Law Council
OF AUSTRALIA

Worker non-compete clauses and other restraints

Competition Review Taskforce
The Treasury

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The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

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The Law Council is also grateful for the contribution of members of the following committees:

- Industrial Law Committee of the Federal Dispute Resolution Section;
- Competition and Consumer Committee of the Business Law Section; and
- Corporations Committee of the Business Law Section.

Executive summary

1. The Law Council is grateful for the opportunity to provide a submission to the Competition Review Taskforce in response to the April 2024 Issues Paper *Non-competes and other restraints: understanding the impacts on jobs, business and productivity* (**Issues Paper**).

2. The Law Council recognises that, in certain circumstances, non-compete and other restraint clauses are necessary to support the legitimate interests of employers in protecting their investment in human resources, intellectual property and confidential information, and client connections.

3. However, in practice, under the current common law, the restraint of trade doctrine typically favours employers due to an inequality in bargaining power when clauses are negotiated and the uncertainty, cost and time issues of litigation when a dispute arises. As a result, the Law Council generally accepts that non-compete clauses have become overly prevalent in Australian employment contracts—particularly in relation to lower-income workers.

4. Lower-income workers generally have less bargaining power to negotiate or remove a non-compete clause, less capacity to absorb a loss of income between jobs and fewer resources to resolve a dispute if they leave. By and large, lower-income workers are also less likely to have access to information or connections reasonably requiring protection. Reduced job mobility amongst lower income workers serves neither the interests of individual workers nor the broader public interest.

5. Therefore, the Law Council considers that the Australian Government should consider legislating additional limitations on the use of non-compete clauses. Such protections could include:

   (a) legislating an income threshold below which non-compete clauses are generally not permitted;

   (b) requiring employers seeking to include a non-complete clause in a contract to identify the 'legitimate interest' that they are seeking to protect;

   (c) requiring employers to provide reasonable compensation when seeking to enforce non-compete clauses; and

   (d) limiting the maximum length of the non-compete clauses or otherwise limiting cascading clauses.

6. However, the Law Council considers that several of the other types of restraints discussed in the Issues Paper, including non-solicitation clauses and non-disclosure clauses, play a crucial role in protecting the viability of businesses. Such clauses are less in need of regulation at this time.

7. The Law Council responds to each of the Discussion Questions in turn below.

Non-compete clauses

General Comments

8. Restraint clauses are used by many Australian businesses. A recent survey conducted by the Australian Bureau of Statistics (**ABS**) found that 46.9 percent of Australian businesses include some type of restraint clause in their employment contracts.[1] The ABS survey demonstrated that non-disclosure clauses were the most frequently used restraint clause.[2] The next most frequently used clauses were non-solicitation of clients, non-compete, and non-solicitation of co-workers.[3]

9. As a species of restraint clause, non-compete clauses restrict employees or independent contractors from working for competitors or establishing competing businesses. They typically operate for specific periods of time and in defined geographical locations.

10. Complex non-compete clauses risk uncertain results because employees and employers do not have a clear understanding of whether clauses will be upheld by the courts as reasonable and enforceable.

11. Competition restraints can be difficult to successfully enforce, both in jurisdictions where the common law doctrine of restraint of trade applies,[4] and in states that modify the common law such as New South Wales. Whilst recent ABS data indicates that large businesses with 1000 employees or more had the highest use of non-compete clauses at 40.0 per cent,[5] the extent to which the non-compete clauses used by these businesses were, or may be, enforceable remains unclear.

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?

12. Under the common law, restraints of trade are presumed to be against the public interest, and therefore unenforceable, unless they are reasonably necessary to protect the legitimate interests of the employer.[6] In this regard, the common law can be seen to initially prioritise the rights of the worker by offsetting the presumed inequality of bargaining power in favour of the employer.

13. However, the Issues Paper identifies legitimate concerns about uncertainty, cost and time that arise out of the existing common law position and the reliance on litigation to resolve disputes.[7] It also identifies the indiscriminate use of non-compete clauses for lower-income workers and the impact that these clauses can have on individual

[1] Australian Bureau of Statistics, Restraint Clauses, Australia, 2023 (21 February 2024).
[2] Ibid.
[3] Ibid.
[4] For example, in Victoria: see *Just Group Limited v Peck* [2016] VSC 614 at first instance, and then on appeal from the first instance decision [2016] VSCA 334.
[5] Australian Bureau of Statistics, Restraint Clauses, Australia, 2023 (21 February 2024).
[6] See eg, *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688; Competition Review, The Treasury, Non-competes and other restraints: understanding the impacts on jobs, business and productivity (Issues Paper, April 2024) 10 ('**Issues Paper**').
[7] Issues Paper, 14.

employees and the broader Australian economy by hampering labour mobility, wage growth and innovation.[8]

Limitations of the common law doctrine

14. In practice, the doctrine arises at two key points in the employment relationship:

    (a) when entering into the employment relationship; and

    (b) when exiting, or considering whether to exit, the relationship.

