5 September 2025

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Dear Sir/Madam

Reform to Non-Compete Clauses and Other Restraints on Workers

The Australian Financial Markets Association (AFMA) represents the interests of over 130 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets.

AFMA is pleased to provide a submission in response to the Treasury Consultation Paper "Reforms to Non-Compete Clauses and Other Restraints on Workers" (**the Consultation Paper**). As evidenced by our previous submission dated 31 May 2024, AFMA and its members have a keen interest in the Government's proposals and the potential impacts on Australia as a place in which to conduct financial business. We have chosen to respond to the elements and questions in the Consultation Paper most relevant to our members.

Executive Summary

AFMA notes the following by way of executive summary:

- AFMA maintains that the current legal framework that applies to non-compete clauses strikes the appropriate balance between protection of employers' legitimate business interests and the rights of employees, particularly in relation to those employees that hold valuable business intellectual property and confidential information;
- Legislative action by the Government to ban non-compete clauses for employees in the finance industry will significantly hinder Australia's attractiveness as a financial centre and

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place Australia at a competitive disadvantage relative to other financial services hubs in the Asia-Pacific region, such as Singapore and Hong Kong;

- The erosion of the ability of firms to protect intellectual property through non-compete clauses will result in less R&D activity being undertaken in Australia and is contrary to both the Government's current R&D and productivity priorities;
- To the extent that any reforms are made by the Government in relation to non-compete clauses, such reforms should only apply to low-to-middle income employees;
- The determination of a low-and-middle income employee should be determined by applying the high-income threshold to the average total income of the employee over the preceding three years, including variable components such as bonuses and commissions;
- The inclusion of a non-compete clause in an employment agreement that is rendered unenforceable by statute should not result in penalties for the employer;
- Existing non-compete clauses should remain enforceable given the existence of the clause was part of the contractual negotiation between the employer and the employee;
- Any transitional period that is adopted by the Government should be of at least eighteen months' duration; and
- There is no basis for statutory restrictions on the use of non-solicitation clauses.

Introductory Comments

Under Australian law as it now stands, employers in the financial services sector rely on contractual protections that incentivise them to invest in employees by sharing valuable information and connections with them. This in turn makes employees more highly skilled, productive and valuable to the employer. Not only do employees and employers benefit from this, so too does the broader Australian economy.

The proposed reform is based on very little relevant empirical data and will reduce employers' incentives to engage in productivity-enhancing investment in Australia. It will encourage global employers, such as many of our members, to keep their most valuable confidential information, particularly around key technologies, outside Australia and within other financial centres such as Singapore and Hong Kong. This will diminish the importance of places like Sydney as a financial centre, which is contrary to both the Government's commitment to enhance Australia's attractiveness as a financial centre and also its current focus on productivity and wage growth. Our view is that any productivity benefits that the Government believes may arise from the reforms may only accrue in relation to lower-income earners and would negatively impact the financial services industry overall.

AFMA's view is that the current framework provides courts with the opportunity to strike down restraints that are unreasonable with the current balance, incentivising employers to invest in staff and share confidential information while protecting employee mobility. Non-disclosure agreements alone are insufficient to protect highly mobile, knowledge-based industries, with breaches difficult to prove and only provable after the fact, once the highly valuable intellectual property has been transferred. AFMA's view is that non-competes are the only effective way to proactively protect confidential information and intellectual property.

International Experience – United States

To the extent that the basis for the proposed reform outlined in the Consultation Paper relies on the overseas experience, it is largely drawn from jurisdictions in the United States. This is problematic for a number of reasons, namely:

- the controversial FTC rule was subject to very vigorous challenge before the Rule was struck down by the US District Court for the Northern District of Texas in August 2024;
- a consequence of the Californian prohibition on employee non-competes is that significant financial services firms largely avoid operating in that state, which shows that such a prohibition may harm the local economy, not stimulate it; and
- the CHOICE Act that came into effect in Florida in July 2025, allows, amongst other things, for non-compete agreements up to four years and creates a presumption of enforceability for covered employees. This legislation was passed in order to attract business and greater employment opportunities in Florida and away from states such as California and New York.

