THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELC/BLC:JBml010925

1 September 2025

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: john.farrell@lawcouncil.au; brendon.murphy@lawcouncil.au

Dear Dr Popple,

REFORM TO NON-COMPETE CLAUSES AND OTHER RESTRAINTS ON WORKERS

Thank you for the opportunity to contribute to the Law Council of Australia's submission in response to the Treasury's Consultation Paper on Reform to non-compete clauses and other restraints on workers (**Consultation Paper**). The Law Society's Employment Law and Business Law Committees contributed to this submission.

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

3.1 Definition of a non-compete clause

*1. How should a non-compete clause be defined in the Fair Work Act? Is the US Federal Trade Commission (**FTC**) definition appropriate for an Australian context?*

The definition of a non-compete clause should be consistent with existing terminologies used in Australian employment law matters. We consider the explanation of non-compete clauses in the 2024 Issues Paper[1] to provide the basis for an appropriate definition, that is:

> 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.

In our view, the FTC definition on page 7 of the Consultation Paper is inappropriate for the Australian context, as references to terms such as 'penalises', 'functions to prevent' and 'seeking work' are foreign to the *Fair*

[1] The Treasury, *Non-competes and other restraints: understanding the impacts on jobs, business and productivity*, Issues Paper (April 2024), 6: https://treasury.gov.au/sites/default/files/2024-04/c2024-514668-issues-paper.pdf.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

Law Council OF AUSTRALIA
CONSTITUENT BODY

Work Act 2009 (Cth) (**Fair Work Act**) and decisions in restraints of trade generally. From a legal perspective, the language of 'restrict' or 'restrain' is more appropriate in the Australian context.

In support of consistency with the Fair Work Act, we suggest a similar format is adopted as exists in relation to the pay secrecy prohibition in section 333D of the Fair Work Act.[2] For example: "An employer contravenes this section if … the contract or agreement includes a term that restricts or restrains the employee from" engaging in various activities, including accepting work from companies in a similar field, or establishing a business that competes with the business. The activities covered should be defined in an expansive rather than exhaustive way.

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

Whether any specific kinds of common contractual terms should be explicitly included or excluded from that definition will largely depend on the definition ultimately adopted. Depending on that final definition, it may be appropriate to expressly exclude "non-solicitation clauses" and "non-disclosure clauses", adopting definitions based on the references to those clauses contained in the 2024 Issues Paper.[3]

3.2 Scope of workers affected

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

In our view, the ban on non-compete clauses should not apply to workers who are not employees.

Regarding independent contractors, the type of relationship is different to an employment relationship, as independent contractors are engaged through a contract for services rather than a contract of service. As service providers, independent contractors may also often provide services to clients in the same industry. As noted in the Consultation Paper on page 12, independent contractors are protected by legislation such as the *Independent Contractors Act 2006* (Cth) and the Fair Work Act, where remedies exist for issues such as unfair contract terms. Complexities could arise in seeking to cover independent contractors who, for a variety of reasons, may be engaged by a principal directly or through an interposed services company.

4. Are there any potential unintended consequences that may arise from a reliance on the high-income threshold in the Fair Work Act? If so, how could they be addressed?

In our view, relying on the high-income threshold in the Fair Work Act is appropriate, as it assists with consistency and certainty in compliance. Adding another threshold or test would add unnecessary complexity to the Act.

---

[2] Section 333D: 'An employer contravenes this section if:
(a) the employer enters into a contract of employment or other written agreement with an employee; and
(b) the contract or agreement includes a term that is …'

[3] The Treasury, Issues Paper: *Non-competes and other restraints: understanding the impacts on jobs, business and productivity* (2024) 6.

However, we suggest there could be some consideration as to which pay elements should be included in the earnings used to test against that high-income threshold calculation. Where the high-income threshold is used in other contexts under the Fair Work Act, payments where the amount cannot be determined in advance – such as commissions, incentive-based payments and bonuses – are excluded from that calculation.

In the context of the potential ban of non-compete clauses, however, the exclusion of those types of payments may have unintended consequences. For example, an employee who receives a relatively low salary may nonetheless be eligible to receive (and may have historically received) a very large cash-based bonus. That employee may have access to highly valuable confidential information and could otherwise have been appropriately covered by a post-employment non-compete restriction (and other restrictions). The structuring of that employee's remuneration, and the pay components to be included in any calculation as against the high-income threshold, would result in that employee being subject to the ban, while their actual earnings could be far in excess of the high-income threshold. To remove this potential consequence, it may be more appropriate to use the value of all past payments to an employee, and calculate the yearly amount of payments received, rather than the usual earnings test, against the high-income threshold.

