RETHINKING NON-COMPETES: TOWARDS A MEANINGFUL AND COMPREHENSIVE BAN WITH SPECIAL REFERENCE TO TRADE SECRETS PROTECTION

DARSHANA SUMANADASA[*]

One of the more unconventional budget proposals of the year 2025–2026 is Australia's complete ban on non-compete clauses for workers earning below the Fair Work Act 2009 (Cth) high-income threshold of AUD183,100. This raises two key questions: (1) Why is an outright ban necessary? and (2) What additional concerns should policymakers address beyond the income threshold? This paper examines these questions, focusing on the rights of both employees and employers, especially in the context of protecting trade secrets. While non-compete clauses can restrict employee mobility and affect the broader economy, they also serve to protect employers' trade secrets and commercially valuable information. Striking a fair balance is crucial, as the common law already limits non-competes to what is reasonable in scope, geography, and duration. While supporting legislative intervention, this paper also explores alternative, practical solutions to effectively balance employer and employee interests.

---

[*] Lecturer, Curtin Law School, Faculty of Business and Law, Curtin University. Substantive portions of this article are drawn from the author's PhD thesis, titled 'The Impact of Trade Secrets Law on Employees and Society: In Search of a Balanced Theoretical and Legal Approach with Special Reference to Australia and Sri Lanka', submitted to the Queensland University of Technology and available at <https://eprints.qut.edu.au/128074/>. The author gratefully acknowledges the guidance of his PhD supervisors, Professor Des Butler and Associate Professor Kylie Pappalardo.

I Introduction

Restraint of trade clauses, which restrict an employee's personal liberties and freedom to work for other employers or start their own business after leaving a job, are now common across a wide range of industries in modern economies. A survey by the Australian Bureau of Statistics in 2023 revealed that Australian businesses frequently include restraint of trade clauses in employment contracts.[1] These clauses take various forms, including non-disclosure agreements ('NDAs'), non-compete clauses ('NCCs'), non-solicitation agreements, and non-poaching provisions. Among these, NCCs are the most impactful, with at least 20% of Australian workers subject to such restrictions in their employment agreements.[2] The gravity of NCCs is that they bind an employee even after leaving the present employment which is one form of post-employment restraint. Recent research highlights the negative impact of NCCs on employee mobility, particularly in limiting job transitions within the same industry.[3] Workers in businesses that extensively use NCCs are also paid, on average, 4% less than their counterparts in similar firms that only require NDAs.[4] This is for the reason that NCCs operate as restraints on labour competition which impede employee mobility and wage bargaining. In order to resolve this issue, the Federal Government, based on a report of the competition task force, made an unconventional budget proposal last year (2025–2026) to completely ban NCCs in Australia, for workers earning less than the *Fair Work Act 2009* (Cth) high-income threshold of AUD183,100.[5] This ban will come into effect from 2027.

Notwithstanding these well-documented adverse effects and the proposed legislative response, the continued prevalence of NCCs is largely driven by employers' concerns about the protection of commercially valuable information, specifically, trade secrets.[6] This concern is especially pronounced in Australia, where Small and Medium Enterprises ('SMEs') account for 97.2% of all businesses.[7] Across various industries, employees are frequently identified as the greatest threat to trade secret security, not only due to their access to sensitive information but also because they may have contributed to its creation or compilation. Employers commonly express concern that departing employees may transfer proprietary knowledge to competitors or utilise it in their own ventures, thereby compromising

---

[1] 'Restraint Clauses, Australia, 2023', *Australian Bureau of Statistics* (Web Page, 21 February 2024) <www.abs.gov.au>. See also Dan Andrews and Bjorn Jarvis, 'The Ghosts of Employers' Past: How Prevalent are Non-compete Clauses in Australia?' (Research Note, e61 Institute, 20 June 2023) <https://e61.in/>.
[2] Ibid.
[3] Jack Buckley, Ewan Rankin and Dan Andrews, 'Non-Compete Clauses, Job Mobility and Wages in Australia' (Research Note, e61 Institute, 14 October 2024) 1 <https://e61.in>; Hon Dr Andrew Leigh MP, *Opinion Piece: Non-compete Clauses are Costing Workers $7 Billion a Year* (2024) Ministers Treasury Portfolio <https://ministers.treasury.gov.au>.
[4] Australian Government, *Budget Strategy and Outlook 2025–26* (Budget Paper No 1, 25 March 2025).
[5] Ibid.
[6] 'Intellectual Property Protection Methods 2012-13', *Australian Bureau of Statistics* (Web Page, 21 August 2014) <www.abs.gov.au>; 'Intellectual Property Protection Methods 2014-15', *Australian Bureau of Statistics* (Web Page, 28 July 2016) <www.abs.gov.au>.
[7] Stefan Dittmer and James Pooley, 'Secrecy: The IP Right Most Often Used by SMEs', *WIPO Magazine* (online, 15 March 2021) <www.wipo.int>.

the competitive advantage of their former employers. Robert Dean, a leading Australian scholar and practitioner in trade secrets, observes that approximately 80% of trade secret litigation involves employers bringing claims against former employees.[8] In a similar vein, William Van Caenegem asserts that 'the law surrounding the post-employment phase is perhaps the most significant part of the law of trade secrets, and it certainly attracts a great proportion of litigation in trade secrets cases.'[9] These dynamics underscore the need for a balanced legal framework that effectively safeguards employers' proprietary interests without unduly infringing upon the post-employment freedoms and rights of employees.

The key issue at hand is whether the prohibition of NCCs should be considered as an isolated legislative or regulatory intervention, or whether a more nuanced approach is necessary to address the issue without unduly compromising the interests of both employers and employees. As stated, this is particularly relevant in the context of safeguarding valuable proprietary information, such as trade secrets. Accordingly, it is essential to explore complementary legislative measures that could enhance the regulation of NCCs. This article argues that any legal reform in this area must strike an appropriate balance between the competing interests of employers and employees. In a nutshell, the proposed prohibition of NCCs may have unintended adverse effects on businesses that rely on trade secret protection. Conversely, overly restrictive NCCs can hinder employee mobility, limit career progression, and suppress industry innovation. Therefore, this article examines how a fair and equitable regulatory framework can be developed to avoid disproportionately disadvantaging either party. First, after establishing the role of NCCs in protecting trade secrets, this article evaluates the extent to which existing common law principles seek to balance employer and employee interests in the enforcement of NCCs. Traditionally, the common law permits the enforcement of NCCs only where they are reasonable in scope, duration, and geographical reach, ensuring that they do not impose undue burdens on employees. Second, this article analyses the broader employment and economic implications of NCCs, particularly their impact on job mobility. Finally, the article proposes policy recommendations for refining the regulation of NCCs, with the aim of protecting both business interests and the economic well-being of workers. By addressing these critical issues, this article contributes to the ongoing debate on the regulation of NCCs in Australia, offering

[8] Robert Dean, *Employers, Ex-employers and Trade Secrets* (Lawbook Co, 2004) 1.

[9] William Van Caenegem, *Trade Secrets and Intellectual Property: Breach of Confidence, Misappropriation and Unfair Competition* (Wolters Kluwer, Netherlands, 2014) 223 ('*Trade Secrets and Intellectual Property*'). See also Robert G Bone, 'A New Look at Trade Secret Law: Doctrine in Search of Justification' (1998) 86 *California Law Review* 241, 244.

practical legal and policy solutions that promote both economic growth and fair employment practices.

II Role of NCCs Safeguarding Trade Secrets

Trade secrets or commercially valuable confidential information are often treated as the crown jewels of a firm's intellectual capital.[10] They represent one of the most significant forms of intellectual property protection in Australia and beyond.[11] For these enterprises, safeguarding proprietary information through confidentiality is a vital strategy for protecting intellectual assets. A major reason for the popularity and significance of trade secrets may be their flexibility in attracting and protecting a wide array of information which is not generally known or readily ascertainable.[12] Trade secrets are not limited to protection of technical or scientific information, but cover mere commercial information as well; for example, formulas, know-how, contract terms, software, customer lists, engineering, marketing, finance or strategic information, and information about suppliers, competitors, and other industrial participants. Their reach now spreads to sectors such as food and beverages,[13] sports,[14] mass media,[15] pharmaceuticals,[16] chemicals,[17] music,[18] information

---

[10] Karl F Jorda, 'Trade Secrets and Trade-Secret Licensing' in Anatole Krattiger et al (eds), *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices* (MIHR and PIPRA, 2007) 1043, 1046.

[11] Dittmer and Pooley (n 7). See also Suzana Nashkova, 'Addressing Criminal Liability for Misuse of Trade Secrets Under Australian Law: Is the Current Legal Framework Adequate to Protect the Interests of Owners of Trade Secrets?' (2024) 55(8) *IIC – International Review of Intellectual Property and Competition Law* 1281, 1281–82.

[12] See art 39(2) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999) 1869 UNTS 299, 33 ILM 1197 (1994) ('*TRIPS Agreement*').

[13] Eg the formula of Coca-Cola (*Coca-Cola Bottling Co v Coca-Cola Co*, 107 FRD 288, 289, 294 (D. Del. 1985)), ingredients of the original recipe of Kentucky Fried Chicken (*KFC Corp v Marion-Kay Co*, 620 F Supp 1160, 1172 (SD Ind, 1985)) and the recipe of Nutella.

[14] Eg Lena Blackburne's baseball rubbing mud: this mud is used to dull the surface of a baseball enabling pitchers to get a good grip. The source of mud is a secret.

