Non-competes and other restraints: understanding the impacts on jobs, business and productivity. Issues Paper 2024.

Submission to Competition Taskforce, CompetitionTaskforce@treasury.gov.au

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Preliminary comments

I welcome the opportunity to make a submission to this important Review of Australia's laws affecting the opportunities of working people to pursue their careers in a vibrant and competitive labour market. I have maintained an interest in this area since undertaking research into the legal techniques used by employers to capture and constrain the value of human capital, as part of my doctoral research. My thesis, completed in 2005 at the University of Sydney entitled *Beyond Deregulation: Imagining an Equitable Private Law of Work* included a chapter dealing with this topic. A condensed version of the thesis was subsequently published as *Employee Protection at Common Law* (Federation Press, 2005), and the chapter dealing with the issues the subject of this Review was Chapter 6, 'Fairly Sharing the Fruits of Work'.

Some of my subsequent academic writing has been cited in the Issues Paper, so I shall not list it here.

In addition to my academic work (which involved reading many cases on these issues), I have some experience as a part-time consultant to specialist employment law firms, where I have witnessed the use of restrictive covenants in employment contracts, and seen their impact on employees. As an academic with a reputation in this field, I am also regularly contacted by persons seeking to understand the restrictions in their existing employment contracts when they are seeking new employment, so I have an insight into how commonly these restraints are used in employment contracts, even for employees who are by no means senior executive personnel.

In order to provide as helpful a submission as possible, I have arranged my comments as responses to the 19 discussion questions in the Issues Paper. I would however like to preface those responses by a statement relevant to my answers to all the questions: I come to this problem from the perspective of determining the proper role for the coercive powers of the State in restricting the lives of citizens. It is common for judges determining disputes over the enforcement of restrictive covenants to allude to 'freedom of contract', and the principle that

persons must be held to the terms of their own agreements ('pacta sunt servanda' is the arcane Latin phrase sometimes cited by the classically-educated members of the judiciary[1]). This assertion ignores the fact that it is the machinery of the state – in the form of the enforcement of contracts in courts – that is called in aid of these supposedly freely-made bargains. While the state may have an interest in maintaining the certainty of commercial bargains between corporations, there is no reason, in logic or policy, why our legal system should support the enforcement of *all* contract clauses made in the context of employment relationships with individuals. Even the argument that these clauses are seriously made is flawed. In my experience in legal practice I have learned that these clauses have become boilerplate in standard form employment contracts. They are rarely if ever seriously negotiated at the time of recruitment. Often the contract documentation is presented after the interview and verbal acceptance of the job, and is signed without reflection.[2]

I am convinced that many employers who simply use the contract templates provided by their lawyers do not even consider these clauses themselves, and only become aware of them when they are seeking advice on how to manage the departure of members of staff. The clauses are, in my view, largely used blindly, as risk mitigation tools to favour the interests of the employer should they decide to make a former employee's departure difficult. Sometimes, employers even seek to enforce these restraints when they have dismissed employees or made their positions redundant.[3] At worst, the clauses appear to be used vindictively, as the final punishment visited upon a departing employee who has fallen out of favour with more senior colleagues in an organization. It often appears that the employer does not wish to keep the services of the departing employee. They just want to make sure that the departing employee suffers, or they want to land a blow in an ongoing rivalry with a competing enterprise. It seems very clear that in *Network Ten v Seven Network Operations*[4], for example, Mr Stephens (a talented programmer) was really just a pawn and ultimately a casualty in the hairy-chested contest between rival television networks and their egoistic executives. He wasn't the first such casualty. *Seven Network (Operations) Ltd v Warburton (No 2)*[5] arose because Seven (who had decided not to promote Mr Warburton to their own

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[1] See *Seven Network (Operations) Limited & Ors v James Warburton (No 2)* [2011] NSWSC 386, [3], where Pembroke J explains this term. The case concerned restraints in an equity participation deed between a major broadcaster and a senior executive who, frustrated by his inability to secure the top job at Seven, was seeking to take up the chief executive's role at Ten.

