

5 June 2024

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

By email to: competitiontaskforce@treasury.gov.au

Dear Competition Taskforce,

Issues Paper (April 2024) - non-competes and other restraints: understanding the impacts on jobs, business and productivity

The Employment Rights Legal Service (**ERLS**) welcomes the opportunity to make this submission on the above Issues Paper regarding non-compete and related clauses in employment contracts (**Issues Paper**). We consent to this submission being published. Any case studies in this submission, names and identifying information have been changed to protect client confidentiality.

About the Employment Rights Legal Service

The Employment Rights Legal Service is a joint initiative of Redfern Legal Centre, Inner City Legal Centre and Kingsford Legal Centre to provide clients across New South Wales with free employment law advice and representation. ERLS aims to address and remove the systemic barriers that prevent access to justice and allow for the exploitation of workers across New South Wales.

This submission was drafted by Kingsford Legal Centre on behalf of ERLS and draws on the experiences of the ERLS partners, including numerous case studies prepared by Redfern Legal Centre.

Overview

ERLS strongly supports legislative reform to limit the use of non-compete and other restraint of trade clauses, particularly in relation to low- and middle-income workers.

Our key reform priority is to ban non-compete clauses in employment contracts in Australia, at a minimum for low- and middle-income workers.

We also recommend further reform to restrict other restraint of trade clauses (such as non-solicitation clauses) in employment contracts so that they only operate to the extent that they are reasonable and proportionate.

We address these reforms in more details in our responses to the discussion questions below.

ERLS has had the opportunity to review the Legal Aid NSW submission to the Issues Paper consultation. We endorse that submission.

We do not intend to address every discussion question raised in the Issues Paper. Instead, we have answered the questions that will add value to the consultation process and align with ERLS' areas of expertise and experience, being questions 1 to 5, 7, 13 and 14 in the Issues Paper.

ERLS is a statewide employment law service in New South Wales and our responses to the Issues Paper are drawn from our experience as legal practitioners in that state.

Discussion questions

1. Discussion 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?

We do not consider that the current common law doctrine adequately balances the interests of businesses, workers and the wider community. The focus of the doctrine is on the legitimate business interests of the employer wanting to enforce a restraint of trade clause.¹ It does not require equal weight to be given to the interests of workers, which include but are not limited to:

- The internationally recognised right to work;²
- Fairness and equality in bargaining in employment contexts;
- The financial and material needs of workers to be able to sustain themselves and their families;
- The ability to benefit from experience and client relationships that have been developed over time; and
- For some workers, the ability to work in particular locations or conditions to accommodate their needs due to factors such as pregnancy, caring responsibilities and/or disability.

Many of these interests are shared by the wider community. The current doctrine also fails to require weight to be given to the interests of circulation of labour for other businesses (i.e. prospective employers) or for the economy as a whole.

¹ See, for e.g., *Stacks Taree v Marshall* [No.2] [2010] NSWSC 77.

² Article 6(1), *International Covenant on Economic, Social and Cultural Rights*, ratified by Australia in 1975.

Meena's story – worker with family responsibilities

Meena came to KLC for advice. She had a career as a hairdresser in a major metropolitan city. She left her job when she went on parental leave for the birth of her first child. Months later she started her own business in a location close to her home and childcare. Her former employer sent her a letter threatening legal action based on a broad restraint of trade clause in her employment contract.

Like most KLC clients, when Meena signed her employment contract she could not afford a lawyer to review it. She did not have the bargaining power to negotiate any changes to the contract before she signed it.

In response to the employer's threatening letter, Meena scaled back her business to work less hours. She stopped promoting her business and stopped working with several valued clients. She was very stressed about her situation when she came for advice.

KLC case study. Details changed to protect client confidentiality.