Accordingly, any reforms in the Australian context should draw on the experience in the United States, where bans on non-compete clauses have both disincentivised the undertaking of financial businesses in states where such bans have arisen and allowed for those states that have provided certainty in relation to the enforceability of non-compete clauses to have a competitive advantage.

Inconsistency with Government's Productivity and R&D Priorities

The Government has, through both the Intergenerational Report and the Strategic Examination of Research & Development (**R&D**), identified business innovation as central to enhancing productivity, which is a current Government priority. AFMA notes that business expenditure on R&D has fallen to 0.88% of GDP, well below the OECE average. Companies, particularly technology start-ups and early-stage firms, will only engage in innovation in Australia to the extent that they believe their valuable intellectual property arising from the innovation will be protected through mechanisms such as non-compete clauses. As such, any erosion of the protection of intellectual property will drive such innovation to occur outside Australia, thereby reducing R&D spend in Australia and the productivity gains that would otherwise accrue.

The Ban on Non-Compete Clauses for Low-and-Middle Income Workers

Scope of Workers Affected

Section 3.2.2 of the Consultation Paper seeks feedback on how a "low-and-middle income earner" should be determined, in the event that any proposed reform only applies to such earners. The current proposal in the Consultation Paper is that the reforms apply only to those employees whose earnings are below the high-income threshold, currently $183,100 and indexed annually. This proposed rule to determine employees who are in scope has two elements that require clarification: what are "earnings" for the purpose of the reforms; and what is the appropriate time to determine the application of the threshold.

The Consultation Paper notes that "earnings" is defined in Section 332 of the *Fair Work Act* to include wages, amounts that are guaranteed in advance, salary-sacrificed amounts, and the agreed value of non-monetary benefits. Importantly, the Consultation Paper states that payments that cannot be determined in advance, such as bonuses and incentive-based payments, are excluded. This proposed definition detrimentally impacts the financial services industry, which has a well-established industry

practice of rewarding employees on a variable remuneration basis to reflect performance. The proposed test would bring a disproportionate number of such employees within scope of the reforms, notwithstanding that they are clearly "high-income" earners, merely by virtue of the structure of their remuneration packages.

It is also necessary to consider the appropriate time for applying the income test, with the Consultation Paper flagging options such as the time of cessation of employment and time that the contract is entered into. Noting the comment above regarding variable remuneration, our view is that the income test should have regard to the employee's total average income received over the three years immediately before the termination of their employment, including bonuses and commissions. This recognises the fact that many high-income employees in many industries, but particularly financial services, receive a significant portion of their incomes from (discretionary or otherwise) bonuses and commission, which sums vary from year to year. These employees are well placed to negotiate their contract terms and they also are usually in possession of valuable confidential information. AFMA notes that the concept of averaging remuneration across multiple years is found in other employment legislation, such as the termination benefits provisions of the *Corporations Act 2001* (C'th) and the long service leave provisions of the *Long Service Leave Act 1955* (NSW).

As well as being fairer, a three-year formula, as opposed to selecting a pay point at either commencement or termination of employment, provides greater certainty for both employer and employee and a "look back" approach would address the discretionary nature of any prospective bonus (which do not become an entitlement for an employee until the point the payment of the bonus is actually made). This is particularly important if the Government is considering imposing penalties.

Enforcement

It is not clear from the Consultation Paper how a penalty regime would operate, that is whether a penalty could be sought simply because there is a non-compete in a contract, or where a non-compete is asserted by an employer.

In any event, imposing penalties on employers for using non-competes is unnecessary, counter-productive and unjust. It is more than sufficient to mandate and publicise that non-compete clauses are unenforceable. Imposing penalties would create a cause of action where the relevant conduct does no harm to any party to the contract, given that the clause itself would be of no legal effect.

