Submission to the Treasury on the Competition Review

Non-competes and other restraints

10 June 2024

Circle Green
Community Legal

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Acknowledgements of Country

Circle Green Community Legal acknowledges the Australian Aboriginal and Torres Strait Islander peoples as the traditional custodians of the lands where we live, learn and work, and particularly the Whadjuk people of the Noongar Nation, traditional custodians of the land where our office is located. We acknowledge and respect their continuing culture and the contribution they make to the life of this nation, and we pay deep respect to Elders past and present.

Attribution

This submission can be attributed to Circle Green Community Legal.

We wish to acknowledge and thank the following individuals who contributed to this submission:

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Contents

Glossary

ATSI means Aboriginal or Torres Strait Islander.

CALD means culturally and linguistically diverse.

Circle Green means Circle Green Community Legal.

FW Act means the *Fair Work Act 2009* (Cth).

FWC means the Fair Work Commission.

FWO means the Fair Work Ombudsman.

Issues Paper means the Issues Paper, 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity' published by the Australian Government Treasury Competition Review Taskforce (April 2024).

NES means the National Employment Standards in the *Fair Work Act 2009* (Cth).

RT Act means the *Restraint of Trade Act 1976* (NSW).

UK means the United Kingdom.

US means the United States of America.

WA means Western Australia.

1. Introduction

Circle Green welcomes the opportunity to make submissions to the Competition Review Taskforce in relation to the Issues Paper.

1.1 About Circle Green Community Legal

Circle Green is a community legal centre in WA providing state-wide specialist legal services in the areas of workplace, tenancy, humanitarian, and family and domestic violence to the WA community. Our services are aimed at assisting people from marginalised communities who face disadvantage in gaining access to justice.

Circle Green is the only community legal centre in WA with a specialist workplace law practice that provides state-wide services to marginalised and disadvantaged non-unionised WA workers. Our workplace law services include legal advice, casework, representation, information, referrals and education on state and national workplace law. This means Circle Green has expertise in providing legal assistance to vulnerable WA workers. We are also a volunteer legal advice provider for the FWC's Workplace Advisory Service.

For more information about Circle Green's services, please see our website: https://circlegreen.org.au.

1.2 Our client base

Circle Green provides legal assistance services to people who are marginalised or disadvantaged in their access to justice. Our clients include those who experience one or more of the following challenges, among others:

- low income or financial hardship;
- homelessness or risk of homelessness;
- physical or mental disabilities;
- being women or gender-diverse;
- being pregnant;
- having dependents and family or other caring responsibilities, or being the sole income earner in their household;
- being under the age of 21 or over the age of 50;
- being from a CALD background;
- being of ATSI descent;
- working or residing in a regional, rural, and remote area;
- being a newly arrived migrant, refugee, or asylum seeker; and
- being subject to family and domestic violence.

2 Summary of Circle Green's recommendations

All types of restraint	
Recommendation 1	There be a complete legislative prohibition on the use of restraint clauses for all employees and gig workers.
Recommendation 2	If a complete prohibition is not preferred, there instead be a staggered approach to limiting the terms and use of restraint clauses for permanent employees based on income as a proportion of the high-income threshold. Specifically, for individuals earning: • below 50% of the high-income threshold, restraint clauses be prohibited; • between 50 and 75% of the high-income threshold, the duration of restraint clauses be limited to a maximum of 3 months, with appropriate compensation payable to the employee; • between 75% and 100% of the high-income threshold, the duration of restraint clauses be limited to a maximum of 6 months, with appropriate compensation payable to the employee; and • more than 100% of the high-income threshold, no limitations apply to the use of restraint clauses.
Recommendation 3	There be a legislative prohibition on the use of restraint clauses for workers living outside of the Perth metropolitan area (and potentially the metropolitan areas of capital cities in other states and territories).
Recommendation 4	Any legislative prohibition or limitation on the use of restraint clauses be a civil remedy provision and unlawful use of a restraint clause be treated in the same manner as a breach of the NES under the FW Act.
Recommendation 5	Employers' ability to access injunctive relief to prevent alleged breach of restraint clauses be limited to applications that seek to protect trade secrets and customer relationships.

Recommendation 6	There be a quick and low-cost pathway for employees to seek a determination on the enforceability of a restraint clause in their employment contract.
Recommendation 7	There be legislative limits on the length of notice periods employees are required to provide to resign their employment. Specifically, we recommend: • the notice period owed by an employee be prohibited from exceeding the notice period owed by an employer under the terms of any contract of employment; and • the notice period owed by an employee earning less than 50% of the high-income threshold be limited to the minimum set out in the NES.
Recommendation 8	Any legislative limit on the length of notice periods owed by employees be a civil remedy provision and an unlawful breach of these limitations be treated in the same manner as a breach of the NES under the FW Act.
Recommendation 9	Information about any legislative prohibition or limitation on restraint and restraint-like clauses be included in the Fair Work Information Statement, so that employees are made aware of them before, or as soon possible after, they start a new job.
Restraints on workers during employment	
Recommendation 10	All restraint clauses be prohibited for part-time, casual, and gig workers.

3 Submissions

3.1 Introduction

This submission is based on Circle Green's experience and expertise assisting WA workers experiencing the kinds of disadvantage and challenges set out in section 1.2 above. We hope to reflect on our clients' experiences throughout our submission. Sometimes we reflect our experience in general terms. Other times, we share case studies of clients who have accessed our services. For all case studies, we have changed or removed names and other identifying information to protect client confidentiality.

Our client base is often disproportionately affected by the "chilling effect" of restraints that the Issues Paper describes at page 22, because they commonly face multiple barriers to understanding and enforcing their rights. Not least among these is often a significant power imbalance between our client and their employer.

In addition to being more susceptible to the "chilling effect" of onerous restraints, our client base presents a low risk to their employer if they were to move jobs or start their own business, as they are often in low-paid or low-skilled roles. They rarely hold trade secrets beyond know-how acquired in the course of performing their work or wield significant influence over an employer's client or customer base.

