Submission to the Treasury on Reform to non-compete clauses and other restraints on workers

4 September 2025

Circle Green
Community Legal

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.

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Glossary

ATSI means Aboriginal or Torres Strait Islander.

CALD means culturally and linguistically diverse.

Circle Green means Circle Green Community Legal.

Consultation Paper means the Consultation Paper, 'Reform to non-compete clauses and other restraints on workers' published by the Australian Government Treasury Competition Taskforce (25 July 2025).

FTC means the US Federal Trade Commission.

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

FW Regulations means the *Fair Work Regulations 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).

US means the United States of America.

WA means Western Australia.

1. Introduction

Circle Green thanks the Treasury and its Competition Taskforce for the further opportunity to contribute submissions in relation to the Consultation 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 Submissions

2.1 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.

At **Annexure A**, we provide an updated summary of our prevalence data on the various types of restraint clauses we have assisted clients with.

We also note that this submission elaborates on the comments, observations, and recommendations we made in our submission to the Treasury's Competition Review on 10 June 2024 (**'2024 Submission' – Annexure B**) in response to the Issues Paper, 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity' (April 2024).

As noted in our 2024 Submission, we 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.

We therefore welcome the Federal Government's commitment to ban non-compete clause from 2027 for workers earning less than the FW Act high-income threshold. We thank the Treasury Competition Taskforce for the opportunity to contribute to this important and impactful reform piece.

2.2 Definition of a non-compete clause

How should a non-compete clause be defined in the FW Act? Is the FTC definition appropriate for an Australian context?

We agree that, as noted in the Consultation Paper, a clear definition of the prohibited or restricted clauses is essential for any regulatory reform to be effective. A clear definition will both avoid any uncertainty for workers and reduce the compliance burden on employers.

The Consultation Paper proposes that the FTC definition of non-compete clauses could be adopted or adapted.

FTC definition of non-compete clause:

A term or condition of employment that either prohibits a worker from, penalises a worker for, or functions to prevent a worker from:

a) Seeking or accepting work with a different person where such work would begin after the conclusion of the employment that includes the term or condition

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

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

We agree that the FTC definition is a good starting point. However, our view is that the FTC definition is insufficient as it does not cover:

- restraints on concurrent employment[1]; or

[1] As noted in the Consultation Paper, this will be discussed further under the consultation questions relating specifically to restraints on concurrent employment.

- terms and conditions that operate like non-compete clauses but apply *only* during the employment.

Examples of these anti-competitive terms and conditions that apply *only* during the employment include:

- unreasonably long notice periods for an employee's resignation, particularly where the employer is not required to give the same amount of notice when terminating employment; and

- clauses requiring repayment of training costs if an employee resigns with in a specified period of time. These training costs, or training bonds, are set at specific amount/s in the employment contract and are required to be repaid irrespective of whether the employee has undertaken the training. They are often not a genuine estimate of the costs incurred that the employer is seeking to have 'repaid'.

These types of clauses act as a form of restraint as they have a similar 'chilling effect' preventing employees from moving freely between jobs. They should therefore be included in any definition of non-compete clauses or otherwise specifically subject to the proposed legislative restrictions.

Further, the FTC definition refers specifically to terms and conditions of "employment", which does not include independent contractors or employee-like workers, who are now captured within the scope of the FW Act[2].

We recommend that the any definition of restraint be drafted specifically to include:

a) any anti-competitive clauses that may apply only during the employment;

b) restraints on concurrent employment (*discussed further below*); and

c) non-compete and any other restraint clause for employee-like workers.

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

As noted above, we recommend that the following common contractual terms be explicitly included in the definition of non-compete clause, or in the alternative, be separately subject to a separate restriction within the FW Act:

- unreasonably long notice periods that are not reciprocal, or even if reciprocal, are excessive; and

- training clauses and other penalty clauses in an employment contract that effectively operate to prevent employees from seeking alternative employment.

We refer to **recommendations 7 and 8** (pages 19 to 20) of our 2024 Submission, which recommends there be limits on the length of notice periods employees are required to provide to resign from their employment, and that any legislative limit on the length of notice periods be a civil remedy provision in the FW Act. We suggest, for example, that for employees earning less than the high-income threshold notice of resignation be capped at the minimum notice required to be given to employees on dismissal.

