Australian Chamber of Commerce and Industry

Submission to the Treasury Issues Paper on Non-Compete Clauses and Other Restraints

Australian Chamber of Commerce and Industry

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Working for Australia.

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Executive Summary

1. The Australian Chamber of Commerce and Industry (**ACCI**) supports the codification of the current common law with respect to non-compete and non-solicitation clauses ("restraints of trade") in an employment context. ACCI does not support the inclusion of non-disclosure agreements (**NDA**) or confidentiality clauses in this Competition Review, noting that they have no impact on labour mobility, the purported purpose of the review. Additionally, ACCI urges the Federal Government to undertake an educative process to inform employers about restraints of trade clauses, including educating businesses about how to use restraint of trade clauses appropriately and reasonably within the current common law construction.

2. ACCI supports the proposition that labour mobility is a critical part of any high-functioning economy. Low friction job mobility allows resources to be deployed where they are most efficiently utilised, and assists more productive firms to expand operations with a broader benefit to the economy.

3. Restraint of trade provisions are an important tool for employers to protect their legitimate business interests. The key aim for policymakers should be setting policies such that legitimate business interests are protected while fostering labour mobility in the economy. This balance is already routinely upheld by the Courts when tasked with enforcing restraint of trade provisions, and it must be allowed to continue, uninterrupted by policymakers.

4. Codifying the existing parameters with respect to employment contexts is not only a sensible policy approach given the sober manner in which Courts currently enforce non-compete and non-solicitation clauses but would also have the downstream impact of providing greater certainty to both employers and employees about their use and enforceability. Employees and employers would have clear, easily accessible rules by reading the relevant legislation, and could be further be supported in this task by additional education material from the Government.

5. In this sense, non-compete and non-solicitation clauses, if codified via the current common law understanding, can be a win-win for both employees and employers to the degree that greater certainty will follow and ensure that they are implemented fairly in the future. Such clauses protect companies from unfair practices or outcomes while allowing employees the freedom to pursue new opportunities within reasonable, clearly outlined boundaries.

6. Respectfully, ACCI has concerns with the relevance of the evidence used in the Issues Paper, particularly the reliance on international examples and case studies to justify change in the Australian context. Australia has a unique workplace relations system, and its regulatory settings are not comparable to the countries cited by Treasury as models for change. Similarly, ACCI is concerned that individual case studies have been given greater weight by Treasury than economic data. This has had the effect of potentially overstating the issue.

7. For instance, an ABS survey of business confirms that only 1 per cent of Australian businesses said that a potential employee had turned down their job offer because of a non-compete clause.[1] Use of non-competes does not appear to have the chilling effect on labour mobility that those advocating change suggest.

8. This Submission will first set out some general observations and submissions (Part 1), will then answer those questions posed by the Issues Paper (Part 2) and finally it will provide an overview of how the Courts treat restraints of trade (Part 3).

[1] Restraint Clauses, Australia, Australian Bureau of Statistics, released 21 February 2024

Part 1

Prevalence of Restraint Clauses and Litigation

9. The vast minority of businesses use non-solicitation of client clauses (25.4%), non-competes clauses (20.8%) and non-solicitation of co-workers clauses (18%).[2] As ACCI has already submitted, the fact that many business – although still a minority at 45.3% – use non-disclosure agreements is irrelevant. The Commonwealth frequently relies on such clauses as do businesses; it is only natural for organisations to protect their confidential information. In ACCI's view there should not be an attempt to make reform with respect to these clauses.

10. Hence, if reform to the functioning of non-solicitation and non-competes in employment contexts is to be contemplated by the Government, then the limited prevalence of these clauses weighs in favour of nothing further than codification of the common law.

11. In addition, a very limited number of disputes ever reach litigation. ACCI's own research indicates that in the previous three years to 2024, there was only an average of 12 cases each year and there have only been a mere 2 cases in 2024 thus far.[3] This accords with research undertaken several years ago, which indicated that in the period of 1989 until 2012, there had never been more than 20 employment restraint of trade cases in a given year.[4] In most years it was below 10.

12. ACCI would here submit that the limited prevalence exhibited in the court system of restraint disputes further supports no further reform than a simple codification of current common law as it relates to non-solicitation and non-compete clauses.

The Variety of Restraint Clauses

13. The Issues Paper raises several types of common contract clauses throughout its discussion including:

    a) Non-compete clauses;

    b) Non-solicitation clauses (both of co-workers and clients);

    c) Non-disclosure clauses; and

    d) Wage-fixing and no-poach agreements.

14. ACCI will deal with each of these separately below. The Issues Paper does not separately deal with those restraints deriving from a business-sale agreement. It is highly important that the Government is cautious about not impacting on restraints deriving from business-sale agreements. ACCI will raise such clauses where relevant.

[2] Restraint Clauses, Australia, Australian Bureau of Statistics, released 21 February 2024.
[3] See annexure A for methodology and case information.
[4] Chia, Hui and Ian Ramsay, 'Employment Restraints of Trade: An Empirical Study of Australian Court Judgments', Australian Journal of Labour Law, 2016.

Non-Compete Clauses

15. Non-compete clauses are a legitimate form of ensuring that business interests can be protected once an employee concludes their employment with a particular employer. This is due to the fact that employees develop significant knowledge about that employer's practices, operations, relationships, clients, suppliers, and other matters.

16. Currently with respect to a given a non-compete clause, the starting presumption is that the given clause is unenforceable. The employer must prove that the clause restrains the former employee to a degree that is no more than what is reasonable to protect a business' legitimate protectable interests.[5]

17. Non-compete restraints cannot prevent an employee from establishing a competing business, beginning employment with a competitor, or using personal skills and experience gained during employment. Non-compete restraints are only typically valid when used to protect business interests, for example knowledge of an advantage or asset innate to the business.[6] Not only must non-competes have the direct purpose of protecting a legitimate business interest but non-compete restraints must be reasonably necessary, meaning that they must:

    a) Not be for an unlimited period of time;[7] and

    b) Be limited to a geographical area within which it genuinely protects the specific interests of a given business.[8]

18. A clause that is too lengthy or too expansive in its geographical coverage will not be enforceable at common law. These matters are expanded upon further below, where specific cases are presented. In addition, to the extent reasonably necessary will also consider the level and position of the employee to which the restraint applies and the level of contact that the employee has or had with customers or clients.

19. It is ACCI's view that this threshold is appropriate and is appropriate for codification without amendment because the courts dispense with these matters in a fair and reasonable fashion in Australia – this is evidenced through this paper's discussion of the relevant case law below (Part 3).

20. Any non-compete restraint clauses that do not protect legitimate business interests or that are unreasonable in their attempts to do so are not enforceable. This common law construction should be codified into legislation.

Non-Competes Derived from Business-Sale Agreements

21. The Government should not attempt any reform to non-competes deriving from business-sale agreements as opposed to employment contexts. Any changes to such restraints could have devastating impacts on entrepreneurship.

[5] *Allied Express Transport Pty Ltd v Braim* [2022] NSWSC 1298.
[6] 'Restraints of trade in the employment context 02: Understanding non-compete clauses', Clayton Utz, 28 April 2022.
[7] *Habitat 1 Pty Ltd v Formby* [No 2] [2017] WASC 33.
[8] *ECI Australia Pty Ltd v Convey* [2020] QSC 207.

