as NSW public sector employees and in relation to disputes about restraints of trade agreed outside of employment contexts.

Treasury will likely proceed with drafting legislation to amend the Fair Work Act and the Competition and Consumer Act next year, and release it for public consultation in 2026. After stakeholder consultation on the Exposure Draft legislation, and incorporating feedback from public submissions, Treasury anticipates that the legislation will be introduced into Parliament in 2026.

Although there are some implementation risks in proceeding with Option 2, there are ways to mitigate these risks

Appropriate compliance by businesses and employees

If employees are uninformed about their entitlements and businesses are unaware of their obligations, this could lead to poor compliance with these reforms. This could result in the reforms being treated the same as the status quo, where although non-compete clauses are largely presumed to be void and unenforceable under the common law, their use and prevalence has proliferated in recent years.

Treasury, the Department of Employment and Workplace Relations, and the Fair Work Ombudsman will develop guidance materials and undertake stakeholder engagement to educate businesses on their obligations and the penalties for non-compliance. The phased-in approach will also assist implementation by providing smaller entities with more time to develop their understanding and ensure compliance with the reforms. These risks will be partially mitigated by market forces that will bear on those businesses who do not comply with the reforms as prospective employees may self-select away from applying to these businesses.

Use of restraints on public servants

Some business stakeholders have noted that the Commonwealth Government uses various restraints, including non-compete clauses, to protect legitimate interests. This will also require further discussions with the APSC on the extent that restraint clauses are applied to Commonwealth employees. As a model employer, the government will align employment practices with the general community and utilise other alternative instruments that are available – exemptions should be used only in very targeted and exceptional circumstances.

Adequate Protections for Legitimate Business Interests

Some business stakeholders have raised concerns that restricting non-compete clauses and non-solicitation clauses will weaken protections for confidential and commercially sensitive information, as well as client connections. Other stakeholders have expressed concerns that reforms would harm small businesses, particularly for small businesses that use these clauses to safeguard their workforce.

Other stakeholders noted that businesses will continue to have other available mechanisms, such as non-disclosure agreements, which are more targeted and less restrictive than non-compete clauses and non-solicitation clauses. Confidential information is also protected under section 183 of the *Corporations Act 2001*, as well as the equitable duty of confidence. The government also notes that large businesses will not have complete freedom to use non-compete clauses for workers above the income threshold.

Stakeholders will be consulted on transitional arrangements through the Exposure Draft legislation process

To help reduce the regulatory burden, consultation will occur on potential transitional arrangements to allow for smooth implementation of the reforms for employees and businesses. Options have been developed to manage the impacts on employees and businesses through grandfathering, ramping up, or creating short-term exemptions for these reforms.

- **Prospective application:** Option 2 would only apply to non-compete clauses in new employment contracts or existing contracts varied after commencement.
- **Transitional or amnesty periods:** Another option is for penalties to only apply after a short period of transition, such as 6 months, after contravening non-compete clauses are made unenforceable. This would provide employees and employers time to understand the new rules before entering new contracts in contravention of the ban.

Table 7: Timeline of key decision points

Year	Key decision points
2025	• At the March budget, the Treasurer announced a commitment for reforms to non-compete clauses and other restraint of trade clauses. • The announcement provided time for businesses, employees and the public to engage and consult on policy details for the proposed reforms.
2026	• Legislative amendments to the Fair Work Act and the Competition and Consumer Act. • Educational resources would be provided to assist with educating businesses, employees and the public about the proposed reforms.
2027	• The proposed reforms come into effect across Australia.
2030 onwards	• As reforms will be applied prospectively, the implementation of an evaluation plan would only be possible from early-to-mid 2030s.

7. How will you evaluate your chosen option against the success metrics?

Evaluation objectives

The success of these reforms will be measured against metrics that align with the desired objectives of the reforms: reducing the barriers to job mobility and improving wages growth, productivity and labour market competition. Another important objective of proposed reforms is improved awareness and understanding of the types of restraint clauses that are legally enforceable, considering stakeholder feedback which highlighted that businesses frequently use overly broad restraint clauses that are unlikely to be upheld by the courts under the existing common law.

Evaluation will be undertaken, subject to resourcing, in line with the implementation plan outlined above as well as the Commonwealth Evaluation Policy. Evaluation will consider the following outcomes against relevant success metrics:

- To what extent have reforms reduced the prevalence of non-compete clauses and other restraints of trade that are inhibiting job mobility?
- To what extent have reforms contributed to improved awareness and understanding of the enforceability of worker restraint clauses?
- To what extent have reforms contributed to improved wages growth?
- To what extent have reforms contributed to improvements in productivity and labour market competition?

Outcome 1: Reduction in restraints that are inhibiting job mobility

The preferred reform option is expected to significantly reduce the use of non-compete clauses and other worker restraints. As these clauses would become unlawful, businesses are likely to remove non-compete clauses, co-worker non-solicitation clauses, and cascading restraint clauses from employment contracts at the point of renewal, variation, or creation. This shift may also prompt employers to reduce the use of standard boilerplate provisions in their contracts.

Metric: A key metric is a reduction in the proportion of businesses using non-compete clauses and other restraint of trade clauses across industries, and a reduction in the intensity of use by businesses. ABS survey data on restraint clauses released in 2024 notes that 46.9% of Australian businesses were using some type of restraint, with one in five businesses using a non-compete clause.[223] Future ABS survey data will be used to assess whether the reforms have contributed to a reduction in the number of businesses still using restraint clauses. Noting the Issues Paper and Options Paper also drew on research from institutions such as QUT and the e61 Institute, future evaluations will similarly benefit from any further independent studies conducted by universities and think-tanks to assess the impact of reforms on reducing barriers to worker mobility.

Another key metric which flows from the reduction in usage of these clauses is an increase in job mobility. This will be assessed through monitoring changes in voluntary job transitions, time between roles and cross-industry movement of skilled employees in roles and industries where non-compete clauses were previously used.

It is not necessary that a large number of workers need to move jobs in order for the reform to have a significant economic benefit. While an increase in job mobility will reflect the number of workers who

[223] ABS (February 2024), Restraint Clauses, Australia, 2023, ABS website, 2024.

will benefit by moving to a better-paying, more productive job (but not measuring the magnitude of the productivity increase, as discussed in Outcome 4 below), job mobility indicators will not reflect the benefit that accrues to workers who remain in their job but can negotiate higher wages from the reduced barriers to job mobility. The benefit to these workers is measured in outcome 3 below. As a result, the magnitude of the increase in job mobility is not inherently a measure of the size of economic benefit.

Targets:

- Significant reduction in use of non-compete clauses and other restraints, particularly among low and middle-income workers (who represent approximate 91% of the workforce).
- Reduction in the number of unenforceable clauses in employment contracts and fair work instruments in the workforce more generally.
- Increased rate of job-switching by workers who were previously subject to a non-compete clause.
- The elimination of no-poach and wage-fixing agreements.

Potential constraints:

- As the reforms are expected to be prospective and only apply to new or varied employment contracts and Fair Work Instruments from 2027 onwards, the overall benefits to job mobility are expected to build over time. Employees currently bound by restraint clauses may not experience any immediate improvement in job mobility because they will continue to be subject to restraints until the point at which their contract is varied or renewed. Consequently, evaluation of this outcome may need to occur after a sufficient lead time. As noted above, most employees covered by the reform are expected to have a new contract within 5-10 years of the policy taking effect.
- There are inherent challenges in detecting and preventing no-poach and wage-fixing agreements given their covert nature. While it will be impossible to detect all agreements, the ACCC would carry out investigations regarding alleged no-poach and wage-fixing agreements in line with its *Compliance and Enforcement Policy and Priorities*. The evaluation will also draw on publicly available franchise agreement data, as this provides the strongest current evidence base of the prevalence of these agreements.

Outcome 2: Improved clarity about the enforceability of restraint clauses

Improved clarity and understanding about the enforceability of restraint clauses, particularly non-compete clauses, is essential to ensure that workers can confidently exercise their rights and make informed decisions about their employment. When employees are uncertain about whether a clause is legally enforceable, they may be deterred from pursuing better job opportunities, even if the clause would not hold up in court. This "chilling effect" undermines other outcomes such as job mobility, wage growth, and overall labour market dynamism. This clarity will come from better education, and clearer drafting of restraint clauses resulting from codifying and strengthening the common law.

Metric: The key metrics would be the number of educational tools developed by the FWO and the uptake by businesses and employees. The FWO would play a role in educating the wider community about the ban, in line with the agency's functions under the Fair Work Act. This would include providing up-to-date and timely education and information to assist employees and businesses to understand and comply with the ban, including but not limited to media releases, developing webpage content, promotion through FWO's social media channels and providing guidance via existing stakeholder networks and community outreach activities. Reductions in litigation of the residual restraints of trade will also provide evidence of success against this outcome.

Targets:

- High uptake of educational resources and compliance tools provided by the Fair Work Ombudsman.
- Reduction in the number of matters before the courts regarding the enforceability of restraint clauses.
- Feedback and qualitative evidence from key stakeholder groups on changes in attitude and understanding, particularly among low- and middle-income employees.

Potential constraints:

- Availability of educational resources does not automatically lead to comprehension or compliance by businesses.
- Greater education about rights may lead to an initial increase in litigation of restraint clauses.

