Australian Government Treasury
Competition Taskforce Division
By email to: competitiontaskforce@treasury.gov.au

31 May 2024

Dear Competition Taskforce Division,

Re: Non-competes and other restraints: understanding the impacts on jobs, business and productivity

Thank you for giving us the opportunity to comment on the above Issues Paper, published in April 2024.

About JobWatch

1. JobWatch Inc (**JobWatch**) is an is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.

2. JobWatch is funded by the Office of the Fair Work Ombudsman, Victoria Legal Aid and the Victorian Government. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).

3. JobWatch provides the following services:

    a) Tailored information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (**TIS**);

    b) Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;

    c) Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and

    d) Law reform work aimed at promoting workplace justice and equity for all workers.

4. Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 257,000 caller records, with each record usually canvassing multiple workplace problems, including contract negotiation, recovery of wages, discrimination, harassment, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time across State and Federal laws.

5. The majority of our callers and clients are not union members and cannot afford to get legal assistance from a private lawyer. In order to become clients of the legal practice, workers must have an employment law matter that has legal merit and their cases must satisfy the requirements of our funding agreements (which typically focus on client vulnerability and public interest issues).

6. The majority of case studies provided in this submission are taken from JobWatch's TIS database and our legal practice client files. Two of the case studies have been provided by WEstjustice (case studies 4 and 5). All case studies have been de-identified to maintain confidentiality.

Questions we have answered from the Issues Paper

7. Given JobWatch's expertise, we have answered questions 1, 3, 5, 13 and 14 in the Issues Paper.

Endorsements

8. This submission has been endorsed by Migrant Workers Centre Inc, South-East Monash Legal Service Inc, The Working Women's Centre SA Inc, Youth Law Australia, Western NSW Community Legal Centre Inc, Victorian Aboriginal Legal Service, WEstjustice, NT Working Women's Centre, Justice Support Centre, Justice Connect, Caxton Community Legal Centre, Mackay Regional Community Legal Centre Inc, and Circle Green Community Legal.

Background

9. We are encouraged that the Federal Government has committed to reviewing non-compete clauses and the role they play in Australian employment law.

10. As outlined in the Issues Paper, non-compete clauses do not only affect senior executives. They appear to be used across all industries and affect workers in many varied occupations, including in low-paid and casual jobs.

11. Whereas in the past people might have expected that employers would only try to enforce non-compete or restraint of trade clauses against senior executives, an analysis of the kinds of court applications filed over the last five years, in the context of a non-compete clause, shows that the workers who were sued did not exclusively belong to the executive level. In fact, some of the workers who had to defend these kinds of legal proceedings worked in lower seniority level jobs. For example, they held these kinds of positions:

    - Office Leasing Manager
    - National Site Project Manager
    - Recruitment consultant for a labour hire agency
    - Accounts manager for a labour hire agency
    - Principal recruitment consultant for a labour hire agency
    - Team leader in a finance company

- Account broker
- Senior property manager at a real estate agency
- Business Analyst for a cleaning company
- A sales manager for a software company
- A professional gymnastics coach.

12. According to JobWatch's TIS database, we received 300 queries relating to restraint of trade in the 2022-23 financial year. Those queries came from people whose job titles included:

- Disability support worker
- Childcare educator
- Youth worker
- Beauty therapist
- Motor mechanic
- Customer service
- Retail worker
- Hairdresser
- Senior stylist
- Remedial massage therapist
- Play therapist
- Body Corporate Administrator
- Pilates instructor
- Cleaner
- Factory hand
- Gym manager
- Art teacher.

13. For JobWatch's callers, who typically live and work in Victoria, Tasmania and Qld (and therefore outside of NSW), the enforceability of a non-compete clause will come down to the application of common law principles. The starting presumption is that restraints are generally against the public interest, and therefore void and unenforceable, unless they are found to be reasonably necessary to protect the legitimate interest of the employer.[1]

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?

14. In our view, the common law restraint of trade doctrine does not get the balance right between the interests of businesses, workers and the wider community. Legislative intervention is required so as to better protect workers.

[1] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.

15. Many TIS callers are intimidated by the restraint clause in their contract. In some cases, callers tell us they are afraid to raise concerns about working conditions and feel trapped and unable to leave their current job for fear of being sued if they work elsewhere.

16. Apart from restricting workers' freedom to leave their jobs and start new ones, or to work multiple part-time or casual jobs in the same industry, non-compete clauses also hamper workers' social mobility by preventing workers from taking up new work opportunities or starting up their own businesses.

Case study 1: Jack has been employed as a casual NDIS support worker for a few months. He is not getting enough shifts each week to cover his living expenses. He often has to travel more than an hour to get to his assigned shifts and so his fuel expenses are high. He feels he is paying exorbitant rent and so recently he has been surviving on noodles to make ends meet. He desperately wants to change to another employer who might offer him more shifts but his contract contains a restraint clause which prevents him from working for a competitor who has NDIS clients who were previously registered with his employer.

Case study 2: John works in a sales role in a small rural town. He wants to change jobs but is feeling anxious about doing so because his employment contract contains a restraint which prevents him from working for any competitor within a certain geographic area for a period of 12 months following a termination of employment.

Case study 3: Maria has been employed by the same business in the hair and beauty industry for several years. She would like to start her own business without poaching any customers from her current employer but she is concerned about doing so given she has a restraint clause in her employment contract which prohibits her from working for any competitor, either as an employee or otherwise, both during her employment and for six months after termination. The clause doesn't specify what the geographic limitation of the restraint is, but Maria's boss has told her that the limitation applies within a 25km radius of their business.

Case study 4 (provided by WEstjustice): Javier is an international student who found work as a removalist on a casual basis. He was very concerned about his contract which had a clause which allowed summary termination if the employee was subject to another restraint and included a broad restraint against working for a competitor removalist company for 12 months after termination within a geographic distance which effectively sought to exclude any part of greater Melbourne.