[2] There is some evidence in the case that even Mr James Warburton signed the deed in question without reflection on the significance of the restraints for his career prospects: see *Seven Network (Operations) Limited & Ors v James Warburton (No 2)* [2011] NSWSC 386, [3], where Pembroke J found that Warburton had forgotten or for some other reason was unaware of the contract term. Pembroke J cites a principle from commercial contract law: 'The enforcement of a commercial contract does not depend on a party's knowledge of its terms: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165 at [43] - [44].'

[3] See for example *IceTV v Duncan Ross* [2007] NSWSC 635; *Ross v IceTV* [2010] NSWCA 272. For background to the circumstances giving rise to this litigation see Joellen Riley, 'Innovation Put on Ice? How Overly Jealous Intellectual Property Protection Discourages Creativity and Productivity' (2008) 20(7) *Australian Intellectual Property Law Bulletin* 102.

[4] [2014] NSWSC 692. Note that this case turned on the application of notice periods in contracts, rather than restrictive covenants. It nevertheless illustrates the kind of personality-driven disputes between rival enterprises that can catch ordinary employees.

[5] [2011] NSWSC 386; (2011) 206 IR 450.

top job) resented his recruitment to lead Channel Ten. It is not uncommon for these disputes to arise because one nasty employer does not like to lose an argument.

Even where contracts are made by employees with some awareness of their terms, there are arguments for refusing to enforce those terms. Some contractual bargains do not serve the public interest, and prove to be entirely oppressive to the parties concerned. In those circumstances our legal system has (in the past) refused to enforce some contractual agreements. Indeed, the doctrine making illegal (and hence unenforceable) any contract in restraint of trade is an ancient one,[6] only relatively recently modified to permit the enforcement of those restraints that go no further than necessary to provide reasonable protection for a 'legitimate interest' of the person claiming the benefit of the restraint.[7]

The progressive erosion of the more ancient principle in recent times, particularly in New South Wales under the influence of the *Restraint of Trade Act 1974* (NSW), has been to the detriment of freely competitive labour markets, and hence to the detriment of the liberties of ordinary working people who should not be shackled in their pursuit of productive careers, even when it is their own signature on an employment contract which purports to bind them.

Several features of the development in the law in New South Wales in particular have led to a situation in which the ancient doctrine making restraints illegal is barely recognized. Those features are:

1. Employers' claims to 'legitimate interests' have been expanded well beyond the kinds of proprietary interests that justified restraints in the past. Now it is not only trade secrets and highly confidential information that employers are permitted to protect, but the good relationships that staff have built up with customers, and an alleged interest in a 'stable workforce'.
2. The length of time that restraints are considered to be reasonable has been expanding, so that my advice to students early in my career that a matter of weeks would be a reasonable restraint protecting client connections, must now be adjusted to many months, or even a year or two.
3. The willingness of courts to enforce restraints by injunctions preventing the employee from taking up new employment (rather than injunctions forbidding them from contacting certain former clients) has increased, so that restraints are being used to keep talent out of the labour market for significant periods of time. And of course, talented employees who cannot afford to take a significant break from the labour market while waiting out the term of a threatened restraint may be discouraged from considering a change of employment at all.

[6] See Harlan M Blake 'Employee Agreements Not to Compete' (1060) 73 *Harvard Law Review* 625.

[7] The decision in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1984] AC 535 is generally attributed as the decision permitting the enforcement of otherwise illegal restraints on trade if they go no further than reasonably necessary to protect a legitimate interest of the covenantee. The case concerned a sale of a business, where the covenantor had accepted a substantial price for the restraint. Unfortunately, sale of business cases (where the covenantor has received substantial consideration for their promise) have infected the findings in employment cases, where no special consideration justifies the restriction on an employee.

