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**Submission by William Van Caenegem, Professor, and Caitlyn Douglas, Research Associate, Bond University to the Australian Commonwealth Treasury *Competition Review of Non-compete Clauses and Other Restraints***

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## INTRODUCTION AND POLICY ANGLE

1. Arup, Dent, Howe and van Caenegem (co-author of the present Submission) examined non-compete clauses in 2009-2011, supported by an Australian Research Council (ARC) research grant<sup>1</sup>. Findings were published in the UNSW Law Journal<sup>2</sup>. This was the only empirical research on the legal practice around employment non-compete clauses undertaken at that time in Australia<sup>3</sup>. Our policy focus concerned the impact of these clauses on mobility in a knowledge and skills-based economy. Our perspective was that the prevalence and proliferation of non-compete clauses in Australia was inimical to the mobility and freedom of employment that are essential preconditions of a competitive market economy.
2. Our particular focus was on the legal practices that had developed in the shadow of the law of employment non-compete clauses in Australia. We found that non-compete terms were often included in the form of ‘boilerplate’ clauses in employment contracts. Such clauses are poorly adapted to the particulars of the employee they concern. Although often unenforceable, they nonetheless affected mobility in various concerning ways.
3. We noted a commonly held view that non-compete clauses are either ‘not worth the paper they are written on’, or at the very least, of doubtful validity. Critically, this uncertainty about the enforceability of such clauses tended to disadvantage employees considering whether to comply, as the weaker party in any putative subsequent dispute or litigation. They were therefore inclined to ‘play it safe’ by either observing the terms of the non-compete or deferring a decision to change employment, even though the non-compete clauses that troubled them would not stand up to hypothetical judicial scrutiny.
4. Because an employee faced with uncertainty and in a weak transactional position would *tend to comply with or be deterred by* any non-compete, both valid and invalid non-compete clauses had a chilling effect on mobility.
5. We found that employers were more capable of absorbing the risk of litigation in relation to a non-compete because they were better resourced, better advised, enjoyed strategic benefits from enforcement action, and were more capable of gaming existing non-compete clauses to obtain concessions in the form of enforceable undertakings from ex-employees. Although such undertakings were usually less constraining than the non-compete that triggered their adoption, they still adversely affected mobility and freedom to compete with the ex-employer.
6. We advocated in favour of the ‘all or nothing’ common law approach to judicial scrutiny of non-compete clauses and against ‘blue pencilling’ and ‘cascading clauses’. This is because when courts exercise a power to rewrite non-compete clauses to bring them

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<sup>1</sup> Australian Research Council Discovery Grant DP0987637 (2009–11).

<sup>2</sup> Arup C, Dent C, Howe J, & van Caenegem W, ‘Restraints of Trade: The Legal Practice’ (2013) 36(1) *UNSW Law Journal* 1. See also Arup C, What/Whose Knowledge: Restraints of Trade and Concepts of Knowledge (2012) 36(2) *Melbourne University Law Review* 369; and Dent, C, Unpacking Post-Employment Restraint of Trade Decisions: The Motivators of the Key Players (October 23, 2015). (2014) 26 *Bond Law Review* 1-26.

<sup>3</sup> Although we took note of the work of Professor Riley: Joellen Riley, ‘Sterilising Talent: A Critical Assessment of Injunctions Enforcing Negative Covenants’ (2012) 34(4) *Sydney Law Review* 617, 631–2.

within the court's bounds of reasonableness, they incentivise employers to include excessively restrictive clauses, in the expectation judges will rewrite them and that broader non-compete clauses will deter employees more.

7. We also called for close judicial attention to, and strict observance of, the reasonableness factors that enable a non-compete to be enforced in exception to the baseline principle that they are unenforceable as illegal restraints of trade and against public policy. We argued against any expansion of the categories of 'legitimate interests' that justify a restraint.
8. We raised the desirability of statutory intervention with various options canvassed. Some were procedural but we do not reiterate those here. The other options are included in our consideration under 'OPTIONS FOR REFORM AND EVALUATION OF THOSE OPTIONS' below.
9. In terms of the importance of employee mobility in a knowledge, information and skills driven economy, we relied on our own analysis and also on extensive US research and publications that address these issues. The previous work of van Caenegem<sup>4</sup>, co-author of the present Submission, highlighted the local significance of this issue, and stressed the importance of mobility as a longstanding pillar of the market economy, a central aspect of human freedom, and a crucial driver of innovation and creativity.
10. A core point is that individual workers should be free to determine in what organisational context their skills and experience are optimised. This approach benefits both basic freedoms and economic efficiency. Liberty of employment should only be displaced with the clearest possible real-world justification. Non-compete clauses shackle a critical freedom of choice and personal welfare optimisation and starve a significant engine driving competition of fuel.
11. Subsequent and more recent work on the importance of employee mobility, specifically in information, knowledge and skills driven economies (of which the United States is the prime example<sup>5</sup>), has done nothing but further reinforce the point that non-compete clauses cause significant detriment. The writings of Gilson, Lobel, Lemley, Starr, Marx,

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<sup>4</sup> van Caenegem, W, 'Inter-firm Migration of Tacit Knowledge: Law and Policy' (2005) 23(3) *Prometheus* 1, 285-306; van Caenegem W, 'The mobility of creative individuals, trade secrets and restraints of trade' (2007) 14(2) *Murdoch University E-Law Journal* 265; van Caenegem W, 'Employee know-how, non-compete clauses and job mobility across civil and common law systems' (2013) 29(2) *International Journal of Comparative Labour Law & Industrial Relations* 219; van Caenegem W, 'Knowledge mobility, trade secrets and non-competes: lessons from the common law tradition', in Bruun N (ed), *Research Handbook on Intellectual Property and Employment Law* (Edward Elgar Publishing, 2021); and van Caenegem, 'Trade secrets and intellectual property: Breach of confidence, misappropriation and unfair competition' (2014) *Kluwer Law International* 272.

<sup>5</sup> See eg, IAB, *Economic Value of the Advertising-Supported Internet Ecosystem*, John Deighton (Harvard Business School), Leora Kornfeld & Marlon Gerra, available at <https://www.iab.com/wp-content/uploads/2017/03/Economic-Value-Study-2017-FINAL2.pdf>.

Bishara, Lipsitz, Fleming and others<sup>6</sup> are sufficiently rigorous and persuasive to convince the US government to prohibit non-compete clauses altogether. This is a federal intervention in a previously state-regulated matter, where California stood out as a pre-eminent innovation and knowledge-driven economy, in part because non-compete clauses had been outlawed there for many decades. The work of Gilson brought attention to this causal connection between the absence of non-compete clauses in labour contracts and the dynamism of the Californian innovation-based economy. That proposition has not been fundamentally shaken by any subsequent work of the scholars mentioned above or others.

