ARA SUBMISSION

WORKER NON-COMPETE CLAUSES AND OTHER RESTRAINTS

SEPTEMBER 2025

The Australian Retailers Association (ARA) and National Retail Association (NRA) welcome the opportunity to provide feedback on the reform to non-compete clauses and other restraints on workers.

The ARA and the NRA, which propose to amalgamate to form the Australian Retail Council (ARC), represent a $430 billion sector that employs 1.4 million Australians—one in ten workers—making retail the nation's largest private sector employer and a cornerstone of the Australian economy.

Our combined membership spans the full breadth of Australian retail: from family-owned small and independent businesses, which comprise 95% of our membership, to the largest national and international retailers that support thousands of jobs and sustain communities across both metropolitan and regional Australia. Our industry operates more than 155,000 retail outlets nationwide, with the majority of those also represented by an online or e-commerce presence.

A strong retail sector delivers widespread benefits to all Australians, with a significant portion of every dollar spent in retail flowing back into employees, suppliers, superannuation funds, and local communities. We are united in advocating for the policy settings, reforms and collaboration that will drive growth, resilience, and long-term prosperity for Australian retail and the millions who rely on it.

EXECUTIVE SUMMARY

The ARA remains committed to ensuring that any reforms balance the protection of legitimate business interests with the rights of employees to pursue job mobility.

In our May 2024 submission, we set out a principles-based framework that highlighted the importance of non-compete, non-solicitation and non-disclosure clauses in protecting businesses from economic, reputational and operational harm. Those principles, centred on evidence-based reform, proportionate regulation and the preservation of essential business protections, form the basis for our responses to the consultation questions outlined in this paper.

This submission therefore revisits the May 2024 principles in light of the government's announced reforms and applies them directly to the questions raised in the September 2025 consultation paper. We provide the following observations:

- The ARA remains of the view that non-compete, non-solicitation and non-disclosure clauses play an essential role in safeguarding confidential information, trade secrets and client relationships.[1]
- The ARA acknowledges the government's proposal to ban non-compete clauses for employees earning below the high-income threshold.[2] While we accept the intent of this reform, we stress that prohibitions should be limited in scope, evidence-based, and targeted towards junior employees.
- We support reforms that provide clarity to both employees and employers, but caution against extending prohibitions to non-solicitation or non-disclosure clauses, which are proportionate and legitimate mechanisms that do not unreasonably restrict job mobility.
- Any reform must be accompanied by a substantial transitional period to allow businesses to adapt contracts, processes and compliance frameworks.

In reviewing the consultation paper, that ARA makes the following assessments;

[1] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 (HL).
[2] *Fair Work Act 2009* (Cth) s 333C

- The government has accepted the case for reform but has chosen a blanket ban on non-compete clauses below the high-income threshold, rather than a tailored approach.[3]
- Our recommendations concerning non-solicitation and non-disclosure clauses, including our call to preserve franchise arrangements, have not been adopted
- The consultation recognises the need for transitional arrangements, which aligns with our initial recommendation.
- There is limited evidence that research and enforcement data have been sufficiently prioritised in policymaking.

RESPONSES TO CONSULTATION QUESTIONS

Definition of non-compete clause (Q1 & Q2):

The ARA recommends a definition that captures clauses that restrict a worker from performing work for a competitor or establishing a competing business after employment ends.[4] However, it is essential that related but distinct provisions, non-solicitation clauses, confidentiality obligations, no-poach agreements, and wage-fixing arrangements, are excluded from this definition.

Non-compete clauses protect businesses from unfair competition by ensuring that employees cannot immediately transfer insider knowledge to a competitor or use it to establish their own business.[5] Such clauses are critical in protecting intellectual property, sensitive customer data, supply chain arrangements and strategic plans. In retail, where competitive advantage is often built on confidential product sourcing, pricing strategies and brand reputation, the misuse of insider information can have devastating impacts.[6]

Non-solicitation clauses are narrower in scope and ensure that employees do not solicit clients, customers or staff of their former employer.[7] In industries already facing skills shortages, or in regional and remote areas with small labour pools, non-solicitation protections are critical to preventing "staff stealing" and preserving customer trust.[8]

Non-disclosure clauses protect confidential information, trade secrets and sensitive data. While statutory and equitable duties of confidence exist, contractual non-disclosure obligations provide clarity for employees and allow businesses to prevent misuse before it occurs.[9] Unlike non-compete clauses, these provisions do not restrict an employee's future work opportunities and are proportionate safeguards.

No-poach agreements also serve a legitimate function, particularly in franchise systems.[10] They prevent one operator from immediately recruiting staff trained at another, which could otherwise destabilise workforces and waste training investment.[11] This is particularly important in regional areas where labour supply is limited.