5. At what point in the employment relationship should the high-income threshold be applied to determine whether a non-compete clause is allowable or not, and why? For example, should it be applied at the time the contract for employment is entered into or varied, the time the employment relationship ends, or some other time?

We suggest that the high-income threshold should be applied at the time the contract for employment is entered into, or at the point of variation (which would need to be defined to include any change to an employee's remuneration). For example, when an employee's income is below the high-income threshold at the time the contract is entered into, the ban on non-compete clauses applies. However, if after two years, the employee is promoted and their income rises above the high-income threshold at the point of varying the contract or of entering into a new contract, the ban on non-compete clauses would not apply.

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

We do not think there will be unintended consequences, given this position is consistent with the analogous section 333C of the Fair Work Act regarding pay secrecy.

3.3 Enforcement

7. What is the appropriate penalty for breaches of the ban on non-compete clauses? Are the existing penalties in the Fair Work Act for other contraventions appropriate? Please consider the following matters in your feedback:

(a) the type of penalty

(b) the magnitude of the penalty, and

(c) the circumstances in which the penalty should apply.

We suggest that any civil penalty regime imposed should be in broad alignment with the civil penalties that apply for pay secrecy contraventions.[4]

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

In our view, there should be no defence available to a contravention of the ban on non-compete clauses. As mentioned in the Consultation Paper, a defence is available for 'sham contracting' on the basis that determining the nature of whether a relationship is an employment or an independent contractor arrangement can be a complex undertaking and therefore a defence is appropriate. We do not consider the ban on non-compete clauses to involve the same complexity so as to warrant a defence.

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

We support providing standing to other businesses that in good faith intend to hire an employee bound by a non-compete clause (i.e. prospective employer) to, for example, seek a declaration on whether the non-compete clause is valid. We suggest that any damages awarded in that context must be limited to an amount considered to be reasonable and proportionate to the prospective employer's loss.

10. What role should the Fair Work Ombudsman have in relation to the ban on non-compete clauses? Are there particular areas where employees and employers may need assistance to understand and implement any proposed ban on non-compete clauses?

Given the ban will be provided for in the Fair Work Act, we consider that the Fair Work Ombudsman would have a role in enforcing compliance with any civil remedy provisions.

We also suggest that the Fair Work Ombudsman should include information about the ban on non-compete clauses in the Fair Work Information Statement.[5]

11. Are there any specific remedies that should be available to persons impacted by potential non-compliance with the ban? What role would the Fair Work Ombudsman have to enforce breaches of the ban, and would new compliance tools be necessary?

See our response to Q10 above.

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

Yes, as the ban will be included in the Fair Work Act, and the Fair Work Commission is generally more accessible to employees than the courts with jurisdiction under the Fair Work Act, such as the Federal Court of Australia and the Federal Circuit and Family Court of Australia. The Fair Work Commission should be

[4] *Fair Work Act 2009* (Cth) s 539.
[5] https://www.fairwork.gov.au/employment-conditions/information-statements/fair-work-information-statement.

provided with a similar jurisdiction to what it has, for example, in resolving disputes arising in the context of the limitation on the use of fixed term contracts (see section 333L of the Fair Work Act).

13. What additional powers, if any, would the Fair Work Commission require to deal with disputes it may be permitted to hear about non-compete clauses?

We suggest the Fair Work Commission should have the same powers that it has in relation to fixed-term contract disputes in section 333L(4) of the Fair Work Act. Recognising the inability of the Fair Work Commission to make judicial rulings, we consider a power to conciliate, and arbitrate by agreement, would be particularly helpful.

14. Are there any exemptions to the non-compete ban that are justified on strong public policy or national interest grounds? How should any such exemptions be applied (e.g. permanent, temporary, by application etc)?

We have no suggestions for particular exemptions, but suggest that any exemption provision should include a provision similar to section 333F(1)(i) of the Fair Work Act, which allows regulations to prescribe exempted contracts.

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

We suggest alignment with the transitional arrangements used for the reforms to pay secrecy clauses as referred to on page 21 of the Consultation Paper, including not applying to existing employment contracts unless or until they are varied or replaced, and the use of a six-month 'grace period'.

