



Australian Government  
The Treasury



# Non-competes and other restraints: understanding the impacts on jobs, business and productivity

Issues Paper

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# Consultation process

## Request for feedback and comments

This paper seeks information and views to inform the Competition Review's consideration of non-compete clauses and related clauses that restrict workers from shifting to better-paying jobs. Should any potential reform be needed, the Government will engage in further consultation on potential options.

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

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

## Publication of submissions and confidentiality

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

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

## Closing date for submissions: 31 May 2024

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# Introduction

On 23 August 2023, the Australian Government announced that non-compete and related clauses in employment contracts would be an area of policy considered by the Competition Review. The Government's Employment White Paper Roadmap, released in September 2023, reiterated the Government's intent to investigate non-compete clauses, and noted emerging research that non-compete clauses may be restricting workers from switching to better-paying jobs and hampering job mobility and innovation. There is empirical evidence linking lower rates of job mobility with reduced productivity growth, both in Australia and across the OECD.<sup>1</sup> Labour mobility is also particularly important for managing structural changes in our economy, including the transformation to net zero and the shift to the care economy.<sup>2</sup>

There is growing international evidence that restraints of trade – and particularly non-compete clauses – are becoming increasingly prevalent. This evidence also suggests that despite benefiting some businesses, restraint of trade clauses are adversely impacting workers, other businesses and broader economic outcomes – through reduced wages growth, job mobility, and access to skilled workers. Some countries already regulate non-compete clauses (e.g. Austria, Finland and Germany), while others, including the United States (US) and United Kingdom (UK), are proposing reforms that would restrict or ban their use.

## What are non-compete and other restraint of trade clauses?

Non-compete clauses are a type of restraint of trade clause that seek to restrict a worker (both employees and independent contractors) from working for a competitor or establishing a competing business, typically within a geographic area and for a time period after the worker ceases employment.

Non-compete clauses can be distinguished from other types of restraint of trade clauses, such as client or co-worker non-solicitation and non-disclosure clauses. These other clauses can restrict what a worker can do with relationships built during employment, or how they can use confidential information learned on the job.

Separately, two or more businesses may agree not to hire each other's workers (a no-poach agreement), or to fix wages or other working conditions (a wage-fixing agreement). Workers may be unaware of these restrictions which can harm labour market competition and worker outcomes.

A recent Australian Bureau of Statistics (ABS) survey has found that 46.9 per cent of businesses surveyed used some kind of restraint clause, including for workers in non-executive roles. The survey also found 20.8 per cent of businesses use non-compete clauses for at least some of their staff and 68.2 per cent of these businesses used them for more than three-quarters of their employees.<sup>3</sup>

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- 1 Z Durretto, O Majeed and J Hambur, 'Overview: Understanding productivity in Australia and the global slowdown', Treasury Round Up, 2022; F Calvino, C Criscuolo, and R Verlhac, 'Declining business dynamism: structural and policy determinants', OECD, 2020.
  - 2 Australian Government, 2023-24 Budget, 'Structural shifts shaping the economy', Budget Paper 1 Statement 4, May 2023.
  - 3 Australian Bureau of Statistics (ABS), 'Restraint Clauses, Australia, 2023', ABS website, 2024.

This issues paper outlines policy concerns with the use of these restraint clauses and seeks feedback on their impact on businesses, workers and the broader economy. It has been informed by experience in Australia and overseas, including targeted engagement with lawyers, business groups, unions, think tanks, international organisations, and relevant national and international government agencies. Following a recommendation in the recent Independent Review of the Franchising Code of Conduct, the Competition Review will also consider how restraints of trade and other uncompetitive terms in franchise agreements may be affecting franchise workers.<sup>4</sup> The feedback received will inform the Government's consideration of whether reform is needed. If so, the Government will engage in further consultation on potential reform options.

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4 M Schaper, Independent Review of the Franchising Code of Conduct, Australian Government, 2023.

## The importance of job mobility to our economy

Job mobility – the movement of workers between jobs – plays an important function in a dynamic and competitive economy. Workers moving to better jobs is a key source of entrepreneurship and innovation in the economy, including by enabling the creation and expansion of new businesses. Businesses benefit by gaining access to the skills they need, while workers benefit by matching with to roles that better suit their skills and preferences, which can mean higher wages and job satisfaction.

Australian research has found that job mobility is associated with higher wages for workers,<sup>5</sup> even for those who stay in their existing jobs, since a more dynamic labour market increases workers' bargaining power.<sup>6</sup> Job mobility is particularly important for younger workers, who to find jobs that better match their skills, which also brings positive mental health benefits.<sup>7</sup> Young workers also receive the largest pay rise from switching jobs compared to other age groups.<sup>8</sup>

Additionally, job mobility plays an important role in increasing aggregate productivity by supporting the expansion of more productive businesses through the movement of workers. Workers who switch jobs tend to move to businesses that are (on average) 13.1 per cent more productive than the businesses they leave.<sup>9</sup> However, the share of workers moving to higher productivity businesses has fallen slightly over time from 54.2 per cent between 2003 to 2006 to 52.8 per cent between 2015 and 2019.<sup>10</sup> Similarly, Treasury research has also highlighted that the pace of labour reallocation from less to more productive businesses has slowed since 2012, perhaps accounting for about a quarter of the slowdown in aggregate labour productivity growth in Australia.<sup>11</sup>

Australia has seen a general decline in job mobility over the past 30 years, a rate that is similar to other advanced economies.<sup>12</sup> Some of this may reflect an ageing population – older workers tend to shift jobs less.<sup>13</sup> But given the economic benefits from job mobility, any barriers that may be limiting people from moving to better opportunities must be carefully assessed.

At the same time, there is evidence that rising market concentration is giving employers more bargaining – or 'monopsony' – power in some markets, which recent Australian research suggests partly explains low wage growth prior to the COVID-19 pandemic.<sup>14</sup> This may be particularly relevant for workers in regional and remote areas of Australia with fewer choices of employer. While some monopsony power can evolve 'naturally' from markets (such as a town based around a mine), it can also be generated by law. Distributional impacts of market power in the labour market are also

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5 For example, see A Wong, 'Climbing the wage ladder: linking job mobility and wages', e61 Institute, 2024; and S Black and E Chow, 'Job Mobility in Australia during the Covid-19 Pandemic', Reserve Bank of Australia Bulletin, June 2022.

6 N Deutcher, 'Job-to-job transitions and the wages of Australian workers', Treasury Working Paper, Australian Government, 2019.

7 A Michielsen and J Buckley, 'The mental health costs of job loss, job insecurity and skill mismatch', e61 Institute, 2023.

8 Wong, 'Climbing the wage ladder: linking job mobility and wages'.

9 J Buckley, 'Productivity in Motion: The Role of Job Switching', e61 Institute, 6 November 2023, p 1.

10 Buckley, 'Productivity in Motion: The Role of Job Switching', p 2.

11 D Andrews and D Hansell, 'Productivity-Enhancing Labour Reallocation in Australia', Treasury Working Paper, 2019, p 2.

12 Australian Treasury, *Working Future: The Australian Government's White Paper on Jobs and Opportunities*, Australian Government, 2023.

13 Productivity Commission, 'A more productive labour market', 5-year Productivity Inquiry Report, Vol 7, 2023, p 8-9.

14 J Hambur, 'Did Labour Market Concentration Lower Wages Growth Pre-COVID', RBA Research Discussion Paper, 2023.

uneven: there is evidence that workers with caring responsibilities may have inflexible preferences when choosing a job (such as flexibility of hours, proximity to homes and schools) that reduce the number of potential employers and increases those businesses' monopsony power.<sup>15</sup> The Organisation for Economic Co-operation and Development (OECD) identified non-compete clauses, no-poach and wage-fixing agreements as increasing the monopsony power of businesses over workers.<sup>16</sup>

Restricting job mobility through non-compete clauses may be particularly important for some businesses, by protecting their intellectual property and confidential information which can give those businesses the confidence to invest and innovate. The key question for policy is whether the benefits from non-compete clauses balance the broader costs to the economy, or if businesses can access the benefits in another way. There has been increasing evidence overseas suggesting that the use of non-compete clauses may be substantially hampering job mobility and wages growth and may also be affecting broader economic outcomes including business dynamism and innovation.<sup>17</sup>

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15 OECD, *OECD Employment Outlook 2022 – Building Back More Inclusive Labour Markets*, 2022, p 139.

16 OECD, *OECD Employment Outlook 2022 – Building Back More Inclusive Labour Markets*, p 137.

17 E Starr, *Noncompete clauses: a policymaker's guide through the key questions and evidence*, Economic Innovation Group, 2023.



# Post-termination worker restraints of trade

There are a number of clauses in worker contracts that limit what a worker can do, both during employment and when they stop working for a business including non-compete, non-solicitation and non-disclosure clauses.

## Non-compete clauses

Non-compete clauses can restrict former workers from working for a competitor or establishing a competing business, typically within a certain geographic area and for a certain time period after the worker leaves the business.

Non-compete clauses are generally considered a ‘catch all’, compared to other more targeted restraint of trade clauses, providing businesses with more far-ranging protections. They can purport to protect business goodwill and intellectual property by delaying the risk that employees’ knowledge of trade secrets and customer relationships may be used by a competitor. They may also seek to protect and encourage investment in workers’ knowledge, training or customer relationships so they are more productive. However, in reducing the costs for business associated with recruitment and job turnover, they also limit a worker’s potential future job opportunities.

## Non-solicitation clauses

Non-solicitation clauses can restrict former workers from ‘soliciting’ former clients (or customers<sup>18</sup>) or other business contacts (for example, suppliers), or co-workers.

During employment, many workers will engage and develop connections with clients, other business contacts and co-workers. Businesses will often facilitate these connections to improve services.

A non-solicitation clause may seek to protect the business against the former worker using the knowledge of, and relationship with, these former contacts for the benefit of their new employer or to start a new competing business.

## Non-disclosure clauses

Non-disclosure (or confidentiality) clauses can restrict former workers disclosing confidential information gained during the course of employment. Such confidential information can include trade secrets, such as product formulas and client lists, that the worker may otherwise seek to use in a future job.<sup>19</sup>

Non-disclosure clauses provide protection to businesses that provide confidential information to workers. Such clauses may facilitate investment in training and hiring of workers, and may be particularly relevant for senior workers, who can require access to a wide range of (often confidential) information to perform their roles.

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18 In this paper, clients and customers have the same meaning.