It is worth noting at this point that Circle Green does not consider restraints of trade to be problematic in and of themselves. We acknowledge that restraints can in some circumstances operate effectively to protect businesses from damage to revenue and reputation from current and former employees.

However:

- the power imbalance between our clients and their employers;
- the low risk to business that our clients pose;
- current policy settings about when and how restraints can be imposed and enforced, which are highly favourable to employers; and
- a lack of clarity arising from the current common law doctrine about when restraints are enforceable;

mean that they are currently used well beyond what is appropriate, justified, and ethical. Our clients suffer as a result.

Overall, our submission aims to support meaningful regulatory reform to prevent and protect low-income, marginalised and disadvantaged workers in WA from the unnecessary and disproportionate negative impacts of restraint clauses in employment contracts.

3.2 Non-compete clauses

Between 1 October 2020 and 7 May 2024 Circle Green provided 152 legal assistance services involving restraint of trade issues. Of those 152 restraint of trade matters that we assisted with, 79 matters (52%) involved non-compete clauses.

A summary of the number of clients Circle Green assisted with various types of restraint, and a breakdown of client numbers by different factors including income and industry, is in **Annexure A**: Prevalence data.

Does the common law restraint of trade doctrine strike an appropriate balance between the interests of businesses, workers, and the wider community?

The current common law restraint of trade doctrine is that a restraint clause is void and unenforceable unless it is reasonably necessary to protect the legitimate interests of the employer.[1]

We recognise that, as set out in the Issues Paper, the use of restraint of trade clauses in employment contracts may be necessary to protect an employer's legitimate business interests, including the protection of intellectual property and confidential information.[2] However, in our view, the current common law doctrine does *not* strike an appropriate balance between protecting those business interests and the interests of our clients to seek appropriate work in locations, industries, and for employers that suit them, as and when they suit them.

There are three issues with the current common law doctrine from our clients' perspective:

1. the common law doctrine is not accessible to our clients, because enforceability of restraints is decided on a case-by-case basis through litigation which is complex, stressful and expensive;

2. there are no disincentives to prevent employers using restraints in circumstances where they are more onerous than is necessary to protect legitimate business interests; and

3. employers are too easily able to access injunctive relief to restrain clients from seeking new employment that is prima facie in breach of a restraint.

The result is an environment that is skewed so far in favour of employers that the practical effects of restraint clauses, regardless of their enforceability, have disproportionate impacts on vulnerable workers. Restraint clauses have a particularly debilitating impact on low- and middle- income earners, workers in insecure work, and workers whose ability to access legal assistance is limited due to financial or other reasons.

Even where an individual can access legal advice, the nature of the common law doctrine means that legal professionals including staff at Circle Green cannot definitively advise clients that a restraint clause is unenforceable. Further, we would not be able to guarantee to a client that their former employer will not pursue them for a potential breach of a restraint clause, regardless of its potential enforceability, particularly in the absence of any penalties or consequences for an employer attempting to take pre-litigation action.

In our view, an appropriate regulatory response would:

1. prevent employers from weaponising restraint clauses as a means of controlling the behaviours and actions of their employees, such as by:

    (a) including a restraint clause simply including it as a penalty clause with no intention of enforcing it, to discourage staff from resigning[3];

    (b) using the prospect of legal proceedings and costs as a scare-tactic[4]; and/or

[1] *2nd Chapter Pty Ltd & Ors v Sealey & Ors* [2023] VSC 599 [33].
[2] Treasury Issues Paper, page 5.
[3] Treasury Issues Paper, page 23.
[4] Treasury Issues Paper, page 14.

(c) attempting to enforce restraint clauses that are, or likely to be, unenforceable.[5]

2. provide workers and legal professionals with a level of certainty around the enforceability or lawfulness of a restraint clause in an employment contract, to empower employees to confidently make decisions about their own employment based on a clear understanding of their rights and obligations.

Circle Green is broadly supportive of a complete legislative prohibition on the use of restraint clauses for all employees and gig workers.

Recommendation 1

There be a complete legislative prohibition on the use of restraint clauses for all employees and gig workers.

However, we note that different countries across the world have adopted different approaches to the regulation of restraint clauses in employment contracts. If policymakers do not wish to adopt a complete ban, we would instead recommend a partial ban on restraint clauses to limit their use in circumstances where there may be disproportionate impacts on certain worker cohorts.

We recommend this partial ban be accompanied by appropriate compensation and other measures to empower employees to understand their rights and obligations, and limits on employers' ability to access injunctive relief. We expand on these additional measures at **page 17** below. These recommendations apply to all types of restraint. As we will explain, all kinds of restraint have a similar oppressive effect on our client base, and for this reason, as well as for the sake of clarity, they should be treated equally.

Recommendation 2

If a complete prohibition is not preferred, there instead be a staggered approach to limiting the terms and use of restraint clauses for permanent employees based on income as a proportion of the high-income threshold.

Specifically, for individuals earning:

- below 50% of the high-income threshold, non-compete clauses should be prohibited;
- between 50 and 75% of the high-income threshold, the duration of non-compete clauses be limited to a maximum of 3 months, with appropriate compensation payable to the employee;
- between 75% and 100% of the high-income threshold, the duration of non-compete clauses be limited to a maximum of 6 months, with appropriate compensation payable to the employee; and
- more than 100% of the high-income threshold, no limitations apply to the use of non-compete clauses.

[5] Treasury Issues Paper, page 14.

Our proposal is for a staggered approach based on employee income in recognition of the fact that there may be circumstances where restraints are considered a fair and effective mechanism to protect employers' interests. This is more likely to be the case the more senior and better-paid an employee is, because:

- the power imbalance between the employee and employer is smaller, and the employee will be better equipped (both in resources and sophistication) to advocate for themselves; and

- the employee will be more likely to have access to confidential information, trade secrets and influence over customer behaviour that is worth protecting against.

We have based our proposed staggered approach on the high income threshold rather than the mean or median wage for reasons set out at **page 15** below.

