



Australian Government
The Treasury



Policy considerations for Australia – non-competes

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Early evidence suggests non-competes and other restraints are prevalent in Australia

- Evidence from the e61 Institute suggests, at least **one in five** Australian workers are bound by non-compete clauses, and **one-half** are bound by some type of employment restraint (Andrews and Jarvis, 2023).
- Not just managers: **43%** of gig workers, **26%** of community workers and **14%** of clerical workers and labourers (Andrews and Jarvis, 2023).
- Qualitative evidence suggests increasing prevalence of non-competes over time.
- No-poach clauses also appear to be common within franchise operations in Australia, including Australian household names like McDonald's, Bakers Delight and Dominos (Leigh, 2023).

Enforcement of non-competes in Australia can create uncertainty for workers

- Presumption at law in most Australian states and territories that post-employment restraints are unenforceable, unless they are reasonably necessary to protect a legitimate interest of the employer.
- Courts determine on a case-by-case basis – no bright line threshold.
- Courts are also permitted to sever restraints considered too wide, leading to prevalence of “cascading” clauses.
 - In NSW, courts can go further and reduce an excessive restraint to a reasonable protection.
- Study evidence indicates there’s significant uncertainty in the law, falling most heavily on employees and resulting in over-enforcement or over-observance of employment restraints of trade (Arup et al. 2013).
- This may incentivise employers to introduce broad non-compete provisions.

Initial policy questions

- What's the legitimate public policy role of non-competes?
- Can legitimate business interests be protected by other instruments such as confidentiality/non-solicit clauses that are less likely to stifle labour mobility?
- What is the most effective way for policy to align the use of non-compete agreements with legitimate social purposes?
- Does the case for reform differ between low- and high-wage workers?
- What is the best approach for bringing the Australian community along in understanding the impact of non-competes and if necessary, achieving reform that has broad support?