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THE TIES THAT BIND: FIVE FACTS ON POST-EMPLOYMENT RESTRAINTS IN AUSTRALIA

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Main findings

Australia's productivity and wage growth slowdown over the past 15 years has been characterised by a decline in job mobility and firm entry. A recent survey of workers by the e61 Institute suggested that the proliferation of non-compete and other post-employment restraint clauses could have contributed to this decline. To explore this further, the e61 Institute has collaborated with the ABS to develop a firm-side survey to measure the prevalence and use of restraint clauses more accurately.

In this note we present five facts from this survey to help policy makers better understand the prevalence, use and economic consequences of post-employment constraints in the Australian economy. The first two facts highlight the economic relevance of restraint clauses. The next two facts relate to how firms deploy restraints, which has implications for productivity and worker bargaining power. The final fact provides preliminary evidence on the consequences of restraint clauses.

Fact 1

A large share of Australian workers are subject to restraint clauses.

- Non-disclosure clauses cover between one-half and two-thirds of the Australian workforce with a central estimate of 58%.
- Between one-quarter and one-third of workers have clauses restricting their ability to poach former clients with a central estimate of 29%.
- Roughly one-fifth to one-quarter of the Australian workforce are subject to non-compete and no-poach of co-workers agreements with a central estimate of 21% and 23% respectively.

Fact 2

Firms' use of restraint clauses has increased over the past 5 years and is expected to increase further absent policy intervention.

Fact 3

Restraints are highly prevalent in knowledge-based service industries, potentially jeopardising the allocation of talent.

Fact 4

Many firms are deploying restraint clauses indiscriminately, potentially adversely affecting low wage workers who lack bargaining power.

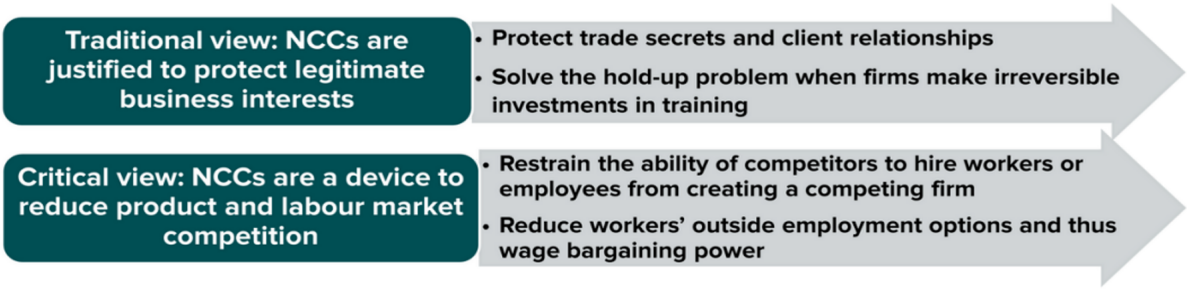
Fact 5

Firm entry and job mobility rates appear to be lower in industries where restraint clauses are more prevalent.

Restraint clauses are on the policy radar

Australia's productivity and wage growth slowdown over the past 15 years has been characterised by a decline in job mobility and firm entry. One of many factors that could help explain this decline is the rising use of post-employment restraint clauses, which prevent workers from joining (or starting) a competing firm (non-compete clauses; NCCs); the disclosure of confidential information; or the poaching of former co-workers or clients. Restraints such as NCCs are traditionally justified on the basis that they protect legitimate business interests (Figure 1), but there are increasing concerns that they are being deployed to stifle job mobility and competition (Box 1).

Figure 1: Two views on non-compete clauses



Source: Andrews and Jarvis (2023).

In June 2023, an e61 Institute report revealed that 22% of Australian workers – including many low wage workers – were subject to NCCs, while one-half of the workforce was bound by some form of restraint clause (Andrews & Jarvis, 2023). Two months later, the Federal Government announced a review of Australia's competition policy settings, including "non-compete and related clauses that restrict workers from shifting to a better-paying job" (Chalmers & Leigh, 2023).

Box 1: Non-complete clauses as a drag on job mobility and competition

This critical view of NCCs has gained traction, given recent US evidence (Johnson et al., 2023; 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, innovation, wages and productivity, which more than offset any gains from enhanced incentives to invest in worker training.

