

2 October 2026

Via Electronic Mail: CompetitionTaskforce@treasury.gov.au

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

Re: Reform to non-compete clauses and other restraints on workers (Draft Legislation)

Dear Competition Taskforce:

MFA¹ appreciates the opportunity to further submit comments in response to the Australian Government's draft legislation on its reforms to non-compete clauses and related restraints. MFA has previously provided feedback to the Treasury on policy details to support the implementation of the reforms, as well as views on whether complimentary reforms to non-solicitation clauses and non-compete clauses for high-income workers are needed.² MFA represents the global alternative asset management industry. Institutional investors—like pension plans, university endowments, charitable foundations, and other institutional investors—rely on MFA members to diversify their investments, manage risk, and generate attractive returns throughout the economic cycle.

The presence of restrictive covenants in the alternative asset management industry is unique, not simply because the industry largely consists of highly-specialised, high-income workers, but because of the intellectual property and proprietary interests which they protect and the contractual terms on which they are offered. Accordingly, restrictive covenants in the alternative asset management industry are distinguishable from those that are often the focus of broad-based academic studies on the use of non-compete clauses. Our submission highlights and reflects the legal and commercial aspects of restrictive covenants frequently found in the alternative asset management industry. We have not responded to every provision of the draft legislation, but reiterate several themes captured in our September 2025 response to

¹ Managed Funds Association (MFA), based in Washington, D.C., New York City, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest it, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 fund manager members, including traditional hedge funds, private credit funds, and hybrid funds, that employ a diverse set of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors diversify their investments, manage risk, and generate attractive returns throughout the economic cycle.

² AUSTRALIAN GOVERNMENT, THE TREASURY, COMPETITION REVIEW, REFORM TO NON-COMPETE CLAUSES AND OTHER RESTRAINTS ON WORKERS: CONSULTATION PAPER (July 2025) ("**Consultation Paper**").

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the Competition Task Force's 2025 Consultation Paper.³ The broader policy concerns which informed our feedback to the 2024 Issues Paper, while still relevant, are not repeated here. Our comments primarily centre on three themes within the draft legislation:

- **Salary threshold:** Clarify that earnings include bonuses, deferred compensation, and other incentive-based remuneration when assessing the high-income threshold.
- **Employee non-solicits:** Permit narrowly tailored co-worker non-solicitation clauses for high-income employees, or at minimum limit any prohibition to low-wage workers, given the lack of empirical evidence that such clauses cause harm.
- **Grandfathering:** Preserve existing restraint provisions unless the parties expressly amend the restraint itself, rather than reopening them through unrelated employment changes.

Our comments are included in the Annex hereto.

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We appreciate the opportunity to submit our comments in response to the Government's draft legislation, and we would be pleased to meet with the Competition Taskforce to discuss our comments. If your staff have questions or comments, please do not hesitate to contact Rob Hailey at rhailey@mfaalts.org.

Yours faithfully,

/s/ Jillien Flores

Jillien Flores
Chief Advocacy Officer
Managed Funds Association

³ MFA comment letter to Competition Task Force Re: Reform to non-compete clauses and other restrains on works: <https://www.mfaalts.org/wp-content/uploads/2025/09/MFA-Consultation-Response-to-AU-on-Non-Competes.pdf>. September 2025.

Annex

Salary Threshold:

The draft legislation confirms that the proposed prohibition on non-compete terms would apply where an employee's annualised full-time equivalent earnings are equal to or less than the high-income threshold, while preserving limited use of non-compete terms for employees above that threshold if the restraint is reasonable, necessary to protect a specified legitimate interest, and not drafted as a cascading clause.

We appreciate that the draft legislation recognises a meaningful distinction between low- and middle-income employees and highly specialised, high-income employees. However, the proposed formulation continues to rely on annualised full-time equivalent earnings at the time an employment arrangement is entered into or varied, and appears to disregard future wage increases and potentially variable forms of compensation. This approach may not accurately capture compensation structures in the alternative asset management industry, where employees often receive a substantial portion of compensation through annual bonuses, deferred awards, carried interest-like arrangements, or other incentive-based compensation.

We therefore recommend that the Government clarify that, for purposes of determining whether an employee is above the high-income threshold, earnings should include bonuses, commissions, deferred compensation, and other incentive-based remuneration, assessed over a reasonable look-back period, such as the three years immediately preceding termination or the period of employment if shorter. Such an approach would better reflect the economic realities of highly compensated employees and would reduce uncertainty caused by annual fluctuations in incentive compensation.

Employee Non-Solicits:

The draft legislation would prohibit co-worker non-solicitation terms for all national system employees, regardless of income, and would make such terms of no effect if included in an employment arrangement. We urge the Government to reconsider this full ban. Co-worker non-solicitation clauses are significantly narrower than non-compete clauses and serve a fundamentally different purpose: they protect investments in employee development, protect confidential information, and address the well-recognised "hold-up" problem in which departing employees may threaten to expropriate employer investments unless paid a premium to stay. Notably, U.S. regulators and legislatures have distinguished non-solicitation clauses from non-compete clauses, with most state statutes that regulate non-compete clauses either not addressing or explicitly excluding non-solicitation clauses. As discussed in our prior submission, co-worker non-solicitation clauses protect legitimate business interests, such as maintaining a stable workforce and protecting confidentiality, without limiting job mobility. Co-worker non-solicitation

clauses allow employees to join a competitor, including firms where former colleagues are employed, without restricting employee choice over where and when to work.