We have serious concerns with the way that restraint of trade clauses are currently used in employment contracts, including that:

- For the majority of our clients, there is no true bargaining process or negotiation of restraint of trade clauses at the time of formation of the employment contract or other relevant agreement;
- Non-compete clauses and other restraints of trade are commonly drafted in overly broad terms (for e.g., to cover the whole of Australia or NSW for long periods of time);
- Such clauses are frequently found in contracts for workers who earn less than \$80,000 per year;³
- Such clauses are often imposed on workers in industries or positions which are unsuitable for restraint of trade clauses; and
- Non-compete clauses and other restraints of trade are commonly drafted in terms which are uncertain. For example, complex and long-winded cascading clauses are difficult for lawyers to interpret let alone individual workers.

³ ERLS sets an income threshold of \$80,000 per year for access to free legal advice through the service.

Sera's story – restraint imposed on low income hairdresser

Sera was employed as a hairdresser on a base salary of \$31,000 – \$41,000 and her employment contract included a restraint of trade clause.

The hairdressing salon had sponsored Sera and her partner to work and live in Australia. About 18 months later, Sera resigned and began working with a new employer in a salon in the same suburb.

Her former employer sent a letter alleging Sera had breached the non-compete and restraint of trade in the employment contract, and that they had evidence that Sera was using confidential client data and client records to attract customers to her new employer. Her former employer also indicated they were going to complain about her to NSW Police and the Department of Home Affairs. Her former employer then filed a claim against her in the NSW District Court, valuing the loss at \$27,000 and seeking compensation for breach of contract, an account of profits and orders restraining the use of confidential information.

RLC case study. Details changed to protect client confidentiality.

In our experience, the inclusion of restraint of trade clauses (whether or not they are enforceable) leads workers to a range of responses. For example, employees may:

- Stay in jobs in which they experience bullying or discrimination;
- Turn down a new job or decide to delay starting their own business;
- Stop working with particular clients even where they had built a strong relationship;
- Consider leaving the region they live in or country; and/or
- Pay money to an employer to avoid the risk of being pursued through the courts.

The current common law doctrine does not address any of these concerns. It does not operate to create clarity and certainty for workers, as even specialist employment lawyers are often unable to say for sure whether a particular clause (or part of a clause) would be enforced by a court.

As outlined in the Issues Paper, there are many other approaches to restraint of trade clauses which could be adopted in Australia. ERLS supports a total ban on non-compete clauses in employment contracts in Australia. If this is not adopted, we recommend at a minimum that a ban on non-compete clauses is implemented for all workers other than high income workers as defined by the *Fair Work Act 2009* (Cth).⁴

A ban on non-compete clauses could be implemented through amendments to the Fair Work Act. If done in this way, consideration must be given to how to cover non-national system employers and employees and interaction with the *Restraints of Trade Act 1976* (NSW).

⁴ *Fair Work Act 2009* (Cth), ss 329 and 333; Fair Work Regulations 2009 (Cth) reg 2.13. The current high-income threshold is \$167,500 per year for a full-time worker.

We support any ban in the Fair Work Act being implemented as a civil penalty provision to effectively deter employers from including non-compete clauses in contracts.

Recommendation 1: the Commonwealth Government should implement a ban on non-compete clauses in employment contracts. At a minimum this ban should apply to employment contracts for all workers other than high income workers. The ban should be a civil penalty provision.

In our view it will still be necessary to set reasonable limits on other restraint of trade clauses. While not as restrictive on workers as non-competes, it is still our experience that confidentiality and non-solicitation clauses are drafted in ways that are overly broad, complex, unsuitable and generally unfair to workers.

We support further reform to address restraint of trade clauses other than non-competes. Clauses that fall into this category can be drafted in a wide variety of ways and it is beyond the scope of this paper to conduct a full analysis. It is our view that clauses such as unnecessarily broad non-solicitation clauses for low-income workers are likely to operate in a similarly restrictive way to non-compete clauses.