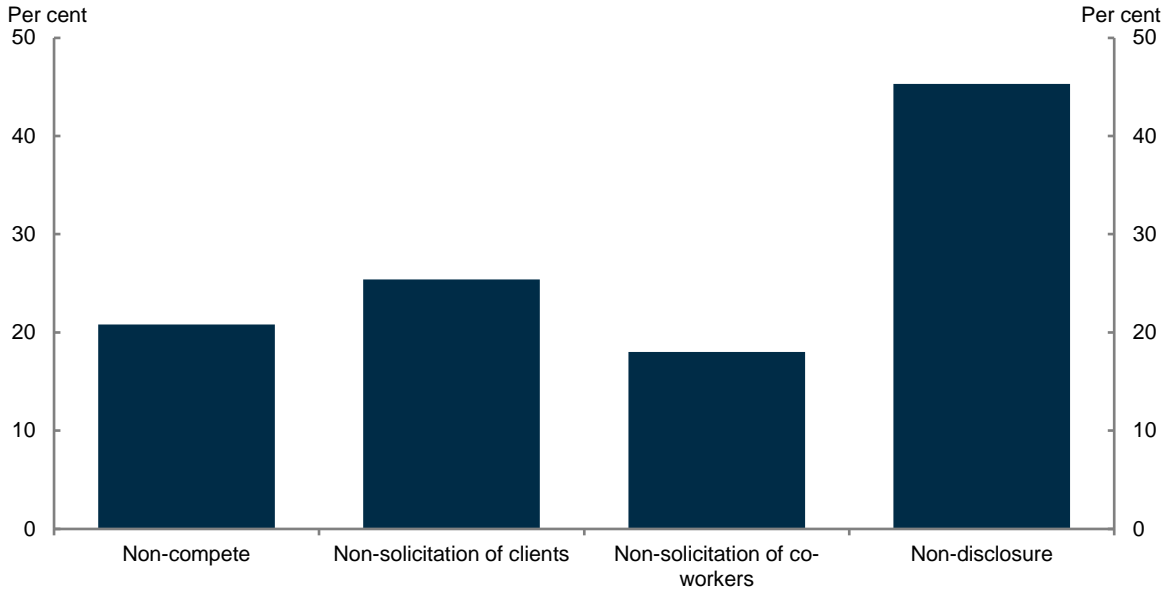
19 Non-disclosure clauses may also be used in other contexts, such as dispute settlements, which is beyond the scope of this issues paper.

Businesses also have other statutory and common law protections available to them to protect confidential information, including section 183 of the *Corporations Act 2001* (Cth) (Corporations Act) which prohibits an employee from improperly using their position (including the company’s information gained through their position) for personal gain, third-party gain, or to cause detriment to the company.<sup>20</sup> The *Privacy Act 1988* (Cth) (Privacy Act) also protects certain personal information collected by certain businesses by restricting the use or disclosure of this information by former workers.

## Prevalence of restraint of trade clauses in Australia

Identifying the prevalence of restraint of trade clauses in worker contracts in Australia is important to assess the potential magnitude of their impact. Recent surveys of employers and workers suggests restraint clauses<sup>21</sup> are reasonably common (Figure 1).

Figure 1: Use of restraint clauses by employers (by type)



Source: ABS, Restraint Clauses, Australia, 2023.

Note: The figures above report the share of businesses surveyed (per cent). They include employers that responded “Yes” to the use of these restraints and does not include employers that responded “Unsure”. Figures do not add to 100 per cent, as employers may use more than one kind of restraint clause.

According to the ABS,<sup>22</sup> restraint clauses are used across all industries and all business sizes,<sup>23</sup> with 46.9 per cent of Australian businesses using some type of restraint clause. The reason or motivation for using restraint of trade clauses may vary by business size – for example, smaller businesses may use standard form employment contracts which automatically include these clauses, rather than a

20 Examples of actions for relief against former employees include *Lifepan Australia Friendly Society Ltd v Woff* [2016] FCA 248; *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifepan Australia Friendly Society Limited* [2018] HCA 43. Also see *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172.

21 The term restraint clauses are used interchangeably with restraint of trade clauses in this paper.

22 ABS, ‘Restraint Clauses, Australia, 2023’.

23 The ABS defines business size based on employment size, grouped into micro/small business (0-19 employees), medium-sized business (20-199 employees) and large business (employment size greater than 199 employees). See ABS, Australian Industry (2021-22), May 2023.

more bespoke company specific employment contract. Use is also not limited to upper-level managers or executives but includes all workers.<sup>24</sup> The use of restraint clauses by businesses is also growing over time, with the ABS survey results indicating that use had increased over the past five years and was likely to increase in the future.<sup>25</sup>

## Non-compete clauses

Around 20.8 per cent of businesses used a non-compete clause for some of their workers in 2023.<sup>26</sup> Usage of non-compete clauses is highest among the largest businesses that have 1,000 or more workers, with 40.0 per cent of these businesses using them.

The ABS survey also reported that 68.2 per cent of businesses which used non-compete clauses, used them for over three-quarters of their workers. Non-compete clauses were used in all industries across the economy, although are particularly common in knowledge- and relationship-focussed services industries including finance, real estate, professional services and healthcare.<sup>27</sup> This is broadly consistent with the e61 Institute's 2023 online survey of 3,000 respondents ('e61 Institute's worker survey'), that estimated 22 per cent of Australian workers had a non-compete clause, including many workers in low-paid relationship-focussed jobs such as childcare workers and yoga instructors.<sup>28</sup>

Australian data on the prevalence of non-compete clauses is comparable to evidence from other jurisdictions. In the UK, 15.2 per cent of businesses reported using a non-compete clause.<sup>29</sup> For workers, surveys report: 26 per cent in the UK,<sup>30</sup> 18.1 per cent in the US,<sup>31</sup> and 37 per cent in the Netherlands (having doubled from 18.9 per cent in 2015)<sup>32</sup> are covered by non-compete clauses. In Austria, prior to setting a minimum income threshold for non-compete clauses in 2006, over 30 per cent of low-income workers were estimated to have one.<sup>33</sup>

## Non-solicitation clauses

### Non-solicitation of clients

The ABS survey reported 25.4 per cent of businesses used a client non-solicitation clause for some of their workers in 2023.<sup>34</sup> Client non-solicitation clauses were the second most used restraint. Client

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24 The ABS restraint clauses survey reported 68.8 per cent of employers using at least one restraint clause for upper-level managers or executives and 74.8 per cent of employers using at least one restraint clause for other types of employees. The ABS notes that the proportion figures do not sum to 100 per cent, as the survey response are not mutually exclusive.

25 ABS, 'Restraint Clauses, Australia, 2023'. See Table 5 and Table 7.

26 ABS, 'Restraint Clauses, Australia, 2023'. See Table 1.

27 ABS, 'Restraint Clauses, Australia, 2023'.

28 D Andrews and B Jarvis, 'The ghosts of employers' past: how prevalent are non-compete clauses in Australia?', e61 Institute, 2023.

29 Office of National Statistics (ONS), Business Insights and Conditions Survey data, Wave 87: 27 July 2023.

30 Competition and Markets Authority, 'Competition and market power in UK labour markets', UK Government, 2024, p 8.

31 E Starr, J Prescott, and N Bishara, 'Noncompete Agreements in the U.S. Labor Force' *Journal of Law and Economics*, 2021 64(1), p 5.

32 M Bartsch, D Grijpstra and R Houweling, 'De werking van het concurrentiebeding', Panteia Research Bureau, 2021, p 117; M Streefkerk, S Elshout and B Cuelenaere, 'Concurrentiebeding. Dataverzameling bij het LISS panel', 2015, CentER Data, p 3.

33 S Young, 'Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria', July 5, 2021, p 3.

34 ABS, 'Restraint Clauses, Australia, 2023'. See Table 1.

non-solicitation clauses are predominantly used by larger businesses, with the highest proportion (46.3 per cent) reported for businesses with between 200 and 999 workers.

The ABS survey also reported that 71.3 per cent of businesses which used client non-solicitation clauses, used them for over three-quarters of their workers. Client non-solicitation clauses were used in all industries across the economy, with the highest prevalence in financial services and real estate.

The e61 Institute's worker survey estimates that 16 per cent of Australian workers are covered by a client non-solicitation clause.

In the UK, 11.4 per cent of businesses reported using a client non-solicitation clause.<sup>35</sup> While in the US, 12 per cent of workers are estimated to be covered by a client non-solicitation clause.<sup>36</sup>

### Non-solicitation of co-workers

The ABS survey reported 18.0 per cent of businesses used a co-worker non-solicitation clause for some of their workers in 2023,<sup>37</sup> the least used of the four restraint clauses reported in the survey. Co-worker non-solicitation clauses were most often used by large businesses, with reported use of 37.7 per cent among businesses that have 1,000 or more workers and 37.6 per cent for businesses with between 200 and 999 workers.

The ABS survey also reported that 67.2 per cent of businesses which used co-worker non-solicitation clauses, used them for over three-quarters of their workers. Co-worker non-solicitation clauses were used in all industries across the economy, with the highest prevalence in real estate and financial services.

The e61 Institute's worker survey estimates that 7 per cent of Australian workers are covered by a co-workers non-solicitation clause.

In the UK around 5.9 per cent of businesses reported using a co-worker non-solicitation clause.<sup>38</sup> While in the US, 4 per cent of workers are estimated to be covered by a co-worker non-solicitation clause.<sup>39</sup>

### Non-disclosure clauses

Non-disclosure clauses were the most used restraint, with the ABS survey reporting 45.3 per cent of businesses using a non-disclosure clause for some of their workers in 2023.<sup>40</sup> Non-disclosure clauses were most used by larger businesses (78.9 per cent).

The ABS survey also reported that 81.3 per cent of businesses which used non-disclosure clauses, used them for over three-quarters of their workers. Non-disclosure clauses were used in all industries across the economy, with the highest prevalence in public administration and safety, financial services, mining, real estate, and healthcare.

The e61 Institute's worker survey estimates that 26 per cent of Australian workers are covered by a co-workers non-solicitation clause.

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35 ONS, Business Insights and Conditions Survey data, Wave 87: 27 July 2023.

36 Starr et al., 'Noncompete Agreements in the U.S. Labor Force', 2021 p 30.

37 ABS, 'Restraint Clauses, Australia, 2023'.

38 ONS, Business Insights and Conditions Survey data, Wave 87: 27 July 2023.

39 Starr et al., 'Noncompete Agreements in the U.S Labor Force', 2021, p 30.

40 ABS, 'Restraint Clauses, Australia, 2023'.

Comparable to Australia data, non-disclosure clauses are the most utilised restraint overseas. In the UK, 29.3 per cent of businesses reported using a non-disclosure clause.<sup>41</sup> While in the US, 36 per cent of workers are estimated to be covered by a co-worker non-disclosure clause.<sup>42</sup>

## Enforceability of restraint of trade clauses

In Australia, restraint of trade clauses between workers and businesses are governed by the common law, with the partial exception of New South Wales (NSW).<sup>43</sup>

At common law, worker restraints of trade are presumed to be against the public interest and therefore void and unenforceable unless they are reasonably necessary to protect the legitimate interest of the employer.<sup>44</sup> 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 limitation on a worker's freedom of trade with the legitimate business interest of the employer.<sup>45</sup>

In a dispute, between a business and worker, a court will consider the nature and extent of the business interest to be protected (for example, confidential client information) and whether the scope of restriction the business wants imposed is reasonable including its geographic area, time period and activities which the restraint seeks to control.<sup>46</sup> This assessment does not typically consider the worker's interests<sup>47</sup> but may take account of the amount of compensation received by the worker<sup>48</sup> and if the restraint operates to prevent the person from earning a living or having reasonable alternative employment opportunities.<sup>49</sup> There are few decided cases in which an otherwise valid restraint has been struck down as being against the public interest.<sup>50</sup>

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41 ONS, Business Insights and Conditions Survey data, Wave 87: 27 July 2023.