Does the Restraints of Trade Act 1976 (NSW) strike the right balance between the interests of businesses, workers, and the wider community?

The RT Act starts with the presumption that a restraint of trade clause is valid 'to the extent to which it is not against public policy, whether it is in severable terms or not'.[6] The RT Act also empowers the court to order that a restraint is 'invalid or valid to such extent only (not exceeding the extent to which the restraint is not against public policy) as the Court thinks fit'.[7]

Despite the RT Act offering some clarity as to what courts can do when considering the enforceability of a restraint clause, the following issues remain:

- employers are not prevented or deterred from using restraint clauses as a tool by which to control or exploit workers, and particularly vulnerable workers, pre-litigation; and

- there are significant barriers to employees defending enforcement action in relation to a restraint clause.

The RT Act is not adequate to mitigate the disproportionate impact that restraint clauses have on lower-income and disadvantaged workers because these workers have limited ability to obtain legal advice from a private lawyer about restraints in their contract in the first instance, and are more likely to be deterred from taking action that might breach a restraint clause, regardless of its unenforceability.

This "chilling effect" on workers in our client base is an issue that requires greater regulatory protection beyond the RT Act. To that end we reiterate our recommendations for either a ban or partial ban on restraint clauses as set out in **Recommendation 1** and **Recommendation 2**.

Are current approaches suitable for all workers, or only certain types of workers?

As outlined above, the common law doctrine, and even the RT Act, is insufficient to address the impact of restraint clauses on individuals in our client cohort given the uncertainties around enforceability of restraint clauses, and the inherent difference in bargaining power between employers and employees.

The current approaches are particularly problematic for our client cohort for the reasons outlined at Box 3 of the Issues Paper[8], including:

[6] *Restraint of Trade Act 1976* (NSW), s 4(1).
[7] *Restraint of Trade Act 1976* (NSW), s 4(3).
[8] Treasury Issues Paper, page 23.

- issues with accessing legal advice due to financial constraints, or other reasons such as caring responsibilities, language barriers, time constraints, and perceptions of the legal system or legal professionals; and

- imbalances in bargaining power between workers and their employers. This is exacerbated by factors such as visa status, for example where someone's employment is linked to their visa, language barriers, unfamiliarity with Australian workplace laws due to CALD background, or general lack of understanding of workplace laws combined with the inability to access legal advice.

We focus our analysis and recommendations on our client cohort, who often experience one or more of the vulnerabilities listed above and generally earn less than 50% of the current high-income threshold of $167,500.

Workers based in rural and remote Western Australia

WA is geographically expansive compared to other states and territories, and there are vast distances between rural and remote towns. If a worker is prevented from or faced with a restraint clause with a geographical reach that may on paper appear modest, but in reality includes the entire town, they may be faced with having to relocate their life and family hundreds of kilometres to find alternative work.

If a rural or remote worker can access legal advice, it is likely that they will be advised that a non-compete clause covering the entire town or city they live and work in may be unenforceable. However, due to the current common law doctrine that applies in WA, legal professionals are unable to provide definitive advice as to the enforceability of a restraint, as this is a decision that only a court can make on a case-by-case basis. Further, there are no guarantees that the employer will not try to enforce the restraint, regardless of the likelihood that it may be unenforceable at law.

The "chilling effect" created by uncertainty about the enforceability of restraints is particularly strong for rural and remote workers because any alternative job opportunity is likely to be hundreds, or even thousands, of kilometres away. As a result, despite the likely unenforceability of such a restraint, remote and rural workers are more likely to be dissuaded from resigning from a job and finding other, and potentially better, job opportunities or starting their own business, due to restraint clauses.

Further, the impact is particularly significant for workers in rural or remote areas who work in a specialised profession or occupation for which job prospects or employers are limited. For example, we have assisted clients in professions including veterinarians and physiotherapists.

Case Study 1 – Audrey

Audrey was employed as a beauty therapist at a salon in a remote WA town. Audrey wanted to start her own small business in the beauty industry, but had concerns about the non-compete and non-solicitation clauses in her employment contract.

The non-compete clause covered the whole town that Audrey lived and worked in, for a period of 12 months.

The non-solicitation clause was for a period of 24 months.

Circle Green was unable to definitively advise Audrey about whether the clauses would be enforceable or not, due to the common law doctrine that applies in WA.

Case Study 2 - Bindi

Bindi was employed as a physiotherapist in a rural town, and was looking for a new job. Bindi found a new job, but she was concerned about the non-compete clause in her employment contract.

The non-compete clause covered a 15km radius of Bindi's former employer's practice, for a period of 12 months.

Bindi lived and worked in a rural town, and the non-compete clause was a big concern for her, and her ability to earn a living in that town.

In our view, if a complete ban is not adopted then workers in remote, rural, or regional WA are deserving of specific legislative protections that are tailored to the specific challenges we describe here. Ideally, these would limit the use of restraint clauses for workers who live outside of the metropolitan areas of major capital cities. We note at this point that we have only considered how this would work for WA workers.

Case Study 3 – Dana

Dana was employed as a hairdresser in a remote town in WA. Dana's employment contract included a non-compete clause that prevented her from working for a competitor within a 100km radius town for a period of 12 months.

When Circle Green advised Dana, she did not have plans to resign from her employment yet, however Dana was still concerned about the restraint clause.

Despite the clause likely being unenforceable, Circle Green was unable to definitively advise Dana whether the clause would be enforceable or not, due to the common law doctrine that applies in WA.

Recommendation 3

There be a legislative prohibition on the use of restraint clauses for workers living outside of the Perth metropolitan area (and potentially the metropolitan areas of capital cities in other states and territories).

Would the policy approaches of other countries be suitable in the Australian context?

Restraint clauses have been a topic of discussion particularly in recent years, not only in Australia but in other countries such as the UK, Austria and the US. We consider that certain aspects of the approaches used in other countries should be carefully considered and implemented in Australia.