With restraint clauses now more clearly on the policy radar, it is crucial that the evidence base surrounding their use is strengthened. This helps us better understand their prevalence, how firms deploy them and their potential economic consequences. Today's release of the Australian Bureau Statistics (ABS) Short Survey of Employment Conditions (cat. no. 6306.0) – which surveys firms about their use of restraint clauses – is an important step in this journey for at least three reasons:

- First, it complements the worker-based survey conducted by Andrews and Jarvis (2023), since a firm's HR officials likely have greater awareness about their use of restraint clauses than workers.
- Second, the ABS data is of much higher quality than other international measurement attempts. The leading US firm-side estimates, for instance, are from a survey of 1530 establishments and exclude firms with less than 50 employees (Colvin & Shierhol, 2019). The final response rate to that survey was 728 firms, of which only 634 provided complete data. In comparison, the ABS survey included a sample of just over 7,000 businesses of all sizes and achieved a response rate of roughly 70%.
- Finally, the planned integration of the survey responses with firm-level administrative data (as part of the ABS Business Longitudinal Analysis Data Environment) will facilitate future Australian research examining the economic consequences of restraint clauses along the lines of the existing international work outlined in Box 1.

Restraint clauses as a barrier to competition

Well-functioning market economies are characterised by an intense churning of firms and jobs, as successful market activities are sorted from unsuccessful ones. This process helps support the emergence of innovative new firms, the reallocation of scarce resources to their most productive use and helps improve the quality of job-matches for workers (Davis & Haltiwanger, 2014). To realise these benefits, firms must compete vigorously in output markets for customers and clients, and in input markets for workers by offering higher wages and superior working conditions. Workers must also retain their ability to join competing employers – or to start a competing firm – if their existing employer does not make a competitive wage offer (Posner & Volpin, 2023).

It is in this context that the potentially anti-competitive aspects of restraint clauses can emerge. When entrepreneurs are prohibited from approaching their former clients, competition in output markets is stifled. When non-compete clauses (NCCs) discourage workers from switching jobs or employees agree not to attempt to poach their former co-workers if they start their own firm, an important source of competition in the input market is impeded. And while clauses that prohibit disclosure of confidential information may appear more benign, they can be written so broadly that they can act as *de facto* NCCs (Hrdy & Seaman, 2023).

Five facts on Australian firms use of restraint clauses

The potential impact of restraints clauses on competition will ultimately depend upon how broadly they have diffused throughout the economy and their potential to alter economic behaviour. Given these are ultimately empirical questions, we identify five key facts on how Australian firms deploy restraint clauses, with a view to informing the Australian policy debate.

Fact 1: A large share of Australian workers are subject to restraint clauses

Table 1 provides estimates of the share of Australian workers that are subject to various restraint clauses. While the ABS survey does not report the precise share of workers that are bound by restraints, it is possible to estimate a range and central estimate based on the new methodology outlined in Box 2.

Table 1: Estimated share of workers subject to restraint clauses

	Firm survey			Worker survey
	Lower	Central	Upper	
Non-disclosure	49%	58%	66%	26%
Non-compete	18%	21%	25%	22%
No-poach co-workers	19%	23%	27%	7%
No-poach clients	24%	29%	33%	16%

Sources: ABS Short Survey of Employment Conditions cat. no. 6306.0, e61 analysis

Our estimates suggest that a high share of Australian workers are bound by the restraint clauses:

- Non-disclosure clauses cover between one-half and two-thirds of the Australian workforce with a central estimate of 58%.
- Between one-quarter and one-third of workers have clauses restricting their ability to poach former clients with a central estimate of 29%.
- Roughly one-fifth to one-quarter of the Australian workforce are subject to NCC and no-poach of co-workers agreements with a central estimate of 21% and 23% respectively.

For most restraint clauses, the prevalence estimates from the ABS firm-side survey are much higher than those sourced from the McKinnon poll of 3000 workers (see Andrews and Jarvis, 2023). A clear exception to this is NCCs where the firm-side survey returns an almost identical measure of workforce prevalence as the earlier poll of workers. This is somewhat surprising given that international experience suggests that firm-side measures show a higher prevalence of NCCs (Colvin & Shierhol, 2019).

Box 2: Estimating the share of workers subject to restraint clauses

Since firms report the share of their workforce subject to each restraint in ranges (e.g. 76-100% as opposed to an exact number; see Figure 5), it is necessary to make a few assumptions to construct an aggregate estimate of prevalence. This results in range of estimates for the share of workers subject to each constraint. Our approach can be broken down into three steps:

The first step involves estimating the extensive margin – the share of firms of each size using the restraint clause for at least some of their workers. Here we treat "unsure" responses as missing at random. While a firm reporting that they are unsure whether they use a particular clause may indicate that they do not use it at all, we find that very large firms, who likely have more sophisticated HR departments, are the most likely to report that they are unsure. This suggests that unsure responses may instead reflect the fact that organisations may be uncertain whether a particular branch, team or store applies these restraints. Treating unsure responses as a no results in prevalence estimates that are only slightly lower (see Table A.1).

The second step involves estimating the intensive margin – the average share of a firm's workforce who are covered by each clause for firms applying the clause. Here we again treat unsure responses as missing at random. This means that a firm who has reported that they use a clause but does not know the share of their workforce covered by it is assigned the average share for firms of their size class. Because the shares reported by firms are in ranges, we develop three estimates at this stage: low – taking the share at the bottom of each range (e.g. 76-100% -> 76%), mid – the middle of each range (e.g. 88%) and high – the top of each range (e.g. 100%).