[15] Eg the New York Times' bestseller list. United States Patent and Trademark Office, *Patent Basics Presentation* (Presentation, 1 March 2024) 20 <www.uspto.gov>.

[16] Eg the Pfizer-BioNTech COVID-19 vaccine which combines lipids and mRNA to produce lipid nanoparticles, including precise mixing, flow rates, concentrations and temperature controls. See Olga Gurgula and John Hull, 'Compulsory Licensing of Trade Secrets: Ensuring Access to COVID-19 Vaccines via Involuntary Technology Transfer' (2021) 16(11) *Journal of Intellectual Property Law & Practice* 1242, 1248.

[17] Eg WD-40. See United States Patent and Trademark Office, *Patent Basics Presentation* (Presentation, 1 March 2024) 20.

[18] Eg Antonio Stradivarius' violins and Zildjian cymbals. Andrew A Schwartz, 'The Corporate Preference for Trade Secrets' (2013) 74 *Ohio State Law Journal* 623, 651.

technology, and social media.[19] Moreover, when compared to other intellectual property rights, trade secrets are 'everlasting, apparently cheaper and faster to protect and do not (obviously) require disclosure'.[20] This feature reflects a deeper strategic choice. A business holding valuable information must weigh two options. The first is the patent route, which secures a finite monopoly only by surrendering the secret to the public, and only where the threshold for patentability is met. The second is reliance on the equitable and common law protection of trade secrets. Their durability depends entirely on the maintenance of secrecy, but they avoid the cost, delay, and disclosure that patenting demands. As such, they are comparatively more attractive, easy to obtain, and more common.

Restraint of trade clauses, or restrictive covenants, have become the primary tool for Australian employers to safeguard trade secrets, reflecting the central role of contractual agreements in modern employment and business relationships.[21] In general, these restraints may include non-disclosures, non-competitions, and non-solicitations of customers, and of employees.[22] NDAs prohibit employees from disclosing and using trade secrets in an unauthorised manner during and at the end of the employment. Non-solicitation agreements prevent employees from soliciting the customers of the ex-employer for his or her own benefit or for the benefit of a competitor after leaving the ex-employer. Broader still, NCCs prevent former employees from engaging in competing activities, such as joining a rival firm or launching a competing business, thereby creating a protective barrier against the misuse of sensitive commercial information gained during the course of employment. The reliance of employers on restrictive covenants to protect their trade secrets has been recognised as a 'belt and suspenders' approach.[23] That is a two-way protection, where employers use contracts to augment their trade secrets rights in addition to other legal protections.[24] From an employer's perspective, such restrictive covenants are a primary way of protecting their legitimate business

[19] Eg Google search algorithm and the algorithms social media platforms use to rank and moderate content.

[20] Nuno Sousa e Silva, 'What Exactly is a Trade Secret under the Proposed Directive?' (2014) 9(11) *Journal of Intellectual Property Law and Practice* 923, 923.

[21] See, eg, *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, 587: 'in modern times the relationship between master and servant, between employer and employed, is inherently one of contract'. See also *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167, 190: 'Express contracts not to divulge confidential information are made every day … between employers and employees'.

[22] *Lindner v Murdock's Garage* (1950) 83 CLR 628, 633.

[23] Viva R Moffat, 'The Wrong Tool for the Job' (2010) 52 *William and Mary Law Review* 873, 876.

[24] Rachel Arnow-Richman, 'Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements' (2007) 49 *Arizona Law Review* 637, 638–9 ('Cubewrap Contracts').

interests, including trade secrets. [25]As such, restrictive covenants are a helpful tool to prevent employees who have been exposed to confidential business information from joining a rival company immediately after leaving their present employment.

In the trade secrets regime, restrictive covenants may be considered as a way to incentivise investing 'in the development of knowledge *[trade secrets]* with some certainty that it will not fall immediately into the hands of a competitor if the employee moves'.[26] In other words, these restraints *inter alia* intend to control and limit the wide circulation of firm-specific information and knowledge. Employers consider that having an express written term in an employment contract may be an effective way of informing employees about their confidentiality obligation and protecting confidential information from current and ex-employees.[27] Consequently, restrictive covenants, whether in the form of NDAs or NCCs, have become increasingly prevalent in commercial practice.[28] Such covenants are frequently treated as a threshold component of trade secret protection, as they demonstrate that the employer has taken reasonable steps to preserve secrecy.[29] The significance of NCCs in this regard has long been recognised by both courts[30] and commentators[31] as an effective means of protecting confidential information and trade secrets. As Lord Denning MR observed, confidentiality obligations alone may be insufficient, given the difficulty of distinguishing confidential information from general skill and knowledge, and of proving misuse of information retained in an employee's mind.[32] In such circumstances, a restraint on competitive employment may constitute the only practical form of protection.[33] The next section explores how the current legal framework balances the competing interests of employers and employees in enforcing NCCs. It examines the principles governing their

[25] Iain Ross, 'Non-compete Clauses in Employment Contracts: The Case for Regulatory Response' (2024) 35(4) *The Economic and Labour Relations Review* 806, 813, 816–17.
[26] Christopher Arup, Chris Dent, John Howe and William Van Caenegem, 'Restraint of Trade: The Legal Practice' (2013) 36 (1) *UNSW Law Journal* 1, 2.
[27] Harald Irgens-Jensen, 'Departing Employees, Confidentiality Clauses and European Trade Secret Protection' (2023) 54(4) *IIC – International Review of Intellectual Property and Competition Law* 495, 511.
[28] Ross (n 25) 810–11.
[29] See *TRIPS Agreement* (n 12) art 39(2).
[30] See, eg, *Printers & Finishers Ltd v Holloway (No 2)* [1965] RPC 239, 256; *Rentokil Pty Ltd v Lee* (1995) 66 SASR 301, 340; *Woolworths Ltd v Olson* [2004] NSWCA 372, 380; *Quantum Service and Logistics Pty Ltd v Schenker Australia Pty Ltd* [2019] NSWSC 2, 16.
[31] Andrew Stewart et al, *Intellectual Property in Australia* (LexisNexis, 5th ed, 2014) 122; Van Caenegem (n 9) 46: '… parties are encouraged to engage in contractual bargains that promise greater certainty'.
[32] *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1479.
[33] Ibid.

enforceability and the extent to which they protect trade secrets while ensuring fair employment opportunities.

III Existing Legal Approach in Balancing Employers' and Employees' Rights

Whereas NCCs are considered to be a popular method of protecting employers' trade secrets, such clauses cannot be automatically enforced by an employer. This is because the common law holds that restraint of trade clauses are *prima facie* void as contrary to public policy, since it considers the likelihood of reducing competition and freedom of trade.[34] Nonetheless, these restraints will be enforced if they are reasonable between the parties (employer and employee) and in the public interest.[35] This can be regarded as a balance of 'two competing policy considerations: the policy of freedom of contract and enforcing contractual obligations, and the policy of preserving freedom of trade from unreasonable contractual restrictions'.[36] In essence, the common law seeks to strike a balance between an employer's interests, ie, protecting trade secrets, and an employee's interests in protecting their rights.

A *Test of Reasonableness*

The modern legal principles of restraint of trade were established in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* (*'Nordenfelt'*),[37] where the House of Lords set out what has come to be known as the *Nordenfelt* test. Lord Macnaghten held that while trade restraints are generally void as against public policy, they may be justified if they are reasonable in protecting legitimate business interests without harming the public.[38] This test, which balances individual freedom with commercial protection, has been widely adopted across common law jurisdictions, including Australia,[39] making it a cornerstone of restraint of trade jurisprudence. There are two aspects that need to be considered by the courts in determining the validity of

---

[34] John Gooley, Peter Radan and Ilija Vickovich, *Principles of Australian Contract Law* (LexisNexis, 3rd ed, 2014) 543.
[35] *Lindner v Murdock's Garage* (1950) 83 CLR 628, 633.
[36] Lindy Willmott et al, *Contract Law* (Oxford University Press, 5th ed, 2018) [18.35]. See also *Peters (WA) Ltd v Petersville Ltd* (2001) 181 ALR 337, 348.
[37] [1894] AC 535, 565 ('*Nordenfelt*').
[38] Ibid.
[39] See *Emeco International v O'Shea (No 2)* (2012) 225 IR 423, [3]: Edelman J states that 'the modern law in relation to restraints of trade began with the speech of Lord Macnaghten'. See also *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, 139; *Ross v IceTV* [2010] NSWCA 272, [86]; Rob Jackson, *Post-employment Restraint of Trade* (Federation Press, 2014) 12–15; Chris Dent, 'Nordenfelt v Maxim-Nordenfelt: An Expanded Reading' (2015) 36 *Adelaide Law Review* 329, 329.

NCCs. First, the NCC must be reasonable between employer and employee. Second, it should be reasonable in terms of public policy considerations.