4. Interlocutory injunctions are extremely easy to obtain. It is rare for courts to refuse an injunction when all they need to determine is whether there is a 'serious question to be tried', and they are predisposed to favour the former employer's interest when assessing where the balance of convenience lies. The notion that the matter will all be resolved equitably upon final hearing, and the injuncted employee will be able to recover damages then if it is established that the injunction ought not to have been granted, ignores the reality of court costs and delays. By the time a matter has come on for final hearing, the interim injunction will have expired, and the employee who has been kept out of work for many months will be very unlikely to have the resources or the appetite to fight on for compensation. The employer effectively wins, without any rigorous assessment of the validity of the restraint. The real winners are the solicitors and barristers who run these matters for fees.

It is time for this Review to take a stringent view of these practices, and return to the wisdom of the past, and the fundamental value in allowing productive human beings to exploit their own personal talents in their own chosen futures. Those lobbying in the interests of employer groups who benefit from these restraints must be put to the task of justifying why an employer should be able to restrict the movement of talented staff, just because those employees were persuaded to sign a standard form contract containing a restraint, at a time when they were optimistically assuming their best interests were served by taking that particular job.

The fact that employers are better off if they can enforce these restraints is not a sufficient justification. The employer must be able to show that something genuinely belonging to the employer is at risk of loss by allowing the employee freedom to move. Employers do not own their customers. Customers are at liberty to do business with whomever they please, so the mere risk that a customer may decide to follow a departing employee is insufficient justification for a restraint. Employers do not own their workforce, so the fact that other employees may wish to resign their employment in order to continue working with a favoured former colleague is also not sufficient justification to enforce a restraint. Just because the enforcement of a restraint would be valuable or convenient to the employer, does not mean that the employer should be granted a legal right to enforce the restraint. To hold such is to favour the interests of existing business owners, over the liberties of workers, and over the interests of potential new businesses which may be prepared to offer more attractive employment opportunities to staff.

With this perspective in mind I make the following observations on the Discussion Questions in the Issues Paper.

Non-compete clauses

1. ***Does the common law restraint of trade doctrine strike an appropriate balance between the interests of businesses, workers and the wider community? If no, what alternative options are there?***

The original doctrine, making illegal all restraints that are contrary to the public interest in freely competitive labour markets strikes the appropriate balance. The current iteration of the doctrine, which has been weakened in favour of protecting dubious claimed interests of employers for long periods of time, and by preventing former employees from taking up new positions, does not strike an appropriate balance.

The current approach needs to be modified to limit the types of claims that employers can make to 'legitimate interests', to restrict the length of time that customer relationships claims can be enforced, and to forbid the enforcement of any restraint by an injunction that stops a person from actually taking up employment.

Employers should be able to obtain injunctive relief to prevent their trade secrets and genuinely confidential information from being exploited, and they should be able to claim a short period of grace during which to shore up their relationships with clients following the departure of an employee who has had close relationships with those particular clients (a matter of two or three months should be more than sufficient for a diligent employer to undertake relationship preservation work), but the restraint should be limited to preventing the former employee from contacting particular clients for a limited period. Restraints should no be permitted to prevent or delay them from taking up a new position.

There should be no recognition of any legitimate interest in a 'stable workforce'. Employers have adequate means to protect their interest in maintain their staff by providing attractive employment conditions to retain staff, and sufficiently long notice periods in employment contracts to allow them sufficient time to recruit replacement staff. It should definitely *never* be permissible for a restraint in a contract between the employer and employee A to be enforced in such a way as to limit the future employment opportunities of employee B (a former colleague).[8]

2. ***Do you think the Restraints of Trade Act 1976 (NSW) strikes the right balance between the interest of businesses, workers and the wider community? Please provide reasons. If not, what alternative options are there?***