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

See our response to Q15 above.

4. Other reforms to employee restraints of trade

4.1 Non-compete clauses for high-income employees

1. What approach for employees earning above the high-income threshold best strikes the balance between the public interest in competition, productivity, job mobility and the protection of legitimate business interests?

We do not support a full ban on non-compete clauses to those earning above the high-income threshold (however calculated). High income employees are more likely to have bargaining power to negotiate the terms of these clauses, such as the duration of the clause, or the compensation payable, so that a fair balance is more readily struck between the interests of the employer and the employee. High-income employees are also better able to absorb any loss of income in order to comply with a non-compete clause. They are also in a stronger position to negotiate compensation or a settlement in the event of a dispute.

4.2 Non-solicitation clauses for clients and co-workers

4. Should the use of client non-solicitation clauses be restricted? If so, what sorts of restrictions are appropriate (e.g. duration, type of activity, and scope of clients).

We appreciate that losing clients to competitors when particular workers leave can have a significant commercial impact on a business. The main considerations that lead to the use of non-solicitation clauses are to protect valuable client connections and to maintain the stability of the employer's workforce and business security. Professional and client service based relationships can take many years to establish and maintain, and are critical to some businesses. Losing clients to a former employee, who either works for a competitor or has set up a new competitive business, can be disruptive to a business and significantly impact its viability.

We do not support restrictions on the use of client non-solicitation clauses beyond the current limitations imposed by operation of the restraint of trade doctrine and other common law principles.

As suggested in the response of both the Law Council and the Law Society of NSW to the 2024 Issues Paper, consideration could be given to limiting the use of non-solicitation clauses in particular roles in which a personal relationship with the client, or skills and experienced only developed through working with a particular client, is central, for example in certain care, medical, therapeutic, education, and personal fitness or coaching roles. We agree that care would be required in defining these categories so as not to cast these limits too widely. We also would not generally support a differentiated outcome based upon the workers' sector.

5. When, if ever, should it be legitimate for business to use co-worker non-solicitation clauses? If these clauses can be legitimate, what restrictions would be appropriate to impose on their use?

In our members' experience, solicitation of co-workers can lead to significant loss of skill and expertise within an organisation. Our view is that employers should be able to restrict that behaviour, subject to the current limitations imposed by operation of the restraint of trade doctrine and other common law principles.

4.3 Other requirements for valid restraint clauses

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

As noted in the response of both the Law Council and the Law Society of NSW to the 2024 Issues Paper, our members report that cascading clauses can be confusing to workers, and create uncertainty in employment contracts which can serve to reinforce the power imbalance between employers and workers. The use of these cascading clauses arose largely from the common law position, allowing a court to sever (but not alter) those parts of a restraint which may go beyond what is reasonably necessary, with the potential for the remaining parts to then be enforced. As a means of increasing the likelihood that a restraint will remain in place and enforceable, the use of cascading clauses has become standard in most employment and other similar contracts, particularly in circumstances where the *Restraints of Trade Act 1976* (NSW) (**NSW Act**) does not apply.

The NSW Act provides a mechanism for bringing clarity to workers and employers by enabling the court to 'read down', or declare invalid, what it considers would otherwise be an unreasonable restraint. Section 4(1) of the NSW Act reverses the common law position, in that it provides that a restraint will be valid to the extent that it is not against public policy. This means that, in applying the NSW Act, courts will:

(1) determine whether an alleged breach infringes the terms of a restraint clause;

(2) determine the extent to which the relevant restraint is contrary to public policy;

(3) to the extent to which the restraint is not contrary to public policy, declare it to be valid.

Under s 4(3) of the NSW Act, where there has been a manifest failure of an employer to attempt to make a restraint reasonable, a court has a discretion to treat that restraint as being altogether invalid, or invalid on such terms as it thinks fit, on public policy grounds.

The consequence should be that, in most circumstances, the use of cascading clauses is unnecessary, at least in relation to employment contracts to which the NSW Act applies. The experience of our members is that the NSW Act can operate as a means of 'saving' what would otherwise be an unreasonable restraint, but which is not enforceable.

In our members' experience, s 4(3) of the NSW Act is underutilised by the courts as a means of declaring altogether invalid clauses which are manifestly unreasonable, such as where an employer has arguably made no real attempt to impose a reasonable restraint, but rather, has drafted an overly broad restraint, with the expectation that a court will do the work of reading it down significantly. However, if the Commonwealth Government were minded to consider enacting Commonwealth legislation drawing on the model of the NSW Act, in principle we would not object to including such a discretion.