[2] For example: Part 3A-2 – Minimum standards for regulated workers; Part 3A-3 – Unfair deactivation or unfair termination of regulated workers; and Part 3A-5 – Unfair contract terms of services contracts.

Further, we refer to **recommendation 10** (page 24) of our 2024 Submission, which recommends that all restraint clauses, or clauses that may have the effect of a restraint clause, be prohibited for part-time, casual, and gig-workers.

2.3 Scope of workers affected

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

As noted above, we recommend that the ban on non-compete clauses apply to workers who are not employees, particularly given that employee-like workers (e.g. gig-workers) are now captured within the scope of the FW Act.

Importantly, Part 3A-5 of the FW Act, which came into operation on 26 August 2024, enables the FWC to make orders in relation to unfair contract terms in services contracts. Where the FWC determines that a term of a services contract is an unfair contract term, it can make an order to set aside, amend, or vary all or part of the contract.[3] In determining this, the FWC may consider a range of factors, including the relative bargaining power of the parties to the services contract, and whether the contract term is reasonably necessary to protect the legitimate interests of a party to the contract.[4]

If independent contractors are excluded from the ban on non-compete clauses, they may have access to an alternative pathway to having the clause declared unenforceable, by relying on the unfair contract term provisions. However, we note that this would be an unnecessary complexity for independent contractors, which could be avoided by including them in the ban on non-compete clauses.

Prevalence data: Advice about whether a worker is likely to be an employee or independent contractor

From 1 July 2023 to 30 June 2025, Circle Green:

- received 122 requests for assistance with matters involving the question of whether a worker is more likely to be an employee or an independent contractor; and
- provided legal assistance in response to 93 of these requests for assistance.

Another important consideration is that there is currently no comprehensive legislative definition of either independent contractor or employee. Whilst section 15AA of the FW Act provides guidance on determining the ordinary meanings of employee and employer, it only provides guidance on how the common law principles about the distinction are applied. Similarly, the 'meaning of independent contractor' in section 338A refers only to regulated workers, which includes 'employee-like workers' as set out in section 15P. The difference according to the FW Act essentially comes down to whether a person has entered into a contract for services or a contract of service but these two terms are not clearly distinguished or defined. This often leaves many workers unclear about whether they are actually an employee or independent contractor.[5]

[3] FW Act, section 536NA.
[4] FW Act, section 536NB.
[5] Similar to the current common law doctrine around restraint of trade clauses, this lack of clarity disproportionately impacts vulnerable workers, and workers whose ability to access legal assistance is limited due to financial or other reasons. Even where legal advice can be accessed, the nature of how the common

By including independent contractors in the ban on non-compete clauses, it would enable legal professionals, including ourselves, to advise workers on whether a restraint is in breach of the FW Act without having to enter the complicated task of assessing whether they are an employee or independent contractor. The value of having a legislative prohibition on non-compete clauses would be reduced if it will remain unclear to workers whether they fall within the scope of the prohibition.

Further, as we discussed in our 2024 Submission, gig-workers tend to be lower-paid, and the nature of this type of engagement 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 these types of workers from engaging in other work.

Given the FW Act already refers to a high-income threshold for independent contractors[6], it is logical to use the threshold as a benchmark and include independent contractors in the ban on non-compete clauses.

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

Our client cohort generally earns less than 50% of the high-income threshold, so it is unlikely that they would be impacted by any potential unintended consequences of using the high-income threshold. We therefore limit our submissions on this point but nonetheless wish to raise two matters for consideration.

Definition of "earnings"

Assessing an employee's earnings as defined by section 332 of the FW Act to determine whether they fall above or below the high-income threshold could create a loophole and enable employers to avoid the ban on non-compete clauses. The definition of "earnings" is broader than just the employee's wages. It includes: amounts applied or dealt with in any way on the employee's behalf or as the employee directs; the agreed money value of non-monetary benefits; and amounts or benefits prescribed by the regulations.[7] Therefore, employers could potentially avoid the ban by increasing the employee's "earnings" to above the high-income threshold without necessarily increasing their wages or take-home pay.

We recommend the high-income threshold be used as the benchmark, but that for the purpose of non-compete clauses it apply only to take-home pay.

Application to part-time employees

We recommend that the high-income threshold is applied to part-time employees as the full-time equivalent. This would likely more accurately reflect the employee or worker's actual seniority and influence, lack of vulnerability, and genuine risks to employer that are worth protecting with a restraint.