Determining the reasonableness of NCCs is a complex task for courts. Generally, a restraint is considered reasonable if it is proportionate to the employer's legitimate need for protection, such as safeguarding trade secrets.[40] However, the mere existence of trade secrets does not automatically justify an NCC. Employers must also demonstrate that the restriction does not extend beyond what is necessary to protect their legitimate interests. Courts generally strike down overly broad restraint clauses on the basis that a restraint will only be enforceable where it is reasonably necessary to protect a legitimate interest of the party seeking to rely on it.[41] A restraint that exceeds what is necessary for that protective purpose will ordinarily be regarded as unreasonable and therefore unenforceable.[42]

The key question is whether the restraint exceeds what is reasonably required for such protection.[43] The burden of proving that a restrictive covenant is reasonable falls on the employer, as they are best positioned to assess the firm's interests. As Heydon J noted, the onus is not to prove reasonableness itself but to establish special circumstances from which reasonableness can be inferred.[44] Beyond reasonableness between parties, an employee may challenge an NCC by proving it is against public interest.[45] However, courts generally assume that a restraint deemed reasonable between the parties is also reasonable in the public interest.[46] While some argue for two distinct tests, others suggest that in most employment cases, proving reasonableness between the parties effectively resolves the matter.[47] Nonetheless, exceptions may arise where a restriction, though fair between the parties, is harmful to the public, warranting further scrutiny.[48] Even with two tests, proving the unreasonableness of NCCs can be challenging. In *Maggbury v Hafele*, Callinan J (dissenting) emphasised that restraints should be upheld unless they clearly harm

[40] *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973) 133 CLR 288, 315–6 ('*Amoco Australia*'); *Lindner v Murdock's Garage* (1950) 83 CLR 628, 633 (Latham CJ). See also *Liberty Financial Pty Ltd v Jugovic* [2021] FCA 607, [194] (Beach J).
[41] *Pennytel Australia Pty Ltd v Engelke* [2025] FCA 1384, 1476.
[42] *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 708. See also, more recently, the run of decisions striking down or sharply reading down overly broad restraints: *2nd Chapter Pty Ltd v Sealey (No 2)* (2024) 336 IR 1; *DXC Eclipse Pty Ltd v Wildsmith* (2023) 324 IR 89; *Pennytel Australia Pty Ltd v Engelke* [2025] FCA 1384.
[43] *Amoco Australia* (n 40) 315–6. See also *Heron v Port Huon Fruitgrowers' Co-operative Association Ltd* (1922) 30 CLR 315, 324.
[44] J D Heydon, *Restraint of Trade Doctrine* (LexisNexis, 3rd ed, 2008) 35.
[45] *Amoco Australia* (n 40) 307.
[46] Ibid.
[47] Heydon (n 44) 34.
[48] See *Amoco Australia* (n 40) 307. See also Willmott et al (n 36) [18.85].

the public interest, such as by reducing competition or causing economic detriment.[49] This suggests that courts may take a strict view, requiring employees to demonstrate a restraint's anti-competitive impact to have it struck down.[50]

Courts have, over time, developed a rule of thumb in determining the reasonableness of restrictive covenants. For example, in *Brilliant Lighting (Aust) Pty Ltd v Baillieu,*[51] the Supreme Court of Victoria set out five considerations in deciding the reasonableness of a restrictive covenant:

1. The scope of the restraint in terms of both the geographic area[52] and duration;[53]
2. The activities covered by the restraint;[54]
3. The relative bargaining power of the parties;[55]
4. The consideration paid in exchange for the restraint;[56] and
5. The context of the contract.

However, in general, courts do not consider these factors in isolation and this may be a combined test. In other words, determining the reasonableness of a restraint of trade clause is a subjective decision of the presiding judges, depending on the prevailing circumstances of the case.[57] As a result, the courts focus on the practical effects of the restraints in each case in assessing reasonableness.[58] It may be, ultimately, a matter of ascertaining the intention of the parties.[59] However,

---

[49] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 185 ALR 152, 177 ('*Maggbury v Hafele*').
[50] See below Part II(B) for more details.
[51] *Brilliant Lighting (Aust) Pty Ltd v Baillieu* [2004] VSC 248, [11].
[52] See, eg, *Papastravou v Gavan* [1968] 2 NSWR 286.
[53] See, eg, *Peters American Delicacy Co Ltd v Patricia's Chocolates and Candies Pty Ltd* (1947) 77 CLR 574.
[54] See, eg, *Geraghty v Minister* (1979) 142 CLR 177.
[55] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 All ER 171. See *Amoco Australia* (n 40) 317: 'The fact that the parties have bargained from a position of equality is therefore one of the circumstances to be considered in determining whether the covenants were reasonable, but it does not save from invalidity a covenant found to be unreasonable or contrary to the public interest'. See also *Creamoata Ltd* v *Rice Equalization Association Ltd* (1953) 89 CLR 286, 318.
[56] The High Court of Australia mentioned in *Amoco Australia* (n 40) 315–6 that the remuneration of the employee may be (but not 'must be') taken into account when considering reasonableness. See also *Smith v Nomad Modular Building Pty Ltd* [2007] WASCA 169.
[57] See *IF Asia Pacific Pty Ltd v Galbally* (2003) 59 IPR 43, 103.
[58] Gooley, Radan and Vickovich (n 34) 545.
[59] *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, 437.

determining reasonableness based on the specific facts of each case can create uncertainty in the law, potentially disadvantaging the parties involved.[60]

B *A Strict View on Employment Contracts*

At common law, contractual restraints imposed on employees have traditionally been subject to more exacting scrutiny than those arising in commercial or business transactions. This heightened level of judicial oversight is grounded in the law's fundamental commitment to preserving the freedom of the individual to engage in work and pursue livelihood, interests that are deemed essential both for personal autonomy and for the broader functioning of a competitive economy.[61] Courts have consistently viewed attempts to restrict productive labour or suppress market competition with disfavour, recognising that such restraints may have adverse consequences for both the individual and the public at large. This approach reflects a well-established principle that, unlike commercial parties negotiating on relatively equal terms, and receiving payment for a restraint, employees often occupy a weaker bargaining position when entering into contracts of employment.[62] As such, judicial intervention serves a protective function, ensuring that any contractual limitation on an employee's post-employment freedom is justified by a legitimate proprietary interest and is reasonable in scope, duration, and geographic reach.

As Lord Macnaghten famously stated in *Nordenfelt,* the courts must adopt a more rigorous standard when evaluating the validity of employee restraints, recognising the distinct power dynamics and the potential for overreach in the employment context.[63] This distinction remains a central feature of Australian law. In *IF Asia Pacific Pty Ltd v Galbally*, Dodds-Streeton CJ reaffirmed that employment restraints warrant closer scrutiny, in contrast to those between commercial entities where parties are presumed to have equal bargaining power.[64] Heydon identifies four principal reasons underpinning this stricter judicial approach in employment cases: first, the inequality of bargaining power between the parties; second, the employee may be giving up their only asset, which depends on specialised training and may not be at all negotiable; third, once labour is hired it remains valuable whether or not the employee later competes; and fourth, once the employee accepts post-employment restraints, the employer's power during the contract is

[60] Arup et al (n 26) 4.

[61] Adrian Brooks, 'The Limits of Competition: Restraint of Trade in the Context of Employment Contracts' (2001) 24(2) *University of New South Wales Law Journal* 346, 346–7.

[62] Heydon (n 44) 89. The development of the Unfair Contract Terms regimes shows that even business contracts too are subject to statutory regulation to ensure fairness for businesses.

[63] *Nordenfelt* (n 37) 543–4.

[64] (2003) 59 IPR 43, [102]. See also *Woolworths Ltd v Olson* [2004] NSWCA 372, [38].

significantly increased by reason of the inhibition on the employee's ability to threaten to leave and seek work elsewhere.[65] This reasoning has found direct judicial endorsement in *Trademax Australia Ltd v Huang*, where the court cited Heydon with approval.[66]

In *Marquett v Walsh*, Long Innes J questioned whether this reasoning applied in Australia, given strong labour protections, trade unions, and industrial tribunals.[67] However, the *Fair Work Act 2009* (Cth), which governs industrial relations, is silent on the regulation of NCCs and other forms of post-employment restraints, focusing on terms and conditions during the employment relationship and not after the relationship has ceased. Moreover, as Cross J explained in *Printers & Finishers Ltd v Holloway (No 2)*, trade secrets are distinct from skills acquired through experience.[68] Courts, in fact, balance two key policy considerations: upholding contractual confidentiality obligations and protecting employees' rights to advance their careers.[69] As such, while employers can safeguard trade secrets, employees retain the right to use their accumulated skills and expertise. Arguably, this may ensure a fair approach that respects both business interests and job mobility.

C *Judicial Power of Severance*

An important feature of the common law is the doctrine of severance, which allows courts to sever the contractual provisions deemed to be void at common law and enforce the remainder of the contract.[70] As explained by Campbell J in *Del Casale v Artedomus (Aust) Pty Ltd*:

> The *first question* for the court, when considering the reasonableness of the restraint at common law, is whether the *particular restriction* that the parties have agreed, imposed upon that *particular employee*, to protect that *particular "trade secret" falls within the range of reasonableness*. The *second question* is whether, if it does not pass the reasonableness test, *it can be severed*, by the rather mechanical test of severance that the common law uses, to cut out words so that what remains after the cutting out has occurred is reasonable and not of a different nature to the clause upon which the parties had actually agreed.[71]

---

[65] J D Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths, 4th ed, 2018) 96–9.
[66] (2024) 336 IR 205,220.
[67] (1929) 29 SR (NSW) 298, 312.
[68] [1965] RPC 239, 255.
[69] See, eg, *Maggbury v Hafele* (n 49) [68]; *GSK Australia Pty Ltd v Ritchie* (2009) 22 VR 482, [25].
[70] *Attwood v Lamont* [1929] 3 KB 571; *IF Asia Pacific Pty Ltd v Galbally* (2003) 59 IPR 43, [171], [174].
[71] *Del Casale v Artedomus (Aust) Pty Ltd* (2007) 165 IR 148, 172 [132] (emphasis added).