12. The United Kingdom has also resolved to greatly restrict non-compete clauses<sup>7</sup>, limiting them to a maximum term of three months.
13. These developments reinforce our previously expressed view that it is timely to subject these clauses to close scrutiny and limit, if not prohibit, their adoption in employment contracts. As will be seen below, we do not advocate for a complete prohibition, but for a form of regulation that will be effective to deter the spread of non-compete clauses throughout the economy but retain some ability to protect trade secrets where the employer finds that genuinely necessary. Our view is that this is important in an economy such as Australia's, which is driven by knowledge, skills and information but also relies on a more traditional industrial base, in such industries as mining and agriculture. It would further ensure that non-compete clauses are not a surreptitious instrument for simply preventing competition but where upheld, do serve a legitimate interest.
14. Our focus on mobility when considering non-compete clauses accepts that there are many other perspectives that form a valid basis for policy evaluation. Nonetheless, our view is that none of these perspectives stress putative *benefits* of non-compete clauses. Rather, they suggest that priorities such as reinforcing workers' rights; vindication of the right to work as a fundamental human freedom; improving worker income levels; redressing bargaining imbalances; and maintaining the competitiveness of a market economy all support a restrictive approach to non-compete clauses.

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<sup>6</sup> See inter alia, Gilson R, The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not To Compete (1999) 74(3) *New York University Law Review* 575; Lobel O, 'Noncompetes, Human Capital Policy & Regional Competition' (2020) 45(5) *The Journal of Corporation Law* 931; Lemley, M A. and Lobel, O, Banning Noncompete Agreements to Create Competitive Job Markets (January 26, 2021), Day One Project, January 2021, San Diego Legal Studies Paper No. 21-010, Available at SSRN: <https://ssrn.com/abstract=3773893> or <http://dx.doi.org/10.2139/ssrn.3773893>; Starr, E P., Prescott J J, and Bishara N D, "Noncompete Agreements in the U.S. Labor Force." *Journal of Law and Economics* 64, no. 1 (2021): 53-84; Marx, M, Reforming Non-Competes to Support Workers, The Hamilton Project 2018, available at [https://www.hamiltonproject.org/assets/files/reforming\\_noncompetes\\_support\\_workers\\_marx\\_policy\\_proposal.pdf](https://www.hamiltonproject.org/assets/files/reforming_noncompetes_support_workers_marx_policy_proposal.pdf); National Bureau of Economic Research (NBER) Working Paper Series, Innovation and the enforceability of noncompete agreements, Matthew S. Johnson, Michael Lipsitz, Alison Pei, Working Paper 31487: <http://www.nber.org/papers/w31487>; Marx M and Fleming L, Non-compete Agreements: Barriers to Entry ... and Exit? (Matt Marx, MIT Sloan School of Management; and Lee Fleming, Harvard Business School and Institute for Quantitative Social Science), *Innovation Policy and the Economy*, Vol 20 (2020), available at <https://www.journals.uchicago.edu/doi/pdf/10.1086/663155>.

<sup>7</sup> Department of Business and Trade (UK), 12 May 2023, 'Non-compete clauses: Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment', available at <https://assets.publishing.service.gov.uk/media/645e27612c06a30013c05c57/non-compete-government-response.pdf>.

15. In any case, we believe that moving to restrict non-compete clauses in employment is warranted *from a mobility-enhancing perspective alone*, because of the fundamental economic importance of such mobility. This Treasury Review, is in any case, focused on the competition aspects of the non-compete controversy.
16. We also make the point that eliminating non-compete clauses is a ‘zero sum game’: employers might lose by the greater freedom of employees to *leave* them, but they also win by employees having greater freedom to *join* them. Their ability to do so would tend to generate beneficial competition between employers in the provision of more attractive and effective workplaces, and more meaningful work.

## BASIC LEGAL PRINCIPLES

17. Non-compete clauses in employment contracts have been the subject of countless items of academic and judicial analysis and have now attracted significant political attention as well. That they involve balancing competing public and private interests, has been highlighted in a range of valuable discussions in the literature about their development over time.
18. More specifically, the ARC research-based article by Arup, Dent, Howe, and van Caenegem referred to above, provides a nuanced understanding of the context in which non-compete clauses operate at common law<sup>8</sup>. The law is also well documented in Heydon’s text,<sup>9</sup> and in further recent analytical accounts of non-compete law in Australia<sup>10</sup>. With this in mind, our Submission does not seek to restate the established law exhaustively and in detail.
19. Notwithstanding this, to understand our proposals and recommendations for reform in the current Submission, it is important to reiterate some basic legal principles and recent controversies.
20. In Australia, the enforceability of non-compete clauses is largely regulated by the common law restraint of trade doctrine as espoused by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* (‘*Nordenfelt*’).<sup>11</sup>
21. More specifically, *Nordenfelt* stands for the presumption that restraints of trade are unenforceable because they are contrary to public policy.<sup>12</sup> Despite this general principle, Lord Macnaghten went on to determine that the presumption can be rebutted if a clause is reasonable in that it does no more than protect an employer’s legitimate interests and is not injurious to the public interest.<sup>13</sup>
22. Regarding legitimate interests, it has been subsequently recognised that an employer is entitled to protect confidential information (including trade secrets),<sup>14</sup> and customer

<sup>8</sup> See Arup et al (n 2).

<sup>9</sup> See Heydon JD, *The Restraint of Trade Doctrine* (LexisNexis, 4th edition, 2018), Chapters 4-7.

<sup>10</sup> Recently see Fell A and Rudz E, ‘Employee Non-compete Restraints: Resolving Uncertainty’, (2023) 46(4) *UNSW Law Journal* 1252. Note also the earlier insightful piece by Joellen Riley (n 3).

<sup>11</sup> See Fell and Rudz, above n10; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 565 (Lord Macnaghten) (‘*Nordenfelt*’).

<sup>12</sup> *Nordenfelt*, *ibid*.

<sup>13</sup> *Ibid*.

<sup>14</sup> See eg *Pioneer Concrete Services Ltd v Galli* [1985] VR 675, 710–11 (Crockett, Murphy and Ormiston JJ); *Just Group Ltd v Peck* (2016) 344 ALR 162, [34] (Beach and Ferguson JJA and Riordan AJA).

connection by way of a non-compete agreement.<sup>15</sup> To this has been recently added, the maintenance of a stable and trained workforce, sometimes referred to as ‘staff connection’.<sup>16</sup> Without elaboration on each interest here, the court ultimately assesses the extent to which ‘legitimate interests’ deserve protection in terms of the duration, nature, and geographic area covered by the non-compete clause in question.