42 Starr et al., 'Noncompete Agreements in the U.S. Labor Force', 2021 p 30.

43 *The Restraint of Trade Act 1976* (NSW) modifies the common law rules where the employment contract is subject to the laws of NSW.

44 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.

45 C Arup et al., 'Restraints of Trade: The Legal Practice', *University of New South Wales Law Journal*, 2013, 36(1): 1-29, pp 2-5.

46 A Stewart, *Stewart's Guide to Employment Law*, 7th edn, The Federation Press, Australia, 2019, pp 320-321.

47 A Fell and E Rudz, 'Employee Non-Compete Restraints: Resolving Uncertainty', *UNSW Law Journal*, 2013, 46(4) 1252-1283, pp 1257-1261.

48 *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Cot Pty Ltd* (1973) 133 CLR 288; Although note that J D Heydon contests whether the proportionality of consideration received by an employee is legitimate on the question of reasonableness. See Heydon, *The Restraint of Trade Doctrine*, p 196-199.

49 A Fell and E Rudz, 'Employee Non-Compete Restraints: Resolving Uncertainty', 2013, pp 1257-1261.

50 Heydon, *The Restraint of Trade Doctrine*, p 199; for an example, see *Lindner v Murdock's Garage* (1950) 83 CLR 628 at 641, and *Sherk v Horwitz* [1972] 2 OR 451 at [454]-[456].

## Business interests that have supported enforceable restraint clauses

Interests considered ‘legitimate’ by courts include the protection of trade secrets or other confidential information; protection against solicitation of clients with whom the former worker had a personal connection; and protection against key staff being recruited by a former colleague.<sup>51</sup> An employer is not entitled to protection themselves against mere competition by a former worker.<sup>52</sup>

Determining what kinds of information can be protected from disclosure and used to enforce a restraint on a worker after termination is complex and can depend on many factors, including how the information is stored and used, what the information cost to acquire or is worth and how easily it could be acquired or duplicated by others.<sup>53</sup>

Although businesses may maintain that information is confidential and make effort to keep the information secret from disclosure, workers with access to the information as part of their role pose a practical threat to this secrecy including when changing jobs. The worker may be unable to avoid remembering the confidential information and be unable to separate potentially confidential information from their general know-how and experience that they developed during their employment and would be entitled to use when they left. The worker may be unaware that they are acquiring information that limits their future job opportunities.

Courts have also determined that businesses can protect their customer and supplier connections<sup>54</sup> using a restraint of trade clause, and in some cases have argued they afford adequate protection to protect customer connections of a business in the absence of a non-compete clause.<sup>55</sup> However, there are exceptions to this broad rule. It is not enough for the worker to simply have contact with the customer for a non-solicitation restraint to be enforceable. There must be some element of the worker-customer relationship where the worker has become the human face of the business and acquires influence over the customer’s business.<sup>56</sup> If the worker acquires influence over or has special knowledge of the customer due to the seniority of their position, they may also be validly restricted from dealing with clients of the business that they have not previously dealt with.<sup>57</sup>

In addition to connections with clients and other business contacts, courts in Australia have recently also held that a business’s interest in a ‘stable workforce’ may justify a reasonable restraint preventing workers from soliciting their co-workers.<sup>58</sup>

Solicitation of clients, other business contacts and co-workers may apply to a broader range of conduct than where communication is initiated by the former worker. An injunction against solicitation may also apply where the customer (or supplier, or co-worker) makes the first approach, and the former worker reciprocates.<sup>59</sup>

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51 Stewart, *Stewart’s Guide to Employment Law*, 7th edn, pp 320-321.

52 *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717; 71 NSWLR 9.

53 A non-exhaustive list of factors is provided by R Dean, *The law of trade secrets and personal secrets* (2nd Edn), Lawbook Co., 2002, p 190 quoted by Hodgson JA in *Del Casale v Artedomus* at [40].

54 *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717; 71 NSWLR 9 at [25].

55 *Stacks Taree v Marshal* [No.2] [2010] NSWSC 77 (McDougal J) at [122], [123].

56 *Stacks Taree v Marshal* [No.2] [2010] NSWSC 77.

57 *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717; 71 NSWLR 9 at [33].

58 I Ross, ‘Non-compete clauses in employment contracts: the case for regulatory response’, *TTPI Working Paper*, ANU, 2024, p 17.

59 *Stacks Taree v Marshal* [No.2] [2010] NSWSC 77 (McDougal J) at [122], [123].

## Rule of severance and cascading clauses

Courts may 'sever' an offending part of an unreasonable restraint to permit the remainder of the otherwise reasonable restriction to survive. However, outside of NSW (see section below on *Restraints of Trade Act 1976 (NSW)*) this 'blue pencil' rule only permits a court to strike out words, not to add words to make the restraint enforceable.

This limitation has encouraged businesses to take a precautionary approach by adopting 'cascading' or 'laddered' clauses. These are a series of overlapping or cumulative restraints which include multiple options so that any offending aspects can be struck out, without the entire restraint being held as unenforceable.

Although cascading clauses have sometimes been held to be void for uncertainty,<sup>60</sup> courts are willing to apply the blue pencil test if the cascading clause is drafted in sufficiently precise and clear terms,<sup>61</sup> and a genuine attempt has been made to define the employers need for protection.<sup>62</sup>

The use of cascading clauses and the blue pencil test has been a subject of criticism.<sup>63</sup> Cascading restraint clauses mitigate the risk of the entire restraint being unenforceable but create significant uncertainty for workers and businesses. For example, the contract might state that the restraint applies for a period of 24 or 12 or 6 months. However, it is unclear – without recourse to the court – which term(s) of the restraint are enforceable as a court will determine each restraint in dispute based on the particular facts and circumstances. As such workers who want 'to do the right thing' or take a precautionary approach are likely to abide with the broadest formulation of the restraint.

See Box 1 for an example of a cascading clause and the application of the rule of severance.

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60 *Austra Tanks Pty Ltd v Running* (1982) NSWLR 840 (82,152 possible restraints were involved)

61 *JQAT Pty Ltd v Storm* (1987) 2 Qd R 162.

62 *Lloyd's Ships Holdings Pty Ltd & Anor v Davros Pty Ltd & Ors* (1987) ATPR 40-769; *Sear v Invocare Australia Pty Ltd* (2007) ATPR 42-149.

63 Ross, 'Non-complete clauses in employment contracts: the case for regulatory response'; A Stewart, 'Drafting and Enforcing Post-Employment Restraints', *Australian Journal of Labour Law*, 1997, 10(2): 181-221, p 218.

### **Box 1: *Hanna v OAMPS Insurance Brokers Ltd* [2010] NSWCA 267**

This case is an example of the use of cascading clauses for non-solicitation.

Mr Hanna was an experienced insurance broker who commenced employment with OAMPS in 1990. He resigned from OAMPS on 22 April 2010, having accepted an offer to work at another insurance broking firm.

After Mr Hanna left OAMPS a dispute arose concerning the enforcement of the restraint clauses in the employment contract. The relevant parts of the restraint clause in the employment contract were as follows:

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

*(a) 15 months*

*(b) 13 months*

*(c) 12 months*

*Restraint Area means:*

*(a) Australia;*

*(b) The State or Territory in which you are employed at the date of termination of your employment;*

*(c) The metropolitan area of the capital city in which you are employed at the date of termination of your employment.*

*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. If a court of competent jurisdiction finally decides any such restraint to be unenforceable in whole or in part, the enforceability of the remainder of that restraint and any other restraint will not be affected.”*

The NSW Supreme Court found that in Mr Hanna’s case the restraint of 12 months within the metropolitan area of Sydney was reasonable due to the strong relationships Mr Hanna had maintained with OAMP’s clients and the fact the length of most insurance policies is 12 months.

The Court found that the clause was not void for uncertainty and the rule of severance allowed the Court to sever the remaining sub-clauses.



## Restraints of Trade Act 1976 (NSW)

In NSW, the *Restraints of Trade Act 1976* (NSW) (NSW Act) presumes that a restraint of trade is valid to the extent to which it is not against public policy. The NSW Act permits the court to add new words into the restraint (rather than only severing words from them) to narrow the restraint to what is reasonably necessary to protect a legitimate interest. This means that employers in NSW are less likely to rely on cascading clauses to protect their interests. In practice, this also results in restraints being more frequently upheld in some form in NSW (56.1 per cent) compared to the average for all other Australian jurisdictions (33.3 per cent).<sup>64</sup>

Notably, while the law governing a contract is typically the same as the jurisdiction in which the contract is contested before a court, they can be different under certain circumstances. For example, this could be where the employer and worker are based outside of NSW, however the employment contract expressly specifies the choice of law to be NSW.<sup>65</sup>

## Enforcement in practice

In practice the enforcement of a restraint of trade clause generally starts with the business reminding the worker of the restraint clause upon resignation or termination, or when the business considers that a worker has breached a restraint or is about to do so.

It is relatively simple for businesses to identify a potential breach of a non-compete clause, as the business may only need to know the new employer or business of the former worker. Establishing breach of a non-solicitation clause can be more challenging, as it requires knowledge and evidence that the worker actually solicited a client, other business contact or co-worker. Similarly, businesses may have little way of knowing whether a worker has used or disclosed confidential information in a new role.

Even though some restraints may be too broad to be backed by law, some businesses may still attempt to enforce them. Although non-solicitation and non-disclosure clauses may be generally more targeted by design, they can be drafted more broadly than would be considered proportionate for the circumstances. In one case study provided by Legal Aid NSW, a worker at a beauty clinic was restricted for 12 months from soliciting “any person associated with the company”.

Although workers could challenge a restraint in court on the basis that it is unenforceable, the financial cost of seeking legal advice and the uncertainty associated with legal action can be prohibitive. Research in the US suggests that a not only a worker’s belief about the possible enforceability of the clause, but also their belief about the likelihood of legal action and the cost that entails that can influence their behaviour.<sup>66</sup>

The Competition Review heard from stakeholders that 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 up to \$700,000 in some cases. These figures are broadly consistent with estimates of the cost of legal action in other earlier research.<sup>67</sup> Even if successful, workers are unlikely to have their full legal costs paid by the business, reducing the

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64 H Chia and I Ramsay, ‘Employment Restraints of Trade: An Empirical Study of Australian Court Judgments’, *Australian Journal of Labour Law*, 2016, 29(3):283-304, p 300.