As identified at Table 1 of the Issues Paper,[9] Austria has a ban on non-compete clauses under a certain income threshold, which is set at the median income level, limits the duration of a non-

[9] Treasury Issues Paper, page 25.

compete clause to 12 months for individuals earning above the median income. We are supportive of this approach to limit the use of non-compete clauses with reference to the employee's income.

However, we propose that any income threshold used should be based on the high-income threshold in the FW Act.[10] This is a familiar, easily accessible, and a pre-existing legislated threshold that is already indexed annually and used as a point of distinction for legislative employment conditions and protections in the FW Act. For example, an employee earning above the high-income threshold is not eligible to be protected from unfair dismissal under section 385 of the FW Act, and modern awards do not apply to high-income earners. Further, noting that the median income level in Australia in August 2023 was approximately $67,600,[11] we consider that the median income level is too low to capture the extent of the impact and the "chilling effect", particularly on our client cohorts. An income threshold of $67,600 would only capture approximately 66% of our clients with non-compete issues (see graph in **Annexure A**: Prevalence data, below).

The high-income threshold is currently $167,500. Therefore, a prohibition on non-compete clauses for individuals earning below 50% of the high-income threshold (see **Recommendation 2** above) would protect all individuals earning less than $83,750. This is more than $15,000 higher than the median income level and more accurately captures the extent of the disproportionate impact of non-compete clauses on our client cohorts, because it covers approximately 92% of our clients with non-compete issues (see graph in **Annexure A**: Prevalence data, below).

The UK Government is currently proposing to limit the length of non-compete clauses to three months.[12] The policy paper released by the UK Government estimates that imposing this limitation will provide five million UK workers with 'greater freedom to switch jobs, apply their skills elsewhere and even earn a pay rise'.[13] The recent development in the US[14], which is arguably the most drastic of the international regulatory approaches to non-compete clauses identified in the Issues Paper, further highlights the extent of the anti-competitive nature of non-compete clauses. We strongly urge the Federal Government to progress legislative reform on this issue in Australia.

Circle Green broadly supports a complete ban on restraint clauses in employment contracts in Australia (see **Recommendation 1** above). However, if this not adopted, we recommend more expansive limitations than those in the UK and Austria (see **Recommendations 2, 3, and 10,** in particular).

[10] The high-income threshold is defined in section 333 of the FW Act and calculated in accordance with regulation 2.13 of the *Fair Work Regulations 2009* (Cth). The high-income threshold for the financial year ending on 30 June 2024 is $167,500.
[11] Australian Bureau of Statistics, *Employee earnings* (13 December 2023) https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/employee-earnings/aug-2023.
[12] UK Department for Business and Trade, *Smarter Regulation to Grow the Economy* (policy paper): https://www.gov.uk/government/publications/smarter-regulation-to-grow-the-economy.
[13] UK Department for Business and Trade, *Smarter Regulation to Grow the Economy* (policy paper), page 15.
[14] The Federal Trade Commission announced a Non-Compete Clause Rule to prohibit persons from entering into non-compete clauses with workers, with very few exceptions, and including a prohibition on entering into or enforcing new non-competes with senior executives after the implementation date. See US Federal Trade Commission, 16 CFR Part 910: https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf.

Are there other experiences or relevant policy options (legislative or non-legislative) that the Competition Review should be aware of?

Civil penalties

To ensure that the limits we suggest in relation to restraint clauses are effective, we recommend that any a legislative prohibition or limitation on the use of restraint clauses be a civil remedy provision.

A civil remedy provision is a provision of the FW Act that could attract financial penalties, to be ordered by a Court, if the provision is breached. This means that if an employer breaches the provision, an employee will be able to apply to a court for an order for the employer to pay penalties. These penalties can be made payable to a particular person, which can include the affected employee. Part 4-1 of the FW Act provides for the enforcement of civil remedy provisions.

From our experience, we note that even where a contractual clause is unlawful, employers with a disregard of the law will continue to use these clauses in employment contracts as a means of dissuading workers from resigning. Further deterrence in the form of potential civil penalties should be considered to promote proactive compliance.

Recommendation 4

Any legislative limitation on the use of restraint clauses be a civil remedy provision and unlawful use of a restraint clause be treated in the same manner as a breach of the NES under the FW Act.

Limits on interlocutory relief

The context in which restraints are enforced by employers also needs to be considered. The law governing the enforcement of restraints is currently skewed in favour of employers. For example, as identified at pages 14 and 15 of the Issues Paper, there are significant disadvantages for workers in defending any enforcement action taken by an employer, including:

- the significant costs of defending an injunction at interlocutory proceedings, and at a final hearing;[15]
- the imbalance in resources and power between employers and employees in settlement proceedings where the employer strategically commences proceedings in court;[16] and
- the lower evidentiary burden in urgent interlocutory proceedings, that favours employers[17].

In our view, there needs to be legislative reform to prevent employers from utilising court proceedings – including the threat of proceedings, and applications for urgent interlocutory injunctions – as a means of misusing their resources and power to their own benefit. We recommend that there be limits on the circumstances in which employers can apply for interlocutory injunctions.

Specifically, we propose that interlocutory injunctions for alleged breaches of a restraint clause be available only to protect trade secrets. At present, employers need only demonstrate that there is a serious question to be tried, that the restraint is reasonable and that it is required to protect the

[15] Treasury Issues Paper, page 14.
[16] Treasury Issues Paper, page 15.
[17] Treasury Issues Paper, page 15.

employer's legitimate interests.[18] The employer need not go so far as to show it is more likely than not that they will succeed, just that there is sufficient likelihood of success, to justify an order to preserve the status quo until trial.[19] Courts have generally accepted that an employer's legitimate interests include trade secrets, confidential information, and customer relationships.

There can be significant difficulty in determining whether information is confidential information or simply know how that is obtained through the course of an employee's employment. Further, just because information has the quality of confidentiality does not necessarily mean that the employee subject to the restraint would disclose this information and therefore, this would not meet the public interest in supressing individual liberties or in encouraging anti-competitive practices.