We therefore recommend that the Commonwealth Government consider implementing legislative changes to implement bans or otherwise ensure that restraint of trade clauses other than non-competes are only valid and enforceable to the extent that they are reasonable and proportionate, having regard to a range of factors including (but not necessarily limited to):

- The type of work (casual, gig economy, contractor or employee);
- The impact of any restraint of trade clause on an employee's ability to make a living in Australia, taking in account the employee's individual and family circumstances;
- The impact on the employer's business of the restraint being enforced or not enforced;
- The relative bargaining power of the parties at the formation of the employment contract containing the clause(s); and
- Whether any compensation is offered for the period of the restraint.

Recommendation 2: the Commonwealth Government should consider extending the ban on non-compete clauses to cover other types of restraint of trade clauses that are overly restrictive, such as broad non-solicitation clauses for low- and middle-income workers.

Recommendation 3: the Commonwealth Government should implement legislation (such as amendments to the *Fair Work Act 2009* (Cth)) to limit the enforceability of unreasonable and disproportionate restraint of trade clauses that are not the subject of a ban as recommended above. The amendments should ensure that any assessment of such a clause adequately balances the interests of all parties.

2. Discussion 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?

We do not consider that the *Restraints of Trade Act 1976 (NSW)* strikes the right balance between the interests of business, workers and the community.

The key provision of the *Restraints of Trade Act* states “A restraint of trade is valid to the extent to which it is not against public policy, whether it is in severable terms or not.”⁵ Determining whether a restraint of trade is against public policy or not requires knowledge and understanding of the common law position on restraints of trade. The language of the *Restraints of Trade Act* does not provide any additional guidance or certainty to the workers that we advise through ERLS.

Despite the ability of the NSW courts to construe restraint of trade clauses as required to meet the public policy test, in our experience employers continue to include long-winded and complicated language in their restraint of trade clauses in the hopes that some part of the restraint may be upheld by a court. In practice, this means that workers self-regulate under contractual provisions that are broader than what a court would ultimately enforce, if the employer ever took the steps to try to enforce it.

Certainty and clarity are beneficial for businesses, workers and the community as a whole. In addition to lacking certainty and clarity, the NSW position prioritises the interests of the business trying to enforce the restraint over the interests of any other business (e.g. the business hoping to hire the employee), workers and/or the community. There is no clear requirement that courts consider fairness, bargaining power or a worker’s interest in earning an income and benefiting from their experience and relationships in seeking future work.

As outlined in Recommendations 1, 2 and 3 above, we recommend that the Commonwealth Government undertake legislative reform to improve on the current position. Any reform will need to be implemented in a way that covers the ground and avoids overlap or duplication with NSW law.

Jay’s story – financial risk of legal action

Jay worked as a chef and received incentive payments whilst on an annual income of \$70,000. He resigned after experiencing a toxic workplace culture.

After Jay started a new role in a different restaurant, he received a letter from his former employer stating he had breached contractual obligations by working for a competitor nearby without written consent to do so. The letter referred to the incentive payments he had received, alleging that they were paid in consideration of employees being strictly bound by the restraint of trade clause in the employment contract. The former employer stated Jay must repay his incentive payments in the amount of \$45,000 or else they would pursue legal action.

RLC case study. Details changed to protect client confidentiality.

⁵ *Restraints of Trade Act 1976 (NSW)*, s 4(1).

3. Discussion 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?

We do not think the current approach is suitable for any workers in NSW.

The unsuitability is more concerning for workers who have no real bargaining power in the creation of the employment contract and who are not compensated to take on the additional burden of non-compete obligations. Some categories of workers that we see through our practice for whom non-competes are completely unsuitable are:

- Low-income workers who experience real financial hardship when they lose work and are limited in seeking further employment;
- Workers who are unable to apply for a wide range of jobs due to training or experience in one field that is not easily transferrable;
- Workers who have limited employment options due to their caring responsibilities, pregnancy, disability or other factors;
- Migrant workers on employee-sponsored visas. These workers may become stuck in an impossible situation in which they have to find work in a particular industry in a short time frame under visa rules, but are restrained from doing so under their employment contract;
- Workers who do not have strong English literacy skills; and
- People who work in rural, remote and regional areas where job and transport options are more limited than in metropolitan areas.