No. The presumption in this legislation is that courts should assist employers in enforcing restraints that would otherwise be unenforceable because they are excessive. Allowing the scope for a court to read down a restraint merely encourages the drafting of excessive restraints with 'ladder' or 'blue pencil' clauses. Employees (and the businesses who want to recruit them) faced with such clauses cannot tell what restraint will be applied until a court is asked to rule through any excessive clauses. Needing a court to determine the meaning of

[8] See for instance the unjustified decision in *Hartleys Ltd v Martin* [2002] VSC 301, in which a secretarial assistant was unable to take up employment in a new job after resigning her employment, because the new employer had agreed to a restraint on hiring former colleagues. The secretarial assistant bore the consequences of a contract made between the two employers, even though she herself was not party to the agreement, and without even being heard in the proceedings determining the matter.

clauses is a prohibitively expensive way of promoting the 'commercial certainty' claimed by proponents of enforceable restraints. It is a system that benefits only the lawyers who charge fees for these services. The legislation should be repealed.

3. ***Are current approaches suitable for all workers, or only certain types of workers? For example, senior management, low-income workers, or care workers, etc?***

The current approach which is highly favourable to the interests of the former employer is justifiable only in respect of contracts with persons whose seniority is such that they have enjoyed special benefits from participation in the employing enterprise. Company directors, who owe fiduciary duties not to engage in conflicts of interest, and who typically earn high levels of remuneration including performance-based incentives, might be appropriately restrained from taking any steps that would impair the fortunes of the company to whom they owe these duties, but only for so long as the company would need to replace their services, and shore up client relationships. Even highly paid individuals should be free to change businesses, and set up new ones.

It should certainly not be the case that hairdressers, dance instructors, baristas, and other service industry personnel should be restrained. These people will rarely hold any kind of trade secret or confidential information worth protecting, and their client relationships will be entirely dependent upon their own talents and personal traits. If clients want to follow a hairdresser to a new salon, or a dance instructor to a new studio, they should be entirely at liberty to do so, because the characteristic that is valuable in the relationship between hairdresser and client is the personal skill and charisma of the hairdresser as a human being. People should not be constrained from continuing their relationships with persons who wish to be served by them, simply because their initial introduction occurred while the worker was employed at a particular establishment. The former employer has it within their power to keep good staff by paying well and providing pleasant working conditions. Too often service personnel leave jobs because they are not treated well. A former employer should not be permitted a power to continue to oppress staff, by calling upon a clause in the initial employment contract purporting to prevent staff from leaving to pursue their career elsewhere in more agreeable circumstances.

4. ***Would the policy approaches of other countries be suitable in the Australian context? Please provide reasons.***

I have not engaged in sufficient comparative legal study to completely answer this question, but I am aware that even before the United States took steps (recently) to outlaw restrictive covenants in employment contracts, it was much more difficult to get an injunction enforcing restraints. This should always have been the case in Australia.

5. ***Are there other experiences or relevant policy options (legislative or non-legislative) that the Competition Review should be aware of?***

I have been impressed by the level of research already undertaken by the Review team and have no further suggestions to make about lines of enquiry.

Non solicitation clauses

Non-solicitation of clients and other business contacts

6. What considerations lead business to include client non-solicitation in employment contracts? Are there alternative protections available?

Employers include client non-solicitation clauses in employment contracts on the assumption (accepted in the case law) that the employer has a legitimate interest in preventing former employees from exploiting their personal relationships with the employer's clients, because the employer initially facilitated the development of those valuable relationships. It is assumed (without testing the proposition) that the employer provided all of the support for that relationship to thrive, and should not be deprived of the ongoing value of the relationship by the risk that clients will follow the former employees to a new enterprise. The accepted assumption nevertheless pays insufficient regard to the aspects of the client relationship that depend upon the personal qualities of the employee. The employee's own personal talents, charisma, diligence, are features they hold as an individual human being. Their opportunity to continue to exploit those traits ought not to be restrained by a former employer. Likewise, clients themselves have an entitlement to receive services from whomever they wish to engage. It unreasonably restrains the liberties of clients if they cannot continue to deal with the service providers they prefer. For this reason, the law would better serve the interests of freely competitive markets in services if restraints based on client connection were not permitted for anything more than a short period of time, sufficient to allow the employer to contact those clients with whom the departing employee had a relationship, to confirm that the employer is still able to service the client's account with suitably qualified staff. This should be a matter that can be achieved in a matter of weeks, and within the usual notice period in employment contracts. Senior people, whose notice periods are often three months, might be restrained for three months, but people whose contracts allow for only one month's notice (or less) should not be able to be restrained for longer than their notice period.