Wage-fixing agreements, while sometimes raised as a concern, cannot lawfully override statutory or award entitlements.[12] Within franchise networks, consistent wage settings may actually protect stability and reduce churn, so long as they operate within the boundaries of the *Fair Work Act* and modern awards.[13]

Scope of workers (Q3–5):

The ARA recognises that restraint clauses can be overused in template contracts. However, existing safeguards already ensure that restraints are enforceable only where reasonably necessary. The common law restraint of trade

[3] *Treasury, List of Consultation Questions – Reform to Non-Compete Clauses and Other Restraints on Workers (2025).*
[4] *Just Group Ltd v Peck* [2016] VSCA 334.
[5] *Rushleigh Services Pty Ltd v Quarry Mining & Construction Equipment Pty Ltd* [2011] NSWSC 382.
[6] *Entello Pty Ltd v Firooztash* [2016] QDC 50.
[7] *AGA Assistance Australia Pty Ltd v Tokody* [2012] QSC 176.
[8] *Corporations Act 2001* (Cth) s 183.
[9] *Restraints of Trade Act 1976* (NSW).
[10] *Australian Clinical Labs Pty Ltd v Glew* [2019] FCAFC 124.
[11] *Competition and Consumer Act 2010* (Cth) Part IV.
[12] *Fair Work Act 2009* (Cth) s 45.
[13] *Buckley v Tutty* (1971) 125 CLR 353 (HCA).

doctrine presumes restraints are void unless justified as reasonably necessary.[14] Courts assess seniority, scope, duration, and the nature of the information involved. Research indicates that only around one-third of restraint clauses are upheld.[15]

We submit that reforms should not adopt a blanket ban on all employees below the high-income threshold.[16] This risks capturing employees who, while below the threshold, still have access to commercially sensitive information. A more proportionate approach would target restrictions only where the employee's role does not expose them to such information.

The ARA also submits that independent contractors should be expressly excluded from the scope of these reforms. Independent contractors are not employees and are already protected through the *Independent Contractors Act 2006* (Cth) and the unfair contracts jurisdiction of the *Fair Work Act 2009* (Cth), in addition to the common law restraint of trade doctrine. These mechanisms ensure that restraints imposed on contractors are subject to appropriate scrutiny and enforceability standards. Extending the proposed reforms to independent contractors would duplicate existing protections and create unnecessary complexity for legitimate commercial contracting arrangements.

Non-solicitation and non-disclosure clauses must not be restricted at all, as they are legitimate, targeted mechanisms that do not pose the same risks to labour mobility.

Enforcement (Q7–11):

The ARA cautions against reforms driven by anecdote or incomplete survey data. For example, the e61 Institute's finding that one in five workers believe they are subject to non-compete clauses does not distinguish between enforceable restraints and employee perceptions,[17] nor does it account for actual enforcement practices.

In practice, litigation over restraints is rare. Most issues are resolved informally through cease-and-desist correspondence. For this reason, education and guidance are far more effective than punitive penalties.[18] Employers often include restraints as a deterrent rather than with intent to litigate. Heavy-handed penalties would add compliance costs without changing this reality.

We therefore recommend proportionate enforcement measures that prioritise education, clear guidance, and practical compliance assistance from the Fair Work Ombudsman.[19]

Exemptions (Q14):

The ARA accepts that exemptions may be justified in limited public-interest cases, such as roles involving national security or highly sensitive information.[20] Outside these narrow circumstances, exemptions should not be broadened, as this would undermine the intent of reforms while adding unnecessary complexity.

Transitional arrangements (Q15–16):

The implementation of reforms will require businesses to review and amend thousands of contracts, update HR systems, and train managers and employees. For the retail sector, with its vast and diverse workforce, this task is substantial[21]

The ARA recommends that any reforms must include a minimum two-year transition period with no retrospective effect. This will give employers sufficient time to adapt without destabilising existing employment relationships.[22]

[14] Ian Ramsay & Hui Chia, *Employment Restraints of Trade: An Empirical Study of Australian Court Judgments* (University of Melbourne, 2017).
[15] Productivity Commission, *5-Year Productivity Inquiry: Advancing Prosperity* (2023).
[16] e61 Institute, *The ghosts of employers' past: how prevalent are non-compete clauses in Australia?* (2023).
[17] Treasury, *Consultation Paper – Reform to Non-Compete Clauses and Other Restraints on Workers* (25 July 2025).
[18] Fair Work Ombudsman, *Employer Guide to Workplace Rights and Obligations* (2024).
[19] *Harrison v Schipp* [1975] 2 NSWLR 597.
[20] Treasury, *Consultation Paper – Reform to Non-Compete Clauses and Other Restraints on Workers* (25 July 2025).
[21] Ibid.
[22] Fair Work Ombudsman, *Employer Guide to Workplace Rights and Obligations* (2024).

Equally, clear guidance and education from government and the Fair Work Ombudsman are essential.[23] Many smaller retailers rely on template contracts and lack in-house legal expertise. Without practical resources, the risk of uncertainty and inadvertent non-compliance is high.

The transitional framework should therefore:

- avoid retrospective invalidation of contracts;
- allow adequate time for adjustments; and
- be accompanied by simple, accessible compliance resources for both employers and employees.

Failure to do so would risk creating greater uncertainty than the reforms are intended to resolve.

CONCLUSION

The ARA reaffirms its position that non-compete, non-solicitation and non-disclosure clauses are legitimate, necessary, and proportionate protections for businesses. Reforms must be carefully balanced to avoid undermining these protections while promoting job mobility.

We support restrictions on non-compete clauses for lower-level employees but strongly oppose extending prohibitions to non-solicitation or non-disclosure clauses. Reforms must be evidence-based, proportionate, and implemented through a substantial transitional period.

The ARA thanks Treasury for the opportunity to contribute to this consultation and remains available for further engagement.

Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.

[23] Ibid.