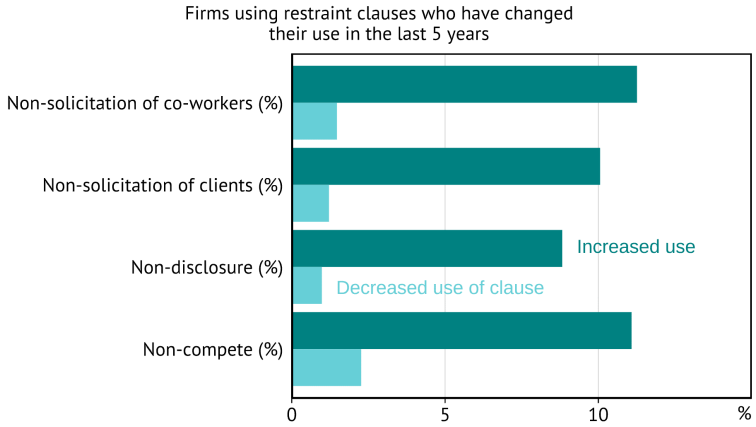
The third step involves combining the above two estimates and aggregating via data on the number of workers employed at firms in each firm size class (see Figure A.1). Here we use data from the ABS Employee Earnings and Hours May 2023 release.

No poaching of co-worker agreements are also a bigger deal than previous thought. Our central estimate reveals that 23% of the Australian workforce are covered by these no-poach clauses, more than three times the estimate from the worker-based poll. This discrepancy could reflect the fact that some no-poach agreements are the outcome of discreet negotiations between employers, which workers have little visibility of. For example, franchises, such as McDonald's, Bakers Delight and Domino's, have standard clauses that prevent franchisees from hiring workers from other stores within the chain (Leigh, 2023).[1]

Fact 2: Firms' use of restraint clauses has increased over the past 5 years and is expected to increase further absent policy intervention

Restraint clauses not only cover a high share of the workforce, but Australian firms have increasingly deployed them over the past 5 years. Of firms currently using NCCs, 11% said they had increased their use in the past 5 years, compared to only 2.3% who decreased their use (Figure 2).[2] Similar lopsided trends are present for other restraint clauses (Figure 2).

Figure 2: Change in use of restraint clauses over the last 5 years

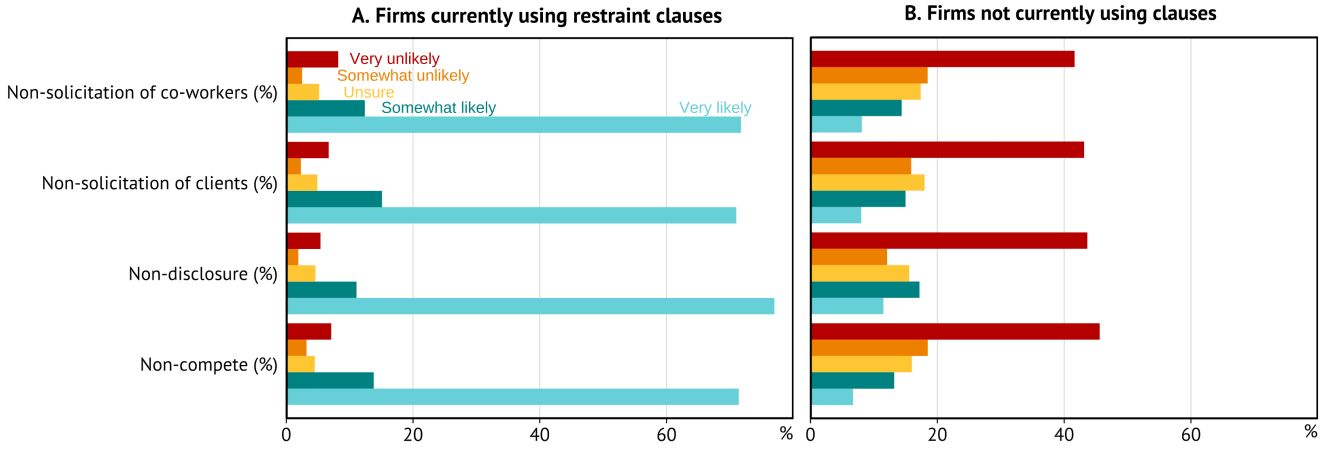


* Chart based on responses to question asked of employers reporting the use of a particular clause: Has this business's use of these conditions in employment contracts increased, remained the same or decreased over the past 5 years? Chart reports the share of firms who said they had either increased or decreased their use in the last 5-years, excluding those firms who were uncertain whether their use had changed.
Sources: ABS; e61 Institute

Absent policy changes, these trends are likely to continue. Many firms who do not currently use restraint clauses say that they are either somewhat or very likely to do so in the future. 1-in-5 firms who do not currently use NCCs say that they will likely do so in the future (Figure 3, panel A), compared to only 1-in-10 firms who currently use NCCs who say they are unlikely to do so in the future (Figure 3, panel B). Similar trends are present for other restraint clauses (Figure 3).