15. A number of common issues arise at each of these points, which may support the over-inclusion of unnecessary or unreasonable restraints.

16. At the point of entry, many workers lack the bargaining power to challenge the inclusion of restraint clauses that may go beyond what is reasonably necessary to protect their employer's interests. Often the worker will be advised that these clauses are 'standard clauses' which are non-negotiable and may lack an appreciation of what they are permitted to do after the point of exit. This is most often the case in lower-paid jobs or where there are few alternative employment opportunities.

17. At the point of exit, while the onus will be on an employer to take some action to enforce a restraint, in practice, the threat or possibility of action is often sufficient to create practical adherence to a restraint clause. The option of a worker challenging a restraint clause through the court system in a proactive way is uncertain, stressful and can be prohibitively expensive.

18. Litigation is inherently uncertain, and striking an appropriate or reasonable balance of interests relies not only on the restraint of trade doctrine itself, but on a court weighing up various factors when applying the doctrine to any specific factual circumstance. These factors include the activities restrained, the duration and geographical area covered, the bargaining power of the parties, whether any specific consideration was paid to the worker to agree to restraints, and the general public interest.[9]

19. One result of the common law restraint of trade doctrine is the trend of a contractual hierarchy of time-based and area restraints, in descending order of time and geography (a 'cascading' restraint clause). Cascading restraint clauses add to complexity, effectively allowing employers to opt out of any meaningful attempt to properly define the appropriate scope of the clause. As noted in the Issues Paper, they also tend to encourage those taking a precautionary approach to comply with the broadest formulation of the restraint.

20. As a result of the uncertainty, cost and time issues identified above, the Law Council generally accepts that non-compete clauses have become overly prevalent in Australian employment contracts.

[8] Ibid 4, 18-23.
[9] As discussed at page 10 of the Issues Paper.

Options for reform

Legislation

21. The Law Council considers that the common law position—that non-compete clauses are unenforceable unless they are reasonably necessary to protect the legitimate interests of the employer—is the appropriate starting point for regulating non-compete clauses and should underpin any reform.[10]

22. The Law Council does not support a blanket ban on non-compete clauses. However, given the issues identified above and explored in the Issues Paper, there is scope for improvement through legislative reform to provide additional protections for employees—particularly those on lower incomes. Elements of such protection could include:

    (a) legislating an income threshold below which non-compete clauses are not permitted;[11]

    (b) requiring employers seeking to include a non-compete clause in a contract to identify the 'legitimate interest' that they are seeking to protect;

    (c) requiring employers to provide reasonable compensation when seeking to enforce non-compete clauses; and

    (d) limiting the maximum length of the non-compete clauses or otherwise limiting cascading clauses.

23. These potential reforms are discussed further below.

Court or tribunal reform

24. Given the financial barriers to engaging in court proceedings to contest a restraint clause, which are particularly faced by lower-income workers, consideration could be given to expanding the jurisdiction of inferior courts to determine these types of matters, and to provide a clearer and easier mechanism for workers to challenge the enforceability of these restraints (beyond simply seeking declarations). Currently, most proceedings concerning restraints are commenced by employers seeking to enforce those clauses by way of injunctions and related orders, and commenced in a superior court. While this reform may assist in reducing the cost of litigation to some degree, we note that it would not address the inherent uncertainty and cost of litigation.

25. The Law Council would not support the creation of a new jurisdiction or role for the Fair Work Commission in this area, acknowledging the limitations that would arise as a result of the Commission's status as an industrial tribunal, and not a court.

[10] See eg, *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.

[11] There may be limited circumstances in which a non-compete clause for a lower-income worker may be reasonably necessary to protect the legitimate interests of a business. For example, where an employee has access to certain intellectual property (such as computer program source code). See further discussion at paragraphs 61-67 below.

