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Employment Relations Podcast #39 – Restraints on restraints! What the United States' ban on non-compete clauses could mean for Australian businesses

The United States is planning to heavily restrict the use of non-compete clauses in employment contracts, and the Australian Government has released an issues paper discussing the subject in the Australian context. In this episode of Employment Law for the Time Poor, Emily Haar, Prof. Andrew Stewart and Dustin Grant discuss the current state of the law on post-employment restraints, what proposals for limitations on such restraints could look like, and what employers can do now to best protect their interests.

In April 2024, the US Federal Trade Commission (**FTC**) voted to ban non-compete clauses in employment contracts, for employees other than "senior executives", being anyone earning more than $151,164USD per year and who are in a "policy-making position". In the FTC's view, this ban will help both employees and employers by promoting competition, wages growth and innovation. It is worth noting this ban is currently subject to several legal challenges, which will determine whether it ultimately comes into effect, and in what form. Several US States (with the most notable being California) have similar bans in place already, for employment contracts within those states.

The Issues Paper[1] recently released by the Australian Government was commissioned in August 2023 as part of a broader policy consideration of the Government's "*intent to investigate non-compete clauses*". Whilst the FTC's ban might have caused more headlines outside of employment law news websites, the issue has long been a matter of keen interest for Andrew Leigh, the current Assistant Minister for Employment, and Assistant Minister for Competition.

What are restraints of trade?

First, it is important to clarify what is meant by a "restraint of trade"; an umbrella term for several types of contractual terms that can be included in employment contracts. The Issues Paper defines these categories or 'types' of restraints to include:

1. Non-compete – clauses that restrict a former employee from working for a competitor or establishing a competing business;
2. Non-solicitation – clauses that restrict a former employee from 'soliciting' other workers, or clients, of the employer to switch to the employee's new business; and
3. Non-disclosure – clauses that seek to protect confidential or sensitive information, such as unique processes, technologies or strategies of the employer.

The law in Australia

As the law in Australia currently stands, the issue is dealt with by common law (other than NSW which has the *Restraints of Trade Act 1976* (NSW)). The underlying position is that all restraints of trade are *presumed* to be unenforceable and contrary to the public interest, *unless* the party relying on the clause can prove that they are "reasonably necessary to protect the legitimate interests of the employer".[2]

However, practically, where an employer seeks to enforce a contractual non-compete term, engaging in potentially uncertain litigation is often not commercially viable for an employee. So the real impact of restraint clauses may be their deterrent or chilling effect: even if not always enforced by employers, or potentially invalid, they may still have the desired

effect on employees.

The Competition Review's Issues Paper

Ultimately, the Issues Paper highlights 3 key "issues" related to restraints; the "chilling effect" such clauses have on worker mobility, particularly in lower-income groups, the high cost of litigation and relying on common law which causes confusion to both workers and business, and the economic consequences caused by hampering growth, competition and innovation.

At this stage, we can only speculate as to what any potential ban or limitation in Australia may look like, as the Government is still in its consultation phase. A number of potential reforms are discussed in the podcast episode.

What can your business do now?

Regardless of whether we see significant reform in this area, when it comes to protecting an organisation's confidential information, client connections, and existing staffing mix, prevention is always better than a cure. Properly protecting confidential information through technology, training and up-to-date workplace policies, and ensuring your workplace is one where staff do not necessarily want to look to greener pastures elsewhere, will have a greater impact than solely seeking to rely on restraints after they have already left.

If your business uses post-employment restraint clauses in its template employment contracts, it is a good idea to have these regularly reviewed to ensure they have the appropriate scope and application to your business, along with your policies to ensure they provide the required protection.

You can contact Piper Alderman's Employment Relations team for specific advice on your needs.

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[1] *Non-competes and other restraints: understanding the impacts on jobs, business and productivity* – The Competition Review Taskforce, April 2024

[2] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688