1 This means that, for example, no McDonalds store is able to offer more pay to get a worker to move from another McDonalds store.
2 These figures represent shares of firms excluding those who responded "unsure" to questions about changes in their use of restraint clauses.

Figure 3: Anticipated future use of restraint clauses



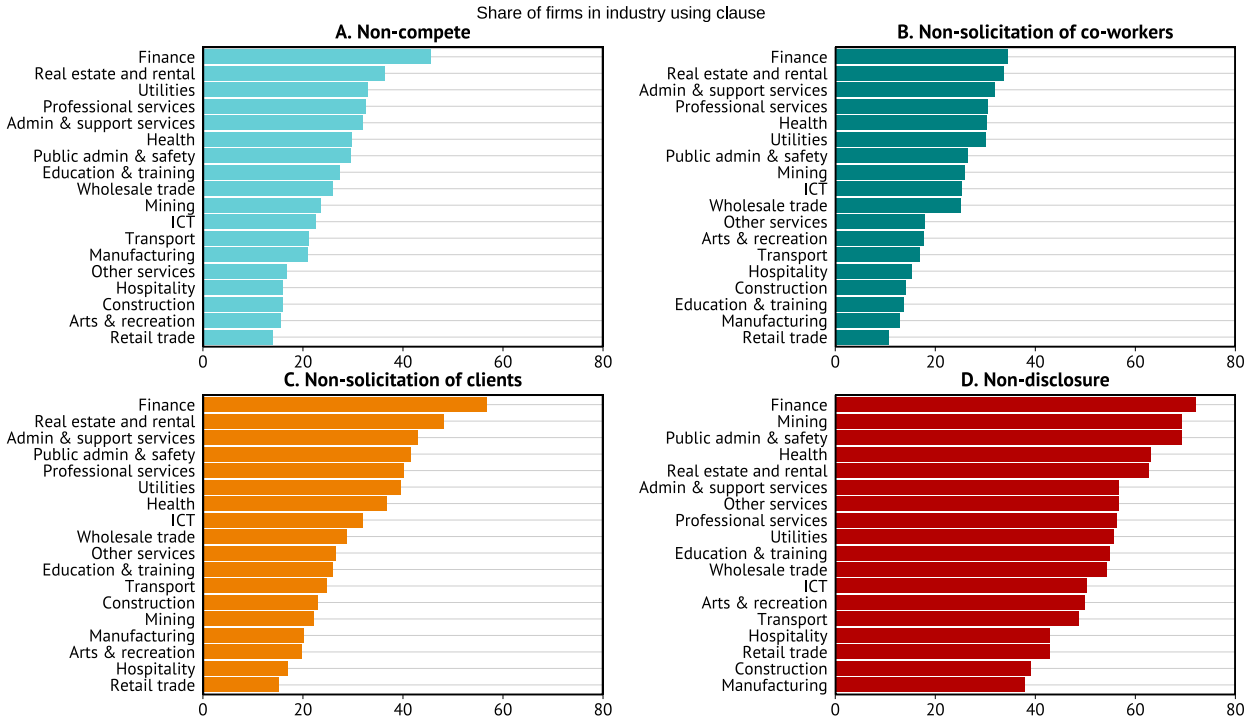
* Chart based on responses to question asked of businesses: How likely is it that this business would include any of these conditions in future employment contracts?
Sources: ABS; e61 Institute

Finally, that restraint clauses are more likely to be deployed in service-based industries (see *Fact 4*) – which represent a rising as a share of the workforce – is also consistent with a rising burden over time. These findings are broadly consistent with insights from consultations with legal practitioners – conducted by Andrews and Jarvis (2023) – which revealed that NCCs have become more prevalent over time and are now a default option in many employment contract templates (via a drop-down box). This was not the case 15 years ago. A key implication of this fact is that restraint clauses could potentially explain the decline in job mobility and firm entry over the past 15 years and why job mobility rates have remained low since the pandemic, despite very low unemployment. We return to this issue in *Fact 5*.

Fact 3: Restraints are highly prevalent in knowledge-based service industries, potentially jeopardising the allocation of talent

While restraint clauses are deployed throughout the economy, they are use particularly intensively in knowledge-intensive services sectors, including finance, real estate, professional services and the steadily growing health sector (Figure 4) .