Education and guidance

26. There is a lack of understanding amongst workers as to the enforceability of unreasonable restraint clauses, even in competitive markets with high job mobility. As such, the Law Council considers that the potential legislative approach set out above could be supplemented by greater education and awareness measures as to workers' rights in this area (as discussed further in our response to Question 4 below).

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?

Broader concerns with the NSW Act

27. Subsection 4(1) of the *Restraints of Trade Act 1976* (NSW) (the **NSW Act**) reverses the general law position, in that it provides that a restraint will be valid to the extent that it is not against public policy. It also provides a mechanism for the court to 'read down', or declare invalid, what it considers would otherwise be an unreasonable restraint. However, this means that it can operate as a means for a court to 'save' what would otherwise be an unreasonable restraint.

28. In the experience of members of the legal profession in NSW, the operation of the NSW Act tends to favour the interests of employers in enforcing restraints over the interests of workers. This is supported by Figure 2 at page 16 of the Issues Paper, which depicts a significant difference between NSW and the rest of Australia in the prevalence of non-compete clauses and in their successful enforcement.[12]

29. The Law Council notes that subsection 4(3) of the NSW Act is arguably underutilised by the courts as a means of declaring altogether invalid clauses that are manifestly unreasonable, such as where an employer has made no real attempt to impose a reasonable restraint, but rather has drafted an overly broad restraint, with the expectation that a court will do the work of reading it down significantly.

30. Given its reversal of the common law position and its practical impact in supporting the more frequent use of non-compete clauses, at this time, the Law Council would not support the adoption of the NSW Act at a national level.

Impact of the NSW Act on cascading clauses

31. However, it has been suggested that the NSW Act may have some benefit as a means of reducing uncertainty and associated challenges, particularly by limiting the use of cascading clauses.

32. Cascading clauses can be confusing to workers, and create uncertainty in employment contracts, which can serve to reinforce the power imbalance between employers and workers.

33. The use of these clauses arose largely from the common law position, allowing a court to sever (but not alter) those parts of a restraint which may go beyond what is reasonably necessary, with the potential for the remaining parts to then be enforced.

[12] Issues Paper, 15 (Figure 2), citing H Chia and I Ramsay, 'Employment Restraints of Trade: An Empirical Study of Australian Court Judgments' (2016) 29(3) *Australian Journal of Labour Law* 283.

As a means of increasing the likelihood that a restraint will remain in place and enforceable, the use of cascading clauses has become standard in many employment and other similar contracts, particularly in circumstances where the NSW Act does not apply.

34. Under subsection 4(3), where there has been a manifest failure of an employer to attempt to make a restraint reasonable, a court has a discretion to treat that restraint as being altogether invalid, or invalid on such terms as it thinks fit, on public policy grounds. The consequence should be that, in most circumstances, the use of cascading clauses is unnecessary, at least in relation to employment contracts to which the NSW Act applies.

35. Regardless of whether the NSW model is adopted more broadly, the Law Council notes that there is scope for Australian courts to apply common law principles in declaring cascading clauses void for uncertainty, particularly where numerous alternatives are proposed for the activities covered, duration and/or geographical area, leading to a large and unreasonable number of possible combinations.[13]

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?

36. In our view, different types of restraint clauses require consideration of a range of different factors and different regulatory responses.

37. We acknowledge that the intention of non-compete and other restraint clauses is to support the legitimate interests of employers in protecting their investment in human resources (having acquired talented and/or experienced staff and equipping those staff with specific skills and industry knowledge) and client connections. However, we suggest that restrictions on the use of non-compete clauses for certain categories of workers are warranted, as set out below.

38. The current trend internationally is to severely restrict the use of restraint clauses—and particularly restraint clauses purporting to operate for longer periods—to senior executive levels. The Law Council is of the view that this is an appropriate approach in the modern labour market.

39. We would support legislative reform that places restrictions on the use of non-compete clauses for workers who are not high-income employees. One option may be to determine the threshold by reference to the existing definition of 'high income employee' in section 329 of the *Fair Work Act 2009* (Cth) (the **FW Act**), as this definition is relied on in various aspects of the FW Act and is generally well-understood. However, the Law Council has received some feedback that the current threshold may be too high, and therefore overly restrictive, in the context of prohibiting non-compete clauses.[14]

40. High income employees often have access to an array of sensitive information which is required to perform their roles, and which validly requires protection in some form. High income employees are more likely to have bargaining power to negotiate the terms of these clauses, such as the duration of the clause, or the

[13] See discussion at page 11 of the Issues Paper.
[14] *Fair Work Act 2009* (Cth) s 329 defines a 'high income employee' by reference to the 'high income threshold' (see s 333) which is prescribed by the *Fair Work Regulations 2009* (Cth). At the time of writing, the high-income threshold is $167,500 per annum.

compensation payable, so that a fair balance is struck between the interests of the employer and the employee. High income employees are generally also better able to absorb any loss of income in order to comply with a non-compete clause. They are also likely to be in a stronger position to negotiate compensation or a settlement in the event of a dispute.