Hence, when a contract contains restraint of trade clauses comprising both reasonable and unreasonable restraints, a court may utilise this doctrine to disregard the unreasonable parts and implement instead the reasonable parts. Where there is an identifiably separate or divisible unreasonable restraint, a court may strike down such a restraint of trade clause and enforce the rest of the contract.[72] Applying the common law, Australian courts, except New South Wales ('NSW'), follow an 'all or nothing' approach and courts do not modify or re-write unreasonable restraints. Instead, courts can only enforce the reasonable part of the contract as far as the reasonable part is severable from the unreasonable part.[73] Thus, Australian courts show a restrictive application of the doctrine of severance. As a result, if a restraint is too broad, unreasonable and indivisible, it is unenforceable. As a result, employees will be free to use their employment-related knowledge and skills in subsequent employment.

Nonetheless, employers may attempt to overcome this legal challenge by including a cascading list of restraints in employment contracts. Cascading, ladder or step clauses were held valid in Australia by Spender J in *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd.*[74] In this case, a cascading clause included 10 potential time periods of restraint, ranging from one to ten years, and several geographical scopes of restraints, such as United States and Australia, Australia and New Zealand, or the East Coast of Australia.[75] Notwithstanding that the clause contained 120 possible meanings, the Court did not hold it void.[76] Further, in *Workpac Pty Ltd v Steel Cap Recruitment Pty Ltd,*[77] the cascading clause included five restraint areas, ranging from a 5 to 500 kilometre radii from the plaintiff's offices, and four restraint periods ranging from 3 to 12 months. Since the plaintiff had 26 offices, there were 520 different possible combinations of potential restraint.[78] Cabrelli and Floyd argue that 'the cascading restraint looks set to remain valid practice in many parts of Australia'.[79] Therefore, the existence of a cascading clause has the potential to draw a blurred picture in an employment contract, and consequently an employee would

---

[72] See *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391.
[73] Willmott et al (n 36) [18.440].
[74] (1987) 17 FCR 505 ('*Lloyd's Ships Holdings*'). See also *Hydron Pty Ltd v Harous* [2005] SASC 176.
[75] *Lloyd's Ships Holdings* (n 74) [46].
[76] Ibid.
[77] (2008) 178 IR 464.
[78] Ibid [35]. Since this was an application for interlocutory injunction, considering the balance of convenience, the court held for defendants. However, the court did not hold invalid the restraint of trade clause, which was severable.
[79] David Cabrelli and Louise Floyd, 'New light through old windows: Restraint of trade in English, Scottish and Australian Employment Laws: Emerging and enduring issues' (2010) 26(2) *International Journal of Comparative Labour Law and Industrial Relations* 167, 173.

be uncertain as to the reasonable scope of restraints until the matter is determined by a court.[80]

D *New South Wales Approach*

NSW is the only Australian jurisdiction to have enacted a *Restraint of Trade Act 1976* (NSW) ('the Act'). The NSW approach differs from the common law approach for two reasons. First, according to s 4(1) of the Act, 'a restraint of trade is valid to the extent to which it is not against public policy, whether it is in severable terms or not'. As such, unlike in other jurisdictions, restraint of trade clauses are not *prima facie* void in NSW, unless the restraint goes against public policy. This approach was confirmed by the Supreme Court of NSW in *Stacks Taree v Marshall (No 2)*.[81] In that case, McDougall J accepted the fact that, 'In New South Wales, it is not strictly correct that a restraint is prima facie void; a restraint is valid to the extent to which it is not against public policy, even if not in severable terms'.[82]

However, as mentioned by Ball J in *Metcash v Jardim (No 3)*,[83] this public policy requirement is satisfied if the restraint is reasonable between the employer and employee, and not unreasonable in the public interest. In this respect, NSW courts may be able to conduct the same test adopted by other states.

Second, s 4(3) allows courts to exercise a discretion not only to invalidate a restraint which goes beyond the public policy requirement, but also to modify a restraint that might otherwise be unreasonable.[84] Hence, unlike other jurisdictions, NSW courts are able to read down an unreasonable restraint of trade clause irrespective of whether or not the covenant is divisible in nature.[85] However, this is permissible only if the covenantee (employer) can demonstrate that they have made a genuine

---

[80] However, this drafting technique does not appear to be commonly adopted in England and Wales. Variable or cascading restraint clauses remain unusual, and there appears to be no reported English decision finally upholding such a covenant. Instead, English law generally requires the restraint to be clear, certain and reasonable at the time of contracting, with only limited blue-pencil severance available to remove offending words. See *Jump Trading International Ltd v Couture* [2023] EWHC 1305 (KB); *Verition Advisors (UK Partners) LLP v Jump Trading International Ltd* [2023] EWCA Civ 701; *Tillman v Egon Zehnder Ltd* [2019] UKSC 32; *Prophet plc v Huggett* [2014] EWCA Civ 1013.
[81] [2010] NSWSC 77.
[82] Ibid [44]. See also *Koops Martin Financial Services Pty Ltd v Reeves* [2006] NSWSC 449, [27] (Brereton J).
[83] [2010] NSWSC 1096, [46]. See also *Stacks/Taree v Marshall [No.2]* [2010] NSWSC 77, [44].
[84] For a recent application of the statutory read-down power, see *Moroney v TM Insight Operations Pty Ltd* [2025] FCA 1337 (confining the restraint to six months and striking down an uncertain definition of 'Identified Prospective Client'); cf *Industrial Rollformers Pty Ltd v Ingersoll-Rand Co (Aust) Pty Ltd* [2001] NSWCA 111 (reading a five-year worldwide restraint down to nine months and Australia), the paradigm of the s 4 power.
[85] Willmott et al (n 36) [18.495].

effort to impose a reasonable restraint.[86] The statutory discretion will not operate to uphold a restraint where no such attempt at reasonableness was made from the outset.[87] As such, the judiciary is empowered with a discretion to enforce an otherwise offensive restraint of trade clause, whether cascading or with only singular prohibitions.[88]

It may be submitted that the common law relating to restraint of trade, which measures the reasonability of restrictive covenants, attempts to strike a balance between the employer's concerns in protecting trade secrets and the employee's right to earn a living. Commentators have even identified common law countries such as Australia as low-enforcers of restrictive covenants as these countries ensure that restraints do not impede employee mobility.[89] Nonetheless, issues such as judicial dependence on the factual matrices of each case, jurisdictional variations in NSW, and the application of cascading clauses may contribute to creating clouds of uncertainties. Moreover, even though Australian courts largely rely on the notion that post-employment restraints should not be extended to the employee know-how of general stock of knowledge, still there is a practical difficulty in defining the line between trade secrets and know-how. Even if courts are able to do so, some courts suggest that using employee know-how in a subsequent employment can be restrained by restrictive covenants.[90]

IV Impact on The Rights of Employees

As discussed, restrictive covenants are highly prevalent in the Australian employment landscape. While the common law seeks to balance the interests of employers and employees, NCCs often undermine employees' rights in significant ways, as explored in the following sections. This analysis examines the impact of non-competes from the negotiation stage through to enforcement, highlighting how they unfairly restrict employees' ability to change jobs and, consequently, their right to earn a livelihood. The effects may be particularly severe for low-income and low-skilled workers, who have limited bargaining power and are less able to sustain themselves financially during the restrictive period.

---

[86] *Restraint of Trade Act 1976* (NSW) s 4(3). See also *Orton v Melman* [1981] 1 NSWLR 583, 589; *Woolworths Ltd v Olson* [2004] NSWCA 372; *Provida Pty Ltd v Sharpe* [2012] NSWSC 1041.
[87] Willmott et al (n 36) [18.495].
[88] Jackson (n 39) 60.
[89] Alan Hyde and Emanuele Menegatti, 'Legal Protection for Employee Mobility' in Matthew W Finkin, and Guy Mundlak (eds), *Comparative Labor Law* (Edward Elgar Publishing, 2015) 195, 203–206.
[90] *IM Maintenance Ltd v Brunt* [2004] WASC 49, [64]–[74].

A *Right to Enter into Employment Contracts Freely and Voluntarily*

An employment contract establishes the rights and obligations of both employers and employees, serving as the foundation for their working relationship. However, the extent to which employees freely and voluntarily assume contractual obligations, particularly restrictive covenants such as NCCs, remains open to question.[91] Voluntariness presupposes both freedom from coercion and a meaningful understanding of the contractual consequences.[92] In practice, however, structural power imbalances inherent in employment relationships may significantly undermine genuine choice. Consequently, it is difficult to maintain that employees voluntarily assume restrictive covenants in circumstances characterised by markedly unequal bargaining power. Indeed, the employment relationship is recognised as 'the paradigmatic example of inequality of bargaining power in contract law'.[93] It is uncommon for a post-employment restraint to be the subject of negotiation at the stage an offer of employment is made, where the focus is typically on negotiating remuneration. Further, in a depressed job market, a candidate who questions the scope of any post-employment protection, not just an NCC, may be at a disadvantage compared to a candidate that says nothing about such clauses.[94]

This asymmetry of power between employer and employee not only shapes the prevalence of restrictive covenants, including non-disclosure and non-compete clauses, but also profoundly influences their content and operation.[95] For example, terms and conditions of an employment contract may be unilaterally defined by an employer and presented in a boilerplate format.[96] Even though there is, theoretically at least, a negotiation period in any contract, for employment contracts this may be less and less in evidence.[97] Moreover, there is evidence that employees are often asked to sign an employment contract as a 'take-it-or-leave' condition.[98] Moreover, modern businesses frequently follow 'agreement-now-terms-later'

[91] This issue is particularly relevant to lower incomes workers. See Part IV(D).
[92] Aristotle, *Nicomachean Ethics* (Sir David Ross trans, 1925 ed) Book III. According to Aristotle, there are two major conditions of voluntary action: freedom from coercion and an understanding of the circumstances and implication of the action.
[93] Rachel S Arnow-Richman, 'Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes' (2006) *Michigan State Law Review* 963, 963.
[94] Ross (n 25) 820.
[95] Moffat (n 23) 885. See also John Howe and Andrew Newman, 'Collective Bargaining and Ownership of Employee Creation: An Empirical Examination of Statutory Industrial Instruments' (Research Paper No 677, Legal Studies, University of Melbourne, May 2014) 6.
[96] Arnow-Richman, 'Cubewrap Contracts' (n 24) 639.
[97] Orly Lobel, 'Enforceability TBD: From Status to Contract in Intellectual Property Law' (2016) 96 *Boston University Law Review* 869, 877.
[98] Ibid 869.

model of contracting.[99] Thus, employees may, in general, not be properly aware of issues such as post-termination competition at the time of signing a contract, whereas they may be more immediately concerned over issues such as salary, duties, and title.[100] Worse, it is doubtful whether the average employee understands the subtleties of a confidentiality contract.[101] Therefore, employees may not have accepted their restraints voluntarily and in a non-coercive manner.