[Co-worker non-solicitation clauses] do not prevent individual staff members leaving their employer and following another employee's departure. They are still able to do this. Restraints only prevent an ex-employee from soliciting or 'poaching' employees. As such, balance is struck between respecting an employee's freedom to choose their employer and an employer's interest in protecting their workforce from an ex-employee's improper conduct.⁴

Implementation of a full ban on the use of co-worker non-solicitation clauses would unfairly enable competitors to poach valuable employees which remain at their former employer or enable "team moves," appropriating confidential information a team of employees may possess. It also makes inevitable that former employees who engage in solicitation will use confidential information of their former employers, such as that related to the performance and compensation of those they solicit. Importantly, there is no published empirical evidence demonstrating that the harms of co-worker non-solicitation clauses outweigh their benefits. Accordingly, MFA recommends that the Government lift the proposed ban on co-worker non-solicitation clauses for high-income employees or, at minimum, narrowly tailor any prohibition to apply only to low-wage workers, while requiring that permitted clauses be reasonable, limited in duration, and tied to legitimate business interests.

Grandfathering:

We appreciate that the draft legislation applies prospectively in important respects and does not immediately invalidate all existing employment arrangements. However, the proposed transitional provisions appear to provide only limited grandfathering. Existing post-employment restraint terms may continue to apply unless the employment arrangement is varied after commencement, at which point the restraint may be assessed as though it had been entered into after commencement, irrespective of whether the variation relates to the restraint itself.

We recommend that the Government preserve existing non-compete and other post-employment restraint terms unless the parties expressly amend the restraint provision itself. Routine variations -- such as compensation adjustments, promotions, administrative updates, changes to benefits, or other ordinary-course employment changes -- should not inadvertently reopen negotiated restraint provisions or unsettle reliance interests formed under existing law. This is especially important where employees voluntarily agreed to restraints supported by additional consideration, including deferred compensation or other incentive arrangements. Broader grandfathering would better protect settled contractual expectations,

⁴ *Id.* at 107.

reduce unnecessary renegotiation costs, and avoid creating disincentives for employers to provide salary increases or other beneficial changes to employees after commencement.

Additional Comments on the Draft Legislation:

MFA supports several aspects of the draft legislation that appropriately distinguish between lower- and middle-income employees and highly specialised, high-income employees. In particular, MFA supports the draft legislation's decision not to impose a categorical ban on non-compete clauses for employees above the high-income threshold, and its decision not to impose either a mandatory compensation requirement or a fixed maximum duration for permitted non-compete clauses. These aspects of the draft legislation appropriately recognise that reasonable restraints involving sophisticated, highly compensated employees should continue to be assessed based on the facts and circumstances of the employee's role and the employer's legitimate business interests.

MFA also supports the draft legislation's express recognition that appropriately tailored confidentiality obligations, non-disclosure obligations, retention-based compensation arrangements, agreed notice periods, and garden leave should not be treated as prohibited non-compete clauses. These exclusions are important because they preserve tools that employers use to protect confidential information, promote retention, preserve continuity, and compensate employees for agreed post-employment obligations. MFA encourages the Government to retain these exclusions in the final legislation.

At the same time, the draft legislation should more clearly confirm that forfeiture-for-competition provisions and deferred compensation arrangements are outside the scope of prohibited non-compete clauses where they do not prohibit or prevent an employee from working for a competitor, do not authorize injunctive relief, and merely condition receipt of additional compensation on compliance with agreed terms. The explanatory materials suggest that mixed-effect terms may not be exempt where monetary benefits are conditioned on not working for competitors. That approach risks sweeping in voluntary incentive-compensation arrangements that do not restrain mobility and that often benefit employees by providing additional compensation and greater contractual certainty. As noted in our previous comment letter, we recommend that the final legislative language specify that the scope of the non-compete clause definition excludes employee forfeiture-for-competition agreements as neither penalty provisions nor post-employment restraints

Finally, MFA believes that the draft legislation's codification of legitimate business interests may be too narrow for highly specialised, high-income employees. The draft legislation identifies confidential information and customer, client, or professional network relationships as legitimate interests, but the explanatory materials state that maintaining a stable workforce would not constitute a legitimate business interest. For high-income employees in the alternative asset management industry, reasonable restraints may also protect against coordinated team moves, safeguard substantial investments in specialised

training and strategy development, and preserve workforce stability where the employee's role, knowledge, relationships, and access to proprietary information are inseparable from the employer's legitimate interests. MFA recommends that the list of legitimate interests be clarified or expanded for high-income employees to include these narrow and industry-relevant interests.