Outcome 3: Improved wages growth

The preferred option is expected to contribute to wage growth by reducing barriers to job mobility and competition in the labour market. Evidence presented in the consultation paper shows that non-compete clauses suppress wages, particularly for lower-skilled workers, by limiting their ability to move to better-paying jobs or negotiate improved conditions. Treasury analysis, supported by ABS microdata and research from the e61 Institute, found that employees at firms with high use of non-compete clauses are paid around 4% less on average than those at firms without such clauses.

Metric: The key metric is evidence of improved wage growth for employees who were previously subject to non-compete clauses who are no longer bound by them due to the reforms. To track this, longitudinal data collection will be essential, using datasets from the Business Longitudinal Analysis Data Environment (BLADE), Single Touch Payroll (STP), HILDA survey, the Australian Bureau of Statistics and/or the Australian Taxation Office, to monitor individual earnings over time.

Target: Increase in average wages by at least 4 per cent over a 5-year period for affected workers, aligning with findings from the e61 Institute that employees at firms with high use of non-compete clauses are paid approximately 4 per cent less than those without such clauses.

Potential constraints:

- Similar to constraints for Outcome 1, as the reforms are prospective and only apply to new or varied employment contracts and Fair Work Instruments from 2027 onwards, the overall benefits to wage growth may be delayed. Employees currently bound by restraint clauses may not experience any immediate improvement in wages because they will continue to be subject to restraints until the point at which their contract is varied or renewed.

Outcome 4: Improved productivity and labour market competition

The cumulative effect of reducing barriers to job mobility and wages growth (Outcomes 1 and 3) should lead to workers moving freely to roles and firms where their skills are best matched. This is a strong indicator of a productive and dynamic economy. It enables job matching, competition among employers and accelerates the diffusion of knowledge and innovation across sectors.

Metric: The metrics identified for the outcomes related to job mobility and wages growth will provide a strong proxy for determining the success of this outcome. Additionally, data from the Household, Income and Labour Dynamics in Australia (HILDA) Survey which provides longitudinal data on individual wages, employment tenure, job transitions, and household circumstances will help identify shifts in industry matching and tenure patterns, which are key indicators of improved labour allocation and productivity. Comparing trends across cohorts, such as those affected by the reforms versus those not covered, can also offer insights into the broader competitive dynamics of the labour market. Success against this metric will also consider any potential negative consequences of the reform, as highlighted in submissions by business stakeholders. Industry-level productivity data will provide insights into whether industries with high-intensity restraint use in the status quo suffer any decline in productivity as a consequence of the policy.

Targets:

- Better labour allocation for employees who are no longer subject to non-compete clauses because of the reforms.
- No reduction in industry-level productivity attributable to the reform.

Potential constraints:

- Precise measurements of productivity attributable to an individual policy are complex, as productivity and labour market competition are influenced by a range of independent factors, including other policy reforms, worker behaviour, broader macroeconomic conditions and sector-specific dynamics. Using industry-level data, linked with other datasets relevant to restraint of trade clauses, will mitigate this difficulty. Furthermore, the measurement of Outcomes 1 and 3 provide strong indicators when coupled with economic frameworks, that the economy is more productive as a consequence of this reform.

Data sources for outcomes 1, 3 and 4

In collaboration with the e61 Institute, the ABS released a short survey of employment conditions released in 2024 reporting results on the use of restraint clauses in employee contracts in Australia. This data was used to help inform early advice to government on the prevalence of restraint clauses. Therefore, another survey of employment conditions should be done to reassess the use and prevalence of the different types of restraint clauses across industries.

For outcomes 1,3 and 4, given the ongoing interest from academia, procurement of third-party reviews by legal and economic scholars would assist in evaluating the success of these reforms. Treasury has previously procured services from the Australian National University to undertake econometric research on the impact and relationship between non-compete clauses on productivity and innovation in Australia as well as the University of Adelaide to better understand the attitudes, motivations and behaviours of workers and small and medium businesses regarding the use of restraint clauses, including targeted analysis for individual sectors. Continuous research into restraint of trade litigation cases (relevant to outcome 2) will help assess whether improved certainty has reduced relevant regulatory burdens on businesses and other litigation costs. Overall, this research will help further build the government's evidence base on the relative merits of non-compete clauses and impacts of potential reforms on the public, workers and businesses.

In addition to the use of BLADE and STP data to assess economic impacts, on Treasury's recommendation, a question has also been included to measure the prevalence of non-compete clauses in the nationally representative Household Income Labour Dynamics of Australia (HILDA) survey that is run by the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne. The question included is below:

Question on non-compete clauses in HILDA wave 25

Thinking about your main job, are you subject to a non-compete clause that requires you not to work at a competing employer or business for a period of time after leaving your current job?

[Yes, No, Refused, Don't know]

The HILDA survey includes other useful information on workers, including their wages, industry and job tenure. These will all support longitudinal analysis of the reform as it progressively affects more workers.

Timing of evaluation

The most fulsome and representative evaluation of the preferred option against success metrics will take place after the reforms have been fully implemented and all transitional measures have ceased. The changes to non-compete clauses and other worker restraints will only apply when employment contracts are renewed or varied. As a result, the full impact of the reforms will take time to materialise and evaluate against the success metrics. This could be as long as 5-10 years after full implementation to provide sufficient time for the impacts of the policy to be identified, as well as allow for any unintended consequences. As such, fully assessing the efficacy of these reforms could only be possible in the early-to-mid 2030s.

In the meantime, monitoring the impacts of these reforms will be integrated into the existing responsibilities of Treasury and the Department of Employment and Workplace Relation which include tracking labour market outcomes and advising government on potential reforms to workplace relation laws. The government will continue to monitor the prevalence of non-compete clauses to reduce barriers to job mobility and ensure Australia's labour market remains dynamic, competitive for both businesses and employees, and fair. This ongoing oversight will help ensure that businesses retain the ability to use non-compete clauses where they are reasonable and necessary, while supporting broader policy objectives aimed at enhancing labour mobility and economic productivity.

Status of the Impact Analysis at Major Decision Point

Decision	Date	Status of the Impact Analysis
Treasurer announced the Competition Review	August 2023	Undeveloped.
Preliminary Assessment is sent to OIA	August 2024	The Preliminary Assessment Form is prepared and sent to OIA for their assessment. OIA confirms that the full IA is required.
Drafting commences on the Impact Analysis	August 2024	Drafting of the IA commences and several drafts were sent to OIA for informal comments.
Government decision on key elements	February 2025	A draft version of the IA considered as part of the government decision, noting subject to further stakeholder consultations of final policy details.
OIA First Pass Final assessment	September 2025	The first pass assessment IA completed. OIA first pass assessment comments addressed in the IA and certification letter for second pass.
OIA Second Pass Final assessment	October 2025	IA for second pass assessment presented to OIA.
Final policy decision to proceed with proposal	November 2025	To be informed by an IA that had been through a final assessment by OIA.

Attachment A: Questionnaire Responses

- The Taskforce conducted a public online questionnaire as part of the issues paper consultations to gather views directly from workers and employers regarding their experience with non-compete clauses and other restraints of trade. The key insights and evidence from the questionnaire are below.
- The findings are not representative of the Australian population, as workers and employers self-selected into the questionnaire to provide a response. The survey also could not restrict respondents from making multiple submissions (a point made by BCA).
- Nonetheless, these provide an indication of the lived experiences of worker and business attitudes to non-compete clauses and other restraints, with detailed stories shared by some respondents, which in many cases confirm what we have heard in consultation and our review of the domestic and international literature.
- Worker survey: 363 respondents, skewed to higher income Australians, and most commonly in software and IT, and holding management roles.
- Business survey: 64 respondents, skewed to smaller employers (<199 employing) largely in Professional, Scientific and Technical industries.

Key findings for Worker Questionnaire

Key findings	Questionnaire statistics	Quotes
NCCs impact a range of workers across occupations and incomes	• Most respondents impacted by a non-compete clause worked in professional services however a large number are also employed in the health and government sectors. • 26 per cent of responding workers impacted by non-compete clauses, reported incomes less than $100,000 and 22 per cent of respondents earned over $200,000.	
Workers feel they have limited negotiation power with employers. Non-compete clauses presented as “take it or leave it”.	• 313 respondents have/or previously had a non-compete clause. Of these, 10 attempted and successfully negotiated the terms of their non-compete clause.	• “New employment agreement presented with option to sign or leave. Queried non-compete period and was told it was not negotiable.” – Head of Risk/Compliance and People • “My experience is that employers are completely inflexible on restraint of trade clauses. You either accept it, or you find another job. On top of that, they're