65 See for example, *Hawker de Havilland Ltd v Fernandes & Anor* (1996) ATPR 41.

66 E Starr, JJ Prescott and N Bishara, ‘The Behavioural Effects of (Unenforceable) Contracts’, *Journal of Law, Economics, and Organization* 36, no. 3 (2020), p 6.

67 Arup et al., ‘Restraints of Trade: The Legal Practice’, p 18.

incentive to challenge a restraint. However, the costs are greater if there are adverse findings, and courts more often grant partial, or provisional enforcement at an interlocutory injunction to an employer, particularly in NSW where courts are empowered to rework the clause.<sup>68</sup>

Businesses may also strategically commence proceedings in court, by filing a statement of claim and serving a former worker. This can provide an impetus for negotiations and provide a basis for the parties to seek out of court settlements. Proceedings are discontinued after a settlement is reached.<sup>69</sup> The Competition Review has heard from employment practitioners that enquiries about restraints of trade are common but are rarely continue beyond initial letters or reminders to workers as typically workers adjust their behaviour to avoid further escalation. Of the 115 matters relating to restraints of trade between 2020 and 2023 dealt with by Legal Aid NSW, only one business was noted as having commenced proceedings in court against a former worker.

Most cases do not go to trial and are often decided on an urgent interlocutory basis.<sup>70</sup> 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.<sup>71</sup> The Competition Review heard that 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 for employers at an interlocutory injunction has been a subject of criticism, as it can practically act as the final determinant of the matter.<sup>72</sup> There are few cases which proceed to trial where they can be fully contested on the merits.<sup>73</sup> If the employer makes an arguable case, the balance of convenience test tends to favour employers since courts generally do not consider damages awarded after the event an adequate remedy.<sup>74</sup>

Despite this, one Australian study<sup>75</sup> found that, out of 145 judgements including interlocutory applications between 1989 and 2012, employers were mostly (53.8 per cent) unsuccessful in enforcing a restraint (see Figure 2).

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68 Arup et al., 'Restraints of Trade: The Legal Practice', p 20.

69 Arup et al., 'Restraints of Trade: The Legal Practice', pp 10-11.

70 Arup et al., 'Restraints of Trade: The Legal Practice', p 12; Competition Review stakeholder engagement.

71 *Hartleys Limited v Martin* [2002] VSC 301 at [24]-[46] for a more detailed discussion on requirements.

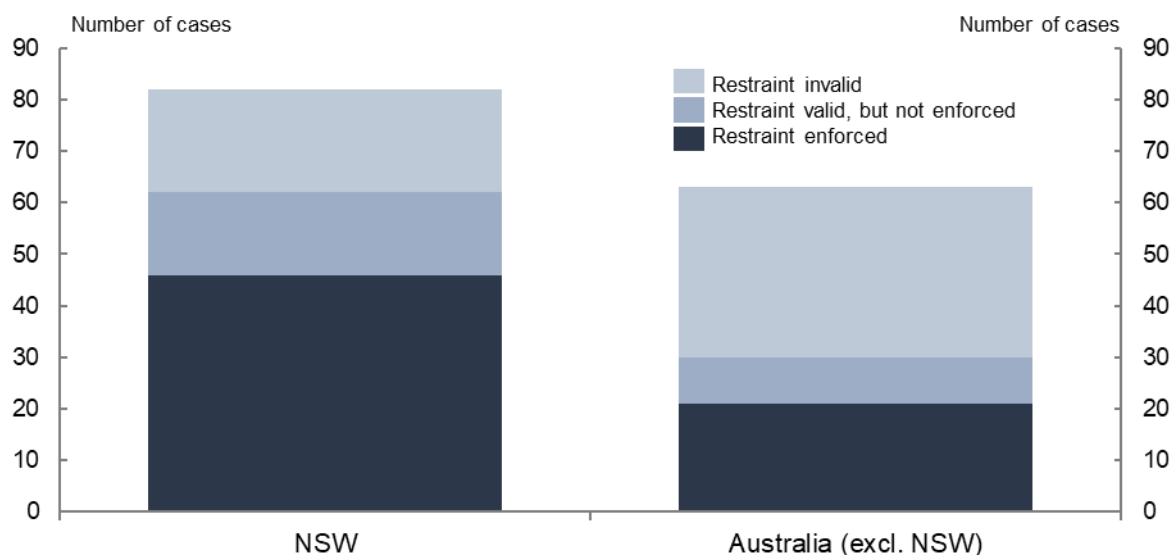
72 Ross, 'Non-compete clauses in employment contracts: the case for regulatory response'; Arup et al., 'Restraints of Trade: The Legal Practice', pp 9-10; J Riley, 'Sterilising Talent: A Critical Assessment of Injunctions Enforcing Negative Covenants', *Sydney Law Review*, 2012, 34(4):617-636.

73 Ross, 'Non-compete clauses in employment contracts: the case for regulatory response'.

74 Arup et al., 'Restraints of Trade: The Legal Practice', p 10-11.

75 Chia and Ramsay, 'Employment Restraints of Trade: An Empirical Study of Australian Court Judgments', p 300.

Figure 2: Enforceability of restraints of trade in Australian courts, 1989 to 2012



Source: Chia and Ramsay, 'Employment Restraints of Trade: An Empirical Study of Australian Court Judgments', 2013. Treasury calculations

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.

The high number of cases with unenforceable restraints may suggest that businesses and workers are unclear as to what is likely to be 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 wider number of restraint clauses that affect worker mobility and outcomes without any interaction with the court system.

# Impact of restraint of trade clauses on workers, businesses and job mobility

## Non-compete clauses

Non-compete clauses may provide businesses with additional protection of legitimate business interests above that provided by other restraints or incentives. However, the experience and evidence that is available in Australia suggests non-compete clauses may have a negative impact on workers, particularly lower-paid workers, who do not have the resources to challenge a non-compete clause even if it may be unenforceable. Non-compete clauses also have consequential and broader impacts on economic growth, competition, wages and innovation.

Figure 3: Lifecycle of a non-compete clause



Figure 3 outlines key elements and consequences across the lifecycle of a non-compete clause from the start of the worker's relationship with the business, during employment, to when a worker resigns, and the considerations faced and the options available to businesses to enforce a restraint.

## Impact on businesses

Non-compete clauses can provide businesses with a way to protect their investment in confidential information and business relationships that may have been built or acquired over a period of years, by restricting the job opportunities of their former workers. However, non-compete clauses can negatively impact on other businesses, particularly in industries experiencing labour shortages as they operate to limit the potential pool of workers. This has broader impacts on workers, business dynamism, competition, innovation, productivity and wage growth.

Including a non-compete clause in employment contracts has 2 primary costs: the consideration (if any) that is paid to the worker for agreeing to the clause, and any legal costs in drafting the contract.

The value of consideration paid for the clause depends on the relative bargaining power of the business and the worker and its relative importance as compared to other contractual terms (e.g. salary, benefits). Relative bargaining power is influenced by how much scope businesses and workers' have to hold out from entering an arrangement and seek alternative opportunities. This dynamic tends to favour businesses as a period of unemployment can be more costly to workers than the cost of a temporary reduction in labour output for a business. Businesses are also more likely to be 'repeat players' in the labour market and have greater negotiating experience and access to relevant information.<sup>76</sup>

There is some evidence overseas that suggests businesses tend to have relatively greater bargaining power in the negotiation of non-compete clauses. Evidence from the US found that only 10.1 per cent of workers reported attempting to negotiate over the terms of their non-compete clause or asked for additional compensation for the clause, and 86.0 per cent of workers reported that businesses did not offer them additional benefits in exchange for agreeing to the non-compete clause.<sup>77</sup> The US study found the majority of respondents simply agreed to the non-compete clause – this may be analogous to the situation in Australia, as the Competition Review heard that many workers in Australia will sign employment contracts without being fully aware of their terms. It may also be difficult or awkward for many workers to negotiate terms of their employment contracts, particularly ones which relate to post-termination restraints as opposed to salary or other benefits of more immediate value, even if the worker has the resources and capacity to negotiate. Many workers, particularly in non-executive roles, will be asked to sign a standard employment contract which may be presented as non-negotiable.

The legal costs to a business of including a non-compete in a contract can be scaled proportionately to the value of the role; for example, by including a standard clause in lower paid contracts and seeking legal advice for tailor made clauses when the risk to business interests is higher. Although the cost of litigation is high, businesses may prefer the relative simplicity of a non-compete clause, since it may be easier to prove a former worker is working for a competitor than to prove they are using confidential information or solicited clients. At the same time, proceedings are generally commenced by the former employer, which means they are well placed to weigh up the costs and benefits beforehand. These factors support the proliferation of non-compete clauses, since businesses can gain the upside or benefit from the use of non-compete clauses, at relatively limited cost.

This relative low cost and simplicity of non-compete clauses raises policy concerns about the potential indiscriminate use beyond that necessary to protect legitimate business interests, particularly given the imbalance in bargaining power between workers and businesses.<sup>78</sup> Some businesses may

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76 Productivity Commission, *Workplace Relations Framework: Volume 1*, Australian Government, 2015, p 87.

77 E Starr et al., 'Noncompete Agreements in the U.S. Labor Force', 2021 pp 34-48.

78 *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 at [566].

strategically use non-compete clauses to maintain a competitive edge by restricting the movement of workers. Others may include a non-compete clause as a standard contract term, without giving appropriate scrutiny as to its purpose or if it is objectively necessary. The relatively low cost supports continued use of non-compete clauses, despite the potentially significant cost to workers, other businesses, and the wider economy.

### Impact on business dynamism and competition

The direct consequence of a non-compete clause is that it hinders competition among businesses: it disincentivises 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.<sup>79</sup> However, the recent ABS restraint clause survey<sup>80</sup> 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 (see *Impact on workers* below).

### Impact on business training, investment and innovation

Empirical evidence on the long-term economic consequences of non-compete clauses on business productivity is relatively limited.

Worker mobility in theory has the potential to present a “hold-up problem” that can prevent the business from efficiently investing in their workers.<sup>81</sup> 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.<sup>82</sup>

While in theory there may be a disincentive for a business to invest in a worker, potentially hampering innovation and productivity, there is no empirical evidence of such a “hold-up problem” in Australia, or that non-compete clauses are the most efficient solution, should such a problem exist.

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79 M Johnson, M Lipsitz and A Pei, ‘Innovation and the enforceability of non-compete agreements’, National Bureau of Economic Research (NBER) Working Paper, 2023.

80 ABS, ‘Restraint Clauses, Australia, 2023’.

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

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

## Box 2: Use of non-compete clauses to recover upfront costs with new staff

The Competition Review has heard from some businesses that non-compete clauses reduce the risk of staff turnover and increase employment tenure, providing businesses confidence that they can recover the costs of hiring and training workers. Businesses argue that it takes some time to recover the upfront costs of recruiting, upskilling and certifying a newly hired worker. If a worker switches relatively quickly to another employer the original business may not be able to recover these upfront costs.

