055 September 2025

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The Treasury
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via email: competitiontaskforce@treasury.gov.au

Dear Dr Freestone,

Reform to non-compete clauses and other restraints on workers

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) welcomes the opportunity to comment on Treasury's consultation for proposed reforms to non-compete clauses and other restraints on workers.

The ASBFEO notes the projected benefits calculated by the Productivity Commission (PC) for the Australian economy from enacting reasonable and measured reforms to worker restraint clauses.[1] As a principle, workers should not be unreasonably constrained from pursuing career and entrepreneurial opportunities. In practice, non-compete clauses are rarely enforced, such is the presumption against them at common law and the costs of enforcing a clause before the courts. This submission primarily addresses the design and implementation of the proposed ban on non-compete clauses for employees earning below the high-income threshold in the *Fair Work Act 2009* (the Fair Work Act), emphasising the need for right-sized reforms and an educative approach to compliance with practical and affordable measures for dispute resolution.

The ASBFEO emphasises that there are legitimate business interests that must still be protected under this reform. Non-solicitation and non-disclosure clauses can be vital protections of legitimate business interests, protecting valuable client relationships, intellectual property and financial entitlements. These protections should remain, and this submission highlights potential unintended consequences if restrictions were imposed.

The ASBFEO believes the introduction of a ban to non-compete clauses must be supported by education for small business. This education must go beyond the changes to non-compete clauses, uplifting understanding of other protections available for their valuable relationships and intellectual property, including non-solicitation clauses and non-disclosure agreements.

Though the prevalence of these clauses among small businesses is proportionally less, and data suggests larger enterprise are twice as likely to use them,[2] small businesses account for just over

[1] Productivity Commission 2024, National Competition Policy: modelling proposed reforms, Study report, Canberra.
[2] Australian Bureau of Statistics. (2024, February 21). Restraint Clauses, Australia, 2023. ABS. https://www.abs.gov.au/articles/restraint-clauses-australia-2023.

97% of all businesses in Australia.[3] A significant number of businesses will therefore be affected by the implementation of these reforms even though many may not have the intent to enforce a non-compete clause. Some small businesses, for example those using a contract template, are neither aware a clause is present nor understand what it seeks to do. Small businesses will have to review contracts and understand if a clause is constructed in such as a way as to fall foul of the new rules. Small businesses will have to understand new terminology and concepts and new obligations. Yet small businesses generally have less time, resources and expertise to comb over contracts and new laws, interpret language and ensure they understand it.

It is vital that the design of the reforms is clear, right-sized and informed by stakeholder insights to understand any unique consequences to be managed in particular sectors. The reform's application should be prospective and with a reasonable transition timeframe of no less than 12 months. Enforcement actions and penalties should be reserved only as a last resort or where there is clear and compelling evidence of an intent to subvert the ban.

The ASBFEO notes the wider scope of potential reforms contemplated in Treasury's consultation paper, including expanding a ban on non-compete clauses to independent contracting, franchising and to workers earning above the Fair Work income threshold. The ASBFEO urges caution against policy expansion that could create unintended consequences and raise business and stakeholder uncertainty. Instead, the focus should be on the prudent delivery of the originally announced reform to non-compete clauses for employees below the income threshold, on proper consultation and design, and assessing its implementation before contemplating further steps.

Recommendation 1: Ensure the definition of 'non-compete clause' and associated description of the prohibition in the Fair Work Act is clear, able to be readily understood by employers and employees, and explicitly excludes circumstances and types of restraints that are not intended to be captured.

The definition of a non-compete clause for the purposes of a ban should be clear and able to be readily understood by those employers and employees who are neither expert nor experienced in industrial relations or legal interpretation. How a non-compete clause is defined in the Fair Work Act, and the articulation of the prohibition on such clauses, should not have the unintended consequence of capturing or suggesting a prohibition on clauses still available to small businesses to protect their legitimate business interests.

The ASBFEO is broadly comfortable with the United States Federal Trade Commission's (FTC) formulation of a non-compete clause that Treasury cites in the paper:

> *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.*

[3] ABS Counts of Australian Business, Table 13a, August 2024 and ASBFEO calculations (excludes businesses that are not registered for GST).

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

The ASBFEO believes this definition is suitably inclusive to achieve the policy intent while clear enough to help communicate the prohibition with which employers are expected to comply.

The ASBFEO recommends that in addition to this definition, and/or the language of the provision setting out the prohibition in the Fair Work Act, further detail is included to avoid the risk of capturing circumstances and restraints protecting legitimate business interests that are not contemplated nor intended to be captured.

Recommendation 2: The definition of 'employee' for the purpose of a prohibition on non-compete clauses should maintain consistency with the existing ordinary meaning set out in the Fair Work Act.

The ASBFEO believes that wherever possible to reduce complexity, existing definitions should be utilised and consistency with existing legislative language, tests and employer understanding be maintained. Consequently, the ASBFEO does not believe it would be beneficial to introduce additional complexity with a new definition of 'employee'. The ASBFEO recommends that for a ban on non-compete clauses, the existing ordinary meaning of an employee within the Fair Work Act under s 15 and 15AA be utilised.

The ASBFEO understands that some employers may find the test under this ordinary meaning complex and sees this reform as an opportunity to enhance employer understanding of what constitutes an employee-employer relationship.

Recommendation 3: A reasonable transition period of at least 12 months from passage of legislation must be provided, supported by targeted education for small business and clarity about its application to existing contractual arrangements.

The introduction of a ban on non-compete clauses represents a significant regulatory shift, particularly for small businesses that often lack the legal and industrial relations expertise to interpret and apply new obligations. A minimum 12-month transition period is essential to allow businesses adequate time to:

- Review and amend existing employment contracts.
- Seek advice on compliance obligations.
- Understand the scope and implications of the ban, including which clauses remain permissible (e.g. non-solicitation and confidentiality clauses).