		often couched in legal terminology that many employees would have trouble understanding”. – Acoustic Consultant
In many instances employees are not made aware that their contract contains a non-compete clause.	• 34 per cent of respondents were not made aware of the clause until after signing their employment contract.	
Employees with non-compete clauses are deterred from starting their own business, changing jobs or finding additional work.	• 55 per cent of respondents noted that a non-compete clause impacted job-switching “to large extent”. • 42 per cent noted they were prevented from opening their own business to a “large extent”.	• “Inability to start my own orthodontic practice for 2 years due to the radius and duration of the non-compete clause. I cannot justify driving an hour to work outside the radius with a young family” - Orthodontist • “I tried to ask them to remove it so I can work for day programs in other company outside of work hours and they refused.” – NDIS worker • “They stopped me making extra income” - Social worker • “I am currently looking for a new job but have virtually no options due to the non-compete” – Product Specialist
NCC can be to the detriment of their clients, particularly for those in care occupations.		• “I am prevented from starting a similar business during my work with them and for 12 months after leaving. If I go… I can’t care for any of my current clients, or they can’t follow me to the new platform for 12 months.” – Support worker, aged care/disability • “Non-compete in psychology is awkward as the clients generally build rapport with the clinician and want to follow them. Relationship and therapeutic outcomes are jeopardised when clinicians have to decline sharing where they're moving to”. – Psychologist
Legal advice is costly and a significant barrier for an employee challenging the clause, even when the non-compete clause is likely unenforceable	• Workers quoted costs of around $600-$800/hr for lawyer, and $100,000 - $150,000 in fees associated with court actions.	• “My former firm is currently seeking to enforce the 3 year restraint in full starting at the end of my 6 month notice period. I am currently taking legal action in the NSW Supreme Court to challenge the restraint as it in effect means I am unable to make a living in my sole profession in insolvency…It has forced me to take legal action which has cost me in excess of $100k in legal fees” – Insolvency worker • “I was made redundant then told they would impose a 12 month non-compete. Working in a specialised industry I therefore had limited job opportunities which was very distressing. I sought legal advice but was told it would be costly to defend and my chances were not good.” – Medical industry

Many employees experience threats to enforce their non-compete clause, even if these are likely unenforceable or followed through with court action.	• 38 per cent had their non-compete clause enforced or have been threatened with enforcement by their employer.	• "I was continually intimidated by my previous boss about how he had enforced the restraint clause for other past employees." – Dentist • "My employer threatened to enforce the non-compete to try to stop me from moving to another job. This disagreement caused me a lot of stress and expense and delayed my start with the new employer for several months… Eventually the new employer and I decided to call their bluff, I started the new job, and my old employer didn't go through with their threat."– Software Engineer
Nearly all workers with non-compete clauses are also subject to either a non-solicit of clients or colleagues, or a non-disclosure agreement.	• Over 88 per cent of respondents were also subject to other restraints. • 74 per cent have client non-solicit • 61 per cent have co-worker non solicit • 70 per cent have a non-disclosure clause	• "Non-disclosure agreement regarding my salary limited my ability to understand if I was on a reasonable salary compared to my colleagues." – IT worker • [I am] Hesitant to offer good opportunities to former colleagues – Administrator

Key findings from Employer Questionnaire

Key Findings	Questionnaire statistics	Quotes
Many businesses reported using non-compete clauses across all their employees.	• 50 respondents use non-compete clauses, 28 use non-compete clauses across all employees, 19 respondents only use non-compete clauses for upper-level executives	
Businesses mainly use non-compete clauses to protect confidential information and client connection which are a significant business concern.	• 94 per cent reported using non-competes to protect their confidential information and client connections.	• *"In a small business with a small client base, it would be devastating if an ex-employee poached a client on leaving"* • *"Going to work for a competitor encourages information being shared that is proprietary"* • *"The intricacies of the product, contract and organisational information known to these employees (typically senior) will enable their next employer to undercut our prices and have a significant negotiation advantage."*
Many businesses consider enforcing restraints to be costly and are concerned about the effectiveness of alternatives to non-compete clauses, such as non-disclosure or non-solicitation clauses.	• Only 30 per cent of respondents noted that compared to alternatives, non-compete clauses were "to a large extent" effective in protecting business interests. • Of the respondents using non-compete clauses, 28 had previously issued cease and desist or warning. 8 had previously commenced court proceedings.	• *It also feels like the onus is on the employer to chase and find proof when clients are stolen. Then the employer needs to invest all the time and money in litigation* • *Breach of confidentiality obligations is hard to prove, so we use non-competes. Their enforceability is uncertain and expensive* • *Hard to enforce, especially in a tight labour market with limited skilled professionals.*
Clauses are discussed at point of employment. Most negotiations do not include additional compensation. The majority of respondents with non-compete clauses do not include additional compensation or benefits for use of non-compete clauses.	• 50 per cent of respondents reported negotiating clauses with all their workers. • 24 per cent of respondents included specific compensation for the restraints.	

Many are reluctant to hire employees who are impacted by post-employment restraints from their current employers.	• 31 per cent of respondents reported they had been affected by a worker's existing non-compete clause when seeking to hire.	• *We will not hire a new employee who is subject to a non-compete clause from a previous employer unless they provide a clear letter of release from these restrictions.* • *Standard in the industry. Need to wait for non-solicit of clients period to elapse before new hire to work effectively.* • *We've either had to wait or negotiate with the past employer to obtain the services of the individual.* • *Need to put reasonable processes in place to ensure the new employee does not breach their obligations to a former employer; sometimes delay start date*
Many face challenges with client businesses poaching their staff.	• 18 respondents reported using a no-poach agreement on their staff. • Several respondents reported using a fee for client businesses in exchange for poaching their staff. • This attempts to balance the business interests with employee freedom and opportunity.	• *Some of our employees work for clients that they do not "own". Our clauses are based on legal advice obtained as to what is enforceable and are intended to avoid departing employees using knowledge of immediate issues to attempt to win work from these clients. Following the relatively short clause, we see no issue in competing against former employees on a level playing field.* • *We also have challenges with clients poaching staff. We try to agree that if they take our staff we get a recruitment fee plus 6 months notice. Without a restraint on our employees we are exposed to too much risk. Given that this does not impact the employee's salary nor opportunity at the new company, we would like a solution that still allows small businesses like ours to be able to negotiate this with our clients and avoid having the employee apply anyway, turning off the revenue with no notice or planning.* • *Clients are required to pay the equivalent of an agency fee if they poach our consultants. Consultants however are not restrained from applying or soliciting for roles on client sites, if we cannot keep them through our work ethic and support of their needs, we have no right to hold them.*

Attachment B: Summary of stakeholder views of the 2024 issues paper

Issue	Stakeholder views	Stakeholders
General comments on stakeholders' preferred options for reform		
Support for reform	• Unions and community legal centres expressed strong support for a ban on non-compete clauses noting the chilling effect on worker mobility and the fact that the current law and practice relating to these clauses does not strike an appropriate balance between the interests of businesses, workers and the wider community.	ACTU, ANMF, Circle Green, ERLS, Job Watch, Legal Aid NSW, WLSA, Youth Law Australia
	• Many stakeholders expressed support for a nuanced approach to limit the use of non-compete clauses through legislative reforms to specific circumstances such as only enforcing non-competes with respect to high-income earners, payment of mandatory compensation for the duration of the non-compete period and/or establishing a limit on duration.	Dr Iain Ross and Professor Andrew Stewart, Professor Joellen Riley Munton, Professor Van Caenegem and Caitlyn Douglas, Australian Society of Authors, AHRI, AWCC, CPSU, Herbert Smith Freehills, Hireup, LCA, Marrickville Legal Centre, NTWWC, Pharmacy Guild of Australia, Tech Council of Australia
Status quo (minimal change)	• Business groups in particular did not consider that there was sufficient evidence to suggest that restraint of trade clauses (ROTCs) restrict job mobility or negatively impact the Australian economy and favoured retaining the current common law position which they consider to be working well. These stakeholders argued the evidence and consideration of legislative reform in overseas jurisdictions was not appropriate in the context of policy development in Australia given the differences in labour markets and employment law.	ACCI, AFMA, AIG, ARA, BCA, COSBOA, Herbert Smith Freehills, Immutable, Tech Council of Australia
Chilling effect on workers	• Unions, Community Legal Centres, legal academics and individual workers noted the "chilling effect" of non-compete clauses on their ability to move between jobs. Workers often opted to stay in unfavourable or under-paying jobs rather than face the risk of court action. • Workers are denied the opportunity to advance their careers, acquire diverse experiences, and broaden their skill sets in various professional settings. Case studies at Attachment D.	ANMF, ERLS, JobWatch, Legal Aid NSW, Marrickville Legal Centre, NTWWC, WLSA, Youth Law Australia, Professors William van Caenegem & Caitlyn Douglas
Indiscriminate use of restraints	• Stakeholders noted the increasing prevalence of non-compete clauses across industries and different worker groups. Submissions from community legal centres highlighted how clauses impact workers in industries or positions which	ANMF, Australian Society of Authors, AWCC, ERLS,