22. This is because restraint clauses in this context are in the interests of both the vendor (usually a small business) and the purchaser (usually the larger business). When most small businesses grow their enterprise to the point it can be sold, the purchaser buys the business subject to a few conditions:

    a) There is usually an 'earn out', which is a mechanism that provides for part of the agreed purchase price of the business to be paid out contingent on certain future conditions being met.

    b) The vendor usually has to commit to not compete in the same space for a period following the sale, otherwise they would undermine the very asset that they have just sold.

    c) Typically, but not always, the vendor's key shareholder or directors will need to remain as employees in the purchased business for a period of time as well as be subject to restraints so that the true value of the business can be transferred to the purchaser.

23. These arrangements are critical for the transaction and transfer of small businesses and support entrepreneurship. Without these measures available, the price that vendors can sell their businesses for will likely be substantially affected. Similarly, it would act as a disincentive for purchasers who would be less likely to have any certainty over the competitiveness of the asset that they have just acquired.

24. It should be noted that even the radical reforms which the US Federal Trade Commission implemented decided to exclude non-competes related to the sale of a business from the blanket ban set to come into force on 04 September 2024.[9]

25. Unlike most employment restraints, where an employee is subject to a restraint because of a business sale agreement, Courts are far more likely to enforce the restraint. ACCI impresses upon the Government that it is critical that these arrangements are unaffected by any new regulation.

[9] 'FTC's near-total ban on noncompete agreements challenged', Norton Rose Fulbright, April 2024.

Non-Solicitation Clauses

26. Non-solicitation clauses, in their enforceability, function as non-compete restraints do. They must protect legitimate business interests only to the extent reasonably necessary. Non-solicitation agreements stop employees from actively trying to lure away an employer's clients or colleagues after having left the company.

27. It is legitimate for an employer to seek to protect client relationships, preserve goodwill and reduce disruption. A well-defined non-solicitation agreement sets clear boundaries for what's acceptable after leaving a job and can help employees avoid unintentionally violating any agreements and potential legal issues.

28. Reasonable non-solicitation agreements will not prevent employees from using their skills and experience in new roles. Workers can and should focus on building new relationships while respecting their previous employer's boundaries.

29. Overall, non-solicitation agreements can be a win-win when implemented fairly. They protect companies from unfair competition while allowing employees the freedom to pursue new opportunities within reasonable boundaries.

30. It is ACCI's position that the courts currently enforce such clauses fairly in the employment context and supports the common law construction as it stands. This was explicated by way of discussion in the preceding discussion on non-compete clauses. To that end, codification should simply implement that common law construction.

Non-Solicitation Clauses Derived from Business-Sale Agreements

31. ACCI submits that, as with non-competes derived from business-sale agreements, non-solicitation clauses that are also derived from business-sale agreements should not be reformed in any way.

32. A big part of a business's worth is to be found in its customer base and in its team. A non-solicitation clause, whether that be in respect of clients or co-workers, prevents the vendor from undermining these very assets, which could cripple the business after the sale. A loyal clientele may be part of what attracted the purchaser to a business in the first instance. If the vendor simply begins to solicit all the previous clients or customers to follow into a new business then the purchaser has lost significant proportions of the value of the business. Non-solicitation clauses discourage this kind of scenario.

33. Furthermore, co-worker non-solicitation clauses derived from business-sale agreements can help retain employees during a period of change. As with clients, part of what may attract a purchaser to a particular business is its talent or workforce. If a purchaser believes a vendor can simply try to win them back to a new, competing business, then they would be far less likely to purchase a business – this would therefore represent a major disincentive to entrepreneurialism.

34. Hence, non-solicitation clauses derived from business-sale agreements are crucial to preserving entrepreneurialism. Without such protections, the value of businesses would reduce. Codification of the common law with respect to non-solicitation clauses should not extend to those that are derived from business-sale agreements.

Non-Disclosure Clauses

35. ACCI is disappointed by the Issues Paper attempt to include NDAs and confidentiality agreements in this process. These clauses have no impact on labour mobility, the purported purpose of investigation through the Issues Paper.

36. NDAs do not attempt to restrict employees in their ability to move to a competing business or to create a business that operates in competition with a former employer. These agreements have zero impact on labour mobility.

37. NDAs and confidentiality clauses are simply designed to restrict employees from sharing confidential information or other sensitive information with others. They are the most frequently used restraint in Australia.[10] Such agreements safeguard confidential business information, like trade secrets, client lists, or marketing strategies.

38. Employees agree to keep this confidential information secret and not disclose it to anyone outside the company without permission. This applies even after employees leave or have their employment terminated.

39. NDAs cannot indefinitely limit employees from disclosing information or impose unreasonable geographical limitations, neither can they restrict employees from sharing general knowledge or skills that an employee may have learned on the job.[11] NDAs that are not reasonable will not be upheld at common law, as with the previously discussed forms of restraint of trade clauses.[12]

40. These agreements can provide significant benefits to employers. They safeguard an employer's competitive edge by keeping sensitive information like trade secrets, client lists, formulas, or marketing strategies under wraps. This helps prevent industrial espionage and maintains a level playing field.

41. NDAs also discourage employees from sharing confidential information with competitors or unauthorised individuals – the Commonwealth also uses confidentiality clauses in order to prevent the sharing of confidential information.[13]

42. When used properly these agreements can clearly outline expectations and set clear boundaries for what information is confidential and what can be shared. This helps employees avoid unintentionally breaching the agreement and potential legal issues. NDAs are also often used to protect the privacy and reputation of employees. They are agreements, which employees have to freely enter into in addition to their employment contracts.

[10] 'Restraint Clauses, Australia', ABS, Released 21 February 2024.
[11] *Robinson v Waco Kwik-Fit Pty Ltd* (2008); *Bell Helicopter Australia Pty Ltd v Nguyen* [2009] NSWSC 104.
[12] Ibid.
[13] 'Albanese vowed his government wouldn't happen in secret — this week showed how far they've strayed from that promise', Brett Worthington, Australian Broadcasting Channel, 28 March 2024.

Wage-Fixing and No-Poach Agreements

43. There is no evidence of widespread use of wage fixing or no-poach agreements in Australia. Such agreements between businesses may raise some competition issues and should be used with caution.

44. Wage-fixing agreements are agreements between two or more businesses to put a cap on the wages and conditions of their employees.

45. No-poach agreements are agreements between two or more businesses to refrain from recruiting from the other's workforces or to prohibit hiring from each other's workers altogether.

46. There has been a proliferation of actions throughout overseas jurisdictions in attempts to limit the use of either no-poach or wage fixing agreements, or both. Those jurisdictions include Canada, the US, the United Kingdom, France, the Netherlands, Portugal, Switzerland, the European Commission, and others.[14]

47. The UK specifically urged businesses to avoid these practices labelling them anti-competitive and an example of business cartels. This is due to the notion that when companies agree on wages, they eliminate the incentive to offer higher salaries or better benefits to attract top talent. This may stifle innovation because competition for skilled workers can drive companies to improve their work environment, offer training opportunities, and develop new technologies to attract and retain talent. Wage fixing agreements remove this pressure to innovate, potentially leading to stagnation in the workplace.