Figure 4: Share of firms using restraint clause, by industry



* Share of firms in each industry responding yes to the following question asked of all employers: Are the following conditions included in employment contracts for any employees in this business?
Sources: ABS; e61 Institute

In finance and professional services, where high-skilled labour is the main input and a key determinant of firm success, restraint clauses (such as NCCs) would likely have greater private value to the incumbent firm. But from the perspective of the economy as a whole, such restraints may be harmful to productivity if they impede the reallocation of skilled labour to more productive firms and the broad diffusion of knowledge.

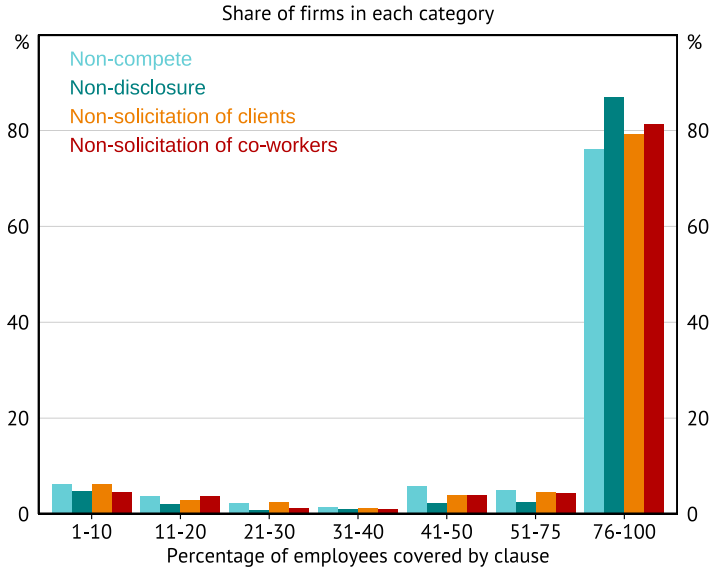
Non-solicitation (of client) clauses are highly prevalent in finance, real estate and professional services – industries where the 'client list' is often the main asset of the firm, and where unique intellectual property and/or physical capital are less important. In these instances, it remains an open question as to whether the primary role of the non-solicitation clause is to protect the client list. An alternate explanation is than such clauses are being employed to make it very unattractive for staff to leave. In this view, a non-solicitation of client clause may serve as a *de facto* non-compete clause: increasing the costs of a worker to leave, especially if they are looking to establish a new competing firm.

Fact 4: Many firms are deploying restraint clauses indiscriminately, potentially adversely affecting low wage workers who lack bargaining power

The breadth with which restraint clauses have spread to sectors such as hospitality, and administration and support services is difficult to reconcile with the traditional view that they are primarily being deployed as a tool to protect legitimate business interests (see Figure 1). Instead, it appears that restraint clauses are being deployed indiscriminately and are generally not a bargained outcome where workers explicitly and consciously trade-off restricted mobility for higher pay.

First, when firms utilise restraint clauses, they use them extensively. For example, 75-80% of firms that use NCCs and no-poach clauses apply them to between three-quarters and all of their workforce (Figure 5). While larger firms are much more likely to use such restraints than small firms, they do so in a more targeted way (Figure A.1). When smaller firms use such restraints, they apply them to a much higher share of their workforce than larger firms. This may reflect "boilerplate" type arguments where small firms lacking well-resourced HR departments issue the same contract to all workers – irrespective of their task – noting that NCCs are now a drop-down box in many employment contracts (Andrews & Jarvis, 2023).

Figure 5: Percentage of employees covered by restraint clauses at firms using restraints



* Based on responses to a question asked of employers reporting the use of a particular clause: What percentage of employees in this business have each of the conditions in their contract? The share of firms in each bucket are calculated excluding firms who answered 'unsure'
Sources: ABS; e61 Institute

Second, of employers reporting the use of at least one clause, 68.8% applied them to the contracts of upper-level managers, while 74.8% applied them to more junior employees. This is consistent with evidence from Andrews and Jarvis (2023), which suggests that NCCs now apply to low wage workers that typically lack bargaining power – such as clerical workers and labourers – as well as workers with customer facing roles, including childcare workers, yoga instructors and IVF specialists.