41. By contrast, lower-income workers generally have less bargaining power to negotiate or remove a non-compete clause, less ability to absorb a loss of income between jobs, less capacity to negotiate better terms of employment if they remain in their current jobs, and fewer resources to resolve a dispute if they leave. Reduced job mobility amongst lower income workers serves neither the interests of individual workers nor the broader public interest.

42. As noted above, the existing common law places the onus on the employer to prove that a restraint clause is reasonably necessary to protect the employer's business interests. One possible approach to strengthening protections for lower-income workers is to legislatively impose a more stringent test for the employer to meet, so that the court may only uphold a clause where the worker's role is so commercially critical to the business that a breach would manifestly cause significant damage to the employer—for example, in some critical sales roles or roles involving unique, but commercially critical, technical skills. This could, in practical terms, discourage the use of restraint clauses as 'standard' terms for the vast majority of lower-income workers.

43. We would not support measures relating to non-compete clauses that differentiate particular sectors of the workforce, such as the care sector. We acknowledge that there may be public interest merit in policies that enhance competition in sectors where there is a shortage of workers, by supporting job mobility and increased competition for labour within those sectors. However, in our view, differentiating lower-income workers is likely to be a more effective means of protecting the mobility of the most vulnerable workers across all sectors and lead to less disputation arising in the context of whether a worker is within or outside of any particular sector.

Recommendation

- **The Australian Government should consider legislating an income threshold below which non-compete clauses are not permitted.**

Discussion Question 4.

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

44. We note the discussion of various options for regulating non-compete clauses which were identified by the United Kingdom's (**UK**'s) Department for Business and Trade, in its response to a consultation on measures to reform post-termination non-compete clauses in contracts of employment (the **UK Government report**).[15]

45. This report does not appear to have been considered as part of the Issues Paper. However, the Law Council considers that some of the potential reforms discussed in this report are worthy of consideration in the Australian context.

Statutory limit

46. Non-compete restraint clauses operating for 12 months or longer can act as a significant barrier to change of employment, which can have a disproportionate impact on young individuals who hold junior positions, and low-income workers such as individuals who provide care in the aged care, health, and disability sectors. Longer-term clauses can also have a disproportionate impact on new employees who are subject to a probationary period. Such employees may leave their employer after a short period of time such as a few weeks or a month, yet remain bound by a restraint for a year.

47. The UK Government has committed to introducing a statutory limit of three months on non-compete clauses, as a means of boosting workplace mobility, flexibility and dynamism in the labour market.[16]

48. In principle, the Law Council would not be opposed to introducing a similar measure for lower-income workers. In addition to striking a balance between worker and employer interests, a statutory limit on the period of non-compete clauses for some or all workers would bring clarity and may remove the use of cascading clauses (at least in relation to restriction periods).

49. However, in the context of other restrictions suggested by the Law Council—including requiring an employer to identify the legitimate interest it is protecting and pay for it—a limit of 3 months may be overly limiting.

Mandatory compensation

50. Another option is the introduction of mandatory compensation for enforcing non-compete clauses. The UK Government report found that this measure may be helpful in encouraging employers to consider whether the use of a non-compete clause is necessary and reasonable for that particular role in the circumstances. Mandatory compensation would also provide a degree of financial security to the worker.[17]

51. We note that the UK Government does not propose to proceed with this measure, based on the likely cost to employers in a time of economic recovery, and the risk that it would increase the enforcement of non-compete clauses, and thereby

[15] Department for Business and Trade (UK), Non-Compete Clauses: Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment (12 May 2023).
[16] Ibid 19.
[17] Ibid 11.

potentially stifle competition and innovation.[18] However, mandatory compensation of workers has been proposed or implemented in a number of other nations including Finland, Denmark, Portugal, Sweden, France, Germany, Netherlands and Spain.