48. ACCI would here draw the attention of the Treasury to the practical effect of multi-employer bargaining, which recent changes made by the Government to the Fair Work Act encourage. These enterprise agreements result in multiple employers, with 'clearly identifiable common interests' – i.e., competitors in the same industry or geographical area – having the same wages, terms and conditions applied to their workforce, sometimes without their consent. The Minister for Employment and Workplace Relations indicated as much (emphasis added):[15]

> *The single-interest stream is still important. You'll get – and not only for workers; you'll also, for example, get a series of employers – take industries like sheet metal or air-conditioning where the industry standard is well above the award and multi-employer bargaining allows the different competitors to have an agreement where they're not competing on a race for the bottom on wages, where people aren't just undercutting each other, that standard above-award industry standard gets reflected and then they compete on quality and everything else.*

49. This would appear to contradict many of the alleged problems which the Treasury Issues Paper is attempting to ameliorate because the Minister is, in effect, advocating for a form of wage-fixing to be implemented by employers and employees. He states that employers

[14] Issues Paper, 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity', the Treasury, April 2024, page 37.
[15] Interview - ABC RN Breakfast with Patricia Karvelas, The Hon Tony Burke MP, 08 November 2022.

will not be competing on wages under a multi-employer agreement. ACCI would ask Treasury to investigate whether these changes, and changes empowering the Fair Work Commission to set minimum standards for independent contracts in the road transport and "gig" sectors are potentially implementing an uncompetitive practice, namely that they may result in wage-fixing, and investigate whether those legislative changes need to be repealed to prevent anti-competitive outcomes.

50. To reiterate, throughout this paper the term 'restraint of trades' or 'restraint clauses' does not refer to or include in its meaning wage-fixing or no-poach agreements.

Enforceability of Restraint Clauses

51. The majority of restraints are clearly unenforceable, as actual case law demonstrates (examined further below at Part 3), examples such as a yoga instructor or a lash technician having a non-compete or other restraint clause would in all likelihood never be upheld at common law.

52. The Issues Paper references instances where non-competes have been used in what could only be described as an unreasonable fashion – this is directly contrary to the common law principles associated with restraint clauses, which emphasise that clauses must be reasonable.

53. In this sense, ACCI asserts that some of the cases discussed are sensationalist. It is potentially disingenuous to rely on such examples when there is no legal basis on which such matters, in all likelihood, could ever be enforced successfully if pursued to their legal finality.

54. Furthermore, while the Issues Paper does acknowledge that many clauses are unenforceable, it goes on to state that workers would not be able to afford the costs associated with disputing said enforceability. ACCI would submit that it is in fact the party interested in enforcing the clause, i.e., the employer, that must begin proceedings and there are several processes to take place before a matter ever arrives at court.

55. In addition, an employer must act quickly to take Court action to enforce a restraint otherwise a Court will not be persuaded that the *balance of convenience* favours the granting of an injunction in favour of the employer. All the onus is on the employer to act swiftly as soon it becomes aware of the employee joining a competitor. In practice, when the employee gives notice, this plays out rapidly.

56. The starting presumption is that restraint of trade clauses are unenforceable, the employer must prove that the clause is necessary to protect the legitimate protectable interests of the business and that the clause is no more than reasonable for purpose of protecting those interests.[16] This is a very high threshold that the employer must demonstrate, not the employee.

57. ACCI would also point out, to that end, a quote from the Issues Paper itself:

> "The Competition Review heard that of those restraint of trade matters which escalate to engaging barristers, fewer than half proceed to court, and only half of those cases reach interlocutory stage and seldom proceeded to full trial."[17]

58. Evidently, of the minority of businesses that use restraint clauses, not only have around 95 per cent of those businesses never sought to enforce their restraint clauses in any way,[18] and not only does onus rest with the employer but seldom does enforcement action where taken even proceed to trial. The issues which arise around the interlocutory stage for workers, which the Paper raises, therefore can only concern the smallest

[16] 'Restraints of trade in the employment context 01: What do I need to know?', Clayton Utz, 31 March 2022.
[17] Issues Paper, 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity', the Treasury, April 2024, page 15.
[18] See footnote 1.

fraction of workers with restraint clauses. Even though the Issues Paper acknowledges its many research limitations, from merely a logical standpoint the notion that such a fraction of the population is having a material economic impact on job mobility and wages growth is dubious.

59. To that end, although the Issues Paper frequently asserts a so-called "chilling effect", it also admits that certainly the ABS data would indicate otherwise, as the Issues Paper itself suggests at page 22:[19]

"However, the recent ABS restraint clause survey suggests employers may not have experienced significant barrier in attracting talent due to the use of non-competes."

60. Codifying the common law construction would eliminate any ability for unenforceable clauses to maintain ambiguity by shrouding themselves in common law. Codifying the common law would provide practical guidance and clarity to both employers and employees, allowing businesses to protect legitimate interests while giving both workers and employers the ability to understand when clauses are being implemented fairly and when they are not.

[19] Issues Paper, 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity', the Treasury, April 2024, page 22.

Overseas Research

61. ACCI would here express its concern at the extent to which the Issues Paper relies on overseas developments and examples. These examples have limited relevance to the Australian legal system, which treats workers very differently and practices enforcement sensibly and reasonably in regard to restraint clauses.

62. The repeated references to the US economy and its functions have limited importance given the marked and material differences between the Australian and US economies' employment laws. Employees in the Australian labour market have been provided significant protections from dismissal and adverse action under a range of circumstances. The US economy is strikingly different, the vast majority of workers, 74 per cent according to job listing site Betterteam, are on at-will agreements.[20]

63. These agreements allow employers to terminate the employment of employees at any time and without cause, explication, or warning. In addition, employers are able to change the terms of employment, such as wages, or shift schedules, without notice or consequence.[21] Similarly, these agreements allow an employee to leave their employment at-will. Under such a hire and fire set of circumstances, it is far more obvious that non-competes may have a superfluously disproportionate impact on job mobility, however, Australia is very different.

64. Additionally, in the US, restraint clauses have been found to largely apply to high paid, highly skilled workers whereas the Treasury Issues Paper argues that restraint of trade clauses disproportionately impact the lower paid in Australia.[22]

65. All this to say that, in ACCI's view, it is not an appropriate comparison that the Issues Paper attempts to make by highlighting research into the use of restraint clauses in the US as a means to infer the potential economic impacts which clauses of the same name may have in Australia.

[20] 'At-Will Employment: Complete Guide with State Information and Definition', Betterteam, 20 January 2021, accessible here: https://www.betterteam.com/at-will-employment.
[21] Ibid.
[22] Starr, Evan et al 'Noncompete Agreements in the U.S. Labor Force', Journal of Law and Economics, October 2020; Issues Paper, 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity', the Treasury, April 2024, page 8.

Deficiencies in the Issues Paper

66. It is ACCI's position that the Issues Paper does not make a strong case that a problem exists in Australia. an ABS survey of business confirms that only 1 per cent of Australian businesses said that a potential employee had turned down their job offer because of a non-compete clause.[23] Of the minority of Australian businesses that actually use at least one form of restraint clause, only 5.1 per cent of that minority indicated having threatened to take or had taken legal action to enforce a restraint clause.