23. Notwithstanding some minor clarifications and developments,<sup>17</sup> the essence of the *Nordenfelt* doctrine has otherwise remained firmly in place for more than one century. Upon examination of this doctrine over time, it is clear that the enforceability of a non-compete clause is independent of the validity of the employment contract, and a clause cannot be allowed to stand if it merely protects against competition. Hence, the courts have been said to operate as ‘guardians of the public interest’, overriding otherwise valid clauses in employment contracts for the benefit of free competition and mobility where the circumstances allow.<sup>18</sup>
24. A consequence of this guardianship is the common law court taking an ‘all-or-nothing’ approach.<sup>19</sup> That is to say, the *Nordenfelt* doctrine does not allow any opportunity to partially enforce or judicially rewrite non-compete clauses. Rather, emphasis is placed on the employers’ responsibility to draft the clause in reasonable terms; if they fail to do so the court will not ‘save their bacon’. The extent to which this approach, although beneficial, is adequate to protect the public interest is often debated and ultimately shapes this Submission.
25. It is sometimes argued that the presumption against enforceability wrongly allows parties to deviate from a contractual term that they freely entered into, interfering with the fundamental tenet of freedom of contract and that *pacta sunt servanda*.<sup>20</sup> While this is true to some extent, it ignores the unequal bargaining power that exists during the drafting and negotiating of employment contracts. Since it also is common practice for employers to impose non-compete clauses on a ‘take-it-or-leave-it basis’, the impact of this line of reasoning has unsurprisingly been limited in the cases.<sup>21</sup>

<sup>15</sup> See eg *Lindner v Murdoch’s Garage* (1950) 83 CLR 628, 654 (Latham CJ); *Commsupport Pty Ltd v Mulligan & Mirow* (2018) 279 IR 436, [58] (Horneman-Wren SC DCJ).

<sup>16</sup> This is a legitimate interest of recent vintage and in our view, doubtful status. It emerged from the decision in *Cactus Imaging Pty Ltd v Peters* (2006) 71 NSWLR 9, 26–7 [55] (Brereton J). Despite such recognition in *Cactus* its foundations and application in the Australian common law remain somewhat uncertain and arguably Brereton J’s acceptance is too accommodating. Hence, we do not recognise ‘staff connection’ as a legitimate interest for the purpose of our Submission and reform recommendation. See para 88 of this Submission for more detail.

<sup>17</sup> See eg *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 700 (Lord Atkinson).

<sup>18</sup> William Van Caenegem, *Trade Secrets and Intellectual Property* (Wolters Kluwer Law International, 2014) 204.

<sup>19</sup> *Ibid* 13–4.

<sup>20</sup> *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462, 465 (Jessel MR). See also *Herbert Morris Ltd v Saxelby* (1916) 1 AC 688, 709 (Lord Parker); *Seven Network (Operations) Ltd v Warburton* (No 2) (2011) 206 IR 450, [3] (Pembroke J); *Sidameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA 418, [86] (Young JA); JD Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 3rd ed, 2008) 275; and *Vision Eye Institute Ltd v Kitchen* [2014] QSC 260, [357] (Applegarth J).

<sup>21</sup> Iain Ross, *Non-compete Clauses in Employment Contracts: The Case for Regulatory Response* (Working Paper 4/2024, March 2024); Evan Starr, et al, ‘Noncompete Agreements in the U.S. Labor Force’ (2021) 64(1) *Journal of Law & Economics* 53, 72.



26. As suggested in the above section ‘INTRODUCTION AND POLICY ANGLE’, this Submission instead focuses on the need for *greater protection* of the public interest, that being society’s interest in a free and mobile labour market. This is particularly necessary given recent studies by the Australian Bureau of Statistics, finding that approximately 1 in 5 employers use non-compete clauses in their businesses.<sup>22</sup> This proliferation in contemporary society demonstrates just how timely it is for Australia’s current approach to undergo significant reform<sup>23</sup>.
27. Another aspect of the law that invokes a need for statutory reform is the contractual use of ‘cascading’ or ‘laddered’ non-compete clauses.<sup>24</sup> Put simply, these clauses contain several variations of the non-compete terms, with each variation decreasing in severity.<sup>25</sup> They are used by employers particularly to avoid the court’s ‘all-or-nothing approach’ by reliance on the rules of severance that exist in contract law generally. Although there is some debate about the acceptance of cascading non-compete clauses,<sup>26</sup> the courts have often severed unreasonable parts of such clauses and enforced those parts that are otherwise reasonable.<sup>27</sup> The availability to the court of severance in this context, goes back to the old decision in *Attwood v Lamont*.<sup>28</sup> Since employers tend to game this ability in their favour, we see the present state of the law as disadvantageous in this regard. At [32] below, this Submission addresses recent beneficial, but ultimately insufficient, evolution in relation to severance.
28. Beyond this broad Australian common law context, it must be noted that New South Wales (‘NSW’) takes a distinct approach to non-compete clauses. The Nordenfelt doctrine is there subject to the relevant provisions in the *Restraints of Trade Act 1976 No 67* (NSW) (‘RSA’).<sup>29</sup> A material effect of this statute is that it allows the courts to enforce non-compete clauses to the extent that they are reasonable.<sup>30</sup> This judicial power to construe broad – and otherwise unenforceable – clauses as narrowly as required to make them reasonable, is concerning as it results in employer overreach with chilling effects on employee mobility. This being said, it is clear that the NSW approach does not provide beneficial guidance for statutory reform, but rather reinforces the need for a stricter, and also nationally consistent, framework.
29. Noting the abovementioned context, including the history and conflicting positions that persist in Australia’s approach to non-compete clauses, our Submission further

<sup>22</sup> Australian Bureau of Statistics, *Restraint Clauses, Australia, 2023* (Web Page, 21 February 2024) <<https://www.abs.gov.au/articles/restraint-clauses-australia-2023>>.

<sup>23</sup> Is this also referred to in Treasury’s position paper/issues paper etc?

<sup>24</sup> Fell and Rudz (n10) 1270-2.

<sup>25</sup> Ibid.

<sup>26</sup> See eg Andrew Stewart, ‘Drafting and Enforcing Post-Employment Restraints’ (1997) 10(2) *Australian Journal of Labour Law* 181, 214–15; and David Cabrelli and Louise Floyd, ‘New Light through Old Windows: Restraint of Trade in English, Scottish, and Australian Employment Laws (2010) 26(2) *International Journal of Comparative Labour Law and Industrial Relations* 167, 175. Although it seems that the law has more recently established that cascading clauses do not generate vitiating uncertainty; see *Habitat 1 Pty Ltd v Formby (No 2)* (2017) 275 IR 49, [143]–[147] (Banks-Smith J); and *Hanna v OAMPS Insurance Brokers Ltd* (2010) 202 IR 420.