7. Is the impact on clients appropriately considered? Is this more acute in certain sectors, for example the care sector? Please provide reasons.

As noted in the response to question 6 above, client interests are largely ignored in the law as it is presently enforced. This is unreasonable in all sectors, but especially so in any sector where the client is dependent upon a particular relationship of trust in the personal delivery of services. So in all sectors involving personal care services, it should not be possible for a contractual restraint between a former employer and employee to interfere with the client's free choice in who they decide to continue to engage. I would include all services that require trust and confidence in persons to be included. For example, a householder reposes a great deal of trust in cleaners who are given house keys to come and service homes in the owners' absence. Householders should not be restricted from continuing to engage their preferred cleaner, simply because the cleaner has a restraint in their employment or services contract.

It is the cleaner's own talent and trustworthiness that makes their work valuable, not anything 'invested' in them by the former employer, so former employers should not be permitted to restrain their choice to continue their careers by continuing to provide services to those clients who have come to value their talents and characteristics.

Non-solicitation of co-workers

8. What considerations lead businesses to include co-worker non-solicitation in employment contracts? Are there alternative protections available?

Of all the restraints enforced in Australia, these are the most pernicious. They have the effect of limiting the future employment prospects of persons who have not even signed the agreement themselves. Businesses operating in a tight labour market understandably prefer to use restraints to attempt to keep their staff. They could however use incentives, such as improved pay and conditions. There is already a natural tendency for people to prefer the stability of their present employment. There are all sorts of privileges built into our system of labour rights that favour long service (such as long service leave, enhanced notice and redundancy entitlements). Employees are not easily tempted to leave good, well-paid jobs. They are tempted however to leave jobs where they have been treated poorly, and they are tempted to look for better jobs with higher pay, more attractive benefits, and more interesting work and career prospects. Employers who wish to keep staff should resort to providing valued benefits, and a good working environment, rather than be permitted to capture unhappy staff by restraints limiting their departure.

9. Is the impact of co-worker non-solicitation clauses more acute for start-ups/new firm creation or in areas with skills shortages in Australia?

I have done no empirical research myself to be able to offer insights into this question. It does appear, however, that restrictive covenants have proliferated in the contracts of 'ordinary workers' at the same time as employers have complained of labour and skills shortages, suggesting that these clauses may be an improper attempt to avoid the usual outcome of a competitive labour market, i.e. rising prices for valued labour (and hence improved wages in areas of skills shortages).

Non-disclosure clauses

I have done no specific work on non-disclosure clauses so have no responses to questions 10, 11 and 12.

Restraints on workers during employment

13. When is it appropriate for workers to be restrained during employment?

An employer should be entitled to expect a full time employee who is being remunerated appropriately for exclusive service to refrain from engaging in other employment or business activities which would undermine the business interests of the employer. This expectation arises from the implied duty of loyalty and fidelity in employment contracts, and is unexceptional. Note however that this duty does not prevent an employee from maintaining

other outside interests – even profitable 'side hustles' – so long as the outside interest does not undermine the business interests of the employer.