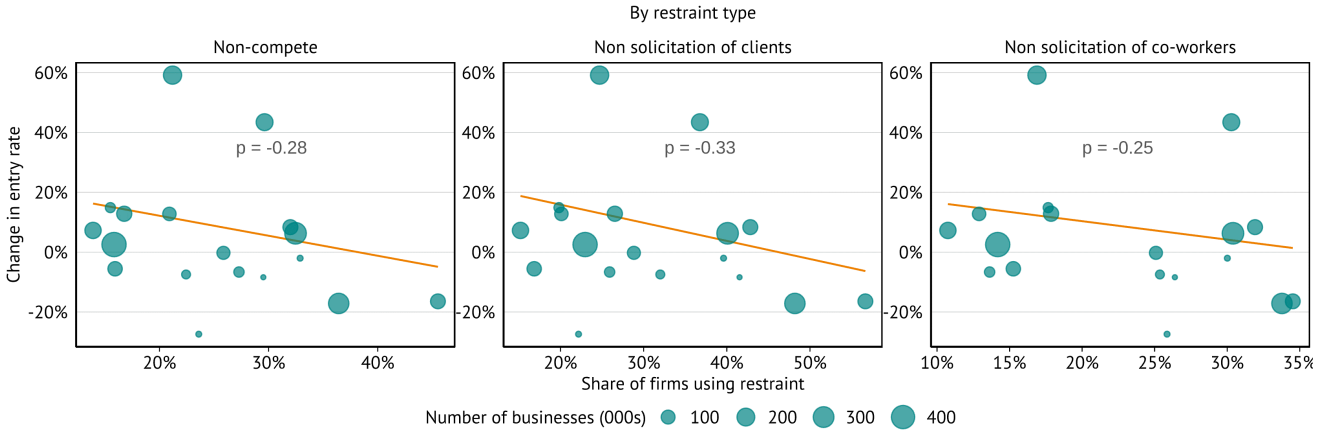
Fact 5: Firm entry and job mobility rates appear to be lower in industries where restraint clauses are more prevalent

Facts 1 and 2 show that restraint clauses apply to a high and rising share of the Australian workforce. In turn, Facts 3 and 4 suggest that these restraints are being deployed in ways that are potentially anti-competitive. This raises the prospect that restraint clauses are a contributing factor to the decline in economic dynamism, which has been an important headwind to Australian productivity and wage growth (Adams et al., 2022).

Analysis that relates job mobility and firm entry rates to the prevalence of employment restraints at the industry-level provides some preliminary support for this hypothesis. However, this analysis comes with some important caveats, including the fact that it does not account for a range of omitted variables that could affect the relationship between restraint clause use, job mobility and firm entry rates. We also face some data limitations, which prevent a proper examination of changes in job mobility and restraint clause use overtime. These limitations are discussed further in Appendix A.2. Future e61 research will look to use the integration of the restraint clause data into the BLADE administrative data to conduct more robust research.

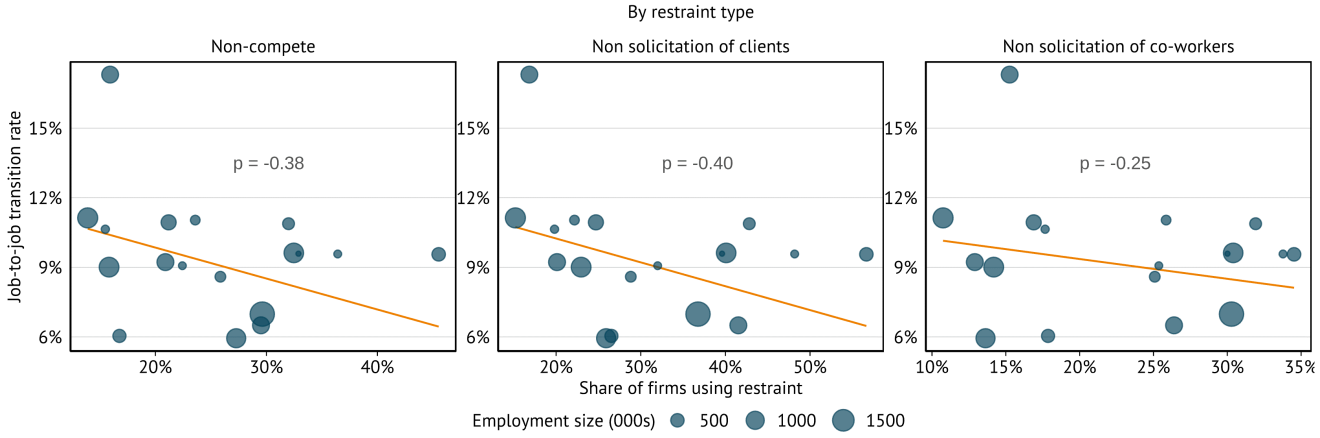
First, job mobility appears to be lower in industries where the use of restraint clauses is higher (Figure 7). This relationship is concerning given the roughly $5,300 average wage gain workers receive when they change jobs and the important role that job switching plays in productivity enhancing labour reallocation (Buckley, 2023; Wong, 2024).