Allowing third parties to bring suits seeking access to penalties in cases where there is the presence of a non-compete in employment contracts is unjust and will further encourage vexatious litigation to the extent that the litigants have suffered no damage.

Transitional Arrangements

To the extent that the Government does embark on reforms in relation to non-compete contracts, successful implementation of the change depends on the transitional arrangements, which should accommodate the difficulties and obstacles employers will face in adhering to the new requirements. AFMA's view is that existing employment contracts that include a non-compete clause must be preserved, and that the preservation of the existing clauses should be maintained until there is a material variation of the existing employment contract, as opposed to a minor update such as an

increase of annual remuneration (without other material changes to the employment contract). The bargain reflected in those contracts was made on the basis that the non-competes would be valid and employees' remuneration reflected this. Nullifying existing non-competes would allow employees to continue to receive the benefit of remuneration paid for agreeing to a non-compete, even as employers lose the benefit of the non-compete.

In respect of new employment contracts, AFMA's view is that an eighteen-month transition phase is required for employers to prepare for compliance with any new restrictions, including revising their contract templates and considering taking other steps to safeguard the legitimate interests that non-competes were designed to protect.

Other Reforms to Employee Restraints of Trade

Section 4 of the Consultation Paper considers potential reforms to non-compete clauses for high income earners, together with potential reforms to restrict the use of non-solicitation clauses. These potential changes are of particular concern to AFMA and its members, as set out below.

Non-Compete Clauses for High-Income Earners

As previously stated in AFMA's response to the Issues Paper, our view is that the status quo strikes the right balance between the public interest in investment, competition, productivity, job mobility and the protection of legitimate business interests. The current approach encourages employers to invest in their employees, which in turn increases employee productivity. This investment takes the form of training, fostering client connections and sharing confidential information with employees. Obviously, an employee cannot provide a return on investment if they take the benefit of that training, connections and information to a competitor. In fact, in that case, the employer's investment will have advantaged its competitor to the detriment of its own business.

As previously stated in AFMA's response to the Issues Paper, courts in Australia and overseas have long accepted that the use of non-disclosure agreements alone are insufficient to protect an employer's legitimate interests, as it is difficult to draw the line between information which is confidential and information which is not. If an employer was forced to rely on a non-disclosure/confidentiality clause in the employment contract rather than a non-compete, they may need to enforce their rights by bringing an action for breach of contract and damages after the damage has already been done, as opposed to preventing the harm in the first place by proactively protecting the confidential information and intellectual property via a non-compete for the duration of the currency of that information. Proving actual trade secret misappropriation is also extremely difficult and often requires turning over the very intellectual property that the employer wants to remain secret. This fact has been long recognised by the law in Australia.

Extending the non-compete ban to high-income earners would discourage employers from investing in their Australian employees through training, providing client connections and sharing confidential information. Further, with the possibility of penalties being imposed, in a global financial services eco-system, it would likely indicate to global employers who have to make rational business decisions about where to locate key technologies, information and people, that employing Australians in its key roles carries risk. This may harm the Australian economy rather than boost productivity as intended.

Australia competes for talent and investment at a regional and global level against competitor financial hubs such as Singapore, Hong Kong and the United Kingdom. Relative to these competitors, restrictions on non-compete clauses will make Australia less attractive as a destination for global investment in human capital.

AFMA reiterates the position expressed in our previous submission, namely that the current legal framework applying to non-competes provides a fair balance between the interests of employers, workers and the wider community. Employers can freely invest in their Australian workforce because they know that they will receive a return on investment in the form of productivity gains, while having contractual protections to safeguard their legitimate business interests. Australians can work for world-leading firms in advanced industries that invest in developing their abilities and increasing their remuneration. The wider community benefits from the increased productivity and tax base.