67. The Issues Paper highlights data deficiencies on a number of occasions (emphasis added):

- "Empirical evidence on the long-term economic consequences of non-compete clauses on business productivity is relatively limited";[24]
- "There is limited empirical evidence on the impacts of client (or other business contacts) non-solicitation".[25]
- "There is limited empirical research that exists on the impact of co-worker non-solicitation clauses on businesses and workers";[26]
- "It is difficult to estimate the prevalence of either no-poach or wage-fixing agreements in the economy as these agreements are often made in secret and may be unwritten. Even if not unlawful, businesses will typically avoid publicising these arrangements if they impose a cap (as opposed to a floor) on worker wages (and other benefits). Consequently, there is limited evidence of their use.";[27]
- With respect to prevalence of restraints in the franchising sector, the Paper states "However, details on the specific type of restraint are limited, such as whether these restraints impact workers (e.g. no-poach agreements), intra-brand competition (non-compete clauses between franchises), or overall business dynamism (non-compete clauses post termination of the franchise relationship).";[28]
- "Evidence from overseas finds that workers with a non-compete clause have lower job mobility and bargaining power during employment and experience lower wages growth than workers without a non-compete clause. However, there is a lack of similar research in the Australian context.";[29]
- "In the same way that evidence on the prevalence of no-poach and wage-fixing agreements is scarce, there are few measurements of the impact of these

[23] Restraint Clauses, Australia, Australian Bureau of Statistics, released 21 February 2024
[24] Issues Paper, 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity', the Treasury, April 2024, page 19.
[25] Ibid, page 26.
[26] Ibid, page 27.
[27] Ibid, page 33.
[28] Ibid, page 34.
[29] Ibid, page 22.

agreements on wages and other outcomes, due to the secrecy of these arrangements";[30]

- "Little empirical research has been identified on the impacts on workers and businesses of non-disclosure clauses which restrict former workers disclosing the confidential information of the business";[31]

68. In ACCI's view, that the economic case has not been appropriately made to justify reform beyond codification of the common law.

[30] Ibid, page 36.
[31] Ibid, page 29.

Preferred Approach – Codification of the Common Law

69. To the extent that it has been exhibited that there is a lack of understanding among employees about restraint of trade clauses in contracts, an educational approach may be undertaken to address this issue. The Issues Paper, highlights the lack of understanding at page 22:

> "Australian research has found that, while uncertainty impacts both businesses and workers, it weighs more heavily on workers who lack the knowledge of court proceedings and decisions, and the financial, psychological, and reputational resources to bargain and undertake litigation."

70. Clearly then, the issue is not so much the clauses themselves and the law surrounding them but rather that workers do not clearly understand how the enforceability of these clauses functions in practice. The obvious solution, therefore, is a dual approach.

71. Firstly, codification of the current common law with respect to non-competes and non-solicitation clauses will provide both employers and employees certainty about how these clauses may be implemented fairly and reasonably.

72. As canvassed earlier in the submission at paragraphs [16] to [18], not only must restraints have the direct purpose of protecting a legitimate business interest but non-compete restraints must be reasonably necessary, meaning that they must:

    c) Not be for an unlimited period of time;[32] and

    d) Be limited to a geographical area within which it genuinely protects the specific interests of a given business.[33]

73. A clause that is too lengthy or too expansive in its geographical coverage will not be enforceable at common law. These matters are expanded upon further below, where specific cases are presented.

74. In addition, to the extent reasonably necessary will also consider the level and position of the employee to which the restraint applies and the level of contact that the employee has or had with customers or clients.

75. These are all factors that must be considered when determining how to codify the common law. These principles should be a key part of any legislative infrastructure that the Government may intend to institute. Treading along the current common law understanding would have both the effect of being fair alongside providing much needed certainty to employees and employers.

76. Secondly, the Treasury should undertake educational activities so that workers and employers are provided a more thorough understanding. This would solve two problems. One, it would inform workers to be aware of restraint clauses that may not be reasonable and therefore enforceable. Two, it would assist employers to understand that some clauses are unreasonable and prevent them from including such clauses in future contracts.

[32] *Habitat 1 Pty Ltd v Formby* [No 2] [2017] WASC 33.
[33] *ECI Australia Pty Ltd v Convey* [2020] QSC 207.

77. Organisations such as ACCI would be able to assist the Department in outreach activities.

78. ACCI outlines the relevant common law principles below, these could form the basis for the Treasury to begin thinking about codification.

Part 2

Discussion Questions

Question 1

Does the common law restraint of trade doctrine strike an appropriate balance between the interests of businesses, workers and the wider community? If no, what alternative options are there?

79. The common law restraint of trade doctrine already strikes the appropriate balance between the interests of businesses, workers and the wider community.

80. ACCI refers to its submissions at [72] to [74]. The courts system will only uphold non-competes or non-solicitation clauses in circumstances where they extend only to a business' legitimate protectable interests and where they only do so to the extent reasonably necessary to protect those interests. Clauses which extend beyond these parameters are unenforceable and are regularly deemed so by the courts.

81. When these clauses are used in a lawful manner, they protect business from unfair competition. They cannot prevent a person from simply using their skills and experience with a competitor.

82. As previously submitted, these clauses can be a win-win for employees and employers when implemented fairly and clearly. In ACCI's view this patently strikes the correct balance between the interests of businesses, workers and the wider community.

Question 2

Do you think the Restraints of Trade Act 1976 (NSW) strikes the right balance between the interest of businesses, workers and the wider community? Please provide reasons. If not, what alternative options are there?

83. ACCI resubmits that its preferred approach is codification of the common law principles as referred to at [69] to [78].

Question 3

Are current approaches suitable for all workers, or only certain types of workers? For example, senior management, low-income workers, or care workers etc?

84. Current approaches are suitable for all workers. ACCI submits that the focus must remain on whether or not a legitimate protectable interest exists, the type of worker and their seniority already plays into this consideration.

85. See paragraphs [132] to [143] for further explication of the common law principles.

Question 4

Would the policy approaches of other countries be suitable in the Australian context? Please provide reasons.

86. No, the approach of the US, for example, would be highly unsuitable. Not only might the recent FTC decision be thrown out in the courts system, but the US labour market functions very differently and those policy approaches have very limited relevance.

87. To name a few of many differences, the US labour system, for example, does not have a modern awards system, has most workers on at-will agreements, has a presumption that all workers (except in Montana) are at-will employees, and has no federal laws requiring paid holidays.[34]

88. See paragraphs [6], [61] to [65] where ACCI discusses this in greater detail.

89. Furthermore, the Australian employment system is highly unique. Any reforms must be unique to the system itself, which differs significantly from other systems across the world. For example, Australia is the only country which has a modern awards system.

90. To that end, ACCI submits that the policy approaches of other countries should not be provided significant weight in the consideration of any reform.

Question 5

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

91. ACCI submits its preferred approach from paragraph [69] to [78].

Question 6

What considerations lead businesses to include client non-solicitation in employment contracts? Are there alternative protections available?

92. Non-solicitation clauses are important for multiple reasons.

93. Businesses invest significant time and resources into building relationships with their clients, staff and others. These relationships are considered valuable assets, and non-solicitation clauses help prevent former employees from leveraging those connections to take clients away to a competitor or their own venture.