For some businesses in need of skills not readily available in the market, workers can be recruited from overseas, which can substantially increase these upfront costs, providing a further incentive for the business to use a non-compete clause.

At the same time, the Competition Review has also heard that migrant workers can be particularly restricted and vulnerable when a non-compete clause is used. Migrant workers can be less aware of their workplace rights in Australia and language barriers may limit their understanding or challenging the terms or enforceability of their employment contract making them vulnerable to the use of broad and potentially unenforceable restraints.

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.<sup>83</sup> 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.<sup>84</sup>

An alternative critical view of non-compete clauses is that they harm innovation by reducing 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, knowhow and innovation within the industry.<sup>85</sup> 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.<sup>86</sup>

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.

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83 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.

84 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.

85 O Lobel, ‘Noncompetes, human capital policy & regional competition’, *The Journal of Corporation Law*, 2021, 45(4), pp 936-942.

86 OECD, ‘Start-ups and innovative entrepreneurship’, *OECD Science Technology and Innovation Outlook 2016*, OECD, 2016.

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.

Several studies have looked at US states that enforce non-compete clauses differently to examine observable differences in training, investment, and patents (to make inferences about innovation). 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 4.0 per cent.<sup>87</sup> 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.<sup>88</sup>

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.<sup>89</sup>

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

88 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.

89 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: Barnett and Sichelman, 'The Case for Noncompetes', pp 978-1008.



## Impact on workers

Evidence from overseas finds that workers with a non-compete clause have lower job mobility and bargaining power during employment and experience lower wages growth than workers without a non-compete clause.<sup>90</sup> However, there is a lack of similar research in the Australian context.

### The 'chilling effect' on worker behaviour

The impacts of non-compete clauses are exacerbated by the complexity of these clauses, the uncertainty as to enforceability and the substantial costs associated with challenging or enforcing a restraint.<sup>91</sup> Australian research has found that, while uncertainty impacts both businesses and workers, it weighs more heavily on workers who lack the knowledge of court proceedings and decisions, and the financial, psychological, and reputational resources to bargain and undertake litigation.<sup>92</sup>

This can result in a 'chilling effect' on job mobility, where a worker's beliefs about the enforceability of a non-compete clause can influence behaviour independent of whether the clause is in fact enforceable. Evidence from the US suggests workers with non-compete clauses frequently decline job offers because of it, even in states that do not enforce such restraints. If a worker seeks to change jobs despite a non-compete clause, the worker is more likely to redirect their job searching towards non-competitors.<sup>93</sup>

In starting a new business, a worker is most likely to do so in an industry where they have existing expertise, skills and experience. Non-compete clauses may also therefore have a chilling effect on entrepreneurialism. This 'chilling effect' may also be amplified for migrants with employer-sponsored visas because they must comply with the terms of their visa, including minimum income and time periods to change sponsor that increase the difficulty of finding employment outside of their field of expertise.

### Impacts on job mobility and wages in the labour market

Non-compete clauses may have broader labour market impacts, including on workers that decide not to switch jobs and even those that do not have a non-compete clause. 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.<sup>94</sup> 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.

Other international studies that looked at the effect of bans on non-compete clauses found positive or unclear impacts on broader labour market mobility and wages. Researchers examining the effect of a ban on non-compete clauses and non-solicitation agreements for tech workers in Hawaii found that it increased job mobility by around 11.0 per cent and new-hire monthly earnings for tech workers by

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90 M Lipsitz and E Starr, 'Low-wage workers and the enforceability of noncompete agreements', *Management Science*, 68(1):143-170; N Balasubramanian et al., 'Locked in? The enforceability of covenants not to compete and the careers of high-tech workers', *Journal of Human Resources*, 2020 58(6); See also Young, 'Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria', which finds that non-compete clauses reduced mobility to better paying jobs but did not increase workers overall wage growth.

91 Ross, 'Non-compete clauses in employment contracts: the case for regulatory response'.

92 Arup et al., 'Restraints of Trade: The Legal Practice'.

93 Starr et al., 'The Behavioural Effects of (Unenforceable) Contracts'.

94 E Starr et al., 'Mobility constraint externalities', *Organization Science*, 2018, 30(5), p 18.

4.2 per cent, while all worker wages (which includes those that do not have or were not seeking outside opportunities, and workers that had non-compete clauses not affected by the ban) rose by 0.7 per cent.<sup>95</sup> On the other hand, researchers studying a ban on non-compete clauses for workers below the median gross-monthly income in Austria found that although it increased job mobility and wages for those workers that were previously subject to non-compete clauses, a significant impact was not observed on job-mobility or earnings trends for all workers.<sup>96</sup>

### **Box 3 Impacts on low-income workers**

The Competition Review conducted targeted engagement with legal practitioners, including low-income legal services Legal Aid NSW and the Employment Rights Legal Service, as well as business groups. This revealed several instances of broad restraint of trade clauses (including non-competes) being applied to low-wage workers.

#### **Lack of bargaining power**

Legal services noted several instances where workers were not aware of or did not understand the restraint of trade clause in their contract. In one instance a migrant worker with limited English skills was asked to sign a 12-month restraint of trade clause and was not provided a copy of the employment contract translated in his preferred language despite being explicitly requested. The employer later threatened to sue if the worker worked for a competitor.

#### **Uncertainty and chilling effect**

Business groups and lawyers both highlighted the significant uncertainty created by non-compete clauses, particularly for low-income workers. Even where a worker was informed that, based on their circumstances, a non-compete clause was unlikely to be enforceable, many workers were unwilling to risk breaching the restraint. Since lawyers cannot provide guarantees of legal outcomes, the risk and costs of challenging a clause in court remained too high for many clients. One business stakeholder noted that many employers may have no intention of enforcing a restraint and merely use it as a means to discourage staff from resigning.

#### **Business enforcement practices and worker impacts**

There were a number of concerning cases of enforcement by businesses. This included:

- Threats and legal proceedings against workers earning below \$45,000, including cleaners, nurses and hairdressers, with no financial means to challenge the employer. In one case, a legal action was filed against a teenager on minimum wage.
- Enforcement of non-competes in cases of toxic and harmful work practices by employers. In one case a worker experiencing workplace bullying felt like they could not resign from the workplace, due to their concerns that the broad non-compete was enforceable and would prevent moving to a similar job nearby.

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95 Balasubramanian et al, 'Locked in? The enforceability of covenants not to compete and the careers of high-tech workers', 2020.

96 Young, 'Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria'.

## Other impacts

### Impacts on clients and consumers

Clients are also affected by non-compete clauses. Clients that have built a relationship a worker may not be able to continue that relationship if the worker changes employer. The right of a client to choose their supplier is important in any market but may be increasingly important in the growing care economy where personal and sensitive information is used and can be affected by non-compete and non-solicitation clauses (see Box 4 below). In the US, around 37.0 to 45.0 per cent of physicians are covered by non-compete clauses, despite the American Medical Association (AMA) Code of Medical Ethics asserting that they can disrupt continuity of care and may limit access to care.<sup>97</sup> Similarly, lawyers in the US have, since the 1960s, been prevented from having non-compete clauses under their rules of professional conduct, with the American Bar Association (ABA) arguing that “an agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer”.<sup>98</sup>

### International comparison of regulation of non-compete clauses

The prevalence of worker non-compete clauses (particularly low-income workers), and concerns with their use and impact on businesses, workers and the broader economy, has resulted in a number of countries regulating, or considering taking action to regulate, the use of non-compete clauses in worker agreements. Table 1 below provides a summary of the policy models adopted, within the broader context of each country’s legal system.

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97 American Medical Association (AMA), ‘AMA backs effort to ban many physician noncompete provisions’, 2023.

98 American Bar Association (ABA), Model Rules of Professional Conduct – Rule 5.6: Restrictions on right to practice, 2024.

Table 1: International regulation of non-compete clauses

	Ban	Limited duration	Post-employment mandatory compensation	Transparency
United States	Nationwide ban (proposed) State-level policy e.g., Complete ban (5 states, notably California)	State-level policy e.g., 12 months (Oregon)	-	State-level policy e.g., Mandatory disclosure to employees (various)
United Kingdom	-	3 months (proposed)	-	Guidance material (proposed)
Austria	Below certain income threshold <sup>1</sup>	Above income threshold: 12 months	-	
Finland	-	12 months	Minimum 40% of regular salary	
Germany	-	24 months	Minimum 50% of earnings	Specify protected interest
Netherlands	-	12 months (proposed)	Minimum 50% of earnings (proposed)	Specify protected interest (proposed)
Spain	-	6 months, up to 24 months for technical employees	'Adequate compensation' – generally between 20 to 70% of earnings	

Note (1): Around the median income level.

## Discussion Questions

1. Does the common law restraint of trade doctrine strike an appropriate balance between the interests of businesses, workers and the wider community? If no, what alternative options are there?
2. Do you think the *Restraints of Trade Act 1976* (NSW) strikes the right balance between the interest of businesses, workers and the wider community? Please provide reasons. If not, what alternative options are there?
3. Are current approaches suitable for all workers, or only certain types of workers? For example, senior management, low-income workers, or care workers etc?
4. Would the policy approaches of other countries be suitable in the Australian context? Please provide reasons.
5. Are there other experiences or relevant policy options (legislative or non-legislative) that the Competition Review should be aware of?

# Non-solicitation clauses (of clients, other business contacts, co-workers)

## Impact of non-solicitation clauses

### Non-solicitation of clients and other business contacts

There is limited empirical evidence on the impacts of client (or other business contacts) non-solicitation. However, for businesses, non-solicitation clauses may provide protection to support efficient worker-client relationships that improve the operation of the business. These clauses may give businesses more trust and confidence in their workers, making them more likely to invest in and share client information among workers, as well as giving workers the freedom to directly engage clients or other business contacts.<sup>99</sup> Client non-solicitation clauses can also support business continuity when a worker departs by preserving the existing relationships between a business and its clients or other business contacts.

While client non-solicitation clauses may be considered less restrictive than non-compete clauses for workers, in some circumstances client non-solicitation clauses can still have comparable impacts on job mobility. This may be the case within customer-centric industries like real estate agencies or law firms, especially in rural or regional areas with smaller markets, or where the business has extensive customer networks. Businesses in smaller, concentrated markets such as these often have long-standing history and entrenched customer relationships spanning across the entire community due to the limited geographic area they serve. Consequently, in these scenarios, non-solicitation clauses, particularly if broadly framed, may function similarly to non-compete clauses, effectively prohibiting former workers from engaging with any 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 – a client may receive a better price offering or higher quality goods or services if the former worker could compete for that client business. Clients may also have special needs that only a particular worker understands, such as in the care sector, and the client may not feel comfortable establishing this relationship with another person (see Box 4).