The vulnerability of employees within the employment relationship is well recognised in Australian labour law, most notably through the *Fair Work Act 2009* (Cth), which establishes the National Employment Standards, enterprise bargaining frameworks, and unfair dismissal protections directed at redressing the structural imbalance of bargaining power inherent in the employment relationship. However, involuntary assumption of obligations by an employee through an employment contract is not identified as a ground to repudiate the contract unless the contract has been concluded where there is misrepresentation, mistake, unconscionable conduct, duress or undue influence.[102] Even mere economic pressure or asymmetrical bargaining power is not considered as grounds for claiming duress or unconscionability.[103] Moreover, there is no legal recourse for the *ex ante* scrutiny of restraint of trade clauses in an employment contract. Instead, legal action in this regard is largely *ex post* and in such cases courts are unlikely to strike down an employment contract solely on the ground that the contract was not concluded with the genuine consent of the employee.[104] That is to say, the law only focuses on the reasonableness of restrictive covenants and contracts which would be held invalid to the extent restrictive covenants are unreasonable. For instance, in *John Fairfax Publications Pty Limited v Birt,*[105] Brereton J, by upholding a post-employment restraint, stated that

---

[99] Arnow-Richman, 'Cubewrap Contracts' (n 24) 640.

[100] Ibid 640.

[101] Charles Tait Graves, 'Trade Secrecy and Common Law Confidentiality: The Problem of Multiple Regimes' in Rochelle C Dreyfuss and Katherine J Strandburg (eds) *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* (Edward Elgar, 2011) 91.

[102] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 182 [46], [57].

[103] See, eg, *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40; *Parkesinclair Chemicals (Aust) Pty Ltd v Asia Associates Inc* [2000] VSC 362.

[104] Arup et al (n 26) 2–3: 'The common law starts with a presumption that restraints are unenforceable as contrary to public policy. This is not because of the quality of the bargain between the employer and employee, whether, for the contract is void for unconscionability of duress or lack of consideration.'

[105] [2006] NSWSC 995. See also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [45] (citations omitted) where the High Court stated: 'It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has

> an employee who pursues such employment despite the terms of a restraint is the author of his or her own misfortune. I do not think that sympathy for the position in which Mr. Birt [the employee] now finds himself can justify not enforcing the contractual rights of Fairfax Publications.[106]

It follows that, where valuable consideration has been exchanged and the restrictions are reasonable in scope, time, and geographical boundaries, courts will generally not examine the circumstances in which the contract was formed.[107] In practice, consideration for a restraint is rarely offered as a distinct or additional payment; rather, it is typically expressed as forming part of the employee's overall remuneration for performing their duties under the contract.[108] This approach reveals a significant gap in the law's protection of employees: provided the restraint is framed as reasonable in scope, duration, and geography, courts will enforce it without inquiring into the circumstances in which the employee came to accept the restriction or whether meaningful consideration was specifically provided for it. The result is that the law's focus on reasonableness, while necessary, may be insufficient to fully address the structural inequality of bargaining power that characterises the employment relationship

B *Right to Choose and Change Employment or Employee Mobility*

One of the major implications of non-competes is that their excessive use can stifle competition, restrict talent mobility, and limit employees' right to pursue job opportunities. Free mobility of labour or the right to change jobs is a crucial issue where 'employment security' or 'free employability' is seen as more important than 'job security' or 'life-long jobs'.[109] From an employee's perspective, the right to choose and change employers or employment is a key factor in the flow of knowledge and in acquiring new knowledge.[110] In other words, employees may develop, sharpen and further enhance their employment capabilities, skills and

read and approved the contents of the document or is willing to take the chance of being bound by those contents, as Latham CJ put it, whatever they might be.'

[106] Ibid [49].

[107] This issue is not even dealt with in the *Competition and Consumer Act 2010* (Cth) since s 51(2)(d) of that Act excludes employment contracts.

[108] Andrew Fell and Elizabeth Rudz, 'Employee Non-Compete Restraints: Resolving Uncertainty' (2023) 46(4) *University of New South Wales Law Journal* 1252, 1260.

[109] Nuna Zekic, 'Job Security or Employment Security: What's in a Name?' Job Security or Employment Security: What's in a Name?' (2016) 7(4) *European Labour Law Journal* 548, 548–9. For example, in Australia today the average tenure of employment is seven years. See Patrick D'Arcy, Linus Gustafsson, Christine Lewis and Trent Wiltshire, 'Labour Market Turnover and Mobility' (2012) *Reserve Bank of Australia Bulletin* 1, 2.

[110] Johan Westerman, 'Should I Learn or Should I Turn? Implications of Job Mobility for Subsequent Learning at Work' (2021) 37(6) *European Sociological Review* 935, 935–6.

professional connections by changing jobs. Freedom of changing employment may also provide an opportunity for employees whose skills or aspirations are a poor match for the current job, employer, or sector in which they work. Therefore, having the freedom or right to change employment may be regarded as a key aspect of the meaningful realisation of the right to work.[111] As discussed, courts are generally sympathetic to a situation where an employee would lose the right to earn a living if a particular NCC is enforced. Courts are, thereby, of the view that post-employment restraints should only be extended to protect employers' trade secrets, not employee know-how or general stock of knowledge. However, in a practical sense, for the following reasons, the existence and enforcement of NCCs may prejudice employees in exercising their freedom in changing employments.

C *Blurry Line between Trade Secrets and Employee Know-How*

There is a doubt whether courts can successfully demarcate employee know-how from the employer's trade secrets which justify the enforcement of NCCs. The approach of Australian courts in this regard is to classify information into three categories: trade secrets (which would be protected by injunction, even in the absence of some contractual covenant according to the principles of equity); know-how (which would be protected by a valid restraint of trade covenant); and trivial information (which is not entitled to any protection).[112] The strategy Australian courts utilise in demarcating trade secrets from employee know-how is the adoption of the reasonable person test.[113] Accordingly, the test is whether 'the information be regarded as a separate part of the employee's stock of knowledge which a man of ordinary honesty and intelligence would recognise to be the property of his old employer and not his own to do as he likes with'.[114] Dean explains that the courts adopt an objective approach — the reasonable person test — in determining what constitutes a trade secret, whereas a subjective approach is used in determining whether information amounts to skill and general technical experience held by a particular employee at the time.[115] Therefore, the court considers the circumstances, such as 'the nature of the employment, the nature of information, whether the employer impressed on the employee the confidentiality

[111] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press, 2014) 272.
[112] See *Sameh Refaat v Michael Barry* [2015] VSCA 218, [131]; *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724, 731–2.
[113] *GD Searle and Co Ltd v Celltech Ltd* [1982] FSR 92, 255.
[114] Ibid. See also *Printers & Finishers Ltd v Holloway (No 2)* [1965] RPC 239, 255 (Lord Cross).
[115] Dean, *Employers, Ex-employers and Trade Secrets* (n 8) 11.

of the information and whether the relevant information can be easily isolated from other information'.[116]

Nonetheless, protection of trade secrets is invariably connected to the protection of information or information-related knowledge. Employee know-how or stock of knowledge acquired through employment is inevitably mixed with that knowledge. For this reason, Merges describes the blurry line between trade secrets and employee know-how as 'one of the most litigated issues in the pantheon of intellectual property disputes'.[117] In *GSK Australia Pty Ltd v Ritchie,* Harper J observed that 'it may not be easy to distinguish between information which remains the property of the former employer and that which forms the general stock knowledge of the ex-employee'.[118] Justice Campbell in *Del Casale v Artedomus (Aust) Pty* held that 'as a matter of ordinary English usage, there is no bright line between things that are of their nature trade secrets and things that are not'.[119] As Dean remarks, 'great difficulty remains in defining the line between trade secrets and know-how. "The difficulty … is that of drawing the line between that which in conscience is his employer's … and that which has become the employee's own".'[120]

In a similar vein, Van Caenegem argues that

> the conceptual, practical and evidentiary difficulties of separating trade secrets from general knowledge, know-how and experience are daunting, particularly where the claim relates to information that is not recorded in a document, file, date storage device or the like allegedly removed by the ex-employee.[121]

---

[116] Ibid 9. See also *New Aim Pty Ltd v Leung (No 4)* [2023] FCAFC 67, emphasising that confidentiality turns on the nature and content of the information rather than where it is stored, and that an employer who fails to take adequate protective steps, for example by permitting storage on an employee's personal device, may lose protection.