<sup>27</sup> See eg, *Habitat 1 Pty Ltd v Formby (No 2)* (n 26)); *Hanna v OAMPS Insurance Brokers Ltd* (n 26)

<sup>28</sup> *Attwood v Lamont* [1920] 3 KB 571, 593-4 (Younger LJ).

<sup>29</sup> *Restraints of Trade Act 1976 No 67* (NSW) (‘RSA’).

<sup>30</sup> Ibid s 4(1).

addresses some recent developments that further inform our recommendations for reform.

## RECENT LEGAL DEVELOPMENTS

### ‘Genuine attempt’ and unreasonable delay

30. One of the most commonly cited cases in recent times is *Just Group Ltd v Peck*, which was decided before the Victorian Court of Appeal.<sup>31</sup> Just Group Ltd sought to enforce its non-compete clause against an employee, Nicole Peck, after she began working at a rival retailer, Cotton On. This clause essentially prevented Peck from working with 50 retailers (including Cotton On) anywhere in Australia and New Zealand for a period of twelve to twenty-four months. At first instance and again on appeal, the courts recognised the employer’s legitimate interest in protecting confidential information,<sup>32</sup> but nonetheless held that the restraint provisions were too broad, and unreasonable.
31. The importance of this case rests with the court’s discussion of severance in obiter dicta. This is because the Court of Appeal effectively modified the requirements that were established in *Attwood v Lamont*.<sup>33</sup> Rather than requiring that it be established that the provision ‘ought to be severed’, it was noted that a non-compete clause must reflect ‘a genuine attempt to establish reasonable protection for the legitimate interests of the employer’.<sup>34</sup>
32. The court is here seeking to prevent employers from automatically and indiscriminately including overly broad and standardised non-compete clauses in employment contracts, and then recruiting the court to undertake the proper drafting exercise. This exemplifies the court’s concern with the way non-compete clauses negatively impact employees themselves and the broader public interest. Although the ‘genuine attempt’ requirement was only established in obiter and is limited to cascading non-compete clauses, the modification still reflects a positive development of the common law that limits employers’ bargaining options. *Just Group Ltd v Peck* displays a tendency towards reform that requires a stricter approach to non-compete clauses.
33. Another key recent case is *Scyne Advisory Business Services Pty Ltd v Heaney* in NSW.<sup>35</sup> For context, the employee in this case, Ms Heaney, was subject to a twelve-month non-compete clause. She resigned and subsequently took gardening leave upon request, but refused to make an undertaking that she would not act in breach of her non-compete clause. Three months after giving notice of her resignation, Ms Heaney began work at a competing company, and the old employer sought an injunction.
34. Justice Parker noted that he was ‘*inclined to grant relief*’ on the circumstances before him, but ultimately held that ‘it would be most unreasonable now to restrain Ms

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<sup>31</sup> *Just Group Ltd v Peck* (2016) 344 ALR 162.

<sup>32</sup> The parties accepted that this confidential information fell into three categories, namely, information concerning the employer’s work-streams, information that was received in connection with the employee’s CFO role and its responsibilities, and information that the employee actually received as CFO.

<sup>33</sup> *Just Group Ltd v Peck* (n33) [39] (Beach and Ferguson JJA and Riordan AJA ).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Scyne Advisory Business Services Pty Ltd v Heaney* [2024] NSWSC 275.



Heaney... because [her old employer] has now belatedly discovered the urgency of its case'.<sup>36</sup> In other words, the court refused to grant interlocutory relief because of the old employer's three-month delay from the date they became aware of a potential breach.

35. Beyond providing important precedent for factors impacting the discretion to grant injunctive relief, this case is telling because of the court's reticence towards the enforceability of non-compete clauses. In avoiding a firm decision on the legitimacy of the employer's case,<sup>37</sup> it seems the court was reluctant to offend against public policy favouring employee mobility, particularly where the employee had already taken their skills and talents elsewhere.
36. These developments in the common law demonstrate that courts are open to new ways of achieving protection for employee mobility and a free labour market. It demonstrates their vigilance in the face of the firmly established and inescapable precedent that allows some 'reasonable' restraints to stand. This supports our Submission for reform as it demonstrates that the proposed changes are not contrary to the spirit of the law and its incremental evolution but are rather in sympathy with them and with broader public needs.

#### Developments in New South Wales

37. As explained in the BASIC LEGAL PRINCIPLES section (above), NSW takes a distinct approach which differs from every other jurisdiction in Australia. By virtue of the NSW courts being able to apply the RSA and read down non-compete clauses,<sup>38</sup> it is arguable that the risk for employers that adopt broad non-compete clauses in that jurisdiction has been reduced during and in the shadow of litigation. This begs an important question about the ability of employers to capitalize on the RSA.
38. This circumstance was recently examined in *Allied Express Transport Pty Ltd v Braim*.<sup>39</sup> In this case, the applicability of the RSA was a key issue in relation to the enforceability of a restraint of trade clause against two defendants, namely, Mr Braim and South Pacific Laundry Pty Ltd ('SPL'). The employer argued that the RSA was applicable because the contract was expressly 'governed by the laws of [NSW]'. On the other hand, the defendants argued that the laws of Victoria were rather applicable because that is where Mr Braim resided, and SPL carried on business.
39. Although Justice Williams found that there was no breach or apprehended breach of the restraint clause, it was held in obiter that the RSA would have applied. In his reasoning, his Honour noted that the court should not decline 'to give effect to the parties' choice of governing law for the employment contract'.<sup>40</sup>
40. This case represents an interesting – and rather ambiguous – development of the law. Whereas Australian courts have not historically hesitated to downplay freedom of contract for the benefit of the public interest, Justice Williams' comments seem to do

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<sup>36</sup> Ibid [80]-[82] (Parker J).

<sup>37</sup> Ibid [37] (Parker J).

<sup>38</sup> RSA (n30) s 4(1).

<sup>39</sup> *Allied Express Transport Pty Ltd v Braim* [2022] NSWSC 1298.

<sup>40</sup> Ibid [273] (Williams J).

just this. Although there are good policy reasons to uphold the contractual intentions and autonomy of parties, the potential consequences in relation to a strategic use of the RSA cannot be ignored. In other words, this obiter risks incentivising employers to manipulate the governing law of a contract so that they may craft broad non-compete clauses that a court will read down in the unlikely event of being challenged by an employee. We have already noted the chilling effect this will have on employee mobility.