In practice an interlocutory injunction is often sufficient to persuade employees to settle the action with the employer and cease the activity the employer has taken issue with, because they do not have the resources to continue to defend the action. In fact, most clients communicate to us that they do not have the resources or will to proceed even to the stage of an interlocutory hearing.

Recommendation 5

Employers' ability to access injunctive relief to prevent alleged breach of restraint clauses be limited to applications that seek to protect trade secrets and customer relationships.

Pathways for determinations on enforceability of restraint clauses

We have observed that one of the key drivers of the "chilling effect" is that employees do not know whether the restraint clause in their contract is enforceable or not, and staff at Circle Green are unable to give a definitive opinion on its enforceability one way or the other. As a result, clients err on the side of caution and comply with restraints that are wider than is necessary to protect legitimate business interests.

This could be addressed by providing employees with a quick and low-cost pathway to access a determination on whether a specific restraint of trade clause is enforceable or not. Such an option would alleviate uncertainty and ward off threats from employers about taking enforcement action. For example, the FWC is a relatively user-friendly and quick tribunal, and with additional funding and powers, could deal with applications about disputes relating to restraint clauses in employment contracts. This could be modelled on the FWC's existing ability to resolve stand down disputes under section 526 of the FW Act.

Recommendation 6

There be a quick and low-cost pathway for employees to seek a determination on the enforceability of a restraint clause in their employment contract, similar to the FWC's jurisdiction to resolve stand down disputes under section 526 of the FW Act.

[18] Employers must also be prepared to provide the usual undertaking as to damages if the matter is determined in the employee's favour at final hearing.

[19] *Hudson Yards Pty Ltd v Minister for Planning* [2018] VSC 277 [55], citing *Gilbert v Endean* (1878) 9 Ch D 259.

Other unlawful or anti-competitive clauses

Between 1 October 2020 and 7 May 2024 Circle Green assisted 11 clients who were all employed by the same employer. The employer utilised unlawful and anti-competitive clauses in the clients' employment contracts with the effect of deterring their employees from resigning or finding a new job.

These clauses included:

- restraint of trade clauses, including non-compete clauses that are cascading both for geographical location – Australia, Western Australia, the city, and a 20km radius of the business; and for duration of restraint – 12 months, 6 months, 3 months, and 1 month;

- unreasonably long notice periods for an employee's resignation from employment, typically around four to six months for the employee, while the employer was only required to provide the minimum NES notice period; and

- clauses requiring repayment of training costs, namely training bonds, that were set at a specific amount in the contract and irrespective of whether the employee had undertaken the training.

The clients affected were either apprentices or migrant workers of limited financial means. Some also experienced an unsafe working environment, which factored into their decision to resign from their employment. Case studies of some of these matters, all involving the same employer, are extracted at **Annexure C**: Additional case studies illustrating use of unlawful and/or anti-competitive clauses in employment contracts below. In each of these cases, the employer either threatened or actually commenced legal action against the clients for damages for breach of contract, seeking significant sums for notice and training costs.

These notice and training cost clauses, at best, effectively acted as a form of restraint for these clients and, at worst, were akin to debt bondage, effectively trapping workers in unsafe or unfair working conditions. Employees bound by such terms are faced with a range of unfavourable options if they want to secure alternate employment, including:

- compromising offers of alternate employment by requesting a four-to-six-month delay in commencing a new job; or

- resigning their employment by providing four-to-six-months' notice before applying for alternate employment, and facing job and income insecurity; or

- breaching their employment contract by providing a lesser, but more reasonable notice period, and facing actual or potential legal action by the employer.

We consider that any legislative prohibition or limitation on restraint clauses should be accompanied by a mechanism to limit the use of other anti-competitive clauses that could be used as a means of avoiding legislative limits on traditional restraint clauses, including the use of excessively long employee notice periods in employment contracts.

Recommendation 7

There be legislative limits on the length of notice periods employees are required to provide to resign from their employment. Specifically, we recommend:

- the notice period owed by an employee be prohibited from exceeding the notice period owed by an employer under the terms of any contract of employment; and
- notice periods owed by employees be limited to the minimum set out in the NES for employees earning less than 50% of the high-income threshold.

In relation to notice periods owed by an employee, we also recommend that any legislative limit be a civil remedy provision and a breach be treated in the same manner as a breach of the NES in the FW Act. This would serve to promote general deterrence and proactive compliance with these limitations.

Recommendation 8

Any legislative limit on the length of notice periods owed by employees be a civil remedy provision and unlawful breaches be treated in the same manner as a breach of the NES under the FW Act.

Increasing awareness of restraint clauses

Most, if not all, of the clients we assist are unaware that some restraint of trade clauses are unenforceable. We therefore consider that any legislative reform should be accompanied by efforts to increase workers' awareness and knowledge of what is a lawful or unlawful restraint clause.

Currently, the Fair Work Information Statement[20], prepared by the FWO pursuant to section 125 of the FW Act, must be given to every new employee before, or as soon as possible after, they start a new job.[21] We recommend that information about any legislative prohibition or limit on restraint and restraint-like clauses be included in the Fair Work Information Statement.

Recommendation 9

Information about any legislative prohibition or limitation on restraint and restraint-like clauses be included in the Fair Work Information Statement, so that employees are made aware of them before, or as soon possible after, they start a new job.

[20] https://www.fairwork.gov.au/employment-conditions/information-statements/fair-work-information-statement.
[21] Note casual employees must also be given a copy of the Casual Employment information Statement, and fixed term employees must also be given a copy of the Fixed Term Contract Information Statement.

3.3 Non-solicitation of clients and other business contacts

Is the impact on clients appropriately considered? Is this more acute in certain sectors, for example the care sector?

The impact of non-solicitation clauses on clients of a business is particularly significant and damaging in certain sectors such as the care sector, health and social assistance sector, and medical professions in rural and remote areas.