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99 In one Australian example, a business required a worker to sign a non-solicitation agreement before they could represent the business in meetings with key overseas suppliers. The NSW Court of Appeal upheld a 4-year injunction against soliciting clients, recognising the information about suppliers as confidential, even if not a trade secret. See: *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317.

#### Box 4: Impact of restraint clauses on access to preferred care providers

While restraints on non-solicitation may be important for businesses to protect connections, this comes at a direct cost to the quality of services in sectors, including in the care sector, where there can be significant benefits to people choosing their preferred service provider.

The National Disability Insurance Scheme is designed to give people with a disability the right to choose who delivers their support and how their support services are delivered and obliges providers to act with respect for this right.<sup>100</sup> This recognises that providing choice and control, provides greater support and enhances the well-being of those with a disability.

The Competition Review heard that the use of non-compete and non-solicitation clauses is prevalent within the disability support sector and within the care economy more broadly, in a way that may be inconsistent with this right to choose:

- Legal Aid NSW noted several instances within the last 3 years where employers had threatened to sue former workers for breach of their restraint clauses after former clients sought to follow them of their own accord. The clauses were often broadly defined to cover all of Australia for as long as 24 months. In one matter, the worker resigned from their new job instead of challenging the restraint.
- These clauses also appear to be common in the childcare sector, as found by the ACCC at a series of roundtables for the Childcare Inquiry 2023. The ACCC noted that some operators may not understand their compliance obligations with industrial law, and some may receive poor advice from disreputable sources,<sup>101</sup> suggesting they may be using clauses that a court would find unenforceable.

The presence of non-compete and non-solicitation clauses in the care sector may also exacerbate worker shortages and persistent low wages in the sector. The Government's 2023 Draft National Care and Support Strategy has outlined the Government's vision for a care and support system that provides quality care and support, which provides safe and secure jobs, and is productive and sustainable.<sup>102</sup>

#### Non-solicitation of co-workers

There is limited empirical research that exists on the impact of co-worker non-solicitation clauses on businesses and workers. However, for business, non-solicitation of co-worker clauses may promote the stability of the workforce by reducing turnover and associated costs. These agreements may also reduce the risk of a business losing its investment in training personnel and allow recoupment of a greater proportion of investment in training.

Despite this, these clauses have been the subject of criticism as they restrict both the rights of the former worker to recruit staff, as well as the opportunities of remaining staff to pursue future

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100 NDIS Commission, NDIS Code of Conduct – Guidance for NDIS Providers, September 2023.

101 ACCC, Childcare Inquiry Roundtable Summary, 11 August 2023, p 4.

102 Department of Prime Minister and Cabinet, Draft National Care and Support Economy Strategy, 2023.

opportunities.<sup>103</sup> In one case, an injunction was granted preventing a personal assistant from accepting a job offer from a previous colleague even though the assistant was not a party to the agreement which contained the restraint.<sup>104</sup> Despite being affected by a colleague's co-worker non-solicitation clause, co-workers are not compensated for the restraint imposed as they are not a party to the agreement.

Non-solicitation of co-worker clauses may, without limiting the ability to make their own enquiries about employment opportunities, in practice limit a co-worker's ability to reach out to networks from the same business. Studies have established that networks play a key role in reducing information frictions in the job market, and facilitating job matches,<sup>105</sup> suggesting possible implications on productivity.

In addition, these clauses may impact business dynamism and competition in the economy. For example, restricting a worker's access to former co-workers when starting a new business, may hamper new business growth. Overseas research finds that co-workers play an important role in facilitating the creation of new firms by founders<sup>106</sup> and that new firms created by former workers tend to survive longer when hiring co-workers.<sup>107</sup>

## Discussion Questions

### *Non-solicitation of clients and other business contacts*

6. What considerations lead businesses to include client non-solicitation in employment contracts? Are there alternative protections available?
7. Is the impact on clients appropriately considered? Is this more acute in certain sectors, for example the care sector? Please provide reasons.

### *Non-solicitation of co-workers*

8. What considerations lead businesses to include co-worker non-solicitation in employment contracts? Are there alternative protections available?
9. Is the impact of co-worker non-solicitation clauses more acute for start-ups/new firm creation or in areas with skills shortages in Australia?

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103 Ross, 'Non-compete clauses in employment contracts: the case for regulatory response'; J Riley, 'No "Poaching"? Why Not? A Reflection on the Legitimacy of Postemployment Restrictive Covenants'. *Commercial Law Quarterly*, 19(1), 3–8, 2005 at p3.

104 *Harleys Ltd v Martin* [2002] VSC 301.

105 A Glitz, 'Coworker Networks in the Labour Market', IZA Discussion Paper No. 7392, 2013; F Cingano and A Rosolia, 'People I know: Job Search and Social Networks', *Journal of Labor Economics* 30(2): 291-332.

106 R Agarwal and B A Campbell, 'What do I take with me?: The Mediating Effect of Spin-Out Team Size and Tenure on the Founder-Firm Performance Relationship', US Census Bureau Center for Economic Studies Paper No. CES-WP-13 -17, 2013, Available at SSRN.

107 V Rocha, A Carneiro, V Celeste, 'Leaving Employment to Entrepreneurship – The Value of Co-worker Mobility in Pushed and Pulled-driven Startups', Paper presented at The DRUID 20th Anniversary Conference, Denmark, 2016.

# Non-disclosure clauses

## Impact of non-disclosure clauses

Little empirical research has been identified on the impacts on workers and businesses of non-disclosure clauses which restrict former workers disclosing the confidential information of the business. However, for businesses, non-disclosure clauses may facilitate investment and innovation by providing assurance that workers cannot disclose unique processes, technologies or strategies.

In the context of estimating the marginal impact of more restrictive covenants, non-disclosure clauses have been associated with higher wages in the United States albeit without establishing a causal link.<sup>108</sup>

Non-disclosure clauses may if not reasonably confined, be hindering the flow of information that should not be restrained and may limit some workers' opportunities by restricting their ability to use their know-how and experience in other roles. This limitation not only detrimentally affects workers, but also presents challenges for businesses, potentially narrowing their access to a diverse pool of talent.

Although non-disclosure clauses may be more targeted than other restraint clauses, the design non-disclosure clauses can disrupt economic efficiency. This includes by:

- unintentionally disrupting the free movement of workers and non-confidential know-how as a byproduct of protecting highly valuable know-how and trade secret, which can prevent the best allocation of business inputs, hampering economic growth; and
- imprecisely defining the confidential information intended to be protected from disclosure, which creates uncertainty that can simultaneously result in workers not knowing what information they are allowed to use, while also potentially reducing the likelihood of successful court enforcement of a restraint.<sup>109</sup>

## Discussion Questions

10. What considerations drive businesses to include non-disclosure clauses in employment contracts? Are there alternative protections, such as s183 of *Corporations Act 2001* available?
11. How do non-disclosure agreements impact worker mobility?
12. How do non-disclosure agreements impact the creation of new businesses?

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108 N Balasubramanian, E Starr & S Yamaguchi, 'Employment restrictions on resource transferability and value appropriation from employees', *SSRN working paper*, 2024.

109 Courts in Australia, particularly Victoria, have been firm on the requirement to be precise in cases relating to confidentiality: see C Arup, 'What/Whose Knowledge? Restraints of trade and concepts of knowledge', *Melbourne University Law Review* 36(2), 2012; also *GlaxoSmithKline Australia Pty Ltd v Ritchie* (2008) 77 IPR 306; and *Manderson M & F Consulting v Incitec Pivot (No 2)* [2011] VSC 205.



## Restraints on workers during employment

Restraints placed on workers during their employment may be justified to uphold the worker's duty of fidelity, as it is generally accepted that, whether written into contract or not, workers have a common law duty to serve their employer 'faithfully'<sup>110</sup> as long as an employment contract subsists.<sup>111</sup> This duty of fidelity is most concerned with conduct involving acts of competition against the employer,<sup>112</sup> and clear breaches of this duty would include running a competing business while still employed or working for another employer in the absence of permission.<sup>113</sup>

It is generally accepted that a fiduciary duty exists for more senior workers with managerial responsibilities,<sup>114</sup> and to satisfy these duties, a worker should not profit at the expense of their employer. For example, if a business opportunity presents itself to a worker, they should bring it to their employer's attention rather than pursuing it for themselves without their employer's consent.<sup>115</sup> This restriction on more senior workers may be justified due to the fact there are more opportunities for them to profit from their position at the expense of the employer. It is less clear however whether the same fiduciary duties apply to less senior employees.

### Box 5: Case study – Casual brow specialist and lash technician\*

A worker employed as a casual brow specialist and lash technician was paid a base rate of \$28.58 per hour with penalty rates applying on weekends and public holidays.

During her employment, to supplement her income, she decided to establish her own at-home business. When her employer became aware of this business, she was called into a disciplinary meeting and made aware of her non-compete restraints. She received a cease-and-desist letter from her employer and subsequently resigned seeking legal advice.

The worker was a young single parent and was unaware of the restraints placed upon her and as she had previously worked in the hospitality industry where it is common to work for more than one business.

*\*Anonymised case study provided by an employment legal service.*

### Part time, casual and gig workers

Businesses may have justifications for placing these restraints on workers during employment, however, they can disproportionately impact workers in part-time, casual or gig roles – an issue that was raised with the Competition Review during consultations. Often these roles are not able to offer a worker a living wage, and these workers must resort to supplementing this income through multiple jobs or streams of income. For these workers, the non-compete clause creates a barrier to working more by holding multiple jobs. Multiple job holdings can also allow for the development of workers'

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110 See *Blyth Chemicals v Bushnell* [1933] HCA 8 49 CLR 66; *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312, [25]-[26], [57].

111 *Mason Gray Strange Ltd v Eisdell* (1989) 31 AILR 271.

112 M Irving, *the Contract of Employment* (Lawbook Co, 2012) 415-430.

113 See *Harris v Digital Pulse Ltd* [2003] NSWCA 10; *Dinte v Hales & Anor* [2009] QSC 63.

114 A Stewart, *Stewart's Guide to Employment Law*, 7<sup>th</sup> edn, p 312.

115 *Victoria University of Technology v Wilson* [2004] VSC 33.

skills which can further stimulate job mobility and entrepreneurial activity.<sup>116</sup> At an aggregate level, these restrictions contribute to underemployment and underutilisation of capacity in the economy.

However, workers are engaged in part-time or variable hours across more than one competing business raises questions relating to fiduciary duties and duties of fidelity and has the potential to create the risk of co-operative behaviour that may be anti-competitive and illegal. However, the extent of this risk could depend on the level of seniority and access to information a person has within their respective workplaces.

### Discussion Questions

13. When is it appropriate for workers to be restrained during employment?
14. Is it appropriate for part-time, casual and gig workers to be bound by a restraint of trade clause?

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<sup>116</sup> K Pouliakas, 'Multiple job-holding: Career pathway or dire straits' IZA World of Labor, 2017, p 1.