In our experience restraint of trade clauses are often included in contracts without consideration of the type of relationship involved. Full-time and some part-time workers are employed in a different way to casual workers and independent contractors, and their obligations with respect to competition and solicitation of customers should not be the same. A non-compete clause or overly broad non-solicitation clause may be unreasonable if it is applied to workers who work on the understanding that they may engage in work for multiple businesses, such as:

- Casual workers;
- Independent contractors; and
- Gig economy workers (however described in their contract).

These considerations overlap with the consideration of restraints of trade in the care sector. Independent contracting and casual work arrangements are common in that sector. As illustrated by the case study below, workers in the disability support sector are often the only point of contact between a business and a client, and the key relationship is between client and worker. Relationships of trust are particularly important in caring work and there is a value in maintaining them that should take priority over business interests.

James' story – importance of relationships in care work

James came to KLC for advice about a contract of employment with his former employer. James is disabled and he worked as a disability carer for other people in his community who were largely NDIS participants. He was paid Award rates. Due to discrimination throughout his life due to his disability, James had a low level of education. His contract of employment contained a broad non-compete clause as well as non-solicitation and confidentiality clauses.

After he stopped working for his former employer, he started his own business providing care to NDIS participants. One of his customers from his previous job contacted him and asked him to keep coming to work in her home. James and this customer had a lot of shared experiences and had formed a relationship of trust. This was important to the customer as her disabilities made it difficult to form these kinds of relationships.

James received a breach of contract notice from his former employer. He did not understand the letter when it came but was very scared by the sentences he could decipher. KLC advised James about the letter and about other claims he may have against his former employer. KLC did not think that a court would be likely to find the clause enforceable against James, who was employed as a casual by his former employer.

KLC case study. Details changed to protect client confidentiality.

Recommendation 4: the Commonwealth Government should ensure that any legislative reform to restraints of trade covers all workers including independent contractors.

If a complete ban on non-competes is not implemented but other reforms are pursued, the Government must consider the needs of workers with caring responsibilities, women, workers in the care sector, gig economy workers, migrant workers, casual and part-time workers and independent contractors in designing its reforms.

4. Discussion question 4: Would the policy approaches of other countries be suitable in the Australian context? Please provide reasons.

We have reviewed the policy approaches of other countries outlined in the Issues Paper. As discussed above, we prefer a ban on non-compete clauses (such as the total ban in the USA, or the partial ban for lower income workers in Austria) but in the absence of that reform the other options outlined could be workable in Australia.

5. Discussion question 5: Are there other experiences or relevant policy options (legislative or non-legislative) that the Competition Review should be aware of?

We have outlined above the serious impact of non-compete clauses on low-income workers and other worker groups who experience disadvantage. Some broader impacts that result from this include:

- Increased demand for free legal services such as ERLS;
- Workers and their families being unable to pay rent and moving out of a rental property due to financial hardship, or incurring additional costs from moving residence due to their restricted options for employment;
- Increased reliance on income support payments such as JobSeeker; and/or
- Climate impact of workers having to travel further from home to comply with a geographic restraint.

Advising workers about restraints of trade that are overly broad and uncertain is a frequent part of the work performed by ERLS. We think that a clear ban on non-compete clauses would, over time, reduce this area of legal need. In the short and medium term, it is likely that this legal need will continue and will not be met due to resource constraints in the legal assistance sector. The community legal sector is calling for urgent injections of funding and a commitment to ongoing legal assistance.⁵ This would support our communities generally and ensure that the workers we assist continue to receive quality and accessible legal advice about their rights.

Recommendation 4: secure and ongoing adequate funding be provided to community legal centres to enable ongoing service provision to workers in Australia.