14. Is it appropriate for part-time, casual and gig workers to be bound by a restraint of trade clause?

An employer who does not wish to absorb an employee's productive time and offers only part-time or casual engagement, should not be permitted to limit the worker's ability to earn income from their skills and experience by taking up other employment in their free-time, even if the other employment is in the same field as the employer's business. If we are to address the problems of under-employment in the labour market, we cannot afford to allow employers to purchase the whole of an employee's labour potential at a discount, by allowing them to restrain the employee while only providing part-time work. The duty of fidelity and loyalty (mentioned in the response to Question 13) is an obligation owed in exchange for full employment. It ought not to be able to be bought cheaply by an employer who is unwilling to provide full employment.

No-poach and wage-fixing agreements

15. Should there be a role for no-poach and wage-fixing agreements in certain circumstances, for example:

a) If the agreement is between unrelated businesses (e.g. competitions)?

b) If the agreement is between businesses that are cooperating in some way (e.g. joint venture partners)?

c) ***If it is part of a franchise agreement, either horizontally (where franchisees through a common agreement do not to [sic] poach each other's staff) or vertically (where franchisors make agreements with each franchisee***?

I refer to my response to Question 8. There should never be an ability to enforce a contract clause which has the effect of limiting the employment prospects of a person who did not sign that agreement. Agreements between organisations, whereby they agree not to recruit other enterprises' current staff, impose unwarranted restrictions on the employment opportunities of the staff themselves, whether or not the enterprises are related parties, members of a common franchise group, or operating at arm's length. The best illustration of this is the outcome in *Quantum Service and Logistics Pty Ltd v Schenker Australia Pty Ltd*,[9] where a relatively modestly paid technician was prevented from taking up employment that he had applied for on Seek.com, because the new employer was a client of his own employer. Mr Murugiah was employed by Quantum, who seconded him to Schenker to provide IT services. Mr Murugiah was unhappy with his employment at Quantum so began searching for new employment through Seek.com. He applied for and was successful in obtaining a position advertised by Schenker, on a salary $22,000 per annum more than his Quantum salary. Quantum were successful in obtaining an injunction requiring Schenker to withdraw the offer of employment, relying on a clause in their services agreement with Schenker that Schenker

[9] [2019] NSWSC 2.

would not seek to hire Quantum staff. Mr Murugiah had signed nothing himself, and yet his employment opportunities were limited by an agreement made between his employer and its clients. The misery caused to Mr Murugiah, not only by being unable to take this job, but by the pursuit of the litigation, was considerable.

It is notable (in respect to Question 2 above) that this restraint was found to be illegal according to the common law doctrine, but was saved by the *Restraint of Trade Act 1974* (NSW). Were it not for that legislation, the restraint could not have been enforced. It is also notable that the judge was prepared to ignore Mr Murugiah's plea of hardship, on the basis that Quantum agreed to continue to employ him at his *original* salary, paying no regard to the fact that he had applied successfully for a position on a considerably higher salary, nor any regard to the fact that he wanted to leave his employment with Quantum in any event. The callous disregard of the employee's interests and preferences in this case is quite breath-taking, especially given that he himself had signed no restraints.

16. Are there alternative mechanisms available to businesses to reduce staff turnover costs without relying on an agreement between competitors?

In *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd,*[10] Lord Justice Jenkins said, wisely, that the value of a stable workforce is 'an interest which employers are entitled to protect by legitimate means, as by paying good wages and making employment attractive'.

17. Should any regulation of no-poach and wage-fixing agreements that harm workers be considered under competition law as an agreement between businesses (for example reconsidering the current exemption), or under an industrial relations framework?

I am not an expert in competition law, but it does appear to me that when matters are considered to be worth prohibiting in competition law, more significant penalties are levied for breach than tend to be levied under industrial legislation, so if this issue is to be treated seriously, it may be best to consider this problem through the lens of the impact of restraints on competition in markets. It would however be wise for the *Fair Work Act* to make it clear that restrictive covenants are prohibited content in enterprise agreements, and to make non-compete restraints unenforceable in employment contracts, in the same way that salary secrecy clauses are now unenforceable.[11] Attempts to use pay secrecy clauses attract civil penalties. Attempts to use non-compete clauses to bluff employees into obedience to an unlawful contractual clause should also attract civil penalties.