94. This is a legitimate avenue through which businesses can protect their interests. ACCI refers to its substantive submission at [26] to [34] where this is discussed further.

Question 7

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

95. The impact of client non-solicitation clauses already appropriate consider the impacts on clients. Client non-solicitation clauses can provide benefits to clients, not simply to an employer. They ensure stability of service and protection from inappropriate sales tactics.

[34] 'At-Will Employment: Complete Guide with State Information and Definition', Betterteam, 20 January 2021, accessible here: https://www.betterteam.com/at-will-employment; 'Holiday Pay', US Department of Labor, accessible here: https://www.dol.gov/general/topic/wages/holiday;

96. When a trusted employee leaves a company, a non-solicitation clause can help ensure continued stability in client service. The client can expect to keep working with the same team they've built a rapport with, minimising disruption.

97. Additionally, client non-solicitation clauses can discourage former employees from using their insider knowledge to pressure clients into switching to a competitor. This helps protect clients from potentially misleading sales tactics that rely on personal connections rather than the merits of the new product or service.

98. Furthermore, it is crucial that it be recognised that client non-solicitation clauses do not prevent clients from choosing to switch providers if they're unhappy. They simply prevent former employees from directly soliciting them. To that end, it is incontrovertible that the impacts on clients are appropriately considered.

99. Finally, ACCI submits that the suitability of restraints has less to do with the given worker or client in question and more to do with whether or not a legitimate protectable interest exists. This is how the common law currently deals with these matters and ACCI supports that approach.

Question 8

What considerations lead businesses to include co-worker non-solicitation in employment contracts? Are there alternative protections available?

100. Co-worker non-solicitation clauses are a legitimate manner of protecting business interests in a reasonable fashion.

101. Co-worker non-solicitation clauses promote workforce stability, reduce turnover and protect team cohesion. Such clauses therefore are regularly used not only to maintain stability within the workforce of a particular enterprise, but they also protect the business from losing out on skilled employees it has invested time and money in through training and development.

102. It is important to note that, and has been canvassed already, non-solicitation clauses have limitations and need to be carefully crafted to be enforceable. They typically only apply to colleagues the employee had direct dealings with, and courts generally favour a reasonable scope that protects legitimate business interests without unduly restricting the employee's ability to find new work.

103. Again, it is crucial that it be recognised that these clauses cannot prevent employees from simply leaving for a competitor. To that end, these clauses strike the appropriate balance between the needs of an employer and certain employees.

104. ACCI would support codification of the common law and refers back to its preferred approach at [73] to [82].

Question 9

Is the impact of co-worker non-solicitation clauses more acute for start-ups/new firm creation or in areas with skills shortages in Australia?

105. ACCI submits that this is a contrived issue. Co-worker non-solicitation clauses are only enforceable where they are used to reasonably protect legitimate business interests. In that sense, the size of a particular business matters less than whether a given business has a legitimate protectable interest and whether they are seeking to protect that interest in a reasonable fashion.

106. There is no evidence that co-worker non-solicitation clauses materially impact on the ability of businesses to attract staff – as previously canvassed the ABS survey of business confirms that only 1 per cent of Australian businesses said that a potential employee had turned down their job offer because of a non-compete clause.[35]

107. Additionally, such clauses in the realm of business-sale agreements may in fact protect new owners and encourage entrepreneurialism. A part of what may attract a purchaser to a particular business is its talent or workforce. If a purchaser believes a vendor can simply try to win them back to a new, competing business, then they would be far less likely to purchase a business – this would therefore represent a major disincentive to entrepreneurialism and non-solicitation clauses help prevent against this.

108. ACCI refers to paragraphs [139] to [150] where the relevant common law principles are discussed in further detail, which ACCI supports the codification of.

Question 10

What considerations drive businesses to include non-disclosure clauses in employment contracts? Are there alternative protections, such as s183 of Corporations Act 2001 available?

109. Any notion that businesses should not be able to protect their legitimate interests through the use of an NDA or confidentiality clause is opposed. ACCI is disappointed by the Issues Paper's attempts to include NDAs and confidentiality agreements in this process. These clauses have no impact on labour mobility, the purported purpose of investigation through the Issues Paper.

110. NDAs do not attempt to restrict employees in their ability to move to a competing business or to create a business that operates in competition with a former employer. These agreements have zero impact on labour mobility.

111. NDAs and confidentiality clauses are simply designed to restrict employees from sharing confidential information or other sensitive information with others. They are the most frequently used restraint in Australia.[36] Such agreements safeguard confidential business information, like trade secrets, client lists, or marketing strategies.

112. The Commonwealth itself has repeatedly relied on these important clauses to protect their own confidential information.[37] Businesses have a right to protect confidential information just as the Commonwealth does.

113. ACCI refers to its substantive submission from [38] to [44], which canvasses this topic.

[35] Restraint Clauses, Australia, Australian Bureau of Statistics, released 21 February 2024
[36] 'Restraint Clauses, Australia', ABS, Released 21 February 2024.
[37] 'Albanese vowed his government wouldn't happen in secret — this week showed how far they've strayed from that promise', Brett Worthington, Australian Broadcasting Channel, 28 March 2024.

Question 11

How do non-disclosure agreements impact worker mobility?

114. NDAs do not impact worker mobility. Confidentiality clauses aim to protect a company's sensitive information, like trade secrets or customer lists. They do not restrict where an employee can work, only what information they can use in new roles.

115. Any suggestion that these clauses impact worker mobility should not be accepted. ACCI would assert that any NDA which sought to enforce restrictions on future employment opportunities would not be, by nature, classified as an NDA – it would be a non-compete clause. NDAs should not be confused with non-compete clauses.

116. Confidentiality clauses do in fact allow employees the freedom to pursue new opportunities while safeguarding a company's legitimate confidential information.

117. ACCI refers to its substantive submission at [38] to [44], which discusses NDAs in detail.

Question 12

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

118. NDAs do not have a material impact on the creation of new businesses.

119. Confidentiality clauses in an employment context aim to protect a company's sensitive information, like trade secrets or customer lists. They do not restrict an employee from using their skills and experience to start a competing business.

120. So long as a former employee avoids using or disclosing trade secrets or other protected information, then a reasonable, enforceable NDA will not prevent that person from creating a new business.

121. NDAs may also serve to protect against disincentives to entrepreneurialism. In terms of business-sale agreements, NDAs provide significant certainty to a purchaser. They ensure that commercially sensitive or confidential information is protected. If a vendor could simply use such information to start up a competing business then this would not only reduce the value of the business but also discourage any potential purchaser.

122. As outlined previously, and as is the case with other restraints, these clauses must also be reasonable and only extend to legitimate protectable interests. ACCI refers to paragraphs [35] to [42] of its submission where NDAs are discussed in greater detail.

Question 13

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

123. Such matters are already dealt with appropriately at common law as has been discussed below at paragraphs [151] and [152] of ACCI's submission.