We strongly agree with the points raised at page 27 of the Issues Paper in relation to the importance of and significant benefits to individuals being able to choose their preferred service provider. In the health and social assistance and care sectors, particularly in circumstances where the employee has been providing care for clients who are vulnerable or disadvantaged and have established trust and rapport, a non-solicitation clause has the consequence of limiting the client or patient's choice of care provider or support worker.

Case Study 4 – Faythe

Faythe was employed as a support coordinator for a disability support service employer for 3 years. Faythe decided to start her own business, and resigned from her employment.

Before finishing up with her employer, Faythe was concerned that some of her current clients might want to come with her to her new business. Faythe proactively consulted her manager about her concerns, and her manager agreed that if clients expressed an interest in following her, they could do so by following the correct procedure of filling in a required form. Faythe was also told that a support coordinator had done the same thing previously.

Faythe wanted to tell her clients that they would be getting a new coordinator, because they were vulnerable clients with disabilities who had been receiving support from for a long time. Some of Faythe's clients wanted to leave with her, because they had been with her for a few years and had built strong relationships with her.

However, after Faythe left, her former employer sent her a cease-and-desist letter, relying on a non-solicitation clause in her employment contract. The employer alleged that Faythe had breached the non-solicitation clause by taking their clients to her new business.

The impact of restraints is exacerbated in rural or remote areas, where the choices that people have in the community are already limited. By way of example, a few medical clinics may have an oligopoly on health services in a rural or remote town, which presents issues when employees want to move between employers or start out their own business in the industry. Some issues the employee might face include:

- being unable to find a job in the same industry within the town due to a non-compete clause; or
- being unable to start out, or continue operating, their own business due to a non-compete clause or a non-solicitation clause, where the clientele is limited in a small town and where the competing business/es have control over the clientele.

These issues have negative impacts on clients, patients and members of the community who require health services. For example, where there are barriers to setting up a new competing business, the community is left with less choice of health care provider or service provider, particularly where the options are already limited. Further, a non-compete or non-solicitation clause can have the impact of preventing a client from following their health professional of choice if they change employers. Choice of health professional is often a very private and life-changing decision for many people, and can have a significant impact on a person's wellbeing and sense of self. Having the ability to make that choice for themselves is particularly important and empowering for people with a disability or mental illness who may otherwise have limited ability to make their own choices in other aspects of their lives.

Access to healthcare and other social assistance services in rural and remote areas are generally poorer, and the issue is more prominent for ATSI people who already face systemic barriers in accessing culturally appropriate health care in remote communities.[22] The use of non-compete and non-solicitation clauses in remote and rural communities are more likely to inhibit the opportunities for people to increase the number and accessibility of health services in their community, for example by opening up a medical clinic that may be more culturally sensitive or easily accessible to certain cohorts within the community.

3.4 Non-disclosure clauses

How do non-disclosure agreements impact worker mobility?

Similar to the issues described above at paragraph 3.2, non-disclosure agreements can have a disproportionate impact on our client cohort because of the uncertainty around what information is protected, as well as around the enforceability of the clause itself.

Even where an individual can seek advice, legal practitioners cannot provide definitive advice about court outcomes. A risk-averse employee from our client cohort is likely to take a cautious approach, and may not be able to put the full extent of their skills or knowledge to use at their new job or prospective job opportunity.

Regulation of the use of non-disclosure clauses is necessary, particularly where:

- there is an existing common law duty of good faith and fidelity that acts as a protection mechanism for employers, and extends to protection of confidential information or trade secrets post-employment[23]; and

- an additional contractual restraint clause, namely a non-disclosure clause, has disproportionate impacts on workers when used by employers where it is not strictly necessary, for example against casual employees or employees in lower-paid roles with no or limited access to confidential information or trade secrets.

[22] https://www.indigenoushpf.gov.au/report-overview/overview/summary-report/6-tier-3-%E2%80%93-health-system-performance/barriers-to-accessing-health-services#:~:text=disliking%20service%2Fprofessional%2C%20embarrassed%20or,24%25%20in%20remote%20areas).

[23] Under the common law, employees have a duty of good faith and fidelity during their employment, which prevents an employee from removing, copying, or memorising any of the employer's confidential information or trade secrets. This duty ends at the termination of the employment relationship, however the duty of confidentiality continues post-employment.

Employers already have the benefit of the implied duties in employment contracts, including the common law duty of confidentiality. If there is to be any real damage to an employer's business, then this doctrine is sufficient to protect their interests.

How do non-disclosure agreements impact the creation of new businesses?

Most types of restraint clauses have some impact on the creation of new businesses, as they impact the decisions of workers to:

- first, leave their former employer to work for a competitor (that competitor being their own new business); and
- second, build a client base or operate their business.

Collectively, restraint clauses, including non-disclosure agreements, effectively create a barrier to employees starting new businesses. This not only inhibits their ability to earn a higher income than they might not be able to earn from their current job, but also inhibits innovation and the creation of new businesses, particularly small businesses.[24]

Additionally, there is a disproportionate impact on low-paid industries, such as the beauty and care industries, where individuals wanting to start a business are not necessarily able to afford comprehensive legal advice regarding the setting up of their business and implications of any restraint clauses that they need to take into consideration. This may serve as an additional barrier to individuals starting their own business.

Case Study 5 – Hae-seong

Hae-seong was a sales representative working for a food supplier company. Hae-seong wanted to resign so that he could start his own similar business, but was worried about the restraint clauses in his contract, including a non-compete, non-solicitation, and non-disclosure clause.

The duration of the non-compete and non-solicitation clauses was 6 months. Hae-seong decided to wait for 6 months before starting his business.

However, Hae-seong was concerned that the non-disclosure clause in his agreement would prevent him from ever reaching out to any customers or suppliers of his employer's business, because the employer is a large, national food supplier with many customers and suppliers across Australia.

We were unable to definitively advise Hae-seong whether reaching out to customers and suppliers of the employer's business after the 6-month period would be a breach of the non-disclosure clause.