Rather than being a hub for sophisticated, high-productivity industries (such as high-frequency trading), in implementing restrictions on non-competes and other restraints for high-income employees, Australia risks becoming a centre for low-productivity work that does not require investment in human capital. If a global business seeks to perform work that requires significant investment in human capital or involves sharing valuable intellectual property with employees, that work would be better performed in Singapore or Hong Kong - where an employer knows its investment will be protected.

On this basis, AFMA urges the Government not to further consider applying any reform to no-compete clauses (or other restrictive covenants) to high-income earners.

Mandatory Compensation

No change to the status quo is necessary or desirable, but if the Government insists on compensation being paid for a post-employment non-compete clause, the fairest and simplest option would be to compensate ex-employees for the period of their restraint based on 50% of their base salary. Mandating the compensation of ex-employees at their full salary level would be excessive given they are no longer bound by most of their employment obligations and are free to earn money from other sources after their last day of employment (provided they comply with the terms of the non-compete). Further, as raised above, the value of the non-compete was already factored into their remuneration during employment, so further remuneration during the restrained period would deliver a windfall.

Duration Limit

A blanket duration limit is a blunt and unwieldy tool not suited to dealing with the wide variety of circumstances in which restraints apply. The legitimate business interest in restraining a particular employee depends on factors including the employee's role, their connections with clients and the confidential information they hold. For some employees, a restraint of any more than a month would be unreasonable. For others, a restraint of multiple years would be reasonable, such as if they led the creation of highly valuable intellectual property for the employer that would be difficult to protect with a confidential information clause. The wide variety of circumstances in which any duration limit would apply means that it is better left to the employer, the employee, and the Courts to assess the reasonableness of a restraint's duration on a case-by-case basis.

Non-Solicitation Clauses for Clients and Co-Workers

In AFMA's view, rather than limiting job mobility, the primary purpose of co-worker non-solicitation clauses is to protect the legitimate business interests of an employer in maintaining the most productive parts of its workforce. Employees subject to co-worker 'non-solicits' (in the true sense) can leave their employer and work at a competing firm, including firms at which their former colleagues work. Employees whose ex-colleagues are subject to co-worker non-solicits can do the same. The restriction is only on solicitation activities and is time limited.

As the Consultation Paper acknowledges, a departing employee can inform their new employer who "*they would be most productive with.*" This sentence highlights one of the unfair aspects of the proposed reform. It will give a competitor a springboard to identify and poach the most valuable and productive employees in an organisation, including those in whom the organisation has most invested. This information is confidential information belonging to the original employer. It allows the competitor to "insider trade" on the original employer's staff, poaching some or all of a team. This information should be able to be protected through a co-worker non-solicit. Very often, employers in the finance industry have worked hard to select, hire, train, and nurture employees to create productive work teams - teams that as a whole, are more valuable to the employer than just being a sum of its parts.

Client non-solicitation agreements are also prevalent in the financial services industry, which in AFMA's view is entirely appropriate given the nature of the work and the importance of protecting client confidential information and relationships. Such provisions do not prevent employees from moving jobs. They merely ensure that the former employer has a protected period of time in which to shore up client relationships (which have been invested in by the employer) and to ensure that confidential information about such clients cannot be taken across to and exploited by a competitor. An established body of case law evaluating the reasonableness of such restraints in different contexts has produced principles regarding the appropriate duration and other limitations when drafting such restraints. In AFMA's view, a legislative cap on the duration, nor any other statutory interventions, are not needed in this space.

No Poach Agreements

In relation to the announced ban on no-poach agreements, it should be noted that these sometimes arise in the financial services industry for legitimate purposes. Especially, in the context of large M&A or financial transactions, there may be mutual agreement between the client and the advisory firm not to solicit each other's employees for a period of time where there is a legitimate business need to do so and the restraint relates only to the personnel actively involved in the transaction. Any reforms in relation to no-poach agreements should preserve the ability for such clauses to continue to operate.

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Yours sincerely,

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