Question 14

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

124. As discussed, ACCI submits that the appropriateness of a clause has less to do with the worker in question and more to do with whether or not a legitimate protectable interest exists. Current approaches are suitable for codification because a business may only use a restraint clause in order to reasonably protect a legitimate protectable interest as required under the common law. This is a fair and consistent approach, which frequently already accounts for an employee's unique characteristics such as seniority and business connections.[38]

125. See paragraphs [139] to [150] where the relevant common law principles are discussed in further detail.

Question 15

Should there be a role for no-poach and wage-fixing agreements in certain circumstances, for example:

a) If the agreement is between unrelated businesses (e.g., competitors)?

b) If agreement is between businesses that are co-operating in some way (e.g., joint venture partners)?

c) If it is part of a franchise agreement, either horizontally (where franchisees through a common agreement do not to poach each other's staff) or vertically (where franchisors make agreements with each franchisee)?

126. ACCI refers to paragraphs [43] to [50], which addresses these matters.

127. With specific reference to franchisees and those businesses engaging in joint ventures or partnerships, ACCI foresees these issues having a far more inconsequential impact where there is agreement not to poach staff within a single brand. In these instances, such agreements may produce positive effects by protecting workforce cohesion and stability. Wage-fixing concerns are likely to be completely irrelevant in franchise settings as franchisees would be likely to have substantially similar terms and conditions and may be on the same enterprise agreement. In such cases, employees would be less likely to obtain the benefits that may usually be derived from exercising mobility in the labour market due to the very nature of franchising. Additionally, in circumstances such as a joint venture, partnership, or franchise setting there is a definitive need to conserve harmony between businesses that need to operate with significant cooperation.

Question 16

Are there alternative mechanisms available to businesses to reduce staff turnover costs without relying on an agreement between competitors?

128. As discussed, ACCI submits that such clauses may raise some competition issues and should be used cautiously. Such agreements may hinder healthy competition.

129. ACCI would here again call on the Treasury to investigate whether the Fair Work Commission's new ability to make minimum standards orders for employee-like workers and road transport contractors, or the recent reforms to multi-employer bargaining are in fact a form of anti-competitive wage-fixing, as canvassed at paragraphs [48] to [49].

[38] 'Restraints of trade in the employment context 01: What do I need to know?', Clayton Utz, 31 March 2022.

Question 17

Should any regulation of no-poach and wage-fixing agreements that harm workers be considered under competition law as an agreement between businesses (for example reconsidering the current exemption), or under an industrial relations framework?

130. With respect to the industrial relations framework, ACCI would here again call on the Treasury to investigate whether the Fair Work Commission's new ability to make minimum standards orders for employee-like workers and road transport contractors, or the recent reforms to multi-employer bargaining are in fact a form of anti-competitive wage-fixing, as canvassed at paragraphs [48] to [49].

131. Beyond that, as ACCI has submitted, this is an issue of limited prevalence in Australia and the Government would be better suited pursuing other reforms.

132. ACCI refers to its submission at paragraph [43] to [50].

Question 18

Should franchisors be required to disclose the use of no-poach or wage-fixing agreements with franchisees?

133. If the franchisors are on the same enterprise agreement, then this consideration is largely redundant. Furthermore, as previously submitted, this is an issue of limited prevalence in Australia and the Government would be better suited pursuing other reforms.

134. ACCI refers to its submission at paragraph [127].

Question 19

Are there lessons Australia can learn from the regulatory and enforcement approach of no-poach and wage-fixing agreements in other countries?

135. As discussed, the use of wage-fixing agreements or no-poach agreements between competitors may raise competition issues. Such agreements may hinder healthy competition.
136. ACCI would here again call on the Treasury to investigate whether Fair Work Commission's new ability to make minimum standards orders for employee-like workers and road transport contractors, or the recent reforms to multi-employer bargaining are in fact a form of anti-competitive wage-fixing, as canvassed at paragraphs [48] to [49].

137. Beyond that, as ACCI has submitted, this is an issue of limited prevalence in Australia and the Government would be better suited pursuing other reforms.

138. ACCI refers to its submission at paragraph [45] through to [54].

Part 3

Relevant Common Law Principles

139. The principles relevant to the validity of restraint of trade clauses in an employment law context are as follows.

140. At common law, a restraint of trade is contrary to public policy and void, unless it can be shown that the restraint is, in the circumstances of the particular case, reasonable[39].

141. The onus at common law of showing that the restraint goes no further than is reasonably necessary to protect the interests of the person, lies on the party seeking to support the restraint as reasonable, i.e. the employer.[40]

142. The validity of the restraint is to be tested at the time *of entering into the contract* and by reference to what the restraint entitled or required the parties to do rather than what they intend to do[41].

143. The Court gives considerable weight to what parties have negotiated and embodied in their contracts, but a contractual agreement cannot be regarded as conclusive, even where there is a contractual admission as to reasonableness[42].

144. The test of reasonableness is measured by reference to the interests of the parties concerned and the interests of the public. The requirement that the restraint be reasonable in the interests of the parties means that the restraint must afford no more than adequate protection to the party in whose favour it is imposed, i.e. the employer, in terms of geographic scope and time.

145. An employer is not entitled to require protection against mere competition[43]. Post-employment restraints that restrain competition are invalid unless they are reasonably necessary to protect an employer's legitimate business interests.

What are these legitimate business interests an employer can seek to protect?

146. A restraint clause will be invalid unless it is necessary to prevent:

    (a) disclosure of confidential information and trade secrets; and/or

    (b) use of a connection built up by the employee with customers/clients[44].

147. With respect to (a), the relevant knowledge must be more than simply the skill and knowledge necessary to equip the employee as a possible competitor in the trade. It must be such an acquaintance with his employer's trade secrets as would enable him to take

[39] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] 1 AC 535 at 565.
[40] *Adamson v New South Wales Rugby League Limited* [1991] FCA 9; (1981).
[41] *Woolworths Ltd v Olson* [2004] NSWCA 372 at [40].
[42] *Woolworths Ltd v Olson* [2004] NSWCA 372 at [39].
[43] *Dewes v Fitch* (1920) 2 Ch 159 at 181.
[44] *Aussie Home Loans v X Inc Services* [2005] NSWSC 285 at [14] per White J.

advantage of his employer's confidential information and/or trade connection or utilise information confidentially obtained[45].

148. With respect to (b), an employer's customer connection is an interest which can support a reasonable restraint of trade, but only if the employee has become, vis-a-vis the client, the human face of the business, namely the person who represents the business to the customer[46].

149. In New South Wales, the effect of the *Restraints of Trade Act 1976* (NSW) is to allow a post-employment restraint to be read down by the NSW Supreme Court so as to be valid. However, the Act does not allow the Court to re-draft the restraint[47].

150. Put simply, not every restraint of trade term is enforceable. Much depends upon the evidence in each case and whether the employer can establish that the restraint is reasonable in terms of geographic scope and duration and that the employee could disclose confidential information or "*take clients with him/her*". Obviously, this will be fact dependent and certainly junior and non-senior employees will not satisfy the heavy onus an employer must overcome to enforce the restraint.