41. Whether this interpretation is accepted or not, the inconsistency that exists between NSW and other states is made particularly clear in *Allied Express Transport Pty Ltd v Braim*. To the extent that this creates a room for dispute and argumentation in itself, and further complicates the applicable rules on non-compete clauses, it is clear that the unified federal framework we argue for below is warranted, even necessary.
42. In contrast to such an expansive application of the RSA, in *McMurchy v Employure Pty Ltd and Kumaran v Employure Pty Ltd*, the NSW Court of Appeal adopted a more conservative attitude.<sup>41</sup> In this case, the court refused to read down a nine-month restraint of its own motion, despite lesser durations being available in the cascading structure of the non-compete clause in question.<sup>42</sup> Since the employer did not make alternative Submissions for a lesser restraint to be enforced, pursuant to s 4(1) of the RSA, the court simply held that the nine-month term was unenforceable. According to the court, the onus of persuading it to read down a non-compete clause rests on the party seeking to enforce it.
43. This decision again proves the court's reluctance to enforce non-compete clauses - even in the face of a statute that permits the reading down of such restraints. The court acted in harmony with the judicial tendency to protect the public interest over the putative interests of the employer. In this regard we point to what was said in [36] above: common law decision-making reflects persistent judicial reservations about non-compete clauses and their adverse effects. A more restrictive regulatory approach would therefore not be 'incoherent' or constitute a sudden reversal compared to judicial attitudes and decision making.
44. The NSW cases also demonstrate significant variability in the presence of a statute like the RSA. We reiterate here that the ensuing uncertainty in NSW also plays in favour of better resourced employers, perhaps even more so than in common law states as they can hope that a judge will rewrite an excessive restraint.

## DEFINING THE TARGET OF REFORM

45. Before canvassing various options for reform, we define 'non-compete clauses'. We use this term instead of 'restraints of trade'. We are referring only to non-compete clauses in employment or work contracts and labour markets, not other non-competes. It is well established that non-compete clauses in employment are a separate class that

<sup>41</sup> *McMurchy v Employure Pty Ltd; Kumaran v Employure Pty Ltd* (2022) 409 ALR 199.

<sup>42</sup> *Ibid* [152] (Gleeson JA).

demands far more restrictive legal oversight than for instance non-compete clauses connected to transfers of goodwill.

46. It is self-evident that any measure or statutory intervention should extend to both de iure and de facto non-compete clauses, defining the latter by reference to substance and not form. We should have regard to the effect and not the nomenclature of the target clauses in employment contracts. We therefore adopt a definition of an employment non-compete as ‘any contractual term that expressly restricts or limits the right or freedom of a worker to be employed by or undertake remunerated work for another person or for the worker’s own account in any capacity’ (below referred to as a ‘restrictive term’). What is traditionally known and recognised as a ‘non-compete clause’ or a ‘restraint clause’ or something similar clearly falls under this definition. But the definition is also effective to apply to a confidentiality clause that is expressed in such broad terms as to amount to a non-compete, and to non-solicitation clauses with the same practical effect<sup>43</sup>.
47. Our definition also extends protection against non-compete clauses to participants in the ‘gig economy’, even if their contractual relationship to the party paying for their work is not strictly or legally speaking an employment relationship, but a contractor relationship. They would be persons that ‘undertake remunerated work for another person’, with person here being defined as a natural or corporate person. Employees that set up their own business post-termination are also covered as they either work for ‘another person’ in the form of a company they have established, or for their ‘own account’. In other words, a non-compete that restricts an employee from performing work for another as a contractor would also be covered.
48. We include the terms ‘expressly restricts’ so that terms that define duties of an employee during the term of employment, or the implied or express duty of fidelity, cannot be construed as ‘restrictive terms’. Our definition is not intended to apply to work undertaken for others during the currency of the contract that purports to impose the restraint by the operation of one of its terms.

## **OPTIONS FOR REFORM AND EVALUATION OF THOSE OPTIONS**

49. The case for reform of the law on employment non-compete clauses, including in Australia, has been sufficiently made out (see above [11]). We already argued for reform more than a decade ago on the basis of our findings in the ARC funded research project,<sup>44</sup> and van Caenegem has consistently supported such reforms in various writings which are in line with what other scholars have argued in terms of the benefits of employee mobility.
50. The more recent legal developments in the caselaw as described have not impacted our views on this topic or led us to revise our position. We argue that the judges applying the common law are both expressly and implicitly aligned with a policy that deters non-

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<sup>43</sup> Recently, in relation to the US, see ‘Confidentiality Agreements Can Act Like Noncompetes’, available at <https://www.promarket.org/2024/02/08/confidentiality-agreements-can-act-like-noncompetes/>.

<sup>44</sup> See (n 1).

compete clauses. We also argue that a national approach is required to minimise gaming of jurisdictional issues and reduce complexity as much as is possible.

51. Our focus in this Submission is therefore primarily on analysing the spectrum of reform options and advancing a concrete proposal for reform. We note that in the United States ('US') the preferred option is a complete ban on non-compete clauses, while in the United Kingdom the preferred option is a three-month maximum term limit for any non-compete.
52. We are conscious of the fact that any regulatory intervention, although in our view well aligned with the present attitude of the judges, is still quite a departure as the common law has not previously been trammelled by regulation in any way. At this point, except for NSW (but in an incidental manner there), non-compete clauses in employment are entirely governed by the common law in every state of Australia<sup>45</sup>.
53. We reiterate that the starting point of the common law is that any contractual restraint on competition per se is against public policy and unenforceable. However, a court can make a contrary order if it determines that the non-compete is reasonable to protect a recognised interest, in terms of time, geographical reach, and targeted activities.
54. We recognise that regulatory intervention will potentially cause some incoherence, trigger gaming and circumvention, generate unintended consequences and possibly have perverse effects<sup>46</sup>. We therefore favour a well-designed intervention that is as resistant as possible to such developments and is not overly prescriptive. We favour a solution that minimises transaction costs while effectively realising the policy goal of deterring encumbrance of mobility.
55. In our view, prescriptively regulating non-compete clauses has the potentially negative consequence of supporting their continuing prevalence, because it will result in a 'tick-a-box' approach. Prescribing the proper formation of non-compete agreements in detail also gives the impression of a regulatory imprimatur. Whereas, our view is that any prescription should deter their adoption and limit them to the narrow category of case where recognised interests so genuinely warrant their terms that the employer is willing to offer distinct and separate remuneration for them.
56. Below we consider some principal options and then advance our preferred option.

#### Option: Prohibition of non-compete clauses

57. Prohibition in the manner proposed in the US<sup>47</sup>, is a very radical departure from the present, and longstanding situation, although perhaps less there than would be the case in Australia. A high-profile, real-life model of how prohibition can operate exists in California and some other states have trended in the same direction. No such developments have occurred here. Prohibition would obviously require more specific

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<sup>45</sup> Note the above discussion concerning the RSA which provides judges more power to rewrite non-competes, in exception to the traditional all or nothing common law principle.