[24] Data from the Small Business Development Corporation shows that small business contributed $50.1 billion to the WA state economy in 2017-2018: https://www.smallbusiness.wa.gov.au/blog/small-business-has-big-impact-economy (13 March 2020).

3.5 Restraints on workers during employment

When is it appropriate for workers to be restrained during employment?

As discussed at page 30 of the Issues Paper, common law and equitable duties protect employers as a means of restraint on workers during employment. These include the duty of fidelity, and fiduciary duties for senior executives and managerial roles.

Although we consider that these existing duties provide sufficient protection for employers of our clients, a contractual restraint clause may be justified in highly specialised or senior roles. A restraint may provide legitimate protection of the business interests, for example, where an individual or role provides the business with a competitive advantage through their unique reputation or expertise. However, this is only appropriate for highly specialised or senior roles where the individual is adequately compensated for any restraint clause in their contract. As we do not assist these high-paid, specialised workers we cannot comment in any more specific terms on the appropriateness of specific types of restraint.

We strongly believe that permitting restraints for individuals in any job or field is not a good approach. It should be a rare, not common practice.

Is it appropriate for part-time, casual and gig workers to be bound by a restraint of trade clause?

It is not appropriate for part-time, casual, or gig workers to be bound by a restraint clause during or after their employment. These workers tend to be lower-paid and their ability to earn a living should not be unduly stifled. Further, the nature of these types of engagements inherently allows for the underutilisation and underemployment of workers by employers to meet their business needs. In these circumstances there are no good economic or policy arguments for employers to seek to prevent workers from engaging in other work.

Once again, we consider that common law and equitable duties are likely to be adequate to protect an employer's interests during part-time and casual employment. As outlined in our submissions and recommendations above, we believe restraint clauses should be prohibited or limited by legislation generally. However, if this approach is not adopted, then we would recommend that restraint clauses be prohibited for casual, part-time and gig workers as a minimum.

Case Study 6 – Gina

Gina was a casual employee working for a roadhouse convenience store. Gina only worked approximately 15 hours a fortnight.

Gina started her own food van business. Gina used her own skills and expertise to sell handmade food at events, which was different to the pre-made food that was sold at the roadhouse where she worked.

However, Gina's employer found out about her food van business, and stopped giving her shifts at her job.

Recommendation 10

All restraint clauses be prohibited for part-time, casual and gig workers.

Annexure A: Prevalence data

For the purposes of this submission we have compiled and prepared data on the prevalence of restraint clauses in client matters between 1 October 2020 and 7 May 2024.

During the period from 1 October 2020 to 7 May 2024 Circle Green:

- received 272 requests for assistance with matters involving restraint of trade issues; and
- provided legal assistance in response to 152 of these requests for assistance.

Restraint clauses by restraint type

The table below summarises the restraint of trade matters by restraint type:[25]

Restraint Type	Total
Non-compete (post-employment)	**79**
Non-solicitation	**37**
Non-disclosure / confidentiality	**5**
Non-compete (during employment)	**6**

Non-compete clauses

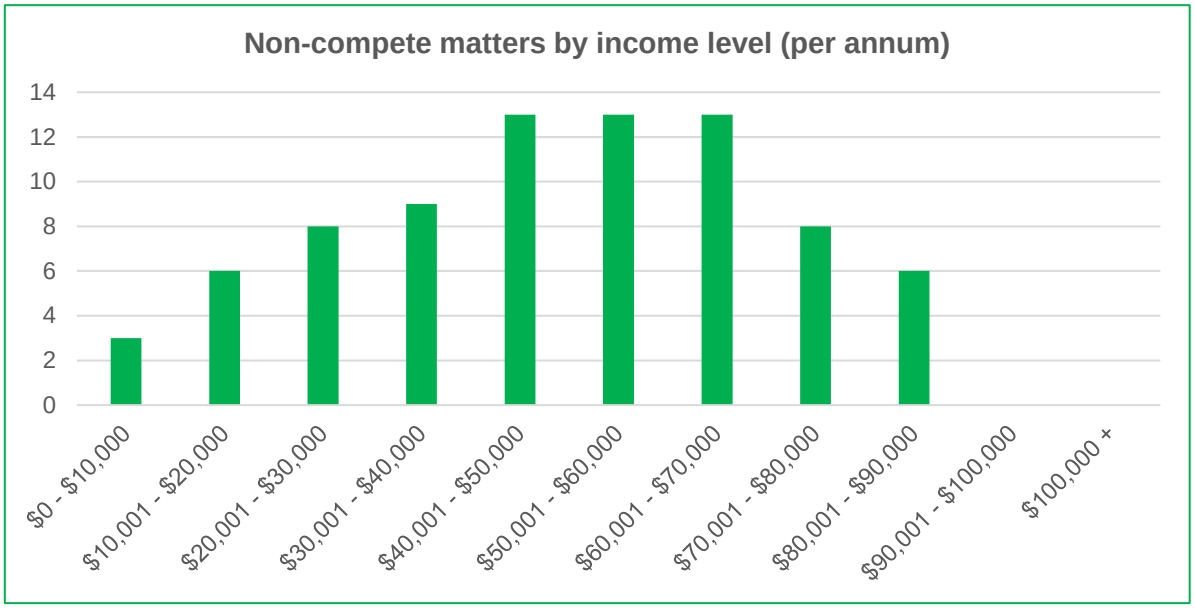
The most prevalent type of restraint clause that we observed was post-employment non-compete clauses. The table below summarises the non-compete matters by industry involved:

Industry	Number of matters
Accommodation / food	1
Arts / recreation	5[26]
Construction	1
Education / training	7
Health care / social assistance	18
Information media / telecommunications	4
Manufacturing	1
Mining	8
Other	7
Professional / scientific / technical	7
Rental / hiring / real estate	4

[25] A matter may include issues involving two or more restraint types.
[26] Of which 1 matter involved the beauty / hairdressing industry.