52. The Law Council suggests that this option is worthy of further consideration. If implemented alongside a restriction on non-compete clauses for lower-income workers, it is likely that the impact on employers would be substantially minimised. It is likely that inclusion and enforcement of non-compete clauses would be reserved for circumstances where the likely benefit of a clause would outweigh the cost of enforcing it.

53. Compensation could help to offset this cost for workers, while also protecting the interests of employers. Consideration could be given to the level of compensation being a portion of the worker's salary and/or determined by reference to any other salary or wages earned by the worker during the restraint period. Any compensation scheme should not impose unreasonable costs on the employer.

Independent legal advice

54. As noted above, there is a lack of understanding among workers regarding non-compete clauses, including as to their enforceability. While improving transparency around the use of non-compete clauses may not overcome the difficulty of uneven bargaining power between lower-income workers and employers, it would go some way to informing workers of their rights—both at the point of entry and at the point where the worker is contemplating changing employers—and may help to reduce the overall incidence of unfair non-compete clauses.

55. One option for improving transparency which was identified in the UK report is to provide that a non-compete clause is unenforceable unless the employer has paid for the worker to obtain legal advice as to the effect, and enforceability, of the clause, before entering the employment agreement.[19] In principle we would support such a measure, and note that it would not preclude the worker from later challenging the non-compete clause.

Guidance

56. Transparency would also be enhanced through the provision of guidance to workers and employers.[20] We suggest this type of guidance should be produced by government and be publicly available in a form much like the Fair Work Information Statement, and through relevant websites. The information should include guidance on what might be fair and reasonable in different circumstances, and how to interpret cascading clauses. It should include plain language and visual information and be available in major community languages.

57. Consideration could also be given to requiring an employer to provide this guidance to a worker in order for a contractual restraint to be enforceable.

[18] Ibid 11-12.
[19] Ibid 18.
[20] Ibid.

Recommendation

- **The Australian Government should consider legislating additional limitations on the use of non-compete clauses to provide further protections to employees and ensure that non-compete clauses are only sought when necessary. Such protections could include:**
  - **requiring employers seeking to include a non-disclosure clause in a contract to identify the 'legitimate interest' that they are seeking to protect;**
  - **requiring employers to provide reasonable compensation when seeking to enforce non-compete clauses; and**
  - **limiting the maximum length of the non-compete clauses, or otherwise limiting cascading clauses.**

Discussion Question 5.

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

58. Beyond the policy options discussed above in response to Discussion Questions 1-4, the Law Council did not receive feedback on additional options for reform.

Non-solicitation of clients and other business contacts

Discussion Question 6.

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

59. The Law Council appreciates that losing clients to competitors when particular workers leave can have a significant commercial impact on a business. The main considerations that lead to the use of non-solicitation clauses are to protect valuable client connections and to maintain the stability of the employer's workforce and business security. Professional and client service based relationships can take many years to establish and maintain, and are the lifeblood of some businesses. Losing clients to a former employee, who either works for a competitor or has set up a new competitive business, can be disruptive to a business and significantly impact its viability.

60. There are limited alternative protections available to employers. Some protections may be available to the employer in equity (including breach of obligations of confidence or fiduciary duties) and by statute (including, for example, section 183 of the *Corporations Act 2001* (Cth), which prohibits an employee from improperly using their position—including the company's information gained through their position—for personal gain, third-party gain, or to cause detriment to the company). However, these protections can be difficult to establish and enforce, and more limited in scope than non-solicitation clauses. Confidentiality clauses are widely used in employment contracts, but are of limited assistance in retaining client relationships, as client information is not necessarily confidential to the employer and may be accessible from the client or other sources.

Comments on non-competes in the context of Intellectual Property

61. The Law Council submits that there are legitimate reasons for businesses to use non-compete clauses and similar restraints, particularly in relation to executives, employees involved in the development of new products, ideas and innovations for a business, and employees who have developed close relationships with clients or suppliers of the business where it is difficult for them to "unknow" the confidential and sensitive information they have acquired in the role and similar personnel.

62. Relevant intellectual property includes, for example:

- copyright, including in materials such as computer program source code, client and customer lists, records of important business methodologies and specifications, plans, blueprints and manuals; and
- confidential information, including know-how, trade secrets and other commercially sensitive and valuable information.