In unfair dismissal matters the threshold is applied to the employee's actual income as defined, without regard to whether they are full-time or part-time. In other words, a part-time employee may

law principles about the distinction between employees and independent contractors are applied means that legal professionals, including staff at Circle Green, can generally only provide an indication of which way a Court or Commission might decide, rather than a definitive conclusion of whether they are an employee or not.

[6] FW Act, section 15C; FW Regulations, reg 1.08AA.

[7] FW Act, section 332.

not be considered to earn above the high-income threshold even if their full-time equivalent salary would exceed it.[8]

This may cause unintended consequences for regulation of non-compete clauses. For example, an employee may hold a senior position and has significant influence in the organisation but only work part-time hours (for example, one day a week). The employee's knowledge, sophistication and influence may be such that a non-compete clause is appropriate to protect the legitimate business interests of the organisation. If the high-income threshold were applied as it does to unfair dismissal matters, it is possible that their annual rate of earnings might still fall below the high-income threshold, and therefore a non-compete clause in their contract could be in breach of the ban.

At what point in the employment relationship should the high-income threshold be applied to determine whether a non-compete clause is allowed or not, and why?

We consider that the high-income threshold should be applied at the time the employment relationship ends. This would ensure the assessment reflects the employee or worker's actual earnings and corresponding sophistication, seniority and risk to the business at the time they cease their employment.

Assessing income at the cessation of employment would also serve to prevent inconsistent treatment of employees in similar roles. For example, if the threshold were to be applied at the beginning of the employment, two employees in the same role and earning the same wage at the termination of their employment could have different outcomes if one employee had started their employment earning below the threshold and subsequently been promoted, but the other earned above for their entire period of employment.

Further, employers may be induced to artificially structure an employee remuneration above the high-income threshold on paper, so that any non-compete clause is not covered by the ban.

2.4 Enforcement

What is the appropriate penalty for breaches of the ban on non-compete clauses? Are the existing penalties in the FW Act for other contraventions appropriate?

We emphasised in 2024 Submission the importance of appropriate penalties to ensure regulation of non-compete clauses is effective. We take the opportunity to reiterate this point. In our experience, employers with a disregard of the law will continue to use unlawful contractual clauses as a means of dissuading workers from resigning if they do not perceive there to be any significant consequence to them. Without appropriate penalties, we consider it very likely that the "chilling effect" will continue to impact our client cohort.

We refer to **recommendation 4** (page 17) of our 2024 Submission which recommends that any ban or restriction on the use of restraint clauses be a civil remedy provision, and breaches should be treated in the same manner as a breach of the NES under the FW Act.

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

As the Consultation Paper notes, defence provisions are relatively rare in the FW Act. However, if there were to be a defence available, it should require the employer to prove that the employee or worker has actual knowledge of trade secrets or confidential information that is reasonably likely to put the employer's legitimate business interests at risk, and that is significant enough to justify the

[8] *Florenca, Elvina v Industrial Foundation For Accident Prevention T/A IFAP* [2019] FWC 144, [32].

non-compete clause. That is, if an employer wants to rely on a non-compete clause that is *prima facie* unenforceable then they should be required to justify their position.

The threshold to successfully defend the breach should be high enough to ensure that employers take compliance seriously. For example, the Consultation Paper refers to the defence to 'sham contracting' arrangements.[9] This type of defence would arguably have too low a threshold to adopt into the ban on non-compete clauses. The lower threshold for this defence may be appropriate for sham contracting arrangements due to the complexity of the assessment of whether an employee is an employee or independent contractor, and the potential lack of resources a small business may have to make the appropriate assessment. Even so, the Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, which amended the defence to 'sham contracting' to what it is now, states the purpose of the amendment as 'reinforc[ing] the expectation that employers should take appropriate steps, commensurate with their experience and the nature of their enterprise, to understand how they are engaging an individual before entering into a contract'[10].

If drafted clearly, the ban on non-compete clauses should, in theory, be easier to comply with than the 'sham contracting' provisions, which relies on common law principles to determine the classification of the worker. Therefore, our view is that any defence to a ban on non-competes should only be for exceptional circumstances, such as where the employer can in fact prove that the employee has knowledge of trade secrets that puts the employer's legitimate business interests at risk, or at significant risk.

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

We recommend that the following parties should be able to commence proceedings:

- the person affected by the contravention;
- a union;
- an employer organisation; and
- the relevant regulator, likely the FWO.