Issue	Stakeholder views	Stakeholders
	may be unsuitable for ROTCs including disability and aged care workers, yoga instructors, retail workers, early childcare workers and hairdressers. The LCA noted the over-prevalence of ROTCs, particularly in lower-income workers. See case studies at Attachment D. • Submissions from HireUp and the ANMF argued that ROTCs were not appropriate for workers in the care sector. However disability and aged care platform Mable noted its reliance on non-solicitation clauses to prevent contractors from soliciting clients from the platform.	JobWatch, HireUp, LCA, Legal Aid NSW, Professionals Australia, WLSA, Youth Law Australia
Uncertainty created by common law	Scope of "legitimate business interests" • Legal academics noted the uncertainty created by the common law which applies an open-ended and context-specific test when determining whether a ROTC reasonably protects the legitimate business interests of an employer. Requiring a court to determine the enforceability of clauses creates a degree of uncertainty regarding the scope of ROTCs which impacts employers and employees alike. • Legal academics noted that employer's claims to "legitimate business interests" have expanded well beyond the protection of trade secrets and an employer's trade connection with customers to now include protection of a "stable workforce".	Professor Andrew Stewart & Dr Iain Ross, Professor Joellen Riley Munton, Professor William van Caenegem & Caitlyn Douglas
	Prevalence of cascading clauses • Courts currently 'read down' (in NSW) or sever (everywhere else in Australia) ROTCs to make them enforceable. This approach has resulted in the proliferation of 'cascading clauses' where employers include a range of different durations and geographical locations in the ROTC in the hope that some combination of the sub-clauses will be found to be enforceable. • Legal academics, employee representative groups and Tech Council of Australia noted how this approach incentivises employers to include broad, boilerplate clauses, in the expectation that judges will rewrite them and the clauses will deter employees even if they are invalid. • Unions, Community Legal Centres, legal academics and individual workers argued that these cascading' clauses leave employees at a disadvantage when navigating contractual terms and potential breaches. The vagueness of ROTCs was also commented on by the Tech Council of Australia and Australian Society of Authors.	Australian Society of Authors, LCA, Tech Council of Australia ANMF, ACTU, Marrickville Legal Centre, NTWWC, WLSA, Youth Law Australia Professor Andrew Stewart & Dr Iain Ross, Professor Joellen Riley Munton, Professor William van Caenegem & Caitlyn Douglas,
	Ease of obtaining injunction • Legal academics and community legal centres argued it is relatively easy for an employer to obtain an injunction compelling a worker to comply with a ROTC pending a substantive trial. The requirement to show that the employer has a prima facie case (i.e. there is a serious question to be tried) and the balance of convenience favours making an	Professor Andrew Stewart & Dr Iain Ross, Professor Joellen Riley Munton, Professor William van

Issue	Stakeholder views	Stakeholders
	order. Stakeholders noted this is not a high bar to clear and created uncertainty on a worker's ability to move between jobs even where a court has not yet determined the enforceability of the clause.	Caenegem & Caitlyn Douglas, Circle Green, Legal Aid NSW
Standardise laws in Australia	• Stakeholders expressed support for legislative reform to standardise legal frameworks in Australia in relation to non-compete clauses.	ACTU, Marrickville Legal Centre Professor Andrew Stewart & Dr Iain Ross, Professor Joellen Riley Munton, Professor William van Caenegem & Caitlyn Douglas ARA, Immutable, Tech Council of Australia
Comments on Restraint of Trade Act NSW (1976)	• Employee representative groups and legal academics criticised the presumption under the NSW Restraint of Trade Act 1976 (ROTA) which deems ROTCs enforceable as it favours business interests over the public interest. • Community legal centres and legal academics noted the court's ability to 'read down' ROTCs in NSW leaves workers with little way of knowing what they can and cannot do emboldens employers to draft ROTCs in broad terms. Business stakeholders such as Immutable and Tech Council of Australia argued for the approach in NSW to be standardised across Australia to reduce the prevalence of cascading clauses.	ACTU, Marrickville Legal Centre Professor Andrew Stewart & Dr Iain Ross, Professor Joellen Riley Munton, Professor William van Caenegem & Caitlyn Douglas ARA, Immutable, Tech Council of Australia
Cost of litigation to determine enforceability	• Community legal centres, unions and small businesses (COSBOA, Pharmacy Guild of Australia) highlighted the high costs of litigation as a barrier to determining the enforceability of the non-compete clause, noting most proceedings concerning restraints are commenced by employers in a superior court. • Circle Green and CPSU advocated for the introduction of a quick and low-cost pathway to determine whether a specific ROTC is enforceable or not, such as expanding FWC powers.	ANMF, Circle Green, COSBOA, CPSU, ERLS, JobWatch, Legal Aid NSW, Marrickville Legal Centre, Pharmacy Guild of Australia, NTWWC, Youth Law Australia, WLSA
Imbalance in bargaining power	• Community legal centres and unions noted there was no true bargaining process or negotiation of ROTCs at the time of formation of the employment contract and the power imbalance encourages employers to broadly draft restraints using the uncertainty to discourage employees from challenging them. The Australian Society of Authors also noted	ACTU, ERLS, LCA, Legal Aid NSW

Issue	Stakeholder views	Stakeholders
	authors' lack of bargaining power in negotiating contracts. The LCA noted how poorly drafted non-competes reinforce the power imbalance between employers and workers. • ERLS noted experiences where employees have been reported to pay money to an employer to avoid the risk of being pursued through the courts.	
Impact on low-income/vulnerable workers	• Community legal centre stakeholders highlighted the impact of non-competes on workers in lower paying jobs noting high prevalence in employment contracts for workers earning less than $80,000 per year. Those workers may find themselves with the dilemma of choosing between personal growth opportunities, job mobility, and compliance with contractual terms that can place undue pressure on workers. Many workers in rural or remote areas are required to move their lives for work or commute long distances. • Lower income workers cannot afford to have a lawyer review their contract prior to signing. • Migrant workers have been reported as provided with complicated contracts in English only. Unsponsored migrant workers reported pressure to accept poor wages and working conditions.	ANMF, ERLS, Legal Aid NSW, Marrickville Legal Centre, NTWWC, Youth Law Australia
Impact on casual/gig workers	• Some stakeholders argued it is not appropriate for part-time, casual or gig economy workers to be bound to one employer as they must inevitably work multiple jobs to make ends meet. The LCA did not support imposing ROTCs on casual or gig workers. • Submissions from HireUp, Mable and Uber expressed support for restricting use of non-compete clauses for gig workers. Mable noted its reliance on non-solicitation clauses to prevent independent contractors from soliciting clients from the platform.	Australian Society of Authors, LCA, Professor Joellen Riley Munton ACTU, ANMF, Circle Green, ERLS, JobWatch, Legal Aid NSW, NTWWC, WLSA HireUp, Mable, Uber
Arguments against restrictions of non-competes		
Protection of business interests	• Business stakeholders noted that non-compete clauses provided an important safeguard of a business' investment in its workforce and protection of its confidential information, intellectual property, client information and maintaining a stable workforce. COSBOA highlighted how small businesses are often struggling with skills shortages and rely on ROTCs to safeguard the business' investment in its workforce, client relationships and confidential information. • The BCA, AIG and ARA noted the many express and implied duties in the employment relationship which justify ROTCs such as the duty of fidelity and loyalty, confidence, accounting for property and duties against soliciting customers or establishing a competing business during employment.	ACCI, AFMA, AIG, ARA, BCA, COSBOA, Herbert Smith Freehills, Immutable, MFA, Pharmacy Guild of Australia, Tech Council of Australia
Non-competes the preferred ROTC	• Business stakeholders and the LCA noted that non-compete clauses are usually the simplest ROTC to enforce. By contrast, pursuing a former employee for copyright infringement or breach of confidence is generally cumbersome, excessively costly and difficult to prove.	AFMA, AIG, BCA, LCA, MFA

Issue	Stakeholder views	Stakeholders
Employers will reduce investment in workers	• Business stakeholders noted that a prohibition or restriction on use of non-compete clauses may disincentivise businesses from investing in workers, giving them access to confidential information or providing them with higher remuneration as it would increase the risk of employees leaving with no consequences. • Submissions from FCA and an individual submission from Mira D'Silva, a recruiter who is a member of the RCSA noted the importance of ROTCs in protecting the investment by employers in recruiting employees who are on a work visa.	AFMA, AIG, AIMA, BCA, FCA, Home Loan Experts, Managed Funds Association, Mira D'Silva
Legislative reform could increase outsourcing to overseas workers	• Some business stakeholders argue that companies may seek to outsource employment if unable to enforce ROTCs in Australia. • AFMA noted that financial services firms have chosen Australia as a jurisdiction to operate Asia-Pacific business, in part, due to IP/confidential information protections under law. Restrictions on ROTCs would undermine Australia's position as a regional financial centre. • Immutable, a global blockchain and video games company, noted it does not employ any developers in the state of California and has shifted recruitment of its US roles involving development of IP to other jurisdictions which do permit the enforcement of restraints.	AFMA, Immutable
Common law position is balanced, changes are not needed	• Business stakeholders and law firm Herbert Smith Freehills argued that the common law position aptly addresses the complexities with respect to non-compete clauses and other ROTCS. Any proposed legislative reform has the potential to introduce greater uncertainty and could lead to inadvertent consequences. • The judicial system currently only enforces non-compete clauses when they protect a businesses' legitimate interests and are reasonably necessary to do so. ACCI, ARA, FCA and RCSA advocated for the codification of the existing common law approach.	AIG, AFMA, BCA, Herbert Smith Freehills, Immutable, Pharmacy Guild of Australia, RCSA
Sale of Business exception	• Business stakeholders argued that commercial agreements such as sale of business and partnership agreements should be excluded from any regulatory reform. • ACCI and BCA noted how ROTCs are crucial for both vendors and purchasers in business-sale transactions. The condition that the vendor will not compete with the purchaser in the same sector for a period following the sale is critical for the transfer and protection of goodwill and supporting entrepreneurship.	ACCI, AFMA, AIG, BCA, FCA
Stakeholder views regarding other restraints		
Client non-solicitation clauses	• Legal academics expressed support for a time limitation on client non-solicitation clauses. Community legal centres argued that these clauses were often overly broad and poorly drafted and could be used to dissuade workers from seeking alternative work. • Community legal centres argued that it was inappropriate to use these clauses for certain categories of workers such as those in low-income roles or workers in the care sector, health and social assistance sector, and medical professions in rural and remote areas.	Professor Andrew Stewart & Dr Iain Ross, Professor Joellen Riley Munton, Legal Aid NSW, Circle Green, Youth Law Australia, HireUp