18. Should franchisors be required to disclose the use of no-poach or wage-fixing agreements with franchisees?

My response to Question 15 above indicates that I do not accept that franchisors should be able to use, let alone fail to disclose, no-poach and wage-fixing clauses in their agreements with franchisees.

[10] [1958] 2 All ER 65.
[11] *Fair Work Act 2009* (Cth) ss 333B-333D.

19. Are there lessons Australia can learn from the regulatory and enforcement approach of no-poach and wage-fixing agreements in other countries?

Even before the United States banned the use of these clauses, the approach taken in certain US states was already much more restrictive than in Australia. For example, in NSW, judges have enforced restraints by granting an injunction, even where the employer has not been able to show any risk of damage as a consequence of the employee breaching the restraint. In *Otis Elevators Co Pty Ltd v Nolan,*[12] Brereton J said:

> 'I am of the view that the mere fact that the injury to the plaintiff is slight or non-existent is insufficient to justify declining an injunction on discretionary grounds; so also is the mere fact that the enforcement of the injunction would occasion considerable hardship to the defendant'.

In New York, such an attitude would not be accepted. In a case decided in the very same year as *Otis Elevators*, a superior court in New York said:

> 'A party seeking the drastic remedy that a preliminary injunction confers must establish a clear legal right to that relief under the law and upon undisputed facts . . . the movant must demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and the balance of equities favours the movant's position.'[13]

With respect, this is a much more rational position. It is difficult to understand why a court should impose an injunction preventing an employee from taking up further employment, if their former employer can show no risk of damage as a result, and where the employee will suffer considerable hardship. Such a punitive approach to remedies is entirely inconsistent with the tenor of all Australian commercial law.[14]

It occurs to me that even in the United States, where these clauses have not been enforceable by injunction, it has been recognized that the clauses still do damage to freely competitive labour markets because many people do not know that they are unenforceable, and are easily intimidated into submission by the threat of litigation. A highly publicized ban is an appropriate antidote to such circumstances. In my view Australia should follow suit, because unfortunately, any half-way solution is still likely to leave employees in doubt about what employers can and can't enforce. The threat of litigation is likely to continue to induce people to fear changing jobs, even in pursuit of more fulfilling and remunerative work.

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[12] [2007] NSWSC 59.

[13] *Jacobi Tool & Die Mfg Inc and Jacobi v Mondi & Ors* 2007 WL 3325854 (NY Supp).

[14] See the majority decision in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, where it was held that equitable remedies (and an injunction is an equitable remedy) as well as contractual remedies, are not punitive.

Final remarks

I expect that the Review Committee will receive many submissions from parties with an interest in maintaining the status quo. Many lawyers who act on these kinds of matters, and many barristers who run interlocutory injunction cases, have a vested interest in maintaining uncertain laws. Uncertain laws are productive of considerable legal work – in providing advice, and in launching proceedings in court. Unfortunately, the boon to lawyers is a tax upon the fortunes of working people who rely on their ability to generate income from pursuing their careers. Many of the people who find themselves subject to these kinds of restraints are people who can ill-afford the expense of legal advice, let alone litigation. And they can ill-afford remaining out of work in their chosen profession for the amount of time necessary to avoid the risk of the threat of legal action. The problem is one that has grown over time, possibly as a consequence of the ease with which people can now use standard form contracts – quite thoughtlessly – to include all sorts of restrictions once deemed appropriate only in cases where a former business owner has sold their business for a price enhanced by the inclusion of the vendor's promise not to compete with the purchaser for a period of time. The cases dealing with such sales of goodwill have infected common practice in ordinary employment contracts, and it is time to address the harm that this practice is doing to our labour market.