<u>Unions, employer organisations, and the FWO</u>

The Consultation Paper refers to commencement of proceedings with the FCA, FCFCOA or an eligible State or Territory Court, using the example of enforcement of a FWC order for reinstatement or compensation in relation to an unfair dismissal claim. These fora for commencing proceedings are unlikely to be an accessible pathway to recourse for our clients, in particular, the federal courts have high filing fees, long timeframes and complicated procedures.

For these reasons, individuals from our client cohort may not be willing to use these pathways. Therefore, it is important to ensure that unions, employer organisations, and the FWO can also commence proceedings to address such breaches.

[9] Employers can defend a 'sham contracting' contravention if they prove that, when the representation was made, the employer reasonably believed that the contract was a contract for services (FW Act, section 357(2)).
[10] Explanatory Memorandum, *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, [778]-[785].

Persons affected by the contravention

For individuals affected by a breach, where it may not be an accessible option to pursue matters in a court, it is important that they have access to quick, informal and low-cost pathway to resolve a dispute about the ban on non-compete clauses, such as by expanding the FWC's jurisdiction to deal with applications about disputes relating to restraint clauses.

As noted in our 2024 Submission, one of the key drivers of the "chilling effect" is that employees may not know whether the restraint clause in their contract is enforceable or not. Even if a Court action is available to resolve this ambiguity, the perceived formality of Court, even utilising a small claims jurisdiction is often an access to justice barrier for individuals, and particularly those who are marginalised.

While affected individuals are unlikely to proceed to Court when they are unsure, they may still utilise a quick and low cost dispute resolution pathway that assists them in determining the lawfulness of the clause.

To effectively dispel the "chilling effect" for our client cohort, the ability to access quick and low-cost pathways to resolve the dispute without commencing court proceedings is crucial.

We recommend that the FWC have a role in resolving disputes that arise from the ban on non-compete clauses. We discuss this in further detail below, in response to the specific consultation question on this point.

What role should the FWO 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?

We recommend that further consideration should be given to the FWO's involvement in ensuring employer compliance with the ban. At the very least, the FWO should be responsible for:

- providing education and assistance to employers and employees about the legislative changes, such as by amending the Fair Work Information Statement to include information about the ban (see **recommendation 9** of our 2024 Submission);

- promoting and monitoring compliance with the ban, such as by inquiring into and investigating breaches of the ban, and taking appropriate enforcement action where relevant.

For example, in our experience, we have seen clients from the same employer seek assistance from us where the employer may be routinely using an employment contract including particularly onerous or potentially unlawful clauses.[11] We recommend that the FWO have the power to investigate into, and take appropriate enforcement action (e.g. infringement notices, compliance notices, enforceable undertakings, or commencing proceedings for penalties under the FW Act) in relation to employers who recurrently use employment contracts with unlawful clauses.

As a more recent example, we provided legal assistance to three clients who were all employed by the same employer[12] who evidently routinely used an employment contract with unreasonable, and potentially unlawful, restraint of trade and similar contract terms:

[11] In our 2024 Submission, we referred (anonymously) to a particularly problematic employer and provided case studies of some clients who were all employed by that same employer (see page 19 and Annexure C of the 2024 Submission).
[12] Note, this is not the same employer we referred to at page 19 and Annexure C of our 2024 Submission.

Case Study 1 - Stella

Stella was an 18 year old part-time employee of a beauty salon, and her employment contract included the following clauses:

- a non-compete clause that prevented her from working for a competitor within a 20km radius for a period of 12 months;
- a non-solicitation clause for a period of 12 months; and
- a clause requiring repayment of $2,000 in training costs for arbitrary "1:1 training" to be provided by the employer or another staff member, if she were to resign within the first 12 months of employment.

Stella's employer had only provided her with less than a couple of hours of 1-on-1 training at the beginning of her employment. Despite this, when Stella resigned from her employment within a year of commencement, her employer unlawfully deducted the $2,000 in training costs from her final pay.

Case Study 2 - Emma

Emma was a young part-time employee of the same beauty salon, and her employment contract included the same non-compete and non-solicitation clauses as Stella's.

However, the training cost repayment clause in Emma's contract specified a figure of $4,000.

Similar to Stella, despite only receiving informal training and guidance from her employer at the beginning of her employment, the employer deducted the training costs from Emma's final pay upon her resignation and asked her to pay the balance.