Figure 6: Prevalence of post-employment restraints and firm entry



* The change in entry rates within each industry is calculated using data from 8165.0 Counts of Australian Businesses, including Entries and Exits from 2008 and 2023. Lines of best fit are calculated using weighted OLS with weights based on the number of businesses in each industry in 2023. Weighted Pearson correlation coefficients reported in grey.
Sources: ABS; e61 Institute

Figure 7: Prevalence of post-employment restraints and job mobility



* Job-to-job transition rates are calculated using data from the ABS Participation, Job Search and Mobility June 2023 release. Transition rates are calculated as the share of workers who were employed in the industry 12 months ago who have changed employer in the last 12 months. Lines of best fit are calculated using weighted OLS with weights based on industry employment in 2023. Weighted Pearson correlation coefficients reported in grey.
Sources: ABS; e61 Institute

Second, there is a negative correlation between the current prevalence of restraint clauses and the change in firm entry rates over the past 15 years (Figure 6). This relationship is concerning because of the central role that new firms play driving aggregate economic performance: they have a comparative advantage in commercialising new innovations, place pressure

on incumbent firms to improve their own productivity, and create new outside options for workers, helping to boost wage growth (Andrews & Criscuolo, n.d.).

Policy implications

A high and rising share of the Australian workforce are exposed to restraint clauses, such as non-competes, non-poach of coworkers and clients and non-disclosure agreements. The balance of evidence suggests that such clauses are being deployed quite broadly across industries and occupations, in ways that do not always easily reconcile with the stated purpose of protecting legitimate business interests. Preliminary evidence suggests that these restraints could present a material headwind to job mobility and firm entry, at a time when Australian productivity growth has flat lined and when the average Australian worker can yield $5,300 from a job change (Wong, 2024).

A strong case is emerging to regulate or curtail the use of non-compete clauses and no-poach agreements. As with National Competition Policy in the 1990s, the presumption should be in favour of competition. The burden should thus be on proponents of such restraints to explain why they should exist, as opposed to on those advocating reform. This matters now more than ever given an emerging empirical evidence base that points to a potential decline in competition in the Australian economy over the past 15 years (Andrews et al., 2023; Hambur, 2021).

In January 2023, the Federal Trade Commission (FTC) in the United States proposed a near outright ban of non-compete clauses. To be sure, there are a range of possible policy responses, including a ban for low wage workers or enforced monetisation of the NCC. But the simplicity of the FTC approach is to recognise that non-competes both reduce the bargaining power of low skilled workers and hamper productivity growth by restricting the mobility of high skilled labour. While many commentators support restricting NCCs for low wage workers, they are more circumspect when it comes to executives (Starr, 2023). But Shi (2023) makes the case that optimal policy – for executives – is close to a compete ban, due to the harm to other firms, workers and consumers who are not at the table when the NCC is being negotiated. Put simply, other firms may value the executive more than the initial employer, implying that NCCs may generate a socially costly misallocation of labour. In any case, this discussion is a reminder that non-compete reform entails no significant growth-equity trade-off – the sweet spot for structural policy.

The logic of business strategy for the individual firm is to find ways to reduce competition and erect barriers to entry. In this environment, competition policy must continually adapt and keep pace with economic changes, such as the rise of the service economy where restraints clauses are now seen to be most prominent. Australia is now making up for lost ground on this issue. Indeed, the collaboration between the ABS and the e61 Institute has created an opportunity to combine economic measurement with structural policy analysis to supply a stronger evidence base for pro-competitive structural reforms.