63. A key feature of the types of intellectual property listed above is that they are intangible and therefore very difficult to trace and contain. It is also worth noting that, unlike in other jurisdictions such as the United States, Australia does not have a legislative regime for the protection of trade secrets. Of the mechanisms available to Australian businesses, non-compete clauses and similar contractual restraints are usually the simplest to enforce. By contrast, pursuing a former employee for copyright infringement or breach of confidence is generally cumbersome, excessively costly and forensically difficult to prove. It often requires Australian businesses to apply for one or more preliminary or interim measures—such as preliminary discovery, interim injunctions and/or Anton Piller orders—which alone can cost hundreds of thousands of dollars to obtain, and still may not be sufficient to uncover all of the wrongdoing of a former employee. That is particularly the case where the former employee deliberately or unintentionally obscures, destroys or loses incriminating evidence of their misconduct, which is easy to do when dealing with intangible intellectual property.

64. As one example, the Law Council notes the recent judgment of the Federal Court of Australia in *Motorola Solutions Inc v Hytera Communications Corporation Ltd* [2022] FCA 1585, which was delivered in December 2022 but only published (with some redactions) in June 2023. In summary:

- Several former employees of Motorola downloaded its confidential files containing software source code before taking jobs at Hytera, a competitor in the supply of digital mobile radios.
- The source code was key to enabling participants in that market to satisfy stringent industry standards for digital mobile radios, which gave Motorola an important competitive advantage.
- Hytera soon developed a similar product, and Motorola commenced Federal Court proceedings alleging copyright and patent infringement.
- To prove that Source Code A infringes the copyright in Source Code B, it is necessary to conduct a side-by-side comparison to assess whether Source Code B contains substantial part of Source Code A. However, Hytera claimed to have lost significant portions of the source code in its digital mobile radio products, which meant that Motorola and the Court were required to engage in difficult comparisons between source code and object code.

- The result was an extremely lengthy and complex case, with a judgment running to 2,315 paragraphs (over 500 pages) and a subsequent appeal, which is likely to have cost Motorola millions of dollars in legal fees. Motorola ultimately succeeded in its claims, but only partially and with great difficulty, and the appeal judgment is currently pending.

65. This case is just one example of how extremely difficult it is for businesses to enforce their intellectual property rights, particularly when dealing with intangibles (such as copyright) upon intangibles (such as source code). In breach of confidence claims, various other difficulties may arise—for example, it is often difficult to delineate proprietary knowledge of the business from personal skills and knowledge of the employee and, while an employee can promise to not utilise information that they have learned on the job when moving to work for a competitor, it may be impossible for that employee to 'un-know' that information.

66. Non-compete clauses and similar restraints provide an important buffer, to mitigate the risk of a former employee disclosing confidential information, infringing other types of intellectual property or, in the case of intellectual property such as patentable inventions and registrable designs, disclosing information that may compromise the registrability or value of that intellectual property. Non-compete clauses and similar restraints also enable Australian businesses to mitigate such risks proactively, rather than being forced to act only once unlawful conduct has actually occurred or been threatened.

67. The Law Council accepts that non-compete clauses may not be appropriate in every circumstance. They are most appropriate for employees who have access to valuable intangible assets of a business, such as confidential know-how, confidential business/client information such as pricing, confidential supplier information, trade secrets, and copyright materials that are not in the public domain. This applies to all industries and sectors, particularly those that are involved in innovation, such as the technology, telecommunications, healthcare, scientific, pharmaceutical, manufacturing, food and beverage, mining, energy and resources, and consumer goods industries.

Business sale restraints of trade

68. Employment contracts are not the only place individuals can be bound by restraints of trade. It is common for business sale agreements, shareholders' agreements and equity incentive plans to restrain parties to the agreement (including founders, senior executives and other employees with equity interests in the business). The commercial basis for restraining these individuals in a business sale context differs from post-employment restraints, in that it is designed to (among other things):

    - restrain former owners of a business from using their knowledge of the business' commercially sensitive trade secrets to operate a new business in competition with the business they sold, to ensure the protection of the goodwill of the business being acquired by the purchaser; and

    - restrain former owners from poaching key employees of the business they sold.

69. Business sale restraints can be crucial to ensure that key executives and 'founders' are retained by the business post-completion, as it is often the case that those individuals have knowledge of (or are the 'face' of) the business and their departure would significantly devalue the entity.

70. Business sale restraints of trade can be crucial to protecting the goodwill and giving the purchaser of a business or the remaining shareholders the full value of the business they are acquiring.