[117] Robert P Merges, 'From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation' (Working Paper, Conference on the Legal History of Intellectual Property, University of Wisconsin Law School Institute for Legal Studies, 13 November 2004) 9.

[118] (2009) 22 VR 482, [29]–[30]. See also *O'Brien v Komesaroff* (1982) 150 CLR 310.

[119] (2007) 165 IR 148, [128].

[120] Robert Dean, *The Law of Trade Secrets* (LawBook Co, 1990) 208, citing *Metrans Pty Ltd v Courtney-Smith* (1983) 8 IR 379, 381.

[121] William Van Caenegem, 'Employee Know-how, Non-compete Clauses and Job Mobility across Civil and Common Law Systems' (2013) 29 (3) *International Journal of Comparative Labour Law* 219, 228 ('Employee Know-how').

Thus, courts face the unenviable task of delineating know-how from trade secrets-related knowledge.[122] This view was further described by Rob Jackson as follows:

> This absence of judicial consideration as to what constitutes know-how is commonplace among all of the State and Commonwealth courts. Employee know-how as a concept in its own right is worthy of serious academic and judicial consideration, not merely as an adjunct to the law regulating the operation of confidential information or post-employment restraint provisions.[123]

Even if the courts are able to define what know-how is, employers can still restrict the use of know-how through restrictive covenants. Dean posits that 'know-how will be protected, but only if that information has been made the subject of a restraint of trade clause'.[124] For instance, affirming the view adopted by Samuels JA in *Faccenda Chicken Ltd v Fowler*,[125] Roberts-Smith J held in *AIM Maintenance Ltd v Brunt* that 'I accordingly take the law to be that confidential information falling short of a "trade secret" may be protected after termination of employment, by an express restrictive covenant'.[126]

As opined by Brereton J in *Cactus Imaging Pty Ltd v Peters:*[127]

> An employer has an interest in its confidential information, which it may legitimately protect by a restraint of trade, even if the information is not in the nature of a trade secret such as to attract equitable protection in the absence of any contractual agreement.[128]

Furthermore, in *Nomad Modular Building Pty Ltd v Smith*,[129] the following view of Lord Denning[130] was endorsed by the Western Australian Supreme Court:

> It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. *The reason is because it is so difficult to draw the line between information which is confidential and*

---

[122] See, eg, *Maggbury v Hafele* (n 49) [160].
[123] Rob Jackson, *Post-Employment Restraint of Trade* (1st ed, Federation Press, 2014) 99.
[124] Dean, *Employers, Ex-employers and Trade Secrets* (n 8) 4.
[125] [1984] ICR 589, 599.
[126] (2004) 28 WAR 357, [74]. See also *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317; *Workpac Pty Ltd v Steel Cap Recruitment Pty Ltd* (2008) 176 IR 464, [34]; and *Smith v Nomad Modular Building Pty Ltd* [2007] WASCA 169, [35]–[36].
[127] (2006) 71 NSWLR 9.
[128] Ibid [12].
[129] [2007] WASCA 117, [35]–[36].
[130] *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1479.

> *information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head.* The difficulties are such that the *only practicable solution* is to *take a covenant from the servant by which he is not to go to work for a rival in trade.* Such a covenant may well be held to be reasonable if limited to a short period.

Master Sanderson, approving Lord Denning's view, stated that 'in my view, that is exactly this case'.[131] His Honour went on to say that even though there is no suggestion at present that the defendant will use information, know-how or the like gained during his employment with the plaintiff, there must be a risk that he will do so. Therefore, the Court held that 'the plaintiff has no way of knowing when and if that might happen. So to prevent the situation arising, a reasonable restraint clause was placed in the employment agreement. It should be allowed to operate as between the parties'.[132]

D *Non-Competes and Lower-Income Workers*

As noted, there is a growing use of NCCs in the Australian workforce, and that includes many low-wage employees who typically lack the bargaining power to negotiate or remove such clauses.[133] Legal consultations confirm that NCCs are increasingly applied beyond traditional high-level roles in law, finance, and business services [134] They now extend to outward-facing customer roles, such as childcare workers, yoga instructors, and IVF specialists.[135] Over time, NCCs have shifted from being an exception to a default inclusion in many employment contracts — something rarely seen 15 years ago.[136] Lower-income workers also face greater financial hardship when transitioning between jobs and have fewer resources to challenge restrictive agreements. Unlike high-level professionals with access to sensitive business information, many low-wage workers have no reasonable justification for being subject to NCCs.[137]

Litigation over NCCs and trade secret protections is heavily skewed in favour of employers. Employees, often 'one-shotters' in legal disputes, face significant

[131] Ibid [36].
[132] Ibid.
[133] See above n 1.
[134] Andrews and Jarvis (n 1) 2.
[135] Legal Aid NSW, *Submission to the Competition Review on Non-Compete Clauses* (Submission, 2023) <https://treasury.gov.au>.
[136] Andrews and Jarvis (n 1) 2.
[137] Omer Majeed et al, 'Non-competes: A Case of Missing Wages in Australia' (Working Paper, Australian Government Department of the Treasury, 12 November 2025) 7, 17.

financial and procedural barriers when challenging these clauses in court.[138] Many lack the resources to hire specialised legal representation or the knowledge to navigate complex intersections of employment and trade secrets law.[139] In contrast, employers — "repeat players" in litigation — have the means to secure expert legal counsel and strategically leverage legal uncertainty to their advantage.[140]

As noted above, NCCs suppress worker mobility, even though the common law adopts a stricter approach towards employee restraints. Many employees, deterred by the fear of legal action, choose not to pursue better job opportunities — even when NCCs are ultimately unenforceable in court — a phenomenon known as the *in terrorem* effect.[141] The psychological and financial burden of potential litigation discourages low-income workers from challenging their contracts, effectively trapping them in lower-paying jobs.[142] Given these systemic disadvantages, there is a strong case for legal reform to specifically protect low-income workers from the undue burden of NCCs, ensuring fairer labour market mobility and economic opportunity.[143]

E *Extending the Scope of Trade Secrecy to Include Mundane Information*

As Joellen Riley claims, in recent years Australian courts have attempted to include mundane or ephemeral information in the orbit of confidential information.[144] For

[138] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law & Society Review* 95, 98.
[139] Katherine Fisk, 'Working Knowledge: Trade Secrets, Restrictive Covenants, and the Rise of Corporate Intellectual Property, 1800–1920' (2016) 52(2) *Saint Louis University Law Journal* 923, 929.
[140] Michael Selmi, 'Non-Compete Clauses and Economic Mobility' (2020) 105 *Cornell Law Review* 1205, 1212.
[141] Richard Posner, *Economic Analysis of Law* (Wolters Kluwer, 7th ed, 2007) 149; Competition Review, *Final Report on Employment Restraints* (Report, 2023).
[142] Alan Krueger and Orley Ashenfelter, 'Theory and Evidence on Non-Compete Agreements' (2021) *National Bureau of Economic Research Working Paper Series* No 29934, 25.
[143] Organisation for Economic Co-operation and Development, *The Role of Firms in Wage Inequality: Policy Lessons from a Large Scale Cross-Country Study* (OECD Publishing, 2021) 26, 81.
[144] Joellen Riley, *Commodifying Sheer Talent*: *Perverse Developments in the Law's Enforcement of Restrictive Covenants* in Christopher Arup and William Van Caenegem (eds), *Intellectual Property Policy Reform* (Edward Elgar, 2009) 267, 282. The same was observed by Katherine Stone in respect of the United States. She argues that 'firms value [and seek to protect] not merely specific technical knowledge, such as computer code or bio-technical discoveries, but also more mundane types of knowledge, such as how the business operates, how the goods are produced, how paperwork flows, and how files are organized.' She further points out even employees may be prohibited from using the knowledge relating to negative-trade secrets in subsequent employments. According to Stone, 'a negative-trade secret is the knowledge of products tested or systems tried that have proven to be unproductive': Katherine V W Stone, 'Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace' (2002) 34 *Connecticut Law Review* 721, 737.

instance, in *Woolworths v Olsen*,[145] Mason P treated a system designed to transform Woolworths' product supply procedures as confidential information.[146] In *John Fairfax Publications Pty Limited v Birt* ('*Birt*'),[147] strategies and tactical plans for selling media advertising to real estate agents were identified as confidential information.[148] This information may have been generated by employees in the course of their employment. Riley remarks that 'in earlier times it is arguable that this kind of information would be regarded as just part of the industry know-how and creative ideas of the employees themselves'.[149]

Therefore, she challenges the judicial approach in which courts have considered information which is mundane as nevertheless being confidential information, or as employees' goodwill which can be protected via restrictive covenants.[150] One of the reasons behind this is that Australian law is concerned with the protection of confidential information in general, which is considerably broader than trade secrets.[151] Put differently, in Australia it is not essential to establish that particular information possesses commercial value.[152] Instead, showing that information is not in the public domain may be sufficient.[153] Therefore, the information that an employer is willing to protect may not necessarily be limited to trade secrets which carry a commercial value.