During this transition, well-targeted education must be delivered to small businesses through trusted channels. While the Fair Work Ombudsman or another Government entity may lead general awareness raising efforts, ASBFEO, industry bodies and representative organisations are best placed to deliver tailored guidance that recognises the particular needs and circumstances of different business sectors. The ASBFEO encourages the Government to work with these bodies to tailor education resources and leverage communications channels so small businesses can obtain well-targeted and timely information.

Clarity around the reform's application to existing contractual arrangements is also critical. Some small businesses use standardised templates and may not be aware that a non-compete clause is present or enforceable. Transition communication must clearly articulate:

- Whether existing clauses will be grandfathered, sunsetted, or deemed unenforceable from a specified date.
- How legacy contracts should be managed during the transition.
- What dispute resolution pathways are available.

The ASBFEO would also emphasise that the introduction of a ban on non-compete clauses should be accompanied by education for small business about what protections can be used to protect their reasonable and legitimate business interests, including client non-solicitation clauses and confidentiality agreements.

Recommendation 4: The regulatory posture for enforcement of a ban on non-compete clauses should emphasise education.

To ensure the successful implementation and enforcement of a ban on non-compete clauses, the regulatory posture should prioritise education and awareness over punitive measures. This approach recognises that many employers—particularly small businesses—may be unfamiliar with the legal definitions and implications of employment restraints under the Fair Work Act 2009, or even that their employment contracts include a restraint that meets the definition of a ban.

Enforcement actions and penalties should be imposed only as a last resort or where there is clear and compelling evidence of an intent to subvert the ban.

Recommendation 5: Disputes relating to non-compete clauses should be managed expeditiously and cost-effectively. In the first instance, the Fair Work Commission should be empowered to hear and resolve these disputes.

The ASBFEO recommends that, in the first instance, the Fair Work Commission (FWC) should be empowered to resolve disputes between employers, and between employees and their employers, arising from a ban on non-compete clauses. The ASBFEO has long advocated for practical measures that avoid or reduce the costs for small business associated with disputes going to court. Where prime facie there is no merit to the claim, the Fair Work Commission should be empowered to quickly dismiss a claim.

Where parties are not able to resolve their dispute in the FWC, it would be appropriate that it proceed to the Federal Circuit and Family Court of Australia (Division 2) if parties so choose. Noting the potential costs associated with court matters for parties, particularly employees and small business, the ASBFEO recommends that disputes relating to non-compete clauses be capable of being heard using the small claims procedure within the Fair Work Division of the Court, provided for under Chapter 4 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021*.

The Federal courts can be an inhospitable place for a small business. The significant cost, delay, obstacles and risks of a small business litigant with limited resources means it is unlikely they have the capacity to bring an action where they have a legitimate and enforceable right relating to a restraint clause. Conversely, a small business facing a claim in court from an employee seeking to void a legitimate clause will face significant costs not of their own choosing. The Fair Work Commission and existing informal expedited process within the Federal Circuit Court's Fair Work jurisdiction provide appropriate forums in which to resolve these disputes, reducing the impost on small business and letting them get back to work.

As mentioned earlier, ASBFEO has significant concern with the wider scope of potential reforms contemplated in Treasury's consultation paper, including expanding a ban on non-compete clauses to independent contracting, franchising and to workers earning above the Fair Work income threshold. The Fair Work jurisdiction has already expanded into business-to-business contracting with the scope creep into an 'employee-like' jurisdiction. The concerns that this policy expansion sought to address were already largely attended to by the Independent Contracting Act 2006. The true issue requiring policy attention was the difficulty small businesses and independent contractors faced enforcing provisions through the Federal Court. Rather than providing a more 'fit for purpose' judicial path through a tailored, accessible, affordable and responsive Federal Circuit Court mechanism as we have advocated and support for ASBFEO's dispute resolution services, the Fair Work jurisdiction was extended to cover only sign-on terms and termination matters. ASBFEO continues to assist with disputes arising 'through the life' of these contracts. It would further confuse the commercial landscape to again extend the Fair Work jurisdiction to enforce an ill-conceived ban on non-compete clauses to independent contracting, franchising and other business-to-business agreements, where existing commercial safeguards such as Unfair Contract Terms protections, are in place. Enforcing interests under existing protections would benefit from policy engagement on ASBFEO's proposal to provide a more 'fit for purpose' judicial path through an appropriate Federal Circuit Court mechanism.

Recommendation 6: Retain reasonable protections for legitimate business interests and business value such as client non-solicitation clauses.

The ASBFEO emphasises the significant importance of protecting business value and legitimate business interests such as sensitive intellectual property and valuable client relationships. The ASBFEO does not support the extension of reforms to client non-solicitation clauses without further assessment of benefits and costs. These clauses provide a valuable and necessary protection for legitimate business interests. Were restrictions to be considered, the ASBFEO recommends Treasury engage in further consultation to understand the potential consequences of restricting such clauses in different business sectors.

For example, in mortgage broking, banks have the ability to 'claw back' a commission paid to a broker firm where the mortgage is taken on by another broker within 2 years. This means that if an individual leaves the firm and solicits clients from that firm within 2 years, the firm may lose not only the client, but the commission the firm earned. An example like this suggests that were a restriction on client non-solicitation clauses considered, it would be most appropriate to enable these clauses to operate for 2 years post an employee's departure to avoid such consequences.

If you require any further information or would like to provide specific feedback on this submission, please do not hesitate to contact the Policy and Advocacy team via email at advocacy@asbfeo.gov.au.

Yours sincerely

The Hon. Bruce Billson

Australian Small Business and Family Enterprise Ombudsman