Case Study 3 - Mina

Mina was a young part-time employee of the same beauty salon. Mina's employment contract had an annexed non-disclosure agreement that included clauses relating to confidentiality, non-disclosure, non-solicitation and non-compete.

Mina's employment contract also had a training cost repayment clause, but specified a figure of $3,000.

Similar to Stella and Emma, Mina resigned within a year of commencement, and her employer unlawfully deducted $3,000 from her bank account.

Should the FWC have a role in resolving disputes that arise from the ban on non-compete clauses?

We strongly recommend that the FWC be empowered to deal with disputes about the ban on non-compete clauses, similar to the way in which it can deal with disputes about unlawful stand downs (FW Act, section 526), or more recently, disputes about unfair contract terms in services contracts (FW Act, section 536NC). We discuss our preferred model further below.

Here, we stress the importance of empowering the FWC to deal with disputes about the ban, particularly for low-income employees and those from marginalised communities who may not have the resources, including the time and energy, to pursue matters to a court, or for those who are simply looking for clarity or a way to resolve the situation with their employer.

At the very least, we recommend that the FWC be empowered to deal with disputes, including by way or arbitration, about whether a contractual clause constitutes a non-compete clause as defined.

Without a fast and low-cost pathway to determine this issue, it is very likely that many of our client cohort will continue to be impacted by the "chilling effect", and simply decide that it is not worth the time, stress and costs of pursuing further if it means that they just continue working for the employer, or comply with an unlawful non-compete clause.

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

In our 2024 Submission, we recommended that the FWC's role in resolving disputes relating to restraint clauses could be modelled on the FWC's existing ability to resolve stand down disputes under section 526 of the FW Act (**recommendation 6**).

However, since 26 August 2024, the FWC has new functions relating to unfair terms in services contracts. We recommend that the FWC's role and powers relating to disputes about the ban on non-compete clauses be modelled on this new function.

Under section 536NC of the FW Act, if the FWC determines that a services contract includes an unfair contract term, the FWC may make an order setting aside all or part of the services contract, or amend or vary all or part of the services contract.[13] If this model were to be adopted, the FWC could make an order to set aside, amend or vary a contract where it determines that a non-compete or other restraint clause is in breach of the ban.

In recommending this model, we refer to section 536N, which sets out the objects of the added Part 3A-5 of the FW Act which deals with unfair contract terms, including (but not limited to):

(a) *to establish a framework for dealing with unfair contract terms of services contracts that: (ii) addresses the need for a level playing field between independent contractors and principals by creating disincentives to the inclusion of unfair contract terms in services contracts*[14];

(b) *to establish procedures for dealing with unfair contracts that: (i) are quick, flexible and informal; and (ii) address the needs of principals and independent contractors*[15]; and

[13] However, note in relation to these orders specific to unfair contract terms in services contracts, the FWC can only set aside, amend, or vary all or part of a services contract which, in an employment relationship, would relate to a *workplace relations matter*.
[14] FW Act, section 536N(1)(a)(ii).
[15] FW Act, section 536N(1)(b).

(c) *to provide appropriate remedies if a term of a services contract is found to be unfair*[16].

These objects are also suitable for a framework and procedure addressing unlawful non-compete and other restraint clauses.

In summary, it would be of significant benefit to our client cohort in particular, if workers can:

- apply to the FWC with a dispute about the ban on non-compete clauses, for example, if their employer makes a threat about the worker breaching a restraint clause, or if they see that their contract has a restraint clause which they are unsure is lawful or not[17]; and

- participate in a conciliation conference to resolve the dispute, and come to an agreement about how the contract may be varied or amended to remove any unlawful non-compete clause[18]; and/or

- participate in a hearing where the FWC could make a decision about whether the clause is in fact in breach of the ban or not; and

- apply for an order by the FWC that the term or clause be set aside, varied or amended, if the FWC decides that it is in breach of the FW Act[19]. Further consideration should be given to empower the FWC to order payment for compensation to the employee in relation to the dispute, if the FWC considers that the employee has suffered economic loss during any period of time that they were restricted by the unlawful non-compete or other restraint clause.

2.5 Transitional arrangements

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

We agree with the examples of transitional arrangements provided in the Consultation Paper. A 'grace period' of 6 months appears appropriate to provide employers with enough time to review their contracts and remove any clauses in breach of the ban. We are also supportive of any educational materials that could be prepared by the FWO to be provided to employees of the change, such as the Fixed Term Contract Information Statement[20] which was developed as a result of changes to laws around rolling fixed-term contract.