## No-poach and wage-fixing agreements

No-poach and wage-fixing agreements between businesses limit hiring competition among employers, directly impacting workers ability to seek new and better employment outcomes and reducing competition between businesses in downstream product markets. This has consequential and broader impacts on economic growth, innovation, and investment. Unlike a non-compete clause or other restraints included in an employment contract, affected workers are typically unaware and not compensated for these agreements which are made between the businesses themselves.

No-poach and wage-fixing agreements are discussed together in this section as although they place restrictions on different aspects of the labour market, they operate in a similar way as they involve coordination between businesses over employment conditions and they may have similar effects on wages and employment opportunities in practice. Both the existing literature and international organisations such as the OECD,<sup>117</sup> treat these agreements similarly as coordinated agreements between competitors that distort competition in the recruitment and employment for labour. Additionally, in other jurisdictions, both no-poach and wage-fixing are regulated on a similar basis.

### No-poach agreements

No-poach agreements can involve 2 or more businesses agreeing to refrain from actively recruiting each other's workers or to complete prohibitions on hiring each other's workers.

One reason for businesses to use no-poach agreements is to maintain a stable workforce and to reduce worker turnover and associated costs. These costs are in addition to the risk that other business interests such as release of confidential information or client and other business contacts that might be harmed through the loss of an experienced worker – although it may be possible to protect these interests through non-disclosure or non-solicitation clauses with workers.

These costs can be particularly acute when, after having recruited and trained a worker, a competing business with demand for similarly skilled workers attracts the worker to move jobs. The competing business can afford to do this, since they do not have to pay for the costs of finding and training a suitable worker.

No-poach agreements are expected to emerge in 3 different kinds of contexts:

- Horizontal, or 'naked' context: they may arise when unrelated businesses that are often competitors in the same goods or services market (e.g., both businesses are mining companies) are competing for the same pool of talent in the labour market. Since these agreements would likely be highly unpopular among affected workers at the affected businesses, these agreements may be unwritten "gentleman's agreements", such as the one between several animating businesses including Walt Disney Animation Studios and DreamWorks.<sup>118</sup>
- They may also emerge in other contexts, where they are related to another business transaction where staff are working quite closely together. This includes:
  - Joint venture agreements, where workers from 2 or more businesses (which may ordinarily be competitors) work together in a new enterprise. No-poach agreements between franchisee and franchisor (instead of between franchisees) may be considered alike the extent that they protect important aspects of the franchise brand shared between the 2 parties.<sup>119</sup>

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117 OECD, Competition in Labour Markets, p 28.

118 Nitsch v DreamWorks Animation SKG Inc, [2015] N.D. Cal 14-cv-04062.

119 OECD, Competition in Labour Markets, 2020, p 30.

- Secondment arrangements and other business-to-business service agreements where a worker from one business works at another workplace. The other business could observe the worker’s performance and attempt to recruit the worker, which may result in businesses being less willing to enter into such secondment or other arrangements.
- Labour hire businesses that incur the cost of finding workers to contract out to another business. A no-poach agreement would prevent the business from directly hiring the worker after the labour hire business has contracted them out, thereby avoiding any recruitment and training costs associated with finding the worker.
- Within franchises, where a franchisor may facilitate an agreement between franchisees not to poach the staff of other franchisees under the same brand. In this context, although they are a vertical arrangement between related business entities, they have horizontal impacts by limiting intra-brand competition for labour between franchisees.

## Wage-fixing agreements

Wage-fixing agreements can involve 2 or more businesses agreeing to set a cap on wages and employment conditions (such as health benefits, or non-statutory leave entitlements) for their workers. This may include agreements to pay a specific wage to workers, but they can also include agreements regarding the absolute or relative compensation that workers receive. For example, businesses may have an agreement to cap bonuses at 5 per cent of their salary.

Like a no-poach agreement, businesses may use wage-fixing agreements to reduce their wage costs and worker turnover. Businesses have an interest in avoiding rising wages and a ‘race to the top’ situation where they face high staff turnover and must offer workers increasingly higher remuneration to retain and attract staff.

Similar to no-poach agreements, wage-fixing agreements can also arise in various contexts. They may arise in a horizontal, ‘naked’ context. An example of this was 4 managers of home health care agencies in the US agreeing to fix the rate paid to essential workers during COVID-19.<sup>120</sup> They may also apply in instances where they are facilitated by a related third party but have horizontal impacts. For example, in the US a trade association that acted on behalf of most hospitals in Arizona to provide them temporary nursing services, set a uniform bill rate schedule with the agreement of its members that the hospitals would pay the temporary nurses.<sup>121</sup> Similarly, a franchisor may also facilitate agreement of standard wages and employment conditions that would limit labour market competition between franchisees.

In some contexts, agreements between businesses may promote the mobility of workers, such as where businesses agree to the portability of long-service or other leave entitlements.

## Prevalence

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 will typically avoid publicising these arrangements if they impose a cap (as opposed to a floor) on worker wages (and other benefits). Consequently, there is limited evidence of their use. However, these agreements are more likely to exist where there are relatively few employers (that is, where the

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<sup>120</sup> DoJ (Department of Justice), Office of Public Affairs, Four Individuals Indicted on Wage Fixing and Labour Market Allocation Charges, United States Government, 2022.

<sup>121</sup> DoJ, Anti-trust Division, U.S. and State of Arizona v. Arizona Hospital and Healthcare Association and AzHHA Service Corp., United States Government, 2007.

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.

No-poach clauses appear to be frequently included in franchise agreements. A 2016 study in the US examined franchising agreements for 156 of the largest franchise chains and found that around 58.0 per cent of them contained no-poach restrictions.<sup>122</sup> The study also found that no-poach agreements are more common in low-wage and high-turnover industries.<sup>123</sup>

In Australia, franchises such as McDonald's, Bakers Delight and Domino's reported using no-poach clauses as a standard term in their franchise agreements, preventing franchisees from hiring workers from other stores within the chain.<sup>124</sup> Data from the Franchise Disclosure Register suggests that 89.9 per cent of all franchisors impose some kind of restraint of trade on franchisees.<sup>125</sup> However, details on the specific type of restraint are limited, such as whether these restraints impact workers (e.g. no-poach agreements), intra-brand competition (non-compete clauses between franchises), or overall business dynamism (non-compete clauses post termination of the franchise relationship).

## Enforcement and regulation of no-poach and wage-fixing agreements

The starting point for analysis of no-poach and wage-fixing agreements is that they are an agreement to fix prices (no-poach agreements indirectly reduce the price of labour by reducing demand for specific workers) and are therefore anticompetitive agreements. These agreements operate in the same way as a seller's cartel that coordinates action to increase prices of output for the mutual profit of its members.

In Australia, cartels are prohibited under Part IV of the *Competition and Consumer Act 2010* (Cth) (CCA) and the Competition Codes of the states which extend the operation of Part IV to all persons in Australia.<sup>126</sup> However, Part IV contains exemptions for certain anti-competitive agreements including:<sup>127</sup>

- Acts done or any provision of a contract, arrangement or understanding to the extent that it relates to the remuneration, conditions of employment, hours of work or working conditions of employees.
- Any provision of a contract of service or a contract for the provision of services where the service provider is not a body corporate (i.e., an independent contractor), where the person agrees to accept restrictions to their work during or after termination of the contract.

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122 A Krueger and O Ashenfelter, 'Theory and Evidence on Employer Collusion in the Franchise Sector', NBER Working Paper Series, 2018.

123 Krueger and Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector.

124 A Leigh, 'How uncompetitive markets hurt workers', Australian Journal of Labour Economics, 2023, 26(1), p 16.

125 Prevalence of the use of restraints of trade as of November 2023. Franchisors may provide a standard franchise agreement on the Franchise Disclosure Register, which can provide relevant information to existing and prospective franchisees. As at March 2024, template agreements were available for around 150 of 1812 franchises listed on the Register.

126 Competition Policy Reform (New South Wales) Act 1995; Competition Policy Reform (Victoria) Act 1995; Competition Policy Reform (Queensland) Act 1995; Competition Policy Reform (South Australia) Act 1995; Competition Policy Reform (Western Australia) Act 1995; Competition Policy Reform (Tasmania) Act 1995; Competition Policy Reform (Northern Territory) Act 1995; Competition Policy Reform (Australian Capital Territory) Act 1995.

127 Competition and Consumer Act 2010 (Cth), s 51(2).

A number of reviews into Australian competition policy and workplace relations have concluded that the negotiation and determination of employment terms and conditions are best dealt with under the *Fair Work Act 2009*, as labour markets are generally treated differently to other markets for goods and services.<sup>128</sup>

The effect of these exemptions and other aspects of the legislation is that the Australian Competition and Consumer Commission (ACCC) may not have jurisdiction to deal with agreements or aspects of agreements that relate to working conditions for employees and independent contractors. Consequently, even if 2 competitors agree to fix and suppress the wages and other conditions of their workers the ACCC, unlike its international counterparts, may not be able to take enforcement action.<sup>129</sup>

Instead, these agreements are dealt with under the common law on restraints of trade. However, in general, at common law, third parties injured by contracts in restraint of trade have no remedy.<sup>130</sup> Thus, workers impacted by a no-poach or wage-fixing agreement, even if they had the awareness of such agreements or the financial resources to challenge them, do not have standing to bring an action against their employer as they are not a party to the agreement. Unless the worker's new employer seeks to challenge the agreement there may be few legal avenues available to workers to challenge their use.

An Australian court recently found, in an interlocutory application, that there was a prima facie case that a no-poach agreement between 2 businesses was enforceable and granted an injunction restraining one of the businesses from employing the employee until final determination of the proceedings.<sup>131</sup> In that case, one business had contracted out an employee to the premises of another business as part of a service agreement. The case did not proceed to a final hearing.

## Impact of no-poach and wage-fixing agreements

The 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.<sup>132</sup> Businesses coordinating to set prices or to not compete for staff effectively increases their market power and deprives workers of new job opportunities and the ability to increase their wage and/or conditions. 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 with their current employer. If the reduction in wages is substantial enough, workers – even those with a great deal of relevant professional experience and education – may have to seek employment in alternative industries to find a higher paying job. This diminishes the value of the worker's accumulated human capital if it is no longer being used in its most productive industry.<sup>133</sup>

In addition, no-poach agreements can suppress a worker's ability to move to a role with a different employer that is a more suitable match and a more productive allocation of their labour. Wage-fixing agreements work analogously by suppressing the potential gains from moving jobs, reducing the

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128 I Harper et al., *Competition Policy Review, Final Report*, Australian Government, 2015; F Hilmer, M Rayner and G Taperel, *National Competition Policy, National Competition Policy Review*, 1993; National Competition Council, *Review of sections 51(2) and 51(3) of the Trade Practices Act 1974*, 1999; Productivity Commission, *Workplace Relations Framework, Productivity Commission Inquiry Report Vol 2 No. 76*, 30 November 2015.