Issue	Stakeholder views	Stakeholders
	• Legal Aid NSW and Circle Green highlighted how use of these clauses may be detrimental to the quality and accessibility of health care services in the community, particularly in rural areas. HireUp identified an increased prevalence of these clauses in care sector gig platforms.	
	• Business stakeholders expressed support for these clauses as they protect valuable client connections and maintain stability of the employer's workforce and business. Businesses also noted that these clauses do not impact job mobility or wage growth as they do not prevent workers from switching jobs. • COSBOA noted that non-solicitation clauses were used to protect small businesses from staff members and clients being poached and often seen as having more of a deterrent effect than something that is enforceable. • The BCA noted that restricting these clauses would result in businesses restricting employee access to building relationships with suppliers, customers and clients during employment. • The LCA noted there are limited alternative protections available to employers, noting that existing equitable, statutory protections as well as confidentiality clauses can be difficult to enforce and less targeted to the protection of client information.	ACCI, ARA, BCA, COSBOA, Herbert Smith Freehills, AFMA, AIG, LCA, Mable
Co-worker non-solicitation clauses	• Legal academics and Legal Aid NSW expressed strong support for banning the use of co-worker non-solicitation clauses. These stakeholders argued that such clauses were inherently unfair as they seek to restrain worker mobility even where workers are not a party to the contract.	Professor Andrew Stewart & Dr Iain Ross, Professor Joellen Riley Munton, Legal Aid NSW
	• Business stakeholders expressed support for co-worker non-solicitation clauses, noting they protected workforce stability as well as the financial stability of a business. Similar to client non-solicitation clauses, businesses noted that these clauses do not impact job mobility or wage growth as they do not prevent workers from switching jobs. • COSBOA noted that non-solicitation clauses were used to protect small businesses from staff members and clients being poached and often seen as having more of a deterrent effect than something that is enforceable.	ACCI, AFMA, BCA, COSBOA
Non-disclosure clauses	<u>Protection of confidential information</u> • Business stakeholders and Herbert Smith Freehills noted that these clauses offered crucial protection of commercially sensitive business information and enabled businesses to remain competitive by preventing employees from sharing confidential information with competitors. • Stakeholders argued that non-disclosure clauses offered more effective protection than the common law, equitable duties and statute. The LCA echoed these views, noting limited protection under the equitable duty of confidence and the Corporations Act. The LCA argued that regulatory responses to non-disclosure clauses should not mirror those for non-compete or non-solicitation clauses. • Business stakeholders strongly expressed the view that these clauses were not restraints of trade and did not prevent workers from moving to another job or starting a new business.	ACCI, AIG, ARA, COSBOA, Herbert Smith Freehills, LCA

Issue	Stakeholder views	Stakeholders
	Scope of non-disclosure clause • Some community legal centres noted how non-disclosure clauses combined with other ROTCs created a barrier for employees seeking to start a new business. Circle Green noted that there was uncertainty around what information is protected and the enforceability of the clause. • The ACTU, ANMF and Legal Aid NSW argued that mechanisms such as intellectual property law and s 183 of the Corporations Act s 183 provide adequate protection for the improper use of information by employees.	ACTU, ANMF, Circle Green, Legal Aid NSW
No-poach and wage-fixing clauses	• Business stakeholders argued there was insufficient evidence to support regulatory reform in relation to no-poach and wage-fixing agreements, noting limited evidence of their existence in Australia. • ACCI, ARA and the FCA argued for the preservation of no-poach and wage fixing agreements within franchise agreements and joint venture partnerships.	BCA, ACCI, ARA, Franchise Council of Australia
	• Legal academics, unions and community legal centres noted it should be impermissible to enforce an agreement which has the effect of limiting the employment prospects of a person who is not a party to the agreement. • The LCA noted these clauses are anti-competitive by design and should be expressly prohibited except in the case of cooperating businesses that are not in competition. • The ACTU noted that employers wanting to fix wages as a group could do so through multi-employer bargaining which is transparent and enables collective input from the workforce.	Professor Joellen Riley Munton, Professor Van Caenegem and Caitlyn Douglas, ACTU, LCA, ANMF, Legal Aid NSW
Restraints of trade during employment	• Generally, stakeholders noted there are no issues with an employer requiring loyalty and confidentiality from employees during employment noting these are implied duties in employment contracts in any case. • Some legal academics and community legal centres argued these restraints should be subject to more scrutiny, as they may infringe on workers' rights, such as freedom of expression, association, and information.	Professor Joellen Riley Munton, Circle Green, Job Watch
	• Business stakeholders and Herbert Smith Freehills noted that restraints on workers during employment are justified to uphold the worker's duty of fidelity, maintain a worker's loyalty to the company and to establish trust and confidence. These are consistent with a common law duty to serve their employer faithfully. • The LCA noted that the question of whether a full-time employee should be permitted to engage in secondary employment without obtaining consent from their primary employer is a complicated issue. The LCA's view is that this matter should remain regulated by the employment contract entered into between the parties, and the common law.	AIG, BCA, Herbert Smith Freehills, LCA

Attachment C: Summary of stakeholder views of the 2025 consultation paper

Issue	Stakeholder views	Stakeholders
Low- and middle-income ban		
General	• Some business groups **reiterated opposition to a blanket low- and middle-income ban**, noting harms to businesses; the case for reform did not sufficiently acknowledge the balanced and nuanced approach of the common law; lack of applicable evidence to Australian context; disproportionate harms to small businesses. • ACCI suggests codifying the existing common law doctrine covering non-compete clauses as an alternative to a ban, providing clarity for businesses and employees to better understand their rights.	BCA, AIG, TCA, ACCI
Definition (i.e. proposed U.S. FTC definition)	• Concern that the **definition may introduce ambiguity**, particularly around phrases like "term and condition" and "functions to prevent", which could increase litigation risk. • Definition **should use existing concepts in the FWA** where possible e.g. use "restricts" or "restrains" instead of "penalises", "functions to prevent" [LCA]; use "term of a workplace instrument…" instead of "term or condition of employment" [Iain Ross & Andrew Stewart]; using "employer" instead of "different person." • Relying on the concept of a "penalty" may have unintended consequences, given penalties are generally unenforceable in Australian contract law. [LCA, KWM] • Calls for a simple, plain-English definition that small businesses can easily understand and apply.	BCA, COSBOA, AIG, LCA, KWM, ASBFEO, William Van Caenegem, AREEA, NTWWC, Iain Ross & Andrew Stewart
	• **Definition should explicitly carve out** other common contractual terms that do not restrict job mobility, such as non-solicitation clauses and other clauses protecting confidentiality or intellectual property. • Limit definition to employment contracts only, excluding commercial arrangements like shareholder agreements, negotiated exit settlements, and clauses triggered solely by resignation (e.g. deferred incentive schemes), which were viewed as voluntary or not aimed at preventing future employment. • Exclude repayment agreements, notice periods, gardening leave and clawback provisions; these are standard industry practices that align incentives rather than restrict mobility. • MFA called for **forfeiture-for-competition agreements to be permitted,** where employees voluntarily agree to forfeit future financial benefits if they join a competitor within a defined period; argued that they do not penalise as they do not claw back money already paid, nor do they restrict a worker from moving jobs.	BCA, HSFK, AIG, COSBOA, KWM, PGA, ASBFEO, MFA, ARA, AREEA, MFAA
	• **Definition should be expanded** to capture indirect restraints, including clauses that prevent resignation, such as unreasonably long notice periods, with some stakeholders also advocating against gardening leave. • Unions and community legal centres raised specific **concerns about training repayment agreements and clawback arrangements** being used to deter resignation and called for these to be in scope of the ban; Iain Ross & Andrew Stewart noted that carve outs for these clauses would need to be tightly circumscribed, potentially	ACTU, ASU, UWU, Circle Green, JobWatch, WLC, Iain Ross & Andrew Stewart