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

Our view is that a ban on non-compete clauses should apply, to some extent, to non-compete clauses contained in existing contracts. We recommend that banned non-compete clauses in contracts entered into before commencement of the ban should be rendered unenforceable, and employers should be required to provide notice to employees subject to these clauses that they won't be enforced.

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[16] FW Act, section 536N(1)(c).
[17] For example, see section 536ND – Application for unfair contract term remedy, or section 526 – FWC may deal with a dispute about the operation of this Part (Stand Down).
[18] For example, section 536NF allows the FWC to conduct a conference in relation to disputes about unfair contract terms.
[19] For example, section 536ng allows the FWC to hear a hearing about unfair contract terms disputes if it considers it appropriate to do so.
[20] https://www.fairwork.gov.au/employment-conditions/information-statements/fixed-term-contract-information-statement.

We are not proposing that any civil penalties should apply retroactively, or that employers be liable for acts or omissions made prior to commencement of the ban. We note that simply rendering unenforceable any clauses in contracts entered into before commencement of the ban would not create any new obligations, risks, or liabilities for employers.

This is the case in the US. The FTC's Non-Compete Clause Rule[21] applies retrospectively in that it renders unenforceable any banned non-compete clauses in existing contracts. The FTC argues that it does not actually 'operate retroactively', stating that the Non-Compete Clause Rule is '*not impermissibly retroactive because it does not impose any legal consequences on conduct predating the effective date. The Commission is not creating any new obligations, imposing any new duties, or attaching any new disabilities for past conduct*'.[22]

This argument is logical and consistent with the existing common law restraint of trade doctrine.[23] We expect that the majority of existing contractual clauses rendered unenforceable by this approach would already be unenforceable under the common law doctrine. In our experience, it is very rare for a low-income employee to threaten a business interest simply by taking their labour elsewhere.

In other words, the context driving the legislation, that the vast majority of non-compete clauses affecting low-income employees are unenforceable, itself implies a minimal adverse effect on employers. To the extent that there is an adverse effect, it is restricted to preventing benefit obtained through the exploitation of a legal ambiguity.

There may also be a misconception that contracts entered into before the commencement of the changes are not subject to restraint of trade protections, emboldening employers and increasing the chilling effect on employees.

This approach should also be made clear in the legislation, as it is crucial to ensure that vulnerable employees, such as those in our client cohort, are not continuously impacted by legal ambiguity, potentially exacerbated by new legislation.

2.6 Non-compete clauses for high-income employees

Circle Green does not have the relevant expertise nor the experience to adequately comment on this, as our client cohort invariably earns well below the high-income threshold.

2.7 Non-solicitation clauses for clients and co-workers

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)

As emphasised in our 2024 Submission, we strongly recommend the use of client non-solicitation clauses be prohibited, or at the very least restricted, for those earning below the high-income threshold.

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[21] 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.

[22] US Federal Trade Commission, 16 CFR Part 910, page 344: https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf.

[23] 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: 2nd Chapter Pty Ltd & Ors v Sealey & Ors [2023] VSC 599 [33].

Our recommendation is based on our experience where vaguely worded non-solicitation clauses cause significant concern to our clients, and situations where employers threaten legal action to enforce a restraint even if the employee is not actively soliciting or approaching clients of the former employer. As discussed in further detail in our 2024 Submission at pages 21 to 22, strict non-solicitation clauses are particularly problematic in certain sectors, such as healthcare and social assistance, and the consequences much more acute in rural and remote areas or communities.

Case Study 4 - Phoebe

Phoebe was employed as a support worker for a disability support service employer on a part-time basis for four years, and worked in a small, remote town. Phoebe's employment contract had a non-solicitation clause that applied during and after her employment, but for an unspecified duration.

During Phoebe's employment, some of her clients were not happy with the service provider that Phoebe worked for, but stayed because they wanted Phoebe as their support worker. When Phoebe resigned, her clients were upset that Phoebe could not continue supporting them, and Phoebe provided alternative service provider details to those clients.

After Phoebe resigned and started her own business, some of her former clients found her through other disability support service platforms, and Phoebe began caring for them.

Phoebe's employer then sent her a cease-and-desist letter, relying on the non-solicitation clause in her employment contract. This left Phoebe distressed because she was under threat of legal action if she did not stop providing care for her vulnerable clients who might otherwise be left without any support.