129 R Sims, *Meeting expectations: Industrial relations as a case study speech*, ACCC, 14 August 2015.

130 Heydon, *The Restraint of Trade Doctrine*, p 301.

131 *Quantum Services and Logistics Pty Ltd v Schenker Australia Pty Ltd* [2019] NSWSC 2.

132 OECD, *Competition in Labour Markets*, p 28.

133 Davis et al., 'No-poach agreements – Closing the enforcement gap', pp 8-11.

incentive for workers to search for more productive roles. Increases to a worker's productivity improves their bargaining position to demand commensurately higher wages. Despite being favourable to the original employer by reducing their fixed costs associated with staff turnover, suppressing this improved match is harmful to the overall economy by reducing economic output – which could conceivably result in reduced employment and higher prices for goods and services.<sup>134</sup>

One justification for no-poach and wage-fixing agreements is that they may provide employers an incentive to invest more into the training and development of their personnel. A no-poach agreement limits the number of prospective employers for a given worker, decreasing the likelihood they will depart their current business. In this sense, no-poach agreements reduce the business' risk of losing their investment in training personnel and allows recoupment of a greater proportion of investment in human capital.<sup>135</sup> Although each business will lose the benefit of attracting experienced workers (and may face increased costs to train new staff), this may be offset by reduced turnover costs and ultimately by reduced remuneration of workers.

However, despite these benefits to employers, wage-fixing agreements are recognised to promote anti-competitive behaviour on the basis that they artificially reduce workers' wages and decrease competition between employing businesses, which may result in reduced output or less innovation.<sup>136</sup> The standardisation of wage levels also reduces the strategic uncertainty that characterises competition and may promote price coordination in the downstream markets.<sup>137</sup>

In the same way that evidence on the prevalence of no-poach and wage-fixing agreements is scarce, there are few measurements of the impact of these agreements on wages and other outcomes, due to the secrecy of these arrangements. However, there is an emerging body of research demonstrating that no-poach agreements have the effect of limiting hiring competition among employers, resulting in worse worker outcomes such as lower wages and fewer benefits.<sup>138</sup>

Some studies have been able to estimate the impacts of no-poach agreements. An analysis investigating the impact of no-poach agreements revealed that such agreements among Silicon Valley businesses led to an estimated 4.8 per cent reduction in worker salaries, with stock bonuses and ratings of job satisfaction also negatively affected.<sup>139</sup> No-poach agreements can also have detrimental effects on workers in lower paid industries. In the fast-food franchise sector in the US, where there is a known prevalence of no-poach agreements and government investigation and litigation to curb these agreements, 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.<sup>140</sup>

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134 Davis et al., 'No-poach agreements – Closing the enforcement gap', pp 8-11.

135 Autoridade da Concorrência (AdC, Portuguese Competition Authority), Labour market agreement and competition policy – Issues Paper – Final Version, September 2021.

136 J M Taladay and V Mehta, 'Criminalization of wage-fixing and no-poaching agreements', Competition Policy International, 2017.

137 Konkurrensverket (Swedish Competition Authority), Joint Nordic report – Competition and Labour Markets, 2024.

138 F Lafontaine, S Saatvic and M Slade, No-Poaching Clauses in Franchise Contracts: Anticompetitive or Efficiency Enhancing?, 2023.

139 M Gibson, 'Employer Market Power in Silicon Valley', IZA Discussion Paper No. 14843, 2021.

140 F Lafontaine, S Saatvic and 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, IZA Institute of Labor Economics discussion paper, 2023, Abstract.

## International regulation and enforcement: no-poach and wage-fixing agreements

No-poach and wage-fixing agreements have been subject to increasing regulatory scrutiny overseas, given their impact on competition:

- In the US, in 2007, the Department of Justice (DOJ) successfully settled enforcement action against a wage-fixing agreement in the healthcare sector.<sup>141</sup> The DOJ also settled an enforcement action in 2010 and 2012 against a group of Silicon Valley companies including Apple, Google, Pixar, Adobe, eBay and Intel not to recruit or solicit each other's software and animation engineers.<sup>142</sup> In 2016, the DOJ issued guidance warning employers that no-poach and wage-fixing agreements would be prosecuted criminally,<sup>143</sup> and has pursued 7 such criminal cases since 2020.<sup>144</sup>
- In 2015, A US court awarded each worker affected by a no-poach agreement between Adobe, Apple, Google and Intel \$5,770 as part of the class action settlement.<sup>145</sup>
- In Europe, the European Commission has expressly included wage-fixing agreement as *per se* illegal in its 2023 Horizontal Antitrust Guidelines.<sup>146</sup> The European Commission has also recently carried out raids for suspected cartel infringements relating to no poach agreements in the online food delivery sector.<sup>147</sup> In addition, France,<sup>148</sup> the Netherlands,<sup>149</sup> Portugal,<sup>150</sup> Switzerland,<sup>151</sup> and other European countries have taken enforcement action against no-poach and wage-fixing agreements.<sup>152</sup>
- In 2023, the UK Competition and Markets Authority (CMA) issued advice to employers to avoid anticompetitive practices, including no-poach and wage-fixing agreements, which are considered to be examples of business cartels.<sup>153</sup> This was preceded by a CMA civil cartel investigation in 2022

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141 U.S. and the State of Arizona v. Arizona Hospital and Healthcare Association and AzHHA Service Corp [2007] D Ariz CV 07-1030-PHX.

142 United States v Adobe Systems Inc, et al [2010] D.D.C 1:10-cv-01629; United States v Lucasfilm Ltd, [2010] D.D.C 1:10-cv-02220; United States v eBay Inc, [2012] N.D. Cal 12-cv-05869.

143 DoJ Antitrust Division and Federal Trade Commission, Antitrust Guidance for Human Resource Professionals, United States Government, October 2016, pp 3-4.

144 J Kanter, Testimony Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights, Assistant Attorney General, DoK Antitrust Division, United States Government, September 2022, p 8; the DOJ has subsequently pursued an indictment in a seventh, ongoing, case, see: United States v. Lopez [2023], D. Nev, 23-cr-00055.

145 Re: High-Tech Employee Antitrust Litigation [2015] D.D.C 11-CV-02509.

146 European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements', 1 June 2023.

147 European Commission, 'Antitrust: Commission carries out unannounced inspections in the online food delivery sector', Press Release, 21 November 2023.

148 Cour D'Appel De Paris [Paris Court of Appeal], 2016/22365, 29 September 2016. In this case the Autorite de la concurrence (French Competition Authority) fined 37 modelling agencies for anti-competitive practices relating to wages of models in France.

149 Authority for Consumers and Markets (Dutch competition authority), ACM suspends investigation into possible wage-fixing cartel between supermarkets after conclusion of collective agreement, November 2021.

150 Autoridade da Concorrenca (AdC, Portugese Competition Authority), AdC issues sanctioning decision for anticompetitive agreement in the labor market for the first time, April 2022.

151 Secretariat of the Competition Commission, Secretariat of the Competition Commission (COMCO) investigates the labour market in the banking sector, 5 December 2022.

152 Davis et al., 'No-poach agreements – Closing the enforcement gap', p 3.

153 CMA, Employers advice on how to avoid anti-competitive behaviour, UK Government, 9 February 2023.



into concerns of wage-fixing by UK broadcasters.<sup>154</sup> Identifying potential competition issues within UK labour markets and actively pursuing collusive behaviour that affects household incomes is one of the CMA's 2023-2024 strategic priorities.<sup>155</sup>

- In 2023, Canada prohibited certain no-poach and wage-fixing agreements under existing criminal and civil competition law prohibitions, (which includes severe criminal sanctions of up to 14 years in prison on conviction) given the potential for these agreements to undermine competition like any other price-fixing agreement between competitors.<sup>156</sup> The reforms followed public scrutiny of the appropriateness of possibly co-ordinated increases to grocery worker wages during COVID.<sup>157</sup>

## Discussion Questions

15. Should there be a role for no-poach and wage-fixing agreements in certain circumstances, for example:
  - a) If the agreement is between unrelated businesses (e.g., competitors)?
  - b) If agreement is between businesses that are co-operating in some way (e.g., joint venture partners)?
  - c) If it is part of a franchise agreement, either horizontally (where franchisees through a common agreement do not to poach each other's staff) or vertically (where franchisors make agreements with each franchisee)?
16. Are there alternative mechanisms available to businesses to reduce staff turnover costs without relying on an agreement between competitors?
17. Should any regulation of no-poach and wage-fixing agreements that harm workers be considered under competition law as an agreement between businesses (for example reconsidering the current exemption), or under an industrial relations framework?
18. Should franchisors be required to disclose the use of no-poach or wage-fixing agreements with franchisees?
19. Are there lessons Australia can learn from the regulatory and enforcement approach of no-poach and wage-fixing agreements in other countries?

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154 CMA, Suspected anti-competitive behaviour relating to freelance and employed labour in the production and broadcasting of sports content, UK Government, 13 July 2022.

155 CMA, 'Corporate report CMA Annual Plan 2023 to 2024', 23 March 2023, accessed on 29 February 2024. This CMA Microeconomics Unit has also recently published a report 'Competition and market power in UK labour markets', Report No.1, 25 January 2024.

156 Competition Act 1985 (CND), c. C-34, s 45(1.1); Competition Bureau Canada, 'Wage-fixing and no-poaching agreements are illegal in Canada', Government of Canada.

157 Canada, Parliament, House of Commons Standing Committee on Industry, Science and Technology: Evidence, 10 July 2020, pp 3-4.

## Conclusion and next steps

This issues paper outlined the existing research and evidence in Australia and overseas on the use and effects of restraints of trade on workers, and no-poach and wage-fixing agreements made between businesses. This has been supported by valuable early engagement from lawyers, business groups, unions, think tanks, international organisations and relevant national and international government agencies.

Several issues have been identified relating to the use and impact of non-compete clauses. Many issues identified in empirical analysis have been affirmed as practical issues affecting Australia today through the Competition Review Taskforce's early engagement, and include concerns about:

- the “chilling effect” of restraint clauses on worker mobility, particularly among lower-income workers, to choose better-paying jobs, and the ability for businesses to start up, recruit talent and grow;
- the high cost of litigation, the lack of clear guidance and ‘bright line’ rules, and the use of cascading clauses or the ‘blue pencil test’, which can leave both workers and businesses with an unclear understanding whether an agreed restraint will be upheld as reasonable and enforceable; and
- the economic consequences of potentially inefficient allocation of labour and information, which may be hampering productivity growth and innovation.

Further feedback is required to improve our understanding of such issues and inform the next steps.

The Competition Review welcomes any perspectives and contributions from the Australian community and will also release a questionnaire for businesses and workers.

The Competition Review will also continue to gather and review evidence, including undertaking analysis of recently released data by the Australian Bureau of Statistics in conjunction with other administrative and survey datasets.