Issue	Stakeholder views	Stakeholders
	within anti-avoidance provisions. Requirements to pay back past bonuses or the cost of training (particularly internal training) risks making it impossible for some employees to move jobs. • Suggested additions included phrases like "whether directly or indirectly" and "interferes with or restricts a worker's ability to work", as well as expressly extending coverage to deeds, settlement agreements, industrial instruments, bonus/share plans, and concurrent employment restraints.	
Scope/ Worker coverage	• **Independent contractors should be excluded** as they typically negotiate their own terms, are covered by other legal protections (e.g. unfair contract terms and *Independent Contractors Act 2006*), and have distinct work arrangements involving sensitive information across multiple clients. Including them would further confuse Fair Work coverage and create inconsistency across employment protections.	BCA, TCA, AIG, ACCI, PGA, COSBOA, HSFK, KWM, ASBFEO, ARA, CPA, HIA, MFAA, MBA, William van Caenegem
	• **Independent contractors should be included** as many perform employee-like work, face similar or greater risks from non-compete clauses, and often lack adequate protections. Exclusion could incentivise employers to misclassify workers, and disproportionately affect vulnerable groups (e.g. women, CALD backgrounds, older/younger workers, people with disability), especially in small jurisdictions with limited job options.	ACTU, ASU, NTWWC, ASA, Circle Green, UWU, Legal Aid NSW, JobWatch, WLC, ERLS, Joellen Riley Munton, Iain Ross & Andrew Stewart
	• LCA members were split on whether the ban should apply to independent contractors; some noted that independent contractors can face similar harms caused by non-competes as lower-income workers (e.g. hairdressers often engaged as contractors); others noted the risks of further complicating the contractor/employee distinction and potential interactions with existing legislation.	LCA
High-income threshold (calculation)	• **Threshold is too high** and excludes employees in lower-paid roles who still have access to sensitive commercial information; remuneration alone is not a reliable proxy for risk. Many senior or commercially exposed employees (e.g. in tech, startups, recruitment) fall below the threshold despite variable income. • Many business groups, especially in the finance sector, advocated for **including bonuses, incentives and commissions as income for the threshold,** to avoid unintended consequences and better reflect actual compensation and exposure. • Suggested alternatives raised include using an average of earnings over the past 2–3 years, using "full rate of pay" (FWA s. 18), past remuneration reporting standards (e.g. *Corporations Act 2001*). • Potential for contracts to be drafted in a way that triggers non-compete clause if earnings rise above the threshold. [BCA, KWM]	BCA, ACCI, HSFK, AIG, KWM, TCA, PGA, MFA, ASIFMA, AFMA, RCSA, AIMA, AREEA, NRA
	• LCA supported using the threshold as proxy, noting benefits of consistency, and certainty; adding another threshold would add unnecessary complexity. ABA also supported use of a threshold.	

Issue	Stakeholder views	Stakeholders
	• **Threshold should be based on base salary**, excluding overtime and additional payments; support for aligning with the Fair Work Act definition for simplicity and consistency. [ACTU, COSBOA, UWU]	
	• Some stakeholders supported applying the threshold to part-time employees as the full-time equivalent (i.e. "pro-rating" income) to reflect seniority and access to sensitive information. [Circle Green, AIG, AHRI] • Others, [Iain Ross & Andrew Stewart], opposed this pro-rating approach, advocating instead for the non-pro-rated, unfair dismissal method; noted benefits of consistency, and reduced confusion/complexity.	
High-income threshold (application)	• Threshold should **apply at the time the contract is made or varied**, as this provides greater certainty and allows for proper planning.	LCA, ACTU, COSBOA, ASU, NTWWC, UWU, ERLS, Iain Ross & Andrew Stewart
	• Threshold **should apply at termination of employment** to reflect actual earnings, seniority, and access to sensitive information; aligns with unfair dismissal regime and avoids inconsistencies from applying it at contract start.	BCA, AIG, ACCI, HSFK, Circle Green, JobWatch, SA Law Society
	• Threshold could apply both at contract formation/variation and at enforcement, to reflect changes over time.	KWM, Legal Aid NSW
Fair Work Instruments (FWIs)	• Most stakeholders **did not oppose or foresee any unintended consequences from applying the ban to FWIs,** noting non-competes rarely used in enterprise agreements and other FWIs. • HSFK raised that an unintended consequence may be that it removes an ability for non-compete clauses to be included in Individual Flexibility Arrangements. • ACCI did not support the application of the ban to FWIs, noting that they generally do not contain non-competes and therefore no grounds to extend the ban.	BCA, COSBOA, KWM, HSFK, LCA, unions, community legal centres
Penalties	• **Support for civil penalties** as a deterrent to carry out the ban; US evidence suggest without penalties employers may still to use non-competes and rely on employees being unaware of their rights. • Agreement existing FWA remedies are appropriate e.g. alignment with pay secrecy or fixed-term contract provisions. Penalties could apply at contract formation, during employment, or post-termination. • Breach of the ban should only be actionable at or after termination of employment, to avoid premature claims and unintended consequences from threshold changes (e.g. indexation invalidating a clause mid-employment). [HSFK]	ACTU, ETU, UWU, LCA, NTWWC, NRA, Circle Green, Legal Aid NSW, JobWatch, ABA, WLC, ERLS, Iain Ross & Andrew Stewart, Joellen Riley Munton
	• **Penalties inappropriate and counterproductive**; clauses in breach of the ban should simply be rendered void and unenforceable. Imposing penalties could create a cause of action even where no harm occurs.	BCA, TCA, AIG, PGA, HSFK, KWM, MFA, SA Law Society, ASIFMA, AFMA, AIMA, AREEA, MBA, William van Caenegem

Issue	Stakeholder views	Stakeholders
Defences	• **Support for defences** where employers had a reasonable or good faith belief that a non-compete was lawful (e.g. misjudged income threshold, believed worker was a contractor). For some stakeholders, this appears to extend beyond supporting an 'honest and reasonable mistake of fact' that applies for strict liability offences, to also include mistakes of law. • Suggested defences included genuine uncertainty (e.g. scope of "functions to prevent"), prompt rectification, or reasonable reliance on professional advice — particularly for small businesses using standard form contracts. • COSBOA proposed applying the Small Business Wage Compliance Code, to address unintentional errors.	LCA, BCA, AIG, ACCI, PGA, HSFK, COSBOA, KWM, Circle Green, MBA, JobWatch
	• **No defences** as they are rare in the FWA and should be reserved for exceptional cases; a well-drafted prohibition should not require them. Allowing defences would add legal complexity, increase uncertainty, and risk perpetuating the chilling effect. • Concern that defences based on reasonable belief would set too low a threshold, especially compared to more complex contexts like sham contracting.	ACTU, ASU, UWU, Legal Aid NSW, ERLS, WLC, William van Caenegem, Iain Ross & Andrew Stewart
Standing	• **Support for standing consistent with other FWA provisions,** i.e. for affected individuals, employee organisations, unions, and Fair Work Inspectors (similar to pay secrecy). • Some stakeholders also supported **broader standing,** e.g. giving standing to prospective employers. [LCA, ACTU, UWU, Legal Aid NSW, JobWatch]	ACTU, LCA, ETU, ASU, NTWWC, Circle Green, UWU, Legal Aid NSW, JobWatch, ERLS, Joellen Riley Munton, Iain Ross & Andrew Stewart
	• **Calls for more limited standing**, including strong opposition to standing for prospective employers, citing lack of direct loss, risk of litigation abuse (especially for small businesses), and availability of alternative support (e.g. indemnifying employee legal costs). Stakeholders also raised concerns about "bounty hunting" and noted no international precedent. • Granting standing to employee organisations risks confidentiality issues, particularly if they represent workers from competing businesses and gain access to sensitive restraint-of-trade information during proceedings. [HSFK]	HSFK, COSBOA, KWM, MFA, AFMA, AIMA
FWO role	• Primary role of the **FWO should be educative**, with enforcement reserved for serious or repeated breaches; emphasis on practical support over punitive action. • Recommended actions include providing template contracts, clarifying complex concepts (e.g. "functions to prevent mobility", high-income threshold), and issuing guidance in collaboration with industry groups. • Additional proposals include a note on non-compete unenforceability in the Fair Work Information Statement, and expand the small business info line with additional funding.	BCA, AIG, HSFK, COSBOA, KWM, ASBFEO, ASU, ARA, AREEA, NTWWC, CPA, NRA, MBA

Issue	Stakeholder views	Stakeholders
	• Support for the **FWO to have a stronger enforcement role**, using all existing powers under the FWA — including investigations, infringement and compliance notices, enforceable undertakings, and standing to commence proceedings — to address repeated use of unlawful non-compete clauses, alongside education.	ACTU, Circle Green, UWU, Legal Aid NSW, ERLS, JobWatch, WLC, Joellen Riley Munton, Iain Ross & Andrew Stewart
FWC role	• **Support for FWC jurisdiction** to resolve non-compete disputes as a lower-cost, accessible alternative to court proceedings where the dispute cannot be solved at the workplace level. • Proposed powers include conciliation, arbitration, and binding determinations on clause scope, earnings calculations, and exemptions — could be modelled off powers under s 526 and 536NC of the FWA. • Others proposed a more limited role regarding disputes over calculating employee's earnings, applying the high-income threshold, and whether any potential exemption applies to a specific circumstance. [KWM] • Community legal centres emphasised the importance of FWC access for marginalised workers, noting that many individuals in their client cohorts are unwilling or unable to pursue complex court pathways like the Federal Court. • While noting that the FWC cannot exercise judicial power, LCA suggested FWC could provide a low-cost, accessible forum for resolving disputes by conciliation or arbitration-by-agreement, particularly where there is uncertainty about the application of the ban; similar to fixed-term contract disputes. • Potential for FWC capacity to control the use of non-competes within the modern award and enterprise bargaining system; could consider permissibility of non-competes on an industry-by-industry basis [PGA].	ACTU, ETU, ASU, KWM, UWU, ASBFEO, WWWA, JobWatch, AREEA, NTWWC, WLC, Circle Green, Legal Aid NSW, ERLS, AHRI, Joellen Riley Munton, William Van Caenegem
	• **Opposition to FWC jurisdiction**, arguing that non-compete disputes are best handled by Chapter III courts due to their judicial nature and expertise; concerns were raised about constitutional limitations, lack of tribunal expertise, and the limited scope for FWC to act outside private arbitration with mutual consent. • ASBFEO raised as an alternative as a low-cost dispute resolution provider.	BCA, AIG, ACCI, HSFK, Iain Ross & Andrew Stewart, Motor Trades Association
Exemptions	• **Support for exemptions** (in addition to national security and defence reasons) including for sale or acquisition of a business; employees below the high-income threshold with access to sensitive information; regulatory requirements (e.g. auditors); cases of employee misconduct (e.g. breach of good faith); mutual agreement between employer and employee to include restraints subject to common law. • May be appropriate to establish a regime for temporary exemptions on application; must have consent between employer and employee; must identify public policy grounds, and must be limited (e.g. time, geography). [HSFK, LCA] • LCA raised that there could be a case for exemptions for workers involved with valuable IP; enforcing IP rights or confidentiality post-employment is often cumbersome, costly, and difficult to prove in Australia.	BCA, COSBOA, AIG, PGA, LCA