<sup>46</sup> See Baldwin, Robert, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012).

<sup>47</sup> See 16 CFR Part 910 RIN 3084-AB74 Federal Trade Commission Non-Compete Clause Rule, Notice of proposed rulemaking; and FTC Announces Rule Banning Noncompetes, available at <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> (April 23, 2024).

regulations concerning existing non-compete clauses and transition to the new regulatory environment.

58. Prohibition would interrupt a longstanding Australian practice concerning certain employees, certain industries and certain types of contracts of employment. However, we also acknowledge that the use of non-compete clauses has in recent times gone beyond the confines of those traditional realms both in this country and seemingly in other market economies such as the US and the UK. Prohibition would obviously stop this evolution in its tracks.
59. Prohibition does not alter or eradicate the underlying conditions and concerns that make non-compete clauses desirable tools for employers seeking to protect legitimate interests, in particular relating to trade secrets and training outlays. That employers often want nothing other than to throw roadblocks to competition in the path of departing employees does not mean they never have legitimate interests to protect. These interests will persist and in the face of prohibition employers will look for alternative ways to protect their perceived interests. Employers may therefore: rely more readily on breach of confidence (trade secrets) actions against ex-employees; rely on the Corporations Law for the same purpose; attempt to disguise what are effectively non-compete clauses; use garden leave; use non-poaching agreements with other employers; and turn to other as yet unknown and putatively undesirable practices.
60. The weak level of protection that the law affords to trade secrets,<sup>48</sup> and evidentiary difficulties when an action for breach of confidence is brought against an ex-employee are one important reason why non-compete clauses are often preferred to NDAs or reliance on equity. Prohibiting these clauses might trigger more trade secrets cases and attempts by employers in aggregate to influence the relevant law in their favour. They might cause judges to become more sympathetic to such claims, as has to some degree happened in the US over the years.<sup>49</sup>
61. We would also expect to see an increase in the number of claims brought by employers under the *Corporations Act 2001* (Cth) for breaches of the various ‘officer and employee’ duties. For example, section 183 prohibits employees of a corporation from improperly using a company’s information to gain an advantage for themselves or someone else or to cause detriment to the corporation.
62. Employers might also react by limiting the circulation of information within organisations, and by taking a more conservative attitude to providing free training and career development support for their employees. Greater limits on internal circulation

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<sup>48</sup> By way of the action for breach of confidence and relatively untouched by the criminal law, at least in comparison with some other jurisdictions.

<sup>49</sup> Note in particular the controversy about the application of the ‘inevitable disclosure’ doctrine in that respect, in particular in relation to the Defend Trade Secrets Act; in *Phoseon Tech., Inc. v. Heathcote*, 2019 WL 72497, \*11 (D. Or. Dec. 27, 2019) it was said that ‘Seventeen states appear to have adopted the inevitable disclosure doctrine in one form or another [...] Five states appear to have rejected the doctrine.’; see Oliver F. Ennis, Nicholas W. Armington, Adam P. Samansky, An Emerging Split on the Applicability of the Inevitable Disclosure Doctrine Under the DTSA, available at <https://www.mintz.com/insights-center/viewpoints/2231/2022-10-10-emerging-split-applicability-inevitable-disclosure>. See also Michael J. Garrison, Dawn R. Swink & John T. Wendt, A Proposed Framework for a Federal Inevitable Disclosure Doctrine under the Defend Trade Secrets Act, 72 Buff. L. Rev. 271 (2024), available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol72/iss1/4>.



of knowledge and information within organisations are well known to have adverse effects on innovation and economic development.<sup>50</sup> This is one significant reason why the UK government has opted for a maximum term rather than prohibition of non-compete clauses.<sup>51</sup>

63. We consider that the arguments made in the US concerning potential disincentives for general firm investment if non-compete clauses are prohibited are too speculative and general to carry much weight in the current debate.
64. Prohibition of non-competes requires more careful consideration of what amounts to a non-compete, and how to combat a variety of probably determined efforts to circumvent the prohibition. It would also require consideration of who to extend the prohibition to, for instance, workers in the ‘gig economy’ and how to achieve such an extension.

#### Option: Prescriptive regulation of non-compete clauses

65. Some jurisdictions already regulate non-compete clauses in more detail. This approach is particularly prevalent in civil law jurisdictions in Europe, and tends to go hand in hand with a requirement for separate consideration.<sup>52</sup> Some other proposals would require a clear indication in advertisements that a job is subject to a non-compete; a condition that clauses only take effect after 6 months; the creation of a public register of company users of non-compete clauses; and annual review of non-compete clauses etc.<sup>53</sup>
66. However, our view is that such prescriptive regulation of these clauses runs the risk of giving them the rule giver’s imprimatur and making them more prevalent. Employers might be encouraged by the certainty that compliance with prescriptions brings, to include non-compete clauses more often. Most of these proposals would not have much direct deterrent effect or greatly affect the cost of imposing non-compete clauses. They would result in tick-a-box compliance.
67. This would go contrary to our policy conclusions that exactly favour *further deterring* the adoption of non-compete clauses in employment contracts. Our preference is for regulations that dissuade use of non-compete clauses, rather than regulations that aim to redress the bargaining imbalance in relation to them, by imposing certain detailed constraints on and surrounding the bargain. As indicated above, this is in part because non-compete clauses do not only negatively impact the personal interests of the employee, but also the public interest in maintaining a free market for labour in aggregate.
68. One possible more prescriptive approach favours prohibition but with a ‘carve-out’ for CEO level employees, or for employees with salary levels over a certain amount per annum. We consider that this will trigger gaming or adjustments to firm practices in

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<sup>50</sup> For an overview of research into knowledge sharing in organisations, see Delio Ignacio Castaneda, Sergio Cuellar, ‘Knowledge Sharing and Innovation: A Systematic Review’ (2020) 27(3) *Knowledge and Process Management* 159.

<sup>51</sup> See n 7 above.

<sup>52</sup> For instance imposing a minimum employee age; mandatory separate consideration at a prescribed level; maximum terms; and separate documenting, consent and agreement.

<sup>53</sup> See UK Report (n 7) 49.

relation to remuneration and job descriptions. We are also not convinced that there is more persuasive policy justification for periods of exclusion of CEO level employees from the labour market than for lower paid employees. On one view the mobility of high-level employees is at least as important, if not more important than that of employees at lower salary levels or lower levels of skill and responsibility. In any case it would be difficult with any certainty or rational underpinning to select a particular salary level. Further, the effect of the amount set might be geographically random or disproportionate, and a rational and appropriate level would have to vary from industry to industry.

