

THE GHOSTS OF EMPLOYERS PAST: HOW PREVALENT ARE NON-COMPETE CLAUSES IN AUSTRALIA?

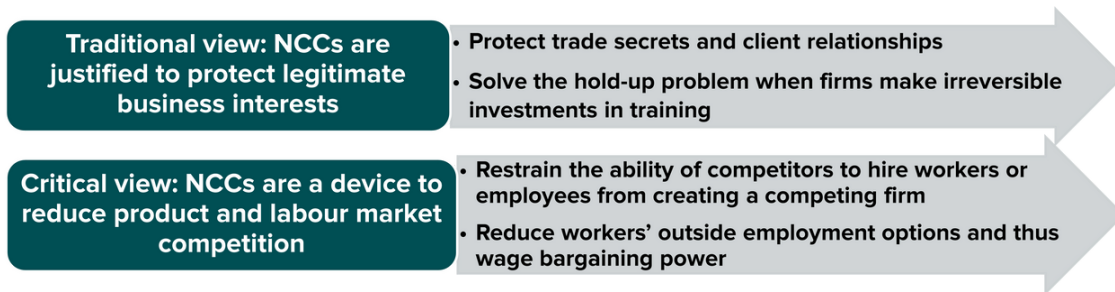
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Australia's Competition Minister Andrew Leigh has asked the ACCC and Treasury for advice on the competitive impacts of non-compete clauses (NCC). A new online survey finds that at least one in five Australian workers are bound by NCCs, including many low wage workers. NCCs appear just as prevalent in Australia as the United States, where the Federal Trade Commission has proposed banning NCCs. This is significant in light of the decline in job mobility in Australia, as well as international evidence which shows that NCCs stifle job mobility, wages and productivity growth.

The economics of non-compete clauses

A non-compete clause (NCC) is a clause of a contract, where an employee agrees not to compete with an employer – in a similar industry or area for a period of time – after their job ends. NCCs have traditionally been justified as a means of protecting legitimate business interests. But there are increasing concerns that NCCs are being used to stifle job mobility and competition (OECD 2022, Figure 1).

Figure 1: Two views on non-compete clauses



This critical view has gained traction, given recent US evidence (Starr et al, 2021; US Treasury 2016, 2022) that NCCs:

- ▶ have spread to low wage occupations (e.g. burger flippers, hairdressers) that are difficult to reconcile with the traditional view
- ▶ are rarely a bargained outcome: less than 10% of workers negotiate higher pay over a NCC while one-third of workers are first asked to sign a NCC after already accepting the job
- ▶ exert a chilling effect: 40% of workers turned down a job offer from a competitor because of a NCC, even though they worked in US states where NCC were non-enforceable
- ▶ stifle inclusive growth by restricting job mobility, firm entry, wages and productivity.

Studies for Denmark, Italy, the Netherlands and Norway paint a similar picture to the US, suggesting that NCCs are also a feature of less flexible labour markets (see: Boeri et al, 2023).

A first look at non-compete clauses in Australia

To provide the first Australian evidence on NCCs, we leverage the McKinnon Poll – an online survey of 3000 respondents – weighted to census data to enhance representativeness. It solicits demographic and employment information (i.e. gender, age, income, industry, occupation, union membership) as well as past and prospective employment status and job mobility.

The questions on non-compete clauses (see Appendix) are drawn from an American online poll in 2014, which revealed that 18% of the US workforce were subject to NCCs (Starr et al, 2021). This estimate was replicated by a Bureau of Labor Statistics survey in 2017 (Rothstein & Starr, 2022), demonstrating the credibility of online surveys for NCC measurement.

Some workers may be unaware whether they are subject to a NCC. For this reason, we directed our questions at those respondents who have changed jobs over the past 12 months. If anything, this may lead us to understate the prevalence of NCCs, if NCCs stifle job mobility.¹

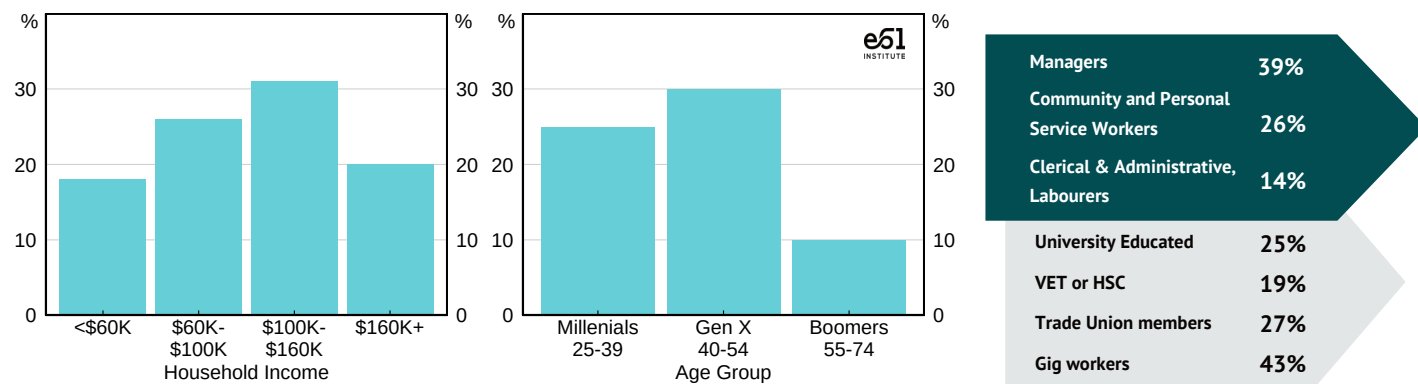
The results suggest that one-half of the workforce are subject to a post-employment restraint (Figure 1):²