Issue	Stakeholder views	Stakeholders
	• Suggestions for an alternative definition which references a "Non-compete Code"; codifies common law principles and would exempt a non-compete clause from the ban if it meets said principles. [BCA, AIG]	
	• **Opposition to broad or multiple exemptions**, with stakeholders arguing that any exemptions should be strictly limited to national security or defence (if any were to be exempt at all); caution was that too many exemptions (as seen with fixed-term contracts) risk undermining the policy intent and creating confusion around the ban.	ACTU, KWM, ARA, NTWWC, UWU, ERLS, Joellen Riley Munton
Transitional arrangements	• **Strong support for transitional grace periods** from most stakeholders, with proposals ranging from 3 to 24 months before civil penalties apply; urging consideration of regulatory burden, especially for SMEs, noting several recent IR reforms. • Some stakeholders also supported a legislative review after the reform is implemented. [AIG]	Most stakeholders
	• **Proposal should be prospective**, applying to non-compete clauses in contracts made or varied after commencement; should respect existing contractual agreements between employers and employees. • Concern about contract variation bring clauses into scope, it is not always clear when a contract is varied, creating uncertainty for businesses. [AIG]	BCA, HSFK, ACCI, AIG, TCA, PGA, KWM, MFA, AISFMA, AFMA, ARA, AREEA
	• **Support ban applying to existing contracts**, with stakeholders proposing that non-compete clauses should be declared unenforceable from commencement, even if agreed earlier; however, penalties should only apply to clauses agreed after the start date. • Some stakeholders suggested a phased approach where existing non-compete clauses become unenforceable after a grace period without requiring renegotiation. [COSBOA, William van Caenegem, CPA, NRA, MFAA]	ACTU, LCA, ETU, Circle Green, Legal Aid NSW, ERLS, Joellen Riley Munton, Iain Ross & Andrew Stewart
High-income workers		
General	• Strong support for **no further reform to non-compete clauses for high-income employees**, with stakeholders arguing the common law is adequate, these workers have greater bargaining power, and their roles often involve legitimate business interests requiring protection. Concerns raised about overregulation, competitive disadvantage for small businesses, and the need for more evidence. • Additional risks identified included the potential for stifling innovation by siloing information within organisations, and the difficulty of proving trade secret misappropriation in court.	BCA, AIG, ACCI, HSFK, TCA, COSBOA, KWM, MFA, ASIFMA, AFMA, AIMA, AREEA, CPA
	• Some stakeholders called for the extension of the ban to high-income employees. • If the ban were not extended, then **some stakeholders supported some combination** of statutory limits**,** including mandatory compensation of varying levels and duration limits ranging from 6–24 months. [ACTU support 6-month and >50% compensation].	ACTU, ETU, NTWWC, UWU, ANMF, Professionals Australia, JobWatch, WLC, William van

Issue	Stakeholder views	Stakeholders
	• LCA supported non-competes for high-income workers being subject to "strict reasonableness tests and possibly mandatory compensation." If adopted, compensation should disincentivise unnecessary restraints but not be so high to make legitimate restraints unworkable; while international practice suggests 12 months, LCA received feedback that 6 months is appropriate in most cases. • Well below 100% to reflect the financial burden on businesses and the fact that non-competes do not prevent employees from earning an income. [HSFK] • Only if duration limits are pursued, then 24 months would be an appropriate statutory maximum duration, based on historically what we have observed to be the typical upper limit of what the courts have found to be enforceable [HSFK]. In comparison, KWM suggested 12 months appropriate.	Caenegem, Iain Ross & Andrew Stewart
Mandatory compensation	• Specific **opposition to mandatory compensation**, with stakeholders warning it would impose a financial burden on employers, encourage reliance on more restrictive mechanisms like garden leave, increase litigation, and also raises unresolved practical issues around administration.	BCA, AIG, ACCI, KWM, TCA, MFA, AFMA, NRA, Speech Pathology Australia
Duration limits	• Specific **opposition to duration limits**; strong support for retaining common law flexibility for restraint clause duration, fixed limits are too blunt, risk undermining legitimate business interests, and fails to reflect the diversity of employment contexts (e.g. 1-month sufficient for some employees but not CEOs) • Some stakeholders, including the LCA, identified that certain circumstances, particularly where sensitive confidential information is involved (such as the creation of new IP), justify restraints for several years and cannot be appropriately addressed through a blanket duration limit ban.	BCA, TCA, AIG, ACCI, KWM, MFA, AFMA, AIMA, CPA
Non-solicitation clauses		
Client non-solicitation clauses	• **Strong opposition to reform of client non-solicitation clauses**, with stakeholders arguing common law strikes the right balance, these clauses do not restrict employee mobility, and are essential for protecting client relationships, goodwill, and intellectual property. • Retain current settings, as these clauses play a key role in safeguarding customer connections and investment in training, and insufficient evidence to justify further restrictions.	BCA, AIG, ACCI, HSFK, TCA, COSBOA, PGA, KWM, ASBFEO, FAAA, AFMA, AREEA, APA, CPA, AHRI, Mable, MFAA, Martha Travis People Innovators
	• Strong support from some stakeholders for **banning or restricting client non-solicitation clauses,** e.g. for workers earning below the high-income threshold, citing disproportionate impacts and enforcement threats even without actual solicitation. • Proposals included banning clauses for casual, part-time, gig economy and contractor workers, limiting duration, and restricting application to active solicitation only. • COSBOA and HSFK suggest that, were there to be reform, a limit of between 12–24 months for businesses to safeguard client relationships is reasonable. Legal academics rejected this, arguing that the maximum duration	ACTU, LCA, NTWWC, ANMF, Circle Green, UWU, Legal Aid NSW, ERLS, JobWatch, WLC, Joellen Riley Munton, Iain Ross & Andrew Stewart

Issue	Stakeholder views	Stakeholders
	should reflect the reasonable time it takes for an employer to re-establish client relationships through other staff (i.e. 2–3 months). [Joellen Riley Munton] • The LCA broadly supported this narrower limit approach while still advocating for non-solicitation clauses to be permitted, clarifying that the scope of solicitation clauses should be restricted to only include active solicitation of clients the employee had direct contact with. • Community legal centres highlighted the burden on marginalised workers, who often feel compelled to comply with restraints regardless of their legal enforceability, likening the impact to non-compete clauses. • Some stakeholders also suggested **banning client non-solicitation clauses in the care and support sector**, particularly under the NDIS, where such clauses conflict with core principles of choice and control for people with disability. Argued these clauses are commonly misused to prevent client movement between providers, especially in areas with limited service options. [ACTU, ASU, ANMF, UWU, ERLS] • The LCA also noted that consideration could be given to limiting these clauses for roles where personal relationships are important, however noted that care would need to be taken in defining these industries to avoid unintended consequences.	
Co-worker non-solicitation clauses	• **Business stakeholders predominately opposed reform to co-worker non-solicitation clauses**, arguing the common law is adequate and these clauses do not prevent employees from changing jobs or following colleagues — only from actively soliciting or poaching staff. • Clauses help prevent unfair competitive advantages by stopping ex-employees from targeting the most valuable staff, balancing employee freedom and employers' interest in protecting their workforce.	BCA, AIG, ACCI, HSFK, TCA, COSBOA, KWM, MFA, AFMA, AIMA, AREEA, Martha Travis People Innovators
	• **Strong support to reform co-worker non-solicitation clauses** from some stakeholders, arguing they restrict job mobility similarly to non-compete clauses, lack a clear legal basis, and undermine freedom of association, career progression, and labour mobility. Staff retention should be achieved through fair wages and good working conditions. • Some support for limited use only in cases involving high-income workers, with calls to ban or restrict these clauses for vulnerable worker groups/lower-income workers. • The LCA sceptical of legitimacy of co-worker non-solicitation clauses, as they restrict the freedom of third parties who are not party to the contract, but accepted they may be justified in rare cases (e.g. preventing coordinated exists); if allowed should be 3–6 months and only apply to senior employees.	ACTU, ETU, ASU, NTWWC, Circle Green, UWU, WLC, LCA, JobWatch, Legal Aid NSW Iain Ross & Andrew Stewart, Joellen Riley Munton, William van Caenegem
Restraint of trade common law doctrine		
Cascading clauses & severability	• **Support banning cascading clauses** due to the uncertainty they create, contributing to a "chilling effect" on workers. Circle Green data shows cascading clauses are common — appearing in around 1 in 4 restraint matters — and are often used to obscure enforceability.	ACTU, COSBOA, LCA, ETU, ASU, NTWWC, Circle Green, WLC, Legal Aid NSW, Joellen Riley