Whilst a court may have found that the non-solicitation clause in her contract was not enforceable, there was a risk that Phoebe had breached and would continue to breach that clause if she continued to assist her clients. Phoebe had to make a difficult decision between offering care to vulnerable clients who had previously Phoebe had supported for up to four years or protecting her own legal interests by avoiding further contact to comply with the non-solicitation clause.

However, we agree with the Consultation Paper that if non-solicitation clauses are to be restricted, the type of activity prohibited or restricted must be clearly defined. This is particularly important where the common law restraint of trade doctrine means that non-solicitation clauses are more likely to be enforceable, and therefore unclear definitions of prohibited or restricted non-solicitation clauses is unlikely to alleviate or dispel the "chilling effect".

Any prohibition or restriction on non-solicitation clauses should be limited to targeted solicitation activity, to ensure that workers can still advertise their services to the general public, or service a former client in situations where the client initiates the contact.

Our recommendation in our 2024 Submission, is that there also be a complete ban of non-solicitation clauses, the same as the proposed ban on non-compete clauses for those earning below the high-income threshold in the FW Act. Non-solicitation clauses are, similar to non-compete clauses, weaponised by employers as a means of controlling and actions of their employees, such as by using it as a scare tactic or threatening legal action.

However, if a complete prohibition of non-solicitation clauses is not preferred, we recommend that a staggered approach be used. For example, for individuals earning:

- below 50% of the high-income threshold, non-solicitation clauses should be prohibited;
- between 50 and 75% of the high-income threshold, the duration of non-solicitation 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-solicitation 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-solicitation clauses.

In addition to this, we recommend that non-solicitation clauses be prohibited for workers living outside of the Perth metropolitan area, and potentially the metropolitan areas of capital cities in other states and territories. See **recommendation 3** (pages 14 to 15) of our 2024 Submission.

2.8 Other requirements for valid restraint clauses

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

Our view is that any uncertainty around the validity of a restraint clause will always contribute to the "chilling effect", and any uncertainty or complexity should be removed where possible. Cascading clauses are often too complex or vague for employees to understand and properly comply with. Even if only the smaller, or smallest, duration or geographical limit is enforceable, the "chilling effect" remains as it is very likely that workers will simply comply with the widest, or a wider scope than necessary, for fear of legal action by their employer.

Prevalence data: Cascading clauses

From 1 October 2020 to 4 August 2025 Circle Green provided **212 legal assistance services** on matters involving restraint of trade issues.

At least **56** (approximately **1 in 4**) of the restraint clauses in these matters had cascading duration periods and/or geographic extents.

**Note: this is a conservative figure, as our primary service is a one-off telephone advice service with no document review, so we often do not know the exact wording or drafting style of a restraint clause.*

Given that restraint clauses are used by employers as required to protect their legitimate business interests, it is appropriate that employers should know what is reasonably necessary to protect these interests. A cascading clause should not be necessary if this assessment is being made appropriately and genuinely.

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

When drafting restraint clauses into employment contracts, employers should be considering the specific legitimate business interests they are seeking to protect, and should, in theory, be limited to the reasonable protection of those legitimate businesses interests.

However, as the Treasury's Issue Paper (2024) and our experience suggests, this is not always the case in practice. Therefore, our view is that there should be a requirement on businesses to specify the legitimate interests to be protected by a restraint clause.

Further, if the business has not complied with the requirement, we consider there should be a 'reverse onus' on the business to disprove the allegation, or a higher standard of evidence required to access injunctive relief (discussed further below). For example, if an employee alleges that a business has breached the ban, but the employer has failed to specify the protected legitimate business interests, the business should have the burden of disproving the allegation.[24]

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 disagree with this proposition. The impact of non-compete clauses on low-income and marginalised workers is significant, and has a substantial impact on their ability to earn a living, start or operate their own small business, or leave an unsafe or exploitative workplace. Where a more targeted non-solicitation clause could be applied to protect certain client relationships, this is more appropriate.

Further, as noted above, only specifically defined solicitation activity should be banned. If clients or service users wish to approach a former worker (i.e. the service provider) in a new capacity, this should not be unjustifiably hindered by any restraint clause, particularly for low- and middle- income workers, and for rural and remote communities.