Restraints during an employment relationship

151. The duty of fidelity and confidence which an employee owes to his/her employer is limited in operation. It is unlikely to prevent an employee from engaging in secondary employment unless that engagement is contrary to the employer's interests, such as when the employee is behaving competitively against the employer. It ends at the cessation of the employment contract and does not forbid certain preparatory work in setting up a competing business to the employer's.[48] Generally, more senior employees will be subject to a more onerous duty of fidelity, compared to junior employees.[49] Similarly, the duty of confidence more strictly restrains employees with greater seniority than junior employees.[50] Accordingly, the duty of fidelity and confidence does not restrict employee behaviour unvaryingly. For example, a clerical employee's obligations "*may vary drastically*" from an unsupervised professional employee in direct contact with clients.[51]

152. Courts will examine the particular facts and circumstances when determining the scope an employee's duty of fidelity and confidence, including the character of the employer's business, the employee's position and the actual and potential impact of the employee's conduct on the employer's interests. One judge has said that for many skilled and manual workers, they have successfully discharged if they have worked "according to their ability for their stipulated hours" and what they do in their free time is not the employer's concern.[52]

[45] *Dewes v Fitch* (1920) 2 Ch 159 at 181.
[46] *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717; (2006) 71 NSWLR 9 at [25] per Brereton J.
[47] *Orton v Melman* (1981) 1 NSWLR 583; *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317 at 329.
[48] *Griffiths & Beerens Pty Ltd v Duggan* (2008) 66 ACSR 472 at [146].
[49] *Plus One international Pty Ltd v Ching (No 3)* [2020] NSWSC 1598 at [448] citing *Prestige Lifting Services Pty Ltd v Williams* (2015) 333 ALR 674 at 701 [198].
[50] *Plus One international* at [449] citing *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 73 IPR 326; [2007] NSWCA 172 at [32].
[51] *Plus One international* at [450].
[52] *Plus One International* at [452] quoting *Weldon & Co v Harbinson* [2000] NSWSC 272 at [26].

Examples of the Application of the Principles Recorded Above to Particular Facts

153. The following cases are examples of how the principles recorded above have been applied by the courts. In some cases, depending upon the facts and the drafting, the restraints were enforced and in others, not enforced. Where they were enforced, it was because there was cogent and probative evidence that there was a legitimate interest to be protected, and not a mere restraint against competition.

Cases in which a Restraint was Ruled Unenforceable

Just Group Limited v Peck (2016) 264 IR 425

Facts

Ms Peck was employed as Just Group's CFO from January 2016. She resigned to take up a position with a competitor.

Just Group sought to enforce restraint clauses, including restraints which prevented Ms Peck from working with 50 retailers (including the employer she had just commenced working with) anywhere in Australia and New Zealand for a period of 12 to 24 months.

Decision

In ruling the restraint unenforceable, the Court ruled that its various permutations, as drafted, were excessive and led to ambiguity.

The Court also ruled that the restraint prevented Ms Peck from engaging in any activity that was "*the same as, or similar to*" the work she undertook, and would unreasonably preclude her from working with entities where the confidential information she had obtained during her employment was irrelevant.

Commsupport Pty Ltd v Mirow [2018] QDC 134

Facts

Commsupport Pty Ltd operated an information technology services business. It employed Mr Mirow as a computer technician. The Restraint Clause prevented Mr Mirow for a period of three months doing the following:

> "*1. Act for any person or entity (natural or otherwise) that the employer had or has as a client during the six-month period immediately prior to the employment with the employer concluding; or*
>
> *2. Contact or cause another to make contact with any person or entity (natural or otherwise) that the employer had as a client during the six-month period immediately prior to the employees employment with the employer concluding, with a view to enticing that person or entity to use the professional services of the employee or a third party*"

Decision

The restraint clause which prevented an employee from acting for or contacting *any* client of the employer who was a client of the employer in the six-months prior to the employee departing was unenforceable.

This was because the restraint was not limited to those clients of the employer with whom the employee had a client relationship with or influence over. The restraint had been drawn too broadly, and as drafted, "*the legitimacy of the interest [sought to be protected, being customer connections] gives way to the restraint being seen as one merely against competition.*"

Evans Road Medical Centre Pty Ltd v Faisal Siddiqi [2021] VCC 546

Facts

A medical centre sought to restrain one of its doctors, Dr Siddiqi, from joining another rival medical clinic approximately 5km away. The medical clinic was also concerned about patients being solicited away to the rival clinic.

Decision

The court declined to enforce the restraints. First, the court ruled that it was too broad because, as drafted, it covered patients who had not been seen by Dr Siddiqi. It could cover a patient he had not even met.

Second, the court ruled that the restraint sought to confer greater protection for the medical clinic could be justified. The restraint was poorly drafted so that there was no time limit imposed as to when the 5km restraint was to continue. This was unreasonable.

Third, the court ruled that because Dr Siddiqi's financial position was weak, and that he had a young family to support and limited work options, that the balance of convenience favoured the injunction not being granted.

Australian Regional Wholesalers v Stafford [2007] NSWSC 572

Facts

Mr Stafford was an assistant branch manager employed by a wholesaler of electrical supplies, Turk. Mr Stafford prepared quotes for clients, had access to prices, margins, discounts, projects and accounts. Mr Stafford informed Turk that he was resigning and at the end of a three months' notice period, would commence employment with a competitor. He was not prepared to comply with his six months' non-competition restraint.

Decision

The court ruled that the non-competition was in excess of that required to provide adequate protection for its confidential information. The court ruled that Turk sold 400,000 products, and that Mr Stafford could not recall any of those details and those details changed from time to time. Accordingly, as there was no evidence that Mr Stafford took copies of confidential information and that he could not exploit the confidential information, that the restraint was excessive and unreasonable in the circumstances.

The court also ruled that the non-solicitation restraint was also excessive because "*Mr Stafford was not the face of Turk so far as [Turk's major customers] was concerned and he was not in a position to control [the major customers'] business*".

Lochdyl Ltd v Lind [2024] SAMC 43

Facts

Ms Lind was a casual hairdresser at Lochdyl Pty Ltd, trading as Changing Looks Hair Salon. The owner purchased the business from Ms Lind's sister and mother and continued to casually employ her on a new contract with a non-compete clause which included a two-year restraint on poaching clients. Approximately 6 months after the new owner purchased the business, Ms Lind resigned at the owner's request and agreed to tell customers she planned to pursue a new career.

The day after Ms Lind began renting a chair at another salon and advertised a new business on Facebook. In this post she announced that she was opening her own business. In a following post she thanked customers that had stayed with her. Changing Looks alleged that a significant number of customers cancelled their continuing appointments and moved their business to Ms Lind, causing it to lose future earnings. The new owner of Changing Looks submitted that at purchase she bought "goodwill" that "was largely comprised of the existing Changing Looks customer base".

Decision

Although the Court ruled that Changing Looks had a legitimate interest in protecting its customer connections acquired through purchasing the business by restraining the hairdresser, it nonetheless found that the restraint clause was "void and unenforceable".

The Court found that the clause was "significantly longer" than necessary to protect Changing Looks's legitimate business interests, taking into account the absence of compensation for the non-compete clause, the hairdresser's low pay and the nature of client relationships:

> *"A hairdresser would usually be able to establish a connection with a 'new' customer, if not on the first appointment, by the second appointment.*
>
> *"In my view, these key aspects of the patterns of customer behaviour suggest that the repeat customer base were exposed to more than [the hairdresser] in the usual course and that ordinarily a close connection could be formed by another hairdresser by the second appointment at the latest."*

Cases where the Restraint was Upheld

DP World Sydney Ltd v Guy [2016] NSWSC 1072

Facts

Mr Guy was a General Manager of a logistics company, DP World Sydney Ltd. In his role, he had access to confidential business information concerning the way in which tariffs, incentives and penalties were calculated and charged to clients. Mr Guy also had access to business plans and

financial information, including data concerning past and anticipated earnings, costs, budgets, capital expenditure and expansion plans.