71. The Issues Paper is silent on the use of restraints of trade in a business sale context. The difficulty with this is that there are restraints that 'cross-over' between business sale and post-employment contexts. For example, if a senior executive holds a substantial but minority equity interest in a company, through a shareholders' agreement or equity incentive plan, they may be restrained from competing against the business they managed from the time they cease to hold an equity interest in the company (which can coincide with the cessation of their employment).

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.

72. Consideration could be given to imposing limits on the use of clauses for the non-solicitation of clients on lower-income workers, due to their reduced means and bargaining power, as discussed above. However, in most cases, the effect on a worker of a non-compete clause, which prevents them from working in their chosen occupation for some period, or in a specific location, is markedly different from the effect of a non-solicitation clause, which allows the worker to continue in their occupation, but without their taking existing client relationships to the new employer. This suggests that, even in relation to lower-income workers, there is a stronger case for regulating non-compete clauses than in regulating non-solicitation clauses.

73. Consideration could also be given to limiting the use of non-solicitation clauses in particular roles in which a personal relationship with the client, or skills and experienced only developed through working with a particular client, is central, for example in certain care, medical, therapeutic, education, and personal fitness or coaching roles. Care would be required in defining these categories so as not to cast these limits too widely. We would not generally support a differentiated outcome based upon the workers' sector.

Non-solicitation of co-workers

Discussion Question 8.

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

74. The Law Council's view is that employers should be able to restrict solicitation of co-workers as this practice can lead to significant loss of skill and expertise within an organisation.

Discussion 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?

75. The Law Council considers that non-solicitation clauses are not the key issue facing start-ups. Rather, start-ups often face the challenge of a general skills shortage in a specialist area, and share that challenge with all businesses operating in the area.

76. Members of the legal profession report that it is relatively uncommon for an employer to seek to enforce a non-solicitation of co-workers restraint in isolation, and, for that reason, it is not generally that type of clause that has the most acute impact for a new or start-up business.

Non-disclosure clauses

Discussion Question 10.

What considerations drive businesses to include non-disclosure clauses in employment contracts? Are there alternative protections, such as s 183 of *Corporations Act 2001* available?

77. We note that the general law provides some limited protection through the equitable duty of confidence. However, it is important for businesses to have an appropriate means of protecting their confidential information, and preventing or restricting former workers from using that information while employed elsewhere, or from disclosing that information to a new employer or other party.

78. Typically, non-disclosure clauses (or confidentiality clauses) are not considered to be restraints and are not viewed by employers and workers in that light. In our view, regulatory responses to non-disclosure clauses should not necessarily mirror those for non-compete or non-solicitation clauses.

79. The enactment of section 183 of the Corporations Act attests to the commercial need to protect organisations from a loss of corporate information. As noted at paragraph 60 above, section 183 prohibits an employee from 'improper use' of their position for personal gain, third-party gain, or to cause detriment to the company.[21]

80. Importantly section 183 prohibits the misuse—not necessarily the disclosure—of information by officers and employees of a corporation. The inclusion of non-disclosure clauses in employment contracts often complements section 183, both by providing a contractual remedy for the employer (rather than relying on a court to impose a civil penalty), and by bringing the issue to the worker's attention.

81. It is important to note that, for non-corporate entities, section 183 provides no protection, and the inclusion of non-disclosure provisions becomes even more important.

[21] A useful analysis of section 183 was recently undertaken by Derrington J in *Smart EV Solutions Pty Ltd v Guy* [2023] FCA 1580 [67]-[83].

Discussion Question 11.

How do non-disclosure agreements impact worker mobility?

82. The Law Council understands that non-disclosure agreements have little to no impact on worker mobility. In practice, workers are able to manage the issue of confidentiality as they transition from one role to another.

Discussion Question 12.

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

83. Again, in the experience of members of the legal profession, non-disclosure agreements do not pose a significant barrier to new businesses. The value that new employees bring to a new business primarily takes the form of skills and general industry experience rather than the information or intellectual property of competitors.

Restraints on workers during employment

Discussion Question 13.

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

84. It is appropriate in most circumstances for workers to be subject to restrictions during their employment to prevent them from engaging in conduct in competition with their employer, setting up a competing business, or taking advantage of a business opportunity that arose during their employment which is relevant to their employer's business or operations.