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

We strongly recommend there be legislative limits on the ability and threshold for which employers can access interlocutory relief. As discussed at pages 17 to 18 of our 2024 Submission, the common law governing the enforcement of restraints is currently skewed in favour of employers. In our view, it is important that there be legislative reform to prevent employers to utilising court proceedings – including threats of proceedings, and applications for urgent interlocutory injunctions – as a means of misusing their resources and power to their own benefit.

The risks of interlocutory proceedings are too high to our client cohort, and in practice, even a threat of an interlocutory injunction is 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.

We recommend that:

- 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; and

[24] For example, see section 557 of the FW Act, where an employer will have the burden of disproving an allegation where they have failed to comply with, amongst other things, the requirements to make and keep employee records of employment.

- where a restraint clause does not specify the legitimate interests being protected by the restraint clause allegedly in breach, the employer be required to provide evidence of this.

2.9 Restraints on concurrent employment

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

As discussed in our 2024 Submission[25], common law and equitable duties provide sufficient protection for employers or our client cohort. Potential unintended consequences of any regulation of restraints on concurrent employment is more likely to be seen in highly specialised or senior roles where the individual is adequately compensated for any restraint clause in their contract.

Conversely, it is only appropriate for those highly specialised or senior roles. We strongly believe that permitting restraints for individuals in any job or field is not a good approach, and it should be a rare, not common practice.

Therefore, we are supportive of legislative restrictions on restraint clauses that restrict concurrent employment (not displacing any existing common law or equitable duties), particularly for our client cohort. We have seen examples of restraints on concurrent employment, or restraints to this effect, used in part-time or casual employment contracts. As long as the employee is acting within their common law and equitable duties around employment, they should not be prevented from earning a living by, for example, working another part-time or casual job, or running a business that is not related to the business of their employer.

Case Study 5 - Oakley

Oakley was an independent contractor for a fitness and wellbeing business for six months, before she signed a part-time employment contract with the business.

Oakley's part-time employment contract had a non-compete clause that prevented her from working for a competitor during her employment.

There was also a post-employment non-compete clause with cascading durations (24 months, then 12 months, then 6 months), and geographical extents (Australia, then Western Australia, then within a 50km, 25km, or 5km radius of the employer's business.

Oakley resigned within a month of signing the employment contract, but the employer called Oakley after she resigned to remind her of the restraint clauses in her contract. Despite being a part-time employee of the business for only less than a month, Oakley was concerned that the restraint clause would prevent her from operating her own fitness business using her own qualifications and skills to earn a living.

[25] Circle Green 2024 Submission, page 24.

Annexure A: Prevalence data

In our 2024 Submission, we provided data on the prevalence of restraint clauses in client matters between 1 October 2020 and 7 May 2024.

For the purposes of this submission, we have incorporated updated data to this summary. The data now covers the period 1 October 2020 to 4 August 2025.

During the period 1 October 2020 to 4 August 2024 Circle Green:

- received 343 requests for assistance with matters involving restraint of trade issues; and
- provided legal assistance in response to 212 of these requests for assistance.

Restraint clauses by restraint type

The table below summarises the restraint of trade matters by restraint type:[26]

Restraint Type	Total
Non-compete (post-employment)	**126**
Non-solicitation	**89**
Non-disclosure	**8**
Non-compete (during employment)	**10**

Examples of particularly onerous restraint clauses in employment contracts

- non-compete and non-solicitation clauses for a healthcare worker on a $50,000 – $60,000 income (per annum), with a cascading clause for duration (24 months, then 18 months, then 12 months) and geographical area (all of Western Australia, then 100km radius from location of the business, then 25km radius from the location of the business);
- a non-solicitation clause for a duration of 2 years, for a casual employee on a $40,000 – $50,000 income (per annum);
- a non-compete clause for a worker on a $60,000 - $70,000 income (per annum) with a cascading restricted geographical area of: Australia, then Western Australia, then 1,400km, 1000km, 500km, then 200km radius from the location of the business;
- a non-compete clause for a healthcare worker on a $30,000 - $40,000 income (per annum) for a duration of 12 months and a geographical area of 15km radius from the location of the business;
- a non-compete and non-solicitation clauses for a hospitality worker on a $60,000 - $70,000 income (per annum) for a duration of 18 months, and covering all of Australia.

[26] A matter may include issues involving two or more restraint types.

Annexure B: 2024 Submission

Circle Green's submission to the Treasury's Competition Review on 10 June 2024.