Mr Guy had also developed a range of connections with customers and clients of DPW by attending pitch meetings.

In breach of his post-employment restraint, Mr Guy accepted employment with a competitor, Asciano Executive Services Pty Ltd.

Decision

In granting the injunction, the Court found that the employer had a right to protect its legitimate business interests because:

My Guy had access to confidential information;

The industry in which DPW operated in was small with only a few competitors;

Mr Guy had built significant client relationships during his employment;

DPW offered to pay Mr Guy 3 months salary during the restraint, mitigating any financial hardship.

Justice White at [30] affirmed:

"Although an employer is not entitled to protection from competition, a restraint for a limited period against a former employee working for a competitor may be justified on the grounds that such a restraint is necessary to protect trade secrets, or confidential information. This is because of the difficulty of proving a breach of an obligation not to disclose or use such confidential information."

And at [50]:

"Having regard to the seniority of Mr Guy's position, the nature of the plaintiff's business, the small number of competitors operating in the same port as DP World and, in particular, the confidentiality of the information that Mr *Guy would be expected to obtain and use and which he did so acquire, I think such a six-month restraint is not larger than is reasonably necessary to protect DP World's legitimate interests in preserving its confidential information."*

McMurphy v Employsure Pty Ltd; Kumaran v Employsure Pty Ltd [2022] NSWCA 201

Facts

The first employee, Mr McMurphy, was appointed as Outbound Sales Manager for Employsure in February 2018. This senior role involved the development and execution of the company's business strategy.

His 2018 employment contract contained a post-employment restraint that he would not be engaged in a business in competition with Employsure for a period of 12, 9, 6 or 3 months.

The second employee, Mr Kumaran, commenced employment with Employsure in February 2018 as an Outbound Sales Consultant and, in November 2019, became a Business Sales

Partner, the most senior level of sales employee. His 2018 employment contract contained a confidentiality covenant and a post-employment restraint similar to Mr McMurphy.

In December 2020, Mr McMurphy accepted a position with ELMO Software, a direct competitor to Employsure, managing a sales team. He also offered to supply ELMO with the names of potential Employsure sales employees and provided Mr Kumaran's name, whom he had already approached about a role with ELMO.

Subsequently, in January 2021, Mr Kumaran accepted a position with ELMO as an account executive and ended his employment with Employsure on 10 February 2021.

Decision

At first instance, the court ruled that the restraints were reasonable, and Mr McMurphy had breached those restraints by commencing employment with ELMO while still employed by Employsure.

A post-employment restraint of nine months for Mr McMurphy was reasonable. Mr McMurphy breached his contract of employment by encouraging and inducing Mr Kumaran to leave his employment.

A post-employment restraint of nine months was also reasonable for Mr Kumaran, effectively delaying his start with ELMO until 10 November 2021.

The appeal judges, Gleeson JA, Leeming and Kirk JJA, supported the initial decision in all respects regarding Mr McMurphy. They noted:

> *"By taking up employment with ELMO to manage a sales team selling a competing*
>
> *software product while still employed by Employsure, Mr (M) proposed to engage in another business that may hinder or interfere with the performance of his duties to Employsure... Employsure had a legitimate interest in protecting its confidential information through a restraint against competition after the departure of an employee".*

Pearson v HRX Holdings Pty Ltd [2012] FCAFC 111

Facts

Mr Pearson was a co-founder, director and employee of a human resources consultancy called HRX Holdings. Despite a two year restraint, he left to join a competitor.

The industry saw him as a leading innovator in the HR consulting field, was the primary presenter to HRX's clients, and had an ability to establish and renew contacts with the senior executives of HRX's clients. He was the "*face of the business*".

He also had full access to all of HRX's confidential information, particularly its techniques for establishing and developing client relationships.

The limitation of the definition to businesses in which HRX was operating at the time of departure made the clause self-limiting, and less vulnerable to offending the rule against public policy.

Decision

In applying the principle that the restraint would be permitted if it were reasonable, the Court relied on the following matters:

The restraint clause expressly acknowledged that Mr Pearson was the key employee of the business and set out the reasons for that in some detail;

The two-year restraint clause was a particularly heavily negotiated point when his contract was drafted;

The duration of the restraint was specifically negotiated;

Pearson was, in effect, paid or to be paid during the restraint period;

Pearson had sought and obtained independent legal and accounting advice, and the parties expressly agreed that the restraints were reasonable.

ANNEXURE A – CASE DATA

Methodology

ACCI used the AustLII database for its legal research. There are 256 documents in AustLII case law databases under an advanced search, under the auto search function for the term 'restraint! of trade' between 1 January 2021 and 28 May 2024. The only selected database was "All Case Law Databases".

ACCI has only included those cases which are related to restraint of trades in an employment context and for which there has been a judgement. This therefore does not include those cases involving a contractor, a business sale, or where a complaint has been lodged and withdrawn or settled. This list also does not reference costs decisions arising from finalised cases.

This list, however, does include those cases where interlocutory hearing occurred, and an injunction or interim injunctive relief was granted to enforce a restraint.

List of Cases

2 cases thus far in 2024:

- Samsung Electronics Australia Pty Ltd v Grenville [2024] NSWSC 608 (21 May 2024)[53]
- Scyne Advisory Business Services Pty Ltd v Heaney [2024] NSWSC 275 (20 March 2024)[54]

12 cases in 2023:

- Techforce Personnel Pty Ltd v Jaffer [2023] FCA 1674 (21 December 2023)[55]
- 2nd Chapter Pty Ltd & Ors v Sealey & Ors [2023] VSC 599 (10 October 2023)[56]
- Smart EV Solutions Pty Ltd v Guy [2023] FCA 1580 (6 October 2023)[57]
- Pellet Experts Pty Ltd v Smith [2023] NSWSC 1170 (28 September 2023)[58]
- AEI Insurance Group Pty Ltd v Martin [2023] FCA 914 (1 August 2023)[59]
- Cushman & Wakefield Agency (NSW) Pty Ltd v Hudson (No 2) [2023] NSWSC 884 (28 July 2023)[60]
- Avant Group Pty Ltd v Kiddle [2023] FCA 685 (23 June 2023)[61]
- KPW Law Pty Ltd v Patel [2023] NSWSC 617 (9 June 2023)[62]
- Janala Pty Limited v Hardaker (No 3) [2023] NSWSC 446 (2 May 2023)[63]
- Cushman & Wakefield Agency (NSW) Pty Ltd v Hudson [2023] NSWSC 218 (14 March 2023)[64]

[53] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/608.html
[54] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/275.html
[55] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1674.html
[56] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/599.html
[57] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2023/1580.html
[58] https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2023/1170.html
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- McMurchy v Employsure Pty Ltd; Kumaran v Employsure Pty Ltd [2022] NSWCA 201 (11 October 2022)[70]
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- NOVA Employment Ltd v Michelle Hira & Ors [2021] NSWSC 1337 (15 October 2021)[80]
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We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth, and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education, and training.

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