Case study 5 (provided by WEstjustice): Mark worked as a casual first aid attendant for 1 to 2 shifts a week. Mark had concerns about his employment including being underpaid, working shifts as short as 1 hour and working longer 12-hour shifts without breaks. Mark was worried about raising any concerns with his employer because he thought he would be unable to find other similar work because his contract had a restraint clause. The restraint prohibited Mark from working for a competitor for 12 months anywhere in Victoria. Mark decided to put up with the unfair working conditions and worked almost a year longer than he would have if his contract did not have a restraint. Mark quit after his working conditions worsened and his former employer then

threatened to sue him if he worked for a competitor. He decided to risk being sued and found a job with another first aid company but negotiated to have another restraint clause removed from the new contract.

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?

17. We are firmly of the view that current approaches are *not* suitable for all workers, and especially not for low and middle-income workers.

18. As stated above, it is incorrect to assume that only senior executives with insider knowledge and trade secrets of their companies are likely to be affected by restraint of trade claims.

Case study 6: Bianca is a young worker who is completing an apprenticeship in a hair salon. She does not feel she is receiving enough training or learning opportunities and would like to change employer but she has a restraint of trade clause which prohibits her from working for a competitor within a 10km radius of her employer's premises. The restraint will last for 12 months following a termination of employment.

19. The case study above demonstrates how entry-level and ordinary workers, some of whom are just starting out, or who are in casual employment and ordinarily might hold multiple jobs, are caught by these clauses. Even if the clauses might eventually prove to be unenforceable, the prospect of litigation and having to argue the invalidity of these clauses can present a challenge for workers, particularly for vulnerable workers, including young people, apprentices, trainees etc.

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

20. Our recommendation is that the *Fair Work Act 2009 (Cth)* should be amended so as to ban non-compete and other restraint of trade clauses. That is, the use of such clauses should be unlawful, subject to very limited and clearly defined exceptions. This should be a civil remedy provision.

21. We note that the common law imposes a duty of fidelity on employees towards their employers and we also accept that employers are entitled to protect their confidential information. We do not believe that non-compete or other restraint of trade clauses are *necessary* for protecting that confidential information and indeed, as we have noted above, we consider the use of such clauses to be disproportionately harmful to workers.

22. We note that on 23 April 2024, the American Federal Trade Commission issued a nationwide ban on the use of non-compete clauses. According to Federal Trade Commission Chair, Lina M. Khan, "noncompete clauses keep wages low, suppress new ideas, and rob the […] economy of dynamism." The ban is said to "ensure Americans have the freedom to pursue a

new job, start a new business, or bring a new idea to market."[2] We urge the Competition Review to make a similar recommendation for Australia.

Question 13: When is it appropriate for workers to be restrained during employment?

23. During the COVID-19 pandemic, JobWatch received queries from employees working in the aged care, early childhood and disability support industries, whose employers wanted to restrict them from working across multiple locations or for other employers, as a way of trying to minimise the risk of contagion.

Case study 7: Norman worked as a personal carer for two different employers. He needed both jobs to make ends meet. During the COVID-19 pandemic, one of the employers notified all staff that they could only continue to work there if they signed an undertaking that they were not working elsewhere.

24. In the event of future pandemics, governments will need to carefully consider the extent to which work across multiple worksites may increase the spread of disease and this will need to be factored into any government directives.

25. However, in the absence of such government directives, we do not consider that the use of non-competes or other restraint of trade clauses are justified to prevent employees from working elsewhere during the employment. Again, we are of the view that the common law duty of fidelity and the existing mechanisms for protecting confidential information are adequate to protect employers during the employment.

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

26. We are firmly opposed to the notion that restraint of trade clauses could be appropriate for part-time, casual or gig workers.

27. There are many reasons why these workers may wish to work multiple jobs, with the most obvious reason being to supplement or grow their main source of income.

28. The Final Report on the ACTU's Inquiry into Price Gouging and Unfair Pricing Practices found that when it comes to part-time and casual workers, non-competes "cause a chilling effect on employees moving between employers and inhibit the transfer of talent to more efficient firms," and "prevent part-time and casual employees from finding employment elsewhere, stifling employment growth."[3]

[2] Federal Trade Commission, 'FTC Announces Rule Banning Noncompetes' (Media Release, 23 April 2024) <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>.

[3] Allan Fels, 'Inquiry into Price Gouging and Unfair Pricing Practices' (Final Report, Australian Council of Trade Unions, February 2024) 67.

29. At the end of December 2023, approximately, 970,700 people were working multiple jobs, which amounts to about 6.7% of the workforce. This is an increase of approximately 100,000 workers since the beginning of the COVID-19 Pandemic and has largely been driven by cost-of-living pressures forcing more people to work multiple jobs.[4]

30. For example, a gig worker in the food delivery industry may need to work for multiple delivery services at once, in order to balance the precarious nature of their work and the generally low pay associated with gig work. A non-compete clause that would prevent such a worker from working for more than one delivery service at a time (or for a period of time into the future) could be financially crippling for that worker.

Thank you for taking the time to consider our submission. Please do not hesitate to contact the writer by email on gabriellem@jobwatch.org.au if you have any queries.

Yours sincerely,

Gabrielle Marchetti
Principal Lawyer
Job Watch Inc

[4] Luca Ittimani, 'Almost 1 million Australians are working at least two jobs as cost-of-living pressures bite', *The Guardian* (online), 8 March 2024 <https://www.theguardian.com/business/2024/mar/08/almost-1-million-australians-are-working-at-least-two-jobs-as-cost-of-living-pressures-bite>.

Submission endorsed by: