Queensland Law Society

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Office of the President

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Dr James Popple
Chief Executive Officer
Law Council of Australia
Level 1, MODE 3
24 Lonsdale Street
Braddon ACT 2612

By email: [redacted]

Dear Dr Popple

Reform to non-compete clauses and other restraints on workers

Thank you for the opportunity to provide feedback on the proposed reform to non-compete clauses and other restraints on workers for inclusion in the Law Council's submission.

This response has been prepared with the assistance of the Queensland Law Society's (**QLS**) Industrial Law Committee and Franchising Law Committee and Competition, whose members have substantial expertise in this area.

We provide the following responses to the questions contained in the Treasury's consultation paper.

Consultation Questions – Part 3:

How should a non-compete clause be defined in the Fair Work Act? Is the FTC definition appropriate for an Australian context?

The existing common law definition of a "non-compete clause" is appropriate, well-understood and should be used in any legislative reform.

Should any specific kinds of common contractual terms be explicitly included or excluded from this definition?

These matters typically involve four areas:

1. Restraints of trade;
2. Non-solicitation provisions;
3. Obligations of confidentiality; and
4. Other terms relating to intellectual property other information.

We are supportive of clauses providing only for restraints of trade being banned. For the other three matters, the existing common law should be preserved.

There is benefit in employment contracts being able to, if so desired, prescribe confidentially obligations to protect an employer's intellectual property, corporate knowledge and assets. QLS additionally considers it is reasonable for contracts to contain appropriate and reasonable non-solicitation clauses.

Should the ban on non-compete clauses apply to workers who are not employees, such as independent contractors?

If the ban was inserted into the *Fair Work Act 2009*, it would apply only to those workers covered by that act and not independent contractors.

In assessing whether legislation relating to other arrangements should be amended to insert a prohibition, the reasonableness of such a ban would depend on the nature of the contract and the circumstances of the parties, for example, their respective bargaining powers.

Are there any potential unintended consequences that may arise from a reliance on the high-income threshold in the Fair Work Act? If so, how could they be addressed?

While QLS considers there is some merit to a high-income threshold, income, itself, may not be the appropriate determinative factor for assessing whether a non-compete clause is reasonable. A non-compete clause is most appropriate when attached to the contract of a senior person in the business who has a sufficient connection to the operational and commercial information held by that organisation and its clientele.

By way of example, some businesses may employ 'middle-managers' on a 'high-income', but these people do have knowledge of sensitive or highly valuable information relevant to the business. Where a non-compete clause is imposed in these circumstances, they will face the challenge of either complying with same or seeking to litigate. These challenges may not appear to be reasonable based on their role.

QLS's concern about the use of income as the sole factor can be supported by the Law Council's comments in its prior submission that:

> *They are most appropriate for employees who have access to valuable intangible assets of a business, such as confidential know-how, confidential business/client information such as pricing, confidential supplier information, trade secrets, and copyright materials that are not in the public domain.*[1]

On balance therefore and noting the findings of the Productivity Commission and the stated objectives of these reforms, QLS considers there should not be a particular threshold reached where these clauses will then be permissible. Rather, we suggest a complete ban, save for retaining obligations relating to confidentiality and permissible non-use of intellectual property and non-solicitation clauses.

Would the application of the ban to all fair work instruments, as defined by the Fair Work Act, have any unintended consequences?

[1] Law Council submission: Worker non-compete clauses and other restraints dated 6 June 2024

QLS generally considers the ban should apply broadly to achieve the stated policy objectives. However, we again caution against the ban impacting obligations of confidentiality, non-solicitation clauses and other aspects of the common law which work well.

7. What is the appropriate penalty for breaches of the ban on non-compete clauses? Are the existing penalties in the Fair Work Act for other contraventions appropriate? Please consider the following matters in your feedback:

(a) the type of penalty
(b) the magnitude of the penalty, and
(c) the circumstances in which the penalty should apply.

QLS considers it is appropriate for penalties to apply to breaches of the ban on non-compete clauses. These penalties could be modelled on those attaching to the pay secrecy prohibition under section 333B of the *Fair Work Act 2009*.

Breaches of the ban should not attract criminal penalties.

Should there be any defences available to contraventions of the ban on non-compete clauses? If so, in what circumstances?

A defence could be considered in circumstances where a historical contract had not been updated, provided this was an error. Otherwise, it is not reasonable for other defences to be available.

Which parties should be able to commence proceedings for a breach of the ban on non-compete clauses and why?

The employee, employee organisations and a Fair Work Inspector.

An impacted person could also apply to the Court for injunctive relief.

What role should the Fair Work Ombudsman have in relation to the ban on non-compete clauses? Are there particular areas where employees and employers may need assistance to understand and implement any proposed ban on non-compete clauses?

The Fair Work Ombudsman (**FWO**) should be given a specific role and specific funding to ensure this ban is understood and complied with. It should develop and publish appropriate factsheets and other information.

Are there any specific remedies that should be available to persons impacted by potential non-compliance with the ban? What role would the Fair Work Ombudsman have to enforce breaches of the ban, and would new compliance tools be necessary?

The impacted person would need to apply to the Court for injunctive relief.

Should the Fair Work Commission have a role in resolving disputes that arise from the ban on non-compete clauses?

The Fair Work Commission cannot exercise judicial power. Any disputes would need to be resolved by a court applying the usual common law remedies.

Are there any exemptions to the non-compete ban that are justified on strong public policy or national interest grounds? How should any such exemptions be applied (e.g. permanent, temporary, by application etc)?

QLS does not generally consider specific exemptions are appropriate. However, as recommended, no legislative amendment should prohibit or otherwise affect protections that employers have relating to confidentiality obligations and protection of intellectual property and other commercially sensitive information, nor obligations of fidelity and loyalty.

The QLS Franchising Law Committee advocates for particular consideration to be given to contracts where the worker is employed by a franchisee to ensure there are no unintended consequences, noting franchising is a distinct business model relying on the sharing of confidential systems, intellectual property, and know-how by franchisors with franchisees. It is not only the interests of the franchisee (the employer) that are relevant, but those the system which includes also the franchisor, other franchisees and prospective franchisees. Franchisors invest heavily in building brand systems and operational methods in a way that is then marketed to franchisees as part of the franchising business model.

While QLS does not specifically call for non-compete clauses in franchising contexts to be expressly exempt from a ban, we note restraint provisions are already considered by the Franchising Code of Conduct (for example in section 42). We caution against reforms that lead to inconsistency and uncertainty and that create any unreasonable burden on the franchising industry.

As stated, the reform should allow obligations relating to confidentiality and non-use of intellectual property of business owners, franchisors, licensors, and their associates to continue to apply and remain fully enforceable. Specific consultation with the franchising sector would be welcomed.

What transitional arrangements are required to support workers, and business compliance with the ban? and 15 How should the ban apply to non-compete clauses contained in existing contracts after commencement?

Any legislative reform should avoid uncertainty for parties to reduce the likelihood of disputes. QLS proposes the ban apply to all contracts formed following commencement of the amending legislation and suggests a 12-month transition period from proclamation for employers to update their contracts to remove non-compete clauses, with an 18-month period to apply for small businesses.

Consultation Questions – Part 4:

What approach for employees earning above the high-income threshold best strikes the balance between the public interest in competition, productivity, job mobility and the protection of legitimate business interests?

As stated, we do not consider it is appropriate for a high-income threshold to be adopted. Accordingly, we do not consider mandatory compensation is necessary or that there should be any duration perioded.

Should the use of client non-solicitation clauses be restricted? If so, what sorts of restrictions are appropriate (e.g. duration, type of activity, and scope of clients).

QLS considers client non-solicitation clauses are adequately dealt with by the common law

Should restraints with cascading duration periods and geographic extents be allowed?

Yes. In New South Wales under the *Restraint of Trade Act 1976*, courts do not need to resort to the "blue pencil" test. Instead, courts are able to "read down" restraints to limit duration or area, without needing to actively "sever" parts of the clause.

At common law, courts in jurisdictions other than NSW apply what is referred to as the "blue pencil test" whereby the court will assess whether discrete portions of a restraint clause that that the Court considers unreasonable can be run through with the "blue pencil" and removed, whilst still retaining the remainder of the otherwise reasonable clause, such that it can still be applied. The ability to sever parts of a restraint clause is why it is common to see "cascading" clauses in a restraint.

A ban on non-solicitation clauses should not have any impact on non-solicitation clauses. Cascading duration periods and geographic extents should be allowed in respect of non-solicitation clauses.

Section 5

Are there any other considerations or potential unintended consequences if restraints on concurrent employment were to be regulated beyond the common law?

An employment contract can typically restrict or prevent a worker from undertaking other work during their period of employment and there are sound reasons for this. We do not advocate for any additional restrictions to be put in place for these matters, noting the existing common law including the common law duty of fidelity.

As we have stated, relevant considerations here would relate to confidentiality and conflicts of interest

A worker should be required to seek agreement from the employer to perform other work and this request should not be unreasonably refused. The employer therefore still has some protection in these matters.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [redacted]

Yours faithfully

[redacted]

Genevieve Dee
President