85. The question as to whether a full-time employee should be permitted to engage in secondary employment without obtaining consent from their primary employer is a more complicated issue. The issue is often considered to be one of whether the secondary employment will have any negative effect on the employee's performance and productivity in their primary role. In our view, this matter should remain regulated by the employment contract entered into between the parties, and by the common law.

86. In relation to part-time employees and casual workers, in our view, the ability for a primary employer to regulate engagement in secondary employment should be much more restricted. However, we support restricting these workers from using the primary employer's time or resources to set up a competing business, or take advantage of a business opportunity that arose during their employment which is relevant to their employer's business or operations.

87. In addition, any change made to the enforceability of post-employment restraints raises further issues for the ability of employers to restrain the conduct of their workers during employment. For example, if an employer is prevented or restricted from relying upon a post-employment restraint, then this may have the consequence of increasing the reliance of employers on longer notice periods and the imposition of 'garden leave'. While the use of this mechanism results in a worker continuing to be paid during that period, it has the effect of limiting job mobility while limiting that worker's productivity.

Discussion Question 14.

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

88. Subject to the points raised in our responses above, we do not support imposing restraints on casual workers or gig workers, for whom job mobility is of prime importance.

No-poach and wage-fixing agreements

Discussion Question 15.

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

89. No-poach agreements, with two or more businesses agreeing to refrain from actively recruiting each other's workers or prohibiting them from hiring each other's workers, are only used in limited circumstances. For example, it is relatively common for that type of agreement to be included in the context of secondment arrangements and labour hire arrangements.

90. Often the no-poach agreement operates for a limited period or with some form of payment being payable by the contracting party seeking to recruit or hire the worker as a form of compensation to the other party. We suggest that, without the availability of some type of no-poach agreement, commercial parties may be less willing to enter into secondment arrangements and the general labour hire business model may be materially adversely affected.

91. In the experience of members of the legal profession, the use of no-poach agreements between unrelated but competitive businesses (described as being in a horizontal or naked context) is rare.

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

92. In our view, no-poach agreements between unrelated but competitive businesses and wage-fixing agreements, while rarely seen, are anti-competitive by design and should be expressly prohibited. Given that these agreements are entered into between two commercial entities, we do not consider that the FW Act is an appropriate vehicle for regulating agreements of this type.

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

93. We consider that there is a continuing role for no-poach agreements between cooperating businesses, such as in the context of joint venture agreements, secondment arrangements and where labour hire businesses are conducting business.

94. In the case of joint venture agreements, no-poach agreements allow a joint venture partner to lend its employees to work in, or for, the joint venture itself, while minimising the risk of losing employees to the other joint venture partner. Similar

issues arise where an employee is seconded to provide services for the benefit of another entity.

95. In the case of a labour hire business without a no-poach agreement in place, that business may incur costs in finding and placing an appropriate individual with a host entity, to be left with a significant commercial risk that the host entity will simply look to directly employ that individual so as to avoid payment of any continuing fee to the labour hire provider. In those circumstances, the labour hire business model may become unsustainable for some providers.

96. The Law Council also understands that it is not uncommon for no-poach agreements to be made in circumstances where a competitor is undertaking due diligence over the business in question. These agreements will usually be for limited periods of less than 12 months and include a carve out for employment arising out of a response to a bona fide advertised job position. Such arrangements may be a necessary and valid protection of a business' workforce.

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)?

97. The Law Council considers that there is a continuing role for no-poaching agreements in a franchise context, but that such agreements should be disclosed (as suggested in our response to Question 18).

Discussion Question 16.

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

98. As discussed in the response to Question 15(a), in our view, the use of no-poach and wage-fixing agreements between unrelated and competitive businesses should be prohibited. For the reasons set out above, there is a continuing role for the inclusion of non-solicitation of co-worker clauses in individual employment contracts.

Discussion 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?

99. As discussed in our response to Question 15(a), the regulation of no-poach and wage-fixing agreements as between commercial entities should be regulated under competition laws such as the *Competition and Consumer Act 2010* (Cth), rather than in an industrial relations framework and under the FW Act.

Discussion Question 18.

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

100. Yes, to the extent that such agreements are in place between a franchisor and its franchisees, the use and terms of those agreements should be disclosed, consistent with the currently prescribed Franchise Disclosure Document.

Discussion Question 19.

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

101. As stated earlier, in our view a cautious approach should always be taken when considering applying approaches adopted in other jurisdictions to the Australian context, due to factors such as population, the level of competition and geographical location.