Explaining the ramification of this legal approach, Riley posits:

> The cases on confidential information demonstrate that the strategic planning skills, the general know-how and creative thinking of working people can now be treated as a resource under the control of the employing business enterprise, not only during employment but afterwards. While the former employer can still (mercifully) not enslave the former employee by requiring continued service, the employer can (with an appropriately drafted covenant in an employment contract) prevent the employee from taking that talent and exploiting it elsewhere for a time.[154]

---

145 [2004] NSWCA 372.
146 Ibid [6].
147 [2006] NSWSC 995 ('*Birt*').
148 Ibid [20].
149 Riley (n 144) 272.
150 Ibid.
151 Christopher Arup, 'What/Whose Knowledge? Restraints of Trade and Concepts of Knowledge' (2012) 36(2) *Melbourne University Law Review* 369, 383.
152 Van Caenegem, 'Employee Know-how' (n 121) 225.
153 Ibid.
154 Riley (n 144) 272.

F *Non-Existence of a Measure to Compensate Employees during the Restraint Period*

As seen, depending on the circumstances, when a trade secret or protectable legitimate interest arises, the court has generally upheld what it deems to be a reasonable restrictive period of employment. However, the law is silent on the issue of what an employee is supposed to do in this restrictive period. Indeed, there is no legal means to compensate an employee who is not entitled to undertake new employment relative to the employee's skill and experience, or to start his or her own business in that period. For instance, in *Birt,* Brereton J adopted the view that, despite the fact the employee had to face hardship during the three month restraint period (his wife was expecting their second child and their first child was only 16 months old), the Court should enforce the restraint.[155] The Court further held that 'to a significant extent, an employee who pursues such employment despite the terms of a restraint is the author of his or her own misfortune'.[156] Therefore, even if courts hold that the restraint of trade period is reasonable, employees may be still deprived of their right to employment or to earn a living in that period. In any case, as noted above, it cannot be argued that agreeing to a NCC in an employment contract is a voluntary act of an employee. In fact, this is not a situation where an employee is responsible for his or her own misfortune. Rather, circumstances at the time may have forced him or her to sign the contract.

Moreover, while there is no automatic enforcement of non-competes by the courts, even within a reasonable non-competition period, there is a risk that an employee may have to separate his or her labour from himself or herself by not working. It is accepted that the post-employment restraint period may be varied depending on the circumstances. However, in some cases, even three month restraints may be long enough to keep an employee out of productive work.[157] Moreover, when there is a longer period of restraint, there is a risk that the enthusiasm of a potential new employer to offer a job may be diminished.[158] Also, in cases such as *IceTV v Duncan Ross and Ors*,[159] it is evident that post-employment restraint can be held to be reasonable in circumstances where an employee is terminated by the employer. The overall ramification is that an employee is deprived of his or her right to earn a living.

Therefore, it can be submitted that the existence and application of restrictive covenants may hinder successful realisation of employees' rights, such as freedom

[155] *Birt* (n 105).
[156] Ibid [49].
[157] Riley (n 144) 282.
[158] Ibid.
[159] [2007] NSWSC 635.

of changing jobs. Given that employees may not be able to delineate what information or knowledge they can obtain and use in their subsequent employment, there is a risk that they may not change their employment or surrender to the contractual restraints and be effectively forced to remain with their current employer. In any case, employers may be able to restrain employees from using their know-how in their future employment or at least successfully pressure them not to do so. The fundamental problem may be that there is no limitation on the protectable interest under restrictive covenants. As such, employers may effectively compel employees to remain with them and cancel any plans to join a competitor. Moreover, the existence of restrictive covenants may lead employees to career detours or involuntary occupational change for the reason that employees may not engage in a competing profession or business for the restraint of trade period.[160] That is, even in the case of a reasonable restraint which merely prohibits employees from working in a particular sector for a limited period, a skilful and enthusiastic employee may be compelled to seek employment opportunities in other sectors which are not covered by the restraint. On other hand, based on the same rationale, one may argue that NCCs do not completely restrict the ability of employees to work. However, a question that arises in this regard is whether it is reasonable to expect a highly skilled employee in one sector to work in a completely different sector. As an illustration, we cannot expect a robotic technician to find work as a cleaner.

Moreover, restricting the right to choose and change employment through restrictive covenants may impede the right to dignity and self-esteem of an employee, at least for the period of restraint. In fact, employees may feel socially unworthy by not having the opportunities to work during the restraint period, or as a result of career detours in which they may have to work in a field in which they might not have expertise or which they are otherwise overqualified to perform. The core of the issue is metaphorically explained by Riley as follows:

> [In] Shakespeare's *Merchant of Venice,* Shylock was forbidden by the court from taking the pound of flesh for which he had contracted because to do so would rob his victim of vital blood, which was not the subject of the bargain. Our present law turns this on its head. The employee is made to surrender up their life-blood — the very liberty to work and use their own know-how, skills and talents to the full — in order to render to the employer a mere pound of so-called "confidential information".[161]

---

[160] Matt Marx, 'The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals' (2011) 76(5) *American Sociological Review* 695, 702.
[161] Riley (n 144) 277.

Overall, restrictive covenants may prejudice an employee who is subjected to restraints depending on the circumstances. As such, employees may not be able to either use their own knowledge, skills and talents in their next employment or to glean and develop new knowledge through continuous employment and industry participation.

G *Economic Implications, Knowledge Spill-Over, and Endogenous Growth*

In today's knowledge-based economy, which is characterised by the production, dissemination, and utilisation of knowledge and information, economic growth is intrinsically linked to the expansion of knowledge.[162] The generation of new knowledge is widely recognised as a cumulative process that fundamentally relies on pre-existing intellectual resources. In this context, the broad dissemination of knowledge, or knowledge spill-overs, such as inter-firm information exchanges, serves as a critical driver of innovation and economic performance at both the industry and national levels.[163] Knowledge spill-overs contribute in at least two significant ways. First, they reduce unnecessary duplication of research efforts across firms, thereby enhancing overall research efficiency. Second, they facilitate follow-on innovation by improving access to the existing body of knowledge relevant to subsequent technological or conceptual advancements.

Legal-economic literature analyses this phenomenon through endogenous economic growth theory and suggests that there is a positive correlation between knowledge spill-over and economic development.[164] Endogenous growth theory establishes that economic growth may be a result of endogenous forces such as knowledge spill-overs, development of human capital, and innovation, rather than external economic forces.[165] In other words, it suggests that investment in human capital and the resultant circulation of knowledge endogenously generates

[162] J S Metcalfe, 'The Entrepreneur and the Style of Modern Economics' (2004) 14(2*) Journal of Evolutionary Economics* 157, 176.
[163] Ronald J Gilson, 'The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete' (1999) 74 *New York University Law Review* 575, 608–9; Effie Kesidou and Adam Szirmai, 'Local Knowledge Spillovers, Innovation and Economic Performance in Developing Countries: A Discussion of Alternative Specifications' (Working Paper No 2008–033, Maastricht Economic and Social Research and Training Centre on Innovation and Technology, United Nations University, 2008) 7.
[164] Luis A Rivera-Batiz and Paul M Romer, 'Economic Integration and Endogenous Growth' (1991) 106(2) *Quarterly Journal of Economics* 531, 550–1; Paul M Romer, 'Endogenous Technological Change' (1990) 98(5) *Journal of Political Economy* 72, 99.
[165] Rivera-Batiz and Romer (n 164) 550–1; Romer (n 164) 99.

economic growth.[166] As such, intra-sectoral and inter-sectoral knowledge diffusion may be regarded as a crucial factor of economic growth in this knowledge-based economy.[167]

Nonetheless, restrictive covenants may bring contrary results to a business or a country. That is because they may slow down the 'dissemination of ideas, process and methods' among firms by prohibiting employees' freedom to change their jobs.[168] This situation may be a reason for slow economic growth.[169] Researchers such as Alan Hyde explain the correlation between enforcement of non-competes, knowledge spill-overs, and endogenous economic growth using the example of the Silicon Valley's rise as a premier centre for innovation and economic growth.[170] According to Hyde, 'regions such as Silicon Valley … that experience growth as knowledge spreads beyond the boundaries of the firm, demonstrate the "endogenous growth" through generation and diffusion of non-rivalrous and non-exclusive information'.[171] The root cause for such a development may be the unenforceability of NCCs in California. Section 16600 of the *California Business and Professional Code* provides that 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void'.[172]

The application of this provision results in establishing a 'culture of mobility' leading to a 'high velocity labour market' and a high volume of 'knowledge spill-overs'.[173] According to Ronald Gilson, this legal approach is the main reason for the dominance of California in the high technology industry.[174] Hyde claims that 'unenforceability of non-competes encouraged a culture of start-ups, velocity of labour and information sharing'.[175] As such, he argues that the rapid technological and economic

---

[166] See Pontus Braunerhjelm, Zoltan J Acs, David B Audretsch and Bo Carlsson, 'The Missing Link: Knowledge Diffusion and Entrepreneurship in Endogenous Growth' (2010) 34(2) *Small Business Economics* 105, 105.

[167] According to Arrow, employee-mobility may be a major source of potential spill-overs: Kenneth Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in Universities-National Bureau Committee for Economic Research, Committee on Economic Growth of the Social Science Research Council (ed), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press, 1962) 609, 614.

[168] Harlan M Blake, 'Employee Agreements Not to Compete' (1960) 73 *Harvard Law Review* 625, 627.

[169] Anna Kirsten Rawlings, *Trade Secrecy in a Knowledge-Based Economy* (Masters Thesis, University of Toronto, 2001) 11.

[170] Hyde and Menegatti (n 89) 196; Gilson (n 163) 608–9.

[171] Hyde and Menegatti (n 89) 196.

[172] *California Business and Professional Code* § 16600.

[173] Gilson (n 163) 608–9.