Retail trade	10[27]
Transport / postal / warehousing	2
Wholesale trade	4
Total	**79**

The graph below shows non-compete matters by income level (per annum):



Examples of particularly onerous restraint clauses in employment contracts

- a non-compete clause for a minimum duration of 24 months for a performer;
- a non-compete and non-solicitation clause for a duration of 23 months;
- a non-compete clause for a regional worker for a duration of 12 months, and a geographical radius of 300km;
- a non-compete clause for a duration of 12 months, across all of Australia;
- a non-solicitation clause for a duration of 12 months, across a 100km radius for a casual employee;
- a non-compete clause for a duration of three years with no specified geographical area; and
- three non-compete clauses of varying durations, covering all of Western Australia.

[27] Of which 5 matters involved the beauty / hairdressing industry.

Annexure B: Additional case studies

Case Study - Rhea

Rhea was an apprentice tattoo artist who resigned from her employment and had concerns about a non-compete clause in her contract.

The clause stated that Rhea was prohibited from working as a tattoo apprentice or artist within a 100km radius of any of the employer's studios. The clause did not specify a duration of the restraint.

Rhea's contract also had a clause that required her to pay back $2,000 per month in training costs if she did not complete the two-year contract.

Case Study - Seweryn

Seweryn worked for an IT company, and his employment contract included a non-compete clause that prohibited him from working for a client company or a competitor. The non-compete clause was cascading, including durations of 12 months, 6 months, and 3 months.

Seweryn applied for a State Government job in a similar role and was offered the position. His employer threatened legal action if Seweryn accepted the job offer.

Seweryn's contract also included a clause that required him to give 3 months' notice of resignation.

Case Study - Tai

Tai was a real estate manager who resigned from their employment. The contract had restraint of trade clauses including a non-compete and non-solicitation clause that covered a duration of 3 months or a geographical area of 2km from the employer's office.

Tai found a new job that was 10km away from employer's office.

However, the employer emailed Tai stating that they had contravened the restraint clause in the contract, because of the 3-month duration of the restraint.

Annexure C: Additional case studies illustrating use of unlawful and/or anti-competitive clauses in employment contracts

Case Study - Ian

Ian was an apprentice and had been working for the employer for approximately 8 months when he experienced work health and safety issues at work. Ian made a workers' compensation claim and resigned without giving the 4 months' notice prescribed in his employment contract.

The employer sought damages totalling approximately $14,000 for failure to work out the 4-month notice period.

Circle Green assisted Ian by drafting a letter for him to send to the employer, and the employer did not pursue him further.

Case Study - Jon

Jon was an apprentice, and had been working for the employer for approximately 7 weeks.

Jon was not earning enough money, so he mentioned needing to find a second job. Jon was dismissed without notice because he was trying to find a second job.

The employer withheld $700 from Jon's annual leave, and demanded that Jon pay them the remainder of $7,000 in training costs.

Circle Green assisted Jon by drafting a letter for him to send to the employer. The employer did not pursue the matter further, and paid Jon out one week in lieu of notice.

Case Study - Karter

Karter was an apprentice, and he experienced a panic attack at work. Karter could not adapt to the challenging working conditions, and decided to resign.

Karter gave one weeks' notice of resignation.

Provisions in Karter's contract stated on resignation, he must:

- give 4 months' notice or the employer can seek $5,000 in lieu; and
- repay $7,000 in training costs.

When Karter resigned, the employer made threats to him that he should be prepared for a letter demanding payment, totalling $12,000.

The employer did not follow through with their threat and did not pursue the matter any further.

Case Study - Lee

Lee was a migrant worker and lived in a rental provided by the employer. During their employment, Lee raised issues about their pay, but the issues were ignored by the employer.

Lee gave two weeks' notice of resignation, but 6 months was required under their contract.

The employer lodged a claim in the Magistrates Court against Lee, and sought approximately $23,000 in damages for breach of contract.

Lee settled with the employer for a lesser amount, but was required to pay the agreed amount through a repayment plan.

Case Study - Miles

Miles was an apprentice, and resigned from employment after working for the employer just over a year.

Miles gave two weeks' notice of his resignation.

Miles' contract required him to give 4 months' notice, and to pay back $7,000 in training costs.

A day after giving notice of his resignation, Miles was told by his employer that they wanted to seek damages for notice and training costs.

Case Study - Neel

Neel was a migrant worker who had to resign from his employment because he was relocating to another state.

Neel gave two weeks' notice of resignation.

Under his contract, Neel was required to give 6 months' notice of resignation.

The employer lodged a claim against Neel in the Magistrates Court of WA for approximately $20,000 for failure to provide the required notice.

Case Study - Otto

Otto was an apprentice who had been working with the employer for approximately 10 months.

The employer did not provide Otto with any work for two months due to a machinery breakdown at the host business at which Otto was placed. Otto was then converted from a permanent to casual employee when placed at a new host business. Otto also raised safety concerns at the new host business, and resigned from employment.

The employer told Otto that they were seeking $14,000 in training costs, and failure to work out the 6 month notice period in his contract.

The employer agreed to reduce the amount sought to $4,000 because of their failure to provide Otto with work during the first host business' machinery breakdown.

Otto was still asked to pay $4,000.

Case Study - Paiman

Paiman was an apprentice. They disclosed a medicinal cannabis prescription to the employer, who confirmed this was fine as long as medical evidence was provided. Paiman provided the medical evidence, but failed the drug test on the worksite, which had a zero tolerance policy for drugs.

The employer told Paiman that they should resign, and that they owe $7,000 in training costs.

The employer also told Paiman that they were required to work out the 6 month notice period.

Circle Green assisted Paiman with drafting a letter for them to send to the employer, and the employer did not take any further action.

Case Study - Quinlan

Quinlan was an apprentice who had been working for the employer for approximately 6 months. Quinlan wanted to resign because of issues with their rostering, and lack of communication from the employer.

Quinlan was concerned about the clauses in their contract that required them to pay back $4,000 in training costs, and give 4 months' notice of resignation.

Circle Green assisted Quinlan by drafting a resignation letter for them to send to the employer to resign by giving the NES minimum period of notice and not having to pay back the training costs.