69. One suggestion is that separate legal advice be required for a valid restraint, that advice being provided to the employee by a lawyer independent of the employer. This also we consider a complex and potentially expensive option. On the other hand, it would also have a deterrent effect, and would mitigate the inclusion of ‘boilerplate clauses’ in employment contracts that prove to be unenforceable.
70. Requiring distinct consideration or remuneration during the period of a non-compete does address the adverse impact a restraint period might have on a worker who cannot take the most remunerative employment otherwise available to them. If separately and properly remunerated, a non-compete becomes more of a burden for employers and would therefore become less prevalent. As it stands, the law and policy proceeds on the basis that consideration for a non-compete clause is absorbed or reflected in the other benefits an employee obtains. This is a highly abstract presumption, and it would be fair to say that the non-compete period is most often effectively uncompensated. Although an ex-employee is free to take employment and earning an income during the restraint period, just not of a kind covered by the non-compete, we do favour a requirement of separate and distinct compensation (see further below).

Option: A maximum term for non-compete clauses

71. We consider that a three-month maximum as proposed in the United Kingdom comes close to prohibition<sup>54</sup>. This is because in most cases it would be ineffective at protecting legitimate employer interests; in case of conflict post-termination the three month term would be mostly consumed by disputation or litigation; any breach would often be detected only when a substantial time from termination has elapsed; and if violated such a short restraint is unlikely to trigger action from an employer engaging in a rational cost/benefit analysis concerning enforcement action. Three-month restraints would be largely pointless and at best an unhelpful complication.
72. As a free-standing measure, a three-month limit might also have the effect of encouraging adoption of restraints that are compliant on that aspect; just another term in a boilerplate provision. A three-month term is likely to be seen as justified because

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<sup>54</sup> See ‘Smarter Regulation to Grow the Economy’, May 2023 (n 7) at p15: ‘The Government intends to legislate when Parliamentary time allows to limit the length of non-compete clauses to three months, providing employees with more flexibility to join a competitor or start up a rival business after they have left a position’; available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1155774/smarter\\_regulation\\_to\\_grow\\_economy-may\\_2023.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1155774/smarter_regulation_to_grow_economy-may_2023.pdf). At the time of writing the UK government has not initiated the legislative process in this regard.

an employee immediately ('from one day to the next') starting work with a rival of the ex-employer is simply 'beyond the pale', whereas we view that ability exactly as critically important for competition.

73. We also consider that a one year maximum, or even a two-year maximum as exists in Germany for instance is too long<sup>55</sup>, even if it would still be subject to the existing common law reasonableness standard. Setting such a maximum term would potentially encourage employers to adopt this term as a standard inclusion. In most industries there would be little justification in terms of protectable interests, for such a long restraint. A one-year restraint takes an employee out of their most efficient employment for a very long time. It denies society access to their optimal skills for a long period and disturbs normal patterns of acquisition of experience and learning in the employee's preferred field of employment for too long.

#### Preferred option: a six-month term limit

74. Our preferred option is to impose, by way of an Australia-wide statutory reform, an absolute and universal maximum six-month term limit on employment non-compete clauses.<sup>56</sup> Importantly we would combine this with limited regulation, and every non-compete would remain subject to reasonableness review.
75. Justification for the six-month maximum term lies in part in what we say above about the disadvantages of a three-month term, and about the fact that we consider a twelve-month maximum term too long. We also rely on our arguments that the case for total prohibition is tempered by certain persuasive and significant policy concerns as canvassed above. A six-month term therefore represents a compromise, where we consider it a duration sufficient to protect the most genuine and legitimate interests of employers, and disincentivise them from placing restrictions on training and information sharing, but not so long as to have an overly deleterious impact on the private interests of the employee concerned and the aggregate public interest in a free, mobile, and competitive market for labour.
76. The six-month maximum term or any other lower term imposed by a contract of employment should still be subject to reasonableness review in the current manner. Separate and distinct remuneration for it should also be required. Below we additionally advocate for codification of the standards to be applied in such a review, based on the current common law position.

#### Preferred option: additional rules

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<sup>55</sup> Concerning the two year maximum term and 50% of salary consideration requirement in Germany see <https://www.dlapiperaccelerate.com/knowledge/2017/germanys-post-contractual-non-compete-covenants-in-a-nutshell.html>.

<sup>56</sup> We do not address the constitutional issue related to the legislative power to enact the necessary provisions as between states and Commonwealth.

77. The additional regulatory intervention we support is to require separate and discrete consideration (remuneration) for any period of restraint (up to the proposed statutory maximum of six months).
78. To be enforceable, such consideration must be agreed on at the time of engagement and be expressly reflected in a clause in the contract of employment. We do not consider that regulations should prescribe a minimum or set level of such consideration as is the norm in certain jurisdictions (eg 50% in Germany). Parties are free to negotiate the consideration which could be a percentage or fraction of salary for the term of the restraint or a lump sum or other form of payment.
79. Because the employee's agreement concerning the level of consideration would be required, the employer is motivated not to seek a non-compete (because a clear cost is attached to it) so that routine or boilerplate inclusion is deterred. It would also motivate employers to include only restraints that are properly adapted to the individual worker. Although still in a weaker bargaining position we believe the worker would be in a better position than currently to withhold their agreement unless on terms they genuinely find satisfactory.
80. We also propose that the level of remuneration be an additional factor relevant to the reasonableness evaluation, which would increase the level of risk for an employer seeking to include inadequate distinct consideration in the contract of employment.
81. We would also require the employer, when notice is given by either party, to notify the employee whether the non-compete clauses will be activated or not.
82. Further, we advocate for codification of the present law concerning illegality of non-compete clauses and the reasonableness exception. In particular: clear identification of protectable interests, the requirement of proper adaptation to the safeguarding of those interests, both in terms of time and area, and clear identification of restricted activities that accord with and do not extend beyond the actual duties undertaken by the employee.
83. We also advocate for protection of a new employer from liability for tortious interference with contractual relationships that bind their new or prospective employee. At present, if an employee subject to a non-compete seeks employment in a manner that is arguably in breach of their restraint clause, their intended or actual new employer is potentially liable for tortious interference if they encourage their new or intended employee to ignore the restraint they are under. If the new employer is protected from such liability, and for instance if they undertake to fund any challenge or litigation related to the restraint, there is a clear benefit. This should therefore be permissible because assistance from a new or intended employer would redress the common imbalance of resources between an ex-employer and a departed employee faced with threats of or actual litigation in relation to a putative breach of their non-compete.
84. Any non-compete agreement should remain subject to the existing common law reasonableness standards, although it might be apt that the presumption of invalidity be reversed as the non-compete would have to have been entered into in the manner described above. This is because the principle of freedom of contract, or to contract on certain terms, normally demands that parties adhere to their bargain. That is arguably even more the case where clear and distinct consideration is attached to a certain

obligation. However, since this would weaken the employee's position we do not strongly advocate for it here.