7. Discussion question 7: Is the impact on clients appropriately considered? Is this more acute in certain sectors, for example the care sector? Please provide reasons.

ERLS is not generally involved in considering the impact of non-competes from the perspective of clients or customers. However, we have observed through our work advising employees that in some cases there is a strong and important relationship between a worker and a customer which holds greater value than the relationship between the business that employed the worker and that customer. We frequently hear of workers who are approached after leaving their previous workplace by customers who would prefer to continue their relationship with the individual worker.

This should be carefully considered in relation to the care sector. In our case study on page 8 above we describe a situation in which an NDIS participant was restricted from employing the support worker of their choice due to a clause in that support worker's contract with a particular NDIS provider. This conflicts with the principles of the NDIS, which include:

- The right of NDIS participants to exercise choice and control; and
- The need for access to a diverse and sustainable market for disability supports which promotes (among other things) quality and effectiveness.⁶

8. Discussion question 13: When is it appropriate for workers to be restrained during employment?

In our experience, most non-compete clauses relate to the post-employment period and employers deal with outside work during employment through secondary employment clauses that require employees to seek approval for any additional work performed. In addition, the common law duty of fidelity would operate to protect employers' interests during the employment period.

⁶ *National Disability Insurance Scheme Act 2013* (Cth), s 4.

For restraint clauses other than non-competes, there is little issue with an employer requiring loyalty and confidentiality from its employees during employment. Employers typically do so through contractual clauses and workplace policies and procedures. As discussed in response to question 1 above, we recommend that all permitted restraint of trade clauses should operate only to the extent that they are reasonable and proportionate having regard to the circumstances of the employment.

9. Discussion question 14: Is it appropriate for part-time, casual and gig workers to be bound by a restraint of trade clause?

We have addressed this question in our response to Question 3 above. Below are several additional case studies to support our view that for workers who are casuals, independent contractors or in the gig economy non-compete clauses are not appropriate. We also think that broad non-solicitation clauses are generally inappropriate for such workers. This is because the bargain between these workers and their employers/principal contractor is not one of exclusivity.

In our view, appropriately tailored and clearly drafted confidentiality clauses (as distinct from other restraint clauses) that protect valuable business information that is not already in the public domain are likely to be suitable for all workers.

Aahan's story - worker in sham contract arrangement prevented from gig economy work post-employment

Aahan* is temporary visa holder who was working in the care industry. His employer pressured him to sign a contract in English and did not provide a Hindi translation as Aahan requested. This contract contained a very broad restraint clause for 12 months.

Aahan was employed as a casual, however his employer treated him as a contractor. After being employed for 18 months, his employer terminated Aahan's employment. They did not pay Aahan either notice or gardening leave.

Aahan began looking for other work using an online platform connecting him directly with clients. His former employer contacted Aahan in writing and provided a warning that he could not work for a competitor for twelve months or they would bring a claim regarding the restraint clause.

RLC case study. Details have been changed to protect client confidentiality.

Fin's story - worker in labour hire arrangement impacted by restraint of trade

Fin was on a student visa and engaged under an employment agreement on a casual basis by a labour hire company. Fin had an annual income of \$52,000 to \$65,000 and primarily worked for one company during his engagement.

Fin was subject to an exclusivity agreement which applied for a 6-month period from the point of termination and applied to clients introduced to Fin by the labour hire company. Fin resigned from his position with the labour hire company and began working with another company providing services to one of his previous clients. Fin was not paid or employed directly by this client. Fin sought advice from RLC as to whether he could work for the new employer given the exclusivity agreement.

RLC case study. Details have been changed to protect client confidentiality.

Please let us know if you have any questions about this submission. You can reach us at legal@unsw.edu.au.

Yours faithfully,

KINGSFORD LEGAL CENTRE on behalf of the Employment Rights Legal Service (**ERLS**)



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