- 22%** had a non-compete clause.
- 26%** had signed a non-disclosure of confidential information agreement.
- 16% and 7%** had agreements restricting the poaching of clients and co-workers respectively.

Of those workers who are looking to switch jobs to a different employer within the same industry in the future, 18% responded that a NCC “definitely applied” to them while 27% believed that a NCC “probably applied” to them.

As in the US, NCCs apply across Australian society (Figure 3). While the high exposure of managers to NCCs is unsurprising, it is striking that low wage workers that typically lack bargaining power – such as clerical workers and labourers – are subject to NCCs.

Figure 3: Prevalence of non-compete clauses across different societal groupings



Source: e61 analysis of McKinnon Poll conducted by JWS Research.

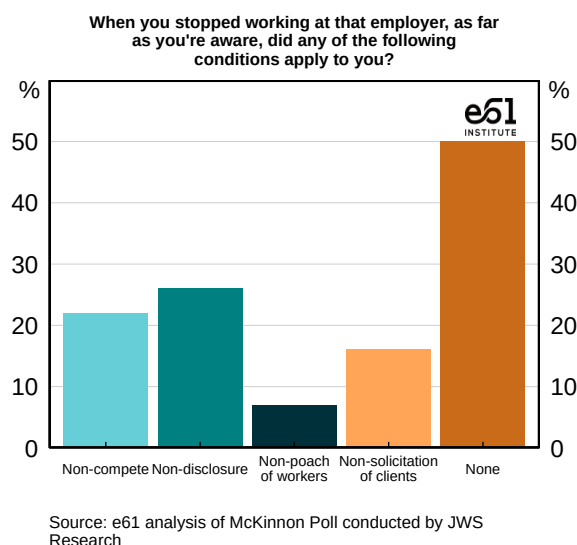
These findings are broadly consistent with our consultation with legal practitioners, which reveal:

- ➡ NCCs now apply to outward facing customer roles – childcare workers, yoga instructors and IVF specialists – in addition to senior roles in law, finance and business services.
- ➡ NCC have become more prevalent over time, and are now a default option in many employment contract templates. This was not the case 15 years ago.

NCCs are thus a potential source of friction behind the observed decline in job mobility, which has reduced workers' outside options, with adverse consequences for wages and productivity (Adams et al, 2022).

Going forward, e61 will continue to collaborate with the ABS on the measurement of NCCs and other barriers to job mobility.

Figure 2: Share of workers subject to post-employment restraints



¹ International experience suggests that measurement approaches from the firm-side show a higher prevalence (and awareness) of NCCs (Colvin & Shierholz, 2019).

² NCCs are often paired with other restraints, so the shares sum to more than 100%.

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APPENDIX

The McKinnon Poll

The McKinnon Poll was commissioned by the Susan McKinnon Foundation and was administered by JSW Research. Over 5-17 May 2023, a 15-minute online survey was conducted among a representative sample of n=3,000 Australian adults (18+ years). The sample was sourced via an ISO26362 accredited online research panel that has, together with its sister panels, over 650,000 Australian panel members. Sample quotas were applied on age, gender and location. Survey data was post-weighted to actual age, gender and location proportions based on the latest ABS Census. The maximum margin of error on the total sample of n=3,000 is +/-1.8% at the 95% confidence level, with differences of +/-1% for reported net scores being due to rounding

The questions on post-employment restraints were sourced from Starr et al (2021), which conducted an online poll of 11,500 respondents in the United States in 2014. An extract from the questionnaire is provided below.

Q	Sometimes employers try to restrict what their employees can do after they leave.	
	When you stopped working at that employer, as far as you're aware, did any of the following conditions apply to you?	
	<i>Please select all that apply.</i>	
	You were not allowed share your former employer’s confidential information (i.e. non-disclosure)	1
	You were not allowed to join or start a business in competition with your former employer (i.e. non-compete)	2
	You were not allowed to solicit former clients (i.e. non-solicitation of clients)	3
You were not allowed to solicit former co-workers to work at your new employer / business (i.e. non-solicitation of co-workers)	4	
	None	5