85. Transitional provisions would obviously be required. We believe that the simplest solution is to allow existing arrangements to stand, subject as they are to judicial scrutiny. Any agreement or contractual term entered into or amended after the commencement date would be subject to the newly promulgated rules. In that manner the overwhelming majority of non-compete clauses would be subject to the new rules within a relatively short period.

A combination of an absolute six-month limit, separate consideration, statutory enactment of reasonableness factors and legitimate interests, and protection against third party liability for interfering with non-compete clauses, recognises that restraints must be reined in, but also that trade secrets and client connection are employer assets that deserve some level of optional protection in the short term and with remuneration expressly agreed to between employer and employee.

#### Arguments in favour of the preferred option, and its anticipated effects

86. Our preferred option provides an employer who has genuine concerns about trade secrets and client connection, means to legally implement a non-compete. However, those means should only be available where separate remuneration distinct from any other form of benefit is specified in the contract of employment. An employer must also choose whether to activate the non-compete or not at the time of notice. The 'boilerplate problem' will be mitigated by these means as the employer would be less inclined to include standard terms in every employment agreement at the time of engagement. The number of non-compete agreements would be considerably reduced but the device would not be denied to employers who consider that there is a real requirement for such a restraint and to employees who are willing to entertain them in part because they are adequately remunerated.
87. Our proposal to codify the standard of reasonableness and retain its application prevents 'slippage' in the common law, gives a clear framework to those who will draft non-compete clauses, and recognises that a non-compete is the exception and not the rule. However, we propose that the adequacy of distinct and separate compensation for the non-compete clause, required under the mooted rules, be an additionally relevant factor in the reasonableness evaluation.
88. We advocate for the only protectable interests to be particularised trade secrets and direct and actual client connection. We do not agree that 'stability of the workforce' is a proper 'interest' that should be the subject of non-compete protection (more specifically a 'non-solicitation of staff clause'). In part this is because we consider that a *current* employee who encourages others to end their employment relationship so as to join a competing employer or embark on a new competing venture, is engaging in conduct that breaches their obligation of good faith and fidelity. If a *departed* employee engages with remaining employees after termination, then so be it: a 'staff connection



clause’ is nothing more than a direct protection from the kind of competition in the labour market from which no employer should be immune. It is not a different interest that deserves some opportunity for contractual safeguard, and we disagree with the characterisation of ‘staff connection’ as some form of ‘goodwill’ and hence a proprietary asset<sup>57</sup>. In any case such clauses are not really ‘non-compete’ clauses but something more limited analogous to non-solicitation of clients clauses and some NDAs.

89. So-called garden or gardening leave would not be ‘caught’ by our proposed rule, since it does not concern working for another employer or for the employee’s own account for a particular period. That complete prohibition would trigger more gardening leave situations is a possible and detrimental outcome, and that is one reason why we advocate for a six-month maximum to be retained, subject to consideration. Our recommendation would result in a choice for employer and employee: either a garden leave-type protection with a longer than usual notice period and a largely inactive employee still enjoying their undiminished entitlements; or a limited term non-compete in return for a negotiated amount and subject to an express choice to enforce it at the end of the employment relationship. We consider this an appropriate choice for an employer to have and to make in the light of their specific circumstances, expectations and requirements.
90. We consider that non-poaching agreements are a matter for competition law and do not address them here other than to say that they are not to be favoured. We do not address non-solicitation of client clauses or confidentiality clauses unless they are so drafted to fall within our definition of non-compete clauses (see above).

## **PROPOSED [DRAFT] PROVISIONS.**

Note: These proposed provisions are only intended to state clearly what the key elements of our preferred option are.

### **Section 1 Rule**

Any express contractual clause in a contract of employment that restricts or limits the right or freedom of a worker to be employed by or undertake remunerated work for another person or for the worker’s own account (‘restrictive term’) in any capacity is unenforceable.

### **Section 2 Exceptions**

- 1.1 A restrictive term which is operative for a period of six months from the date of termination of a contract of employment or less is binding in exception to the Rule, if the restrictive term is reasonable in accordance with the standard of subsection 1.2.
- 1.2 A restrictive term is reasonable if it does not extend in terms of geographical extent, duration, and scope of activities beyond what is necessary to protect an interest of the employer recognised in subsection 1.3 (‘recognised interests’).

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<sup>57</sup> As proposed by Brereton J in *Cactus*, see above n 16.

- 1.3 The recognised interests are: a. the employer's particularised confidential information; and/or b. the connection between the clients or customers of the employer and the employee.
- 1.4 A court must declare a restrictive term unenforceable if it is not reasonable.
- 1.5 A court cannot sever, vary or alter a restrictive term but must declare it either enforceable or unenforceable.
- 1.6 A court may declare that a restrictive term is not enforceable because of vagueness or uncertainty and must declare a restrictive term that includes alternatives unenforceable.
- 1.7 A restrictive term is not enforceable in the absence of separate and distinct remuneration specified in the contract of employment, or if the employer fails to pay the separate and distinct remuneration in the terms so agreed.

### **Section 3 Liability for Interference**

Giving advice or assistance of any kind to a party subject to a restrictive term does not amount to tortious interference with a contractual agreement in and of itself.

## **RECOMMENDATIONS IN BRIEF**

- 1. The case for restricting non-compete clauses in employment contracts to safeguard mobility in the workforce is sufficiently made out to conclude uniform legislative intervention is warranted;**
- 2. Complete prohibition of employment non-competes does not adequately accommodate the legitimate short-term post-termination employer interests in trade secrets and client connection;**
- 3. New uniform legislation should therefore have the following elements:**
  - a. An absolute time limit on all non-competes of maximum six months;**
  - b. Every non-compete remaining subject to reasonableness review;**
  - c. The legitimate interests that can be protected by a non-compete being prescribed by legislation, those interests being trade secrets and client connection, and no other;**
  - d. A non-compete included in the contract of employment only being enforceable if it triggers separate and distinct consideration or remuneration payable by the employer;**
  - e. The factors to be taken into account in judicial reasonableness review being prescribed by legislation;**
  - f. The prescribed factors being the existing common law ones of geographical reach, time period and scope of restricted activities, and the additional factor of the adequacy of separate and distinct remuneration; and**
  - g. Assisting a new employee in relation to an existing non-compete never amounting to an actionable tort.**