Issue	Stakeholder views	Stakeholders
	• Some stakeholders propose that if any invalid restraint is imposed on a worker, no restraint should be enforceable. Suggested amending the *Fair* Work *Act* to exclude the operation of the NSW *Restraints of Trade Act.*	Munton, William van Caenegem, Iain Ross & Andrew Stewart
	• **Support for retaining cascading clauses**, with stakeholders arguing they are presumed enforceable if reasonable, and concerns about uncertainty are overstated. Cascading clauses are practical in fluid workplace relationships, avoiding the need for constant contract revisions, which would be costly and burdensome for both employers and employees. Continued use of severability is supported as a useful tool for courts to identify fair and reasonable restraint outcomes.	BCA, AIG, ACCI, PGA, HSF, AREEA, QLD & ACT Law Society
	• **Support for codifying a national power for courts to modify and enforce restraint clauses** to the extent they are reasonable, consistent with the *NSW Restraints of Trade Act 1976*.	AIG, HSFK, KWM
Specifying legitimate business interests	• **Support for requirement to specify legitimate business interests**, with some stakeholders recommending employers be required to specify the nature of the interest (e.g. the type of confidential information), aligning with general law breach of confidence principles and providing greater certainty for all parties.	ACTU, ETU, ASU, PGA, NTWWC, Circle Green, Legal Aid NSW, WLC, Joellen Riley Munton, William van Caenegem
	• Opposition to requiring specification of legitimate business interests, arguing it would impose an unreasonable regulatory burden, complicate drafting, and risk outdated or irrelevant terms as roles and interests evolve over time, necessitating frequent contract variations. • LCA noted it could simply lead to employers pointing to all potential legitimate interests as providing a basis for a particular restraint, with no material change to practice or enforcement.	BCA, ACCI, HSFK, COSBOA, KWM, NRA
Misc. issues	• Some stakeholders **supported raising the threshold for interlocutory injunctions** for restraint cases, requiring employers to demonstrate a likelihood that the restraint clause will be found valid, and for courts to consider the public interest in promoting competition and the interests of affected employees when applying the balance of convenience test; LCA called for clarification of the threshold for injunctions.	ACTU, ASU, Circle Green, Legal Aid NSW, Iain Ross & Andrew Stewart
	• Support for **making restraint clauses unenforceable** against employees whose employment ends **due to involuntary redundancy**, recognising the unfairness of restricting future work opportunities in such circumstances; LCA supported clarifying whether a restraint should apply to a worker made redundant. • Recommendation that restraints should also be **unenforceable where the employer has wrongfully terminated or repudiated the employment contract**. While this may reflect common law principles, case law is mixed, and clarification would provide greater certainty. [Iain Ross & Andrew Stewart]	ACTU, ETU, ASU
Restraints on concurrent employment		

Issue	Stakeholder views	Stakeholders
General	• **Opposition to blanket restrictions on concurrent employment**, with stakeholders arguing that common law adequately balances interest (including for part-time and casual workers). • Concurrent employment clauses are typically used to manage legitimate concerns such as conflicts of interest, safety risks, fatigue, and interference with primary duties — a full-time ban would likely be unreasonable. • Need for further research and evidence to assess the need for statutory regulation before any changes are introduced.	BCA, AIG, ACCI, HSFK, LCA, COSBOA, KWM, AREEA, CPA, NRA, Iain Ross & Andrew Stewart
	• While recognising that these clauses are mostly appropriate for full-time workers, **some stakeholders supported prohibiting or restricting concurrent employment restraints for part-time, casual, and gig economy workers**, arguing these workers often rely on multiple jobs to make ends meet and should not be restricted where there is no conflict of interest or risk to confidential information. • Emphasis that restraints disproportionately affect lower-income workers, particularly women, who are overrepresented in casual roles and more likely to depend on secondary employment. • Support for legislative reform that limits the use of these clauses without displacing existing common law or equitable duties, with calls for approval not to be withheld where secondary employment is non-competitive and the employee is performing their primary role satisfactorily.	ACTU, KWM, ETU, ASU, NTWWC, JobWatch, Circle Green, UWU, Legal Aid NSW, WLC, ERLS, WWWA
No-poach and wage-fixing agreements		
General	• **Opposition to banning no-poach and wage-fixing agreements**, citing limited evidence of prevalence and harm and arguing that additional regulation would add unnecessary complexity with minimal benefit.	BCA, AIG, ACCI, AREEA, MTAA
	• Other stakeholders **strongly supported a no-poach and wage-fixing ban.**	ACTU, ASU, UWU, ABA
	• The ACCC's submission identified potential issues to be addressed if no-poach and wage-fixing agreements were prohibited through a new, standalone provision in Part IV of the *Competition and Consumer Act*, noting that existing offence provisions in the Act are complex and interact, including through the 'anti-overlap' provisions. • ACCC noted the merits of ensuring that the new proscribed conduct is regulated coherently with the existing provisions. This would include the application of existing penalties (civil and criminal), depending on the nature of the conduct.	ACCC
Penalties	• **Support for both criminal and civil penalties applying** if no-poach and wage-fixing agreements are considered cartel conduct under Part IV.	ACTU, KWM, LCA, ETU, ACCC, NTWWC, UWU, Legal Aid NSW, JobWatch, Joellen Riley Munton
Exemptions	• **Concerns raised regarding exemptions for the ban.** Calls for requirements for businesses to demonstrate clear worker benefits. Agreements should be publicly disclosed, temporary, and tightly overseen. Note the lack of	ACTU, NTWWC, UWU

Issue	Stakeholder views	Stakeholders
	transparency around current no-poach and wage-fixing agreements, making it difficult to assess their impact or determine if they function as ancillary restraints. • **Strongly opposes exemptions for no-poach agreements**, arguing they unjustly restrict third-party worker mobility—even in labour hire contexts [Prof. Riley Munton, Legal Aid NSW, Prof. van Caenegem, SA Law Society]. • **Strongly opposes exemptions for wage-fixing agreements** (apart from multi-employer bargaining) given anti-competitive risks. LCA had mixed views, with some arguing there should be no exemptions to the ban, while other members gave the view that the same exemptions for no-poach agreements should apply for clarity.	
	• **Support for exemptions raised in the consultation paper** which are in the public benefit. • Supports **clear statutory exemptions** and transparent exemption processes to avoid a chilling effect on public interest agreements (e.g. sustainability or anti-slavery collaborations) [ACCC] • Most LCA members supported the exemptions raised in the paper for no-poach agreements, including for labour hire firms. ABA noted the difference between horizontal no-poach agreements, which warrant per se treatment, and ancillary/vertical agreements, which are assessed by US courts using the rule of reason test (i.e. balancing anti-competitive and pro-competitive effects).	COSBOA, KWM, ACCC, LCA, ABA
	• **Multi-employer enterprise agreements should not be exempt**, as they can function as wage-fixing arrangements. The claim that these agreements set a “floor” rather than a “cap” is unsubstantiated, and businesses can still pay above the agreed rate, just as with other wage-fixing agreements.	ACCI, MTAA

Stakeholder acronyms include: Alternative Investment Management Association (AIMA), American Bar Association (ABA), Asia Securities Industry & Financial Markets Association (ASIFMA), Australian Chamber of Commerce & Industry (ACCI), Australian Competition and Consumer Commission (ACCC), Australian Council of Trade Unions (ACTU), Australian Financial Markets Association (AFMA), Australian Food and Grocery Council (AFGC), Australian HR Institute (AHRI), Australian Industry Group (AIG), Australian Nursing and Midwifery Federation (ANMF), Australian Podiatry Association (APA), Australian Resources and Energy Employer Association (AREEA), Australian Retailers Association (ARA), Australian Services Union (ASU), Australian Small Business and Family Enterprise Ombudsman (ABSFEO), Australian Society of Authors (ASA), Business Council of Australia (BCA), Certified Practicing Accountants Australia (CPA), Council of Small Business Organisations Australia (COSBOA), Electrical Trades Union (ETU), Employment Rights Legal Service (ERLS), Financial Advice Association Australia (FAAA), Herbert Smith Freehills Kramer (HSFK), Housing Industry Australia (HIA), King and Wood Mallesons (KWM), Law Council of Australia (LCA), Managed Funds Association (MFA), Master Builders Australia (MBA), Mortgage and Finance Association Australia (MFAA), National Retail Association (NRA), Northern Territory Working Women’s Centre (NTWWC), NSW Small Business Commissioner (NSWSBC), Pharmacy Guild of Australia (PGA), Recruitment Staffing and Consulting Association (RSCA), Tech Council of Australia (TCA), United Workers Union (UWU), Women’s Legal Centre ACT (WLC), Working With Women Alliance (WWWA)