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

As noted in both the Law Council and our response to the 2024 Issues Paper, there is also scope for Australian courts to take a more active approach in applying common law principles in declaring cascading clauses void for uncertainty, particularly where numerous alternatives are proposed for the activities covered, duration and/or geographical area, leading to a large and unreasonable number of possible combinations.

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

Under the common law, restraints of trade are presumed to be against the public interest, and therefore unenforceable, unless they are reasonably necessary to protect the legitimate interests of the employer. In this regard, the common law can be seen to initially prioritise the rights of the worker by offsetting the presumed inequality of bargaining power in favour of the employer. Moreover, the onus is on the employer to prove that the restraint is reasonably necessary to protect their legitimate business interests. Legitimate interests identified by courts include protection of trade secrets or other confidential information, protection

against solicitation of clients with whom the former worker had some personal connection, and protection against key staff being recruited by former colleagues.[6]

In our view, while placing a requirement on an employer to specify the legitimate interest which is intended to be protected by a restraint clause is reasonable and does not create a significant burden, this additional requirement could simply lead to employers pointing to all potential legitimate interests as providing a basis for a particular restraint, with no material change to practice or enforcement.

9. Should client relationships or workforce stability ever be justified for a non-compete clause of the same duration when a more targeted non-solicitation clause could apply?

We consider that this is an appropriate matter to continue to be dealt with by courts in determining what restraint or restraints are reasonable and enforceable in any particular circumstance.

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

In our view, the current approach of courts in these matters to considering issues such as: the extent to which any compensation to an employee for entering into a restraint is relevant to its reasonableness; what legitimate interests should be protectable in any circumstance; and the principles which should apply in determining whether an injunction should be granted, is appropriate and does not require clarification or amendment.

5. Restraints on concurrent employment

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

In our view, it is appropriate in most circumstances for workers to be subject to restrictions during their employment to prevent them from engaging in conduct in competition with their employer, setting up a competing business, or taking advantage of a business opportunity that arose during their employment which is relevant to their employer's business or operations.

As noted in both the response of the Law Council and the Law Society of NSW to the 2024 Issues Paper, the question as to whether a full-time employee should be permitted to engage in secondary employment without obtaining consent from their primary employer is a more complicated issue. The issue is often considered to be one of whether the secondary employment will have any negative effect on the employee's performance and productivity in their primary role. In our view, this matter should remain regulated by the employment contract entered into between the parties, and by the common law.

As regards part-time employees and casual workers, in our view, the ability of a primary employer to regulate engagement in secondary employment should be much more restricted. However, we support restricting these workers from using the primary employer's time or resources to set up a competing business, or take

[6] The Treasury, Consultation Paper: *Reform to non-compete clauses and other restraints on workers* (2025) 34.

advantage of a business opportunity that arose during their employment which is relevant to their employer's business or operations.

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

Consistent with the proposed ban on non-compete clauses, to the extent that any such restrictions are implemented, we suggest that they should be included in the Fair Work Act.

6. No-poach and wage-fixing agreements

2. Should there be exemptions to the proposed ban on no-poach agreements? If yes, on what grounds? What restrictions should apply to their use?

As noted in both the response of the Law Council and the Law Society of NSW to the 2024 Issues Paper, there is a continuing role for no-poach agreements between cooperating businesses, such as in the context of joint venture agreements, secondment arrangements and where labour hire businesses are conducting business.

In the case of joint venture agreements, no-poach agreements allow a joint venture partner to lend its employees to work in, or for, the joint venture itself, while minimising the risk of losing employees to the other joint venture partner. Similar issues arise where an employee is seconded to provide services for the benefit of another entity.

In the case of a labour hire business, without a no-poach agreement in place, that business may incur costs in finding and placing an appropriate individual with a host entity, to be left with a significant commercial risk that the host entity will simply look to directly employ that individual so as to avoid payment of any continuing fee to the labour hire provider. In those circumstances, the labour hire business model may become unsustainable for some providers.

We consider that the above issues are most appropriately dealt with by including specific exemptions in any changes otherwise implemented.

If you have any queries about the items above, or would like further information, please contact Mimi Lee, Policy Lawyer, on 02 9926 0174 or mimi.lee@lawsociety.com.au.

Yours sincerely

Jennifer Ball

Jennifer Ball
President