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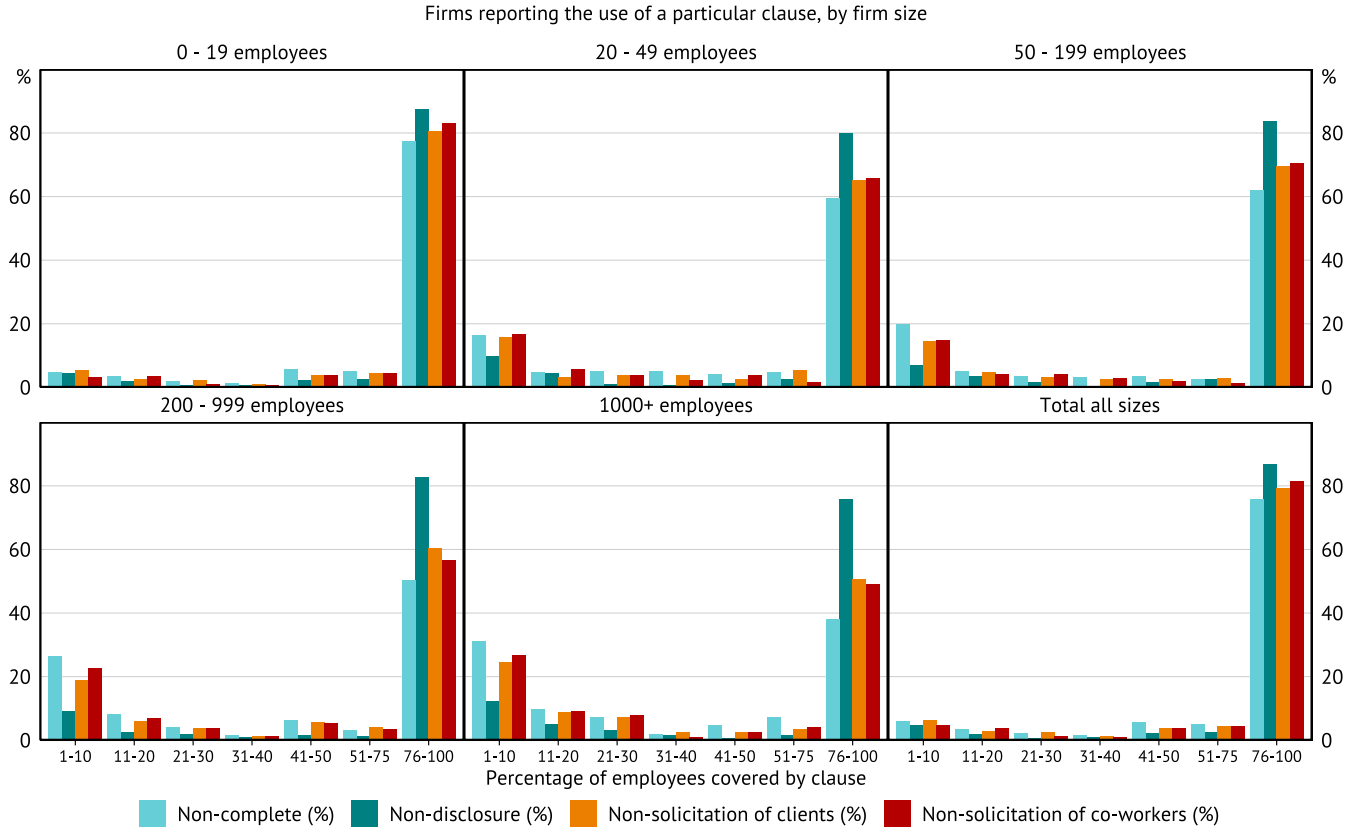
A.1. Additional results

Table A.1: Estimated share of workers subject to restraint clauses, conservative method

	Firm survey			Worker survey
	Lower	Central	Upper	
Non-disclosure	49%	58%	66%	26%
Non-compete	18%	21%	25%	22%
No-poach co-workers	19%	23%	27%	7%
No-poach clients	24%	29%	33%	16%

Sources: ABS Short Survey of Employment Conditions cat. no. 6306.0, e61 analysis

Figure A.1: Percentage of employees covered by restraint clauses at firms using restraints



* Based on responses to a question asked of employers reporting the use of a particular clause: What percentage of employees in this business have each of the conditions in their contract?
Sources: ABS; e61 Institute

A.2. Data

Short Survey of Employment Conditions

In late 2023 the ABS conducted the first Short Survey of Employment Conditions (cat. no. 6301.0.1) to better understand the use and prevalence of different types of restraint clauses in Australia. This is the first time the ABS has run an employer survey

on this topic and it represents one of the highest-quality surveys on restraint clauses in the world (Box 1). The survey made use of the Employee Earnings and Hours (EEH) responding sample and around 7,000 businesses were approached to answer a series of follow up questions on restraint clauses. Unlike EEH, the short survey was not compulsory but still achieved a relatively high response rate of around 70%. Further details on the SSEC can be found through the ABS release note.

Dynamism measures

Job-to-job transition rates

To estimate job mobility we use data from the ABS Participation, Job Search and Mobility June 2023 release. Transition rates are calculated as the share of workers who were employed in a given industry 12 months ago who have since changed employer. In Figure 7 we present a simple cross-sectional comparison of these job mobility estimates with the prevalence of restraint clauses in each industry. Ideally we would compare changes in job mobility rates to changes in the prevalence of NCCs and other restraints. However, the initial ABS release of the SSEC Survey data does not include information on changes in the prevalence of restraints at the industry level. We were also limited by the fact that information on job mobility at the industry level only extends back to the introduction of the Participation, Job Search and Mobility Survey in 2015. Because of this limited time series we do not examine the change in job mobility as most of the recent decline in job mobility occurred prior to 2015, with the rate of job switching actually increasing slightly since 2015.

Firm entry rates

We estimate the change in new firm entry rates within each industry using data from the ABS Counts of Australian Businesses, including Entries and Exits (cat. no. 8165.0). We compare changes in entry rates between 2008 and 2023 to utilise as long a time series as possible, while still having access to data which uses the Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006 industry classification, which was first used in the 2007 release. Given we have access to a much longer time series, we choose to compare the change in new firm entry rates to the current prevalence of restraint clauses in each industry.