[174] Ibid.

[175] Alan Hyde, *Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market* (Routledge, 2nd ed, 2015) 167.

growth in Silicon Valley cannot be achieved unless there is high velocity of labour and resultant knowledge spill-overs among firms and sectors.[176] For instance, high labour mobility or velocity of labour was a decisive factor in forming the semiconductor and biotechnology industries of Silicon Valley.[177] According to Guido Buenstorf et al, these industries were developed through spin-off entrepreneurs –– new firms started by either leaving employees or those who work in the same or closely related industries.[178] Overall, enforcement of non-competes may prejudice knowledge spill-over, which may contribute to a lack of innovation, technological and economic growth. In fact, restrictions on working in the same country or region may contribute to brain-drain, since employees who are restricted by non-competes may be induced to relocate by seeking a suitable job.[179]

V A Way Forward

As discussed, the enforcement of NCCs has the effect of restricting employees' fundamental right to work. Arguably, a legislative response may offer a viable means of clearly defining and safeguarding employees' rights in this area. This broader statutory orientation is consistent with the earlier empirical work of Christopher Arup et al, who identified uncertainty, hard bargaining and litigation costs as reasons why restraint clauses may be over-observed by employees even where they are vulnerable to legal challenge.[180] In the context of the welfare state where legislative interventions are often employed to protect underprivileged or vulnerable workers,[181] it is contended that statutory regulation of NCCs is both appropriate and necessary to address a distinct form of economic vulnerability. Absent such legislative safeguards, underprivileged or vulnerable employees may be left exposed to the inequities of traditional contractual principles such as freedom of contract and the sanctity of contract. This concern is underscored by the 2025–2026 federal budget proposals, which recognise that vulnerability is most acutely experienced by workers at the entry level and in low-wage occupations, where the ability to negotiate fair contractual terms is markedly limited. However, an effective legislative

---

[176] Ibid.
[177] Laura G Pedraza-Farina, 'Spill Your (Trade) Secrets: Knowledge Networks as Innovation Drivers' (2017) 92(4) *Notre Dame Law Review* 1561, 1565.
[178] Guido Buenstorf et al, 'Non-compete Clauses, Employee Effort and Spin-off Entrepreneurship: A Laboratory Experiment' (2016) 45 *Research Policy* 2113, 2113.
[179] Matt Marx, Jasjit Singh and Lee Fleming, 'Regional Disadvantage? Employee Non-Compete Agreements and Brain Drain' (2015) 44 *Research Policy* 394.
[180] Arup et al (n 26) 25.
[181] See, eg, Australia: *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); and *Occupational Health and Safety Act 2004* (Vic).

framework must also account for legitimate business interests. While protecting employees from unfair restraints, the law must also allow employers to safeguard proprietary interests, particularly trade secrets, without which innovation and investment in commercially valuable information may be discouraged. This is especially important given the distinctive role trade secrets play within the broader framework of intellectual property ('IP') law, often covering subject matter that falls outside the scope of conventional IP protections. The sections that follow will first examine the current proposal for a limited ban on NCCs and then explore additional considerations that a legislative initiative should address beyond the banning of non-competes for low- and middle-income workers, in order to achieve a more balanced and equitable regulatory approach.

A *Selective or Limited Ban*

The recent federal government proposal to ban NCCs from 2027 for employees on less than AUD183,100 per year marks a transformative shift in employment law and trade secrets protection.[182] Presented in the budget as a cost-of-living measure, the Labor Government framed the reform as a way to enhance workers' job mobility, ultimately boosting their earning potential.[183] The proposed ban on NCCs forms a part of a broader legislative trajectory of reforms to the *Fair Work Act 2009* (Cth), particularly amendments made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth), which are all designed to produce wage growth and labour mobility.[184] Rather than being driven by a direct focus on workers' rights, the ban is primarily grounded in economic considerations. Budget Paper No 1 quoted research which suggests that removing these restrictions could increase annual gross domestic product by AUD5 billion once fully implemented.[185] As revealed, currently, around 3 million Australian workers are bound by NCCs, which are becoming increasingly prevalent even in lower-wage industries such as childcare.[186] The reform is expected to provide workers with greater freedom to pursue higher-paying opportunities and start their own businesses while enabling growing

---

[182] *Budget Paper No 1* (n 4); 'Non-Compete Clauses and Other Restraints', *Australian Government* (Web Page, 2023) <https://treasury.gov.au>.
[183] Australian Government, *Building Australia's Future: Budget 2025–26* (Budget Overview, March 2025) 15.
[184] See, eg, *Fair Work Act 2009* (Cth) ss 333B–D: pay secrecy, which was previously regarded as a common contractual term, imposing a prohibition on disclosing pay to others, is now unlawful. The restriction applies to any contractual term, not just pay.
[185] *Budget Paper No 1* (n 4) 25.
[186] Ibid.

companies to attract skilled employees. Overall, it is projected to lift wages by 2–4%, potentially increasing annual earnings by up to AUD2,500 for median-wage workers.[187]

This move is expected to reshape employer-employee relationships while prompting businesses to reconsider their strategies for safeguarding proprietary information. At its core, this reform seeks to address a longstanding issue, namely the unnecessary extension of NCCs to low-skilled workers, such as hairdressers, baristas, and retail staff, who pose little to no risk of misusing confidential business information.[188] The assumption underlying non-competes has always been that higher-ranking, highly paid employees are more likely to have access to trade secrets or sensitive business data. If enacted, this legislation would entirely prohibit NCCs for lower- and medium-income workers, directly remedying one of the most criticised aspects of current employment contract practices. While non-competes may no longer be enforceable against low-income employees, other legal safeguards, such as NDAs, will remain in place to prevent misuse of confidential information. This approach is expected to strike a fair balance between protecting employer interests and ensuring worker mobility. While the proposed ban on NCCs for low and medium-income workers is a positive step, it alone cannot address the systemic issues tied to employment restraints. This point also reflects Arup et al's earlier view that legislative reform should be considered not merely as a question of enforceability in individual cases, but as a response to the broader legal practice through which restraints operate.[189] To drive meaningful reform, policymakers must go beyond this narrow intervention and address the broader systemic issues underpinning employment restraints, such as ensuring robust legal protections for trade secrets, as the following sections will demonstrate.

B *Defining the Boundaries: Protectable vs Non-Protectable Interests in Restrictive Covenants*

As noted elsewhere, trade secrets which are proprietary information of a firm represents valuable intellectual assets of a company in this knowledge economy. They offer protection for early-stage ideas before they develop into formal IP such as patents or copyrights. Even when firms secure patents, they may choose to keep certain aspects, including know-how, as trade secrets. Additionally, because patenting is costly and requires registration, SMEs often prefer non-registrable

---

[187] Ibid.

[188] Omer Majeed et al, *Non-competes: A Case of Missing Wages in Australia — Wages and Productivity in Firms Using Non-compete Clauses* (Competition Review, Australian Government Department of the Treasury, 2025) 8–10.

[189] Arup et al (n 26) 25–6.

protections, ie trade secrets, especially when their products are difficult to reverse engineer. In Australia, where there is a large presence of SMEs, the role that trade secrets play is significant as there is a positive correlation between the firm's size and the reliance of trade secrets.[190] As such, while banning NCCs, a legislative framework should still explicitly recognise the employer's right to protect trade secrets through measures of contracts or otherwise. From the employers' perspective, a more viable approach may be to draft agreements that focus explicitly on the protection of an employer's confidential information, as this constitutes a legitimate business interest. Policymakers, on the other hand, should explicitly state in legislative instruments that the prohibition of NCCs does not preclude employers from protecting trade secrets or other legitimate business interests through alternative contractual mechanisms. Such an explicit recognition would provide valuable guidance for courts when adjudicating disputes concerning restrictive covenants. Similarly, this clarification would be essential when evaluating the validity or reasonableness of NCCs applicable to high-income earners.

Notwithstanding the prohibition of NCCs, employers can continue to safeguard their legitimate business interests by requiring employees to enter into robust confidentiality or NDAs. Such agreements serve to clearly define what constitutes confidential information and provide guidance to employees regarding their obligations to maintain its secrecy. Moreover, NDAs may be regarded as a reasonable and proportionate means of preserving secrecy which is an essential element of trade secrecy, as recognised in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd*.[191] However, confidentiality obligations have their limits. In *Jackson Power Real Estate Pty Ltd v Jones,* the Court made clear that confidentiality provisions cannot be used as a substitute for a post-employment restraint.[192] If an employer seeks to prevent a former employee from competing, it must do so through an express and properly drafted restraint clause, rather than by expanding confidentiality obligations beyond their legitimate protective function.

This distinction is important for legislative reform. The continued availability of independent legal protections for employers was emphasised in *2nd Chapter Pty Ltd v Sealey (No 2)*,[193] where the Court treated the existence of alternative protections as a reason why the restraints in issue were unnecessary. In other words, employers are not left without recourse merely because NCCs are prohibited or restricted. They may still rely on statutory duties under ss 182–183 of the *Corporations Act 2001*

[190] See above Part II.
[191] [1967] VR 37, 49–50.
[192] [2024] NSWSC 1665, [37]–[39].
[193] (2024) 336 IR 1.

(Cth), which prohibit the improper use of position or information. Separately, an employer may seek protection through the equitable action for breach of confidence.[194]

In the context of legal actions based on breach of confidence, the existence of an NDA can also assist in establishing that the information was confidential and was disclosed in circumstances that impose an obligation of confidence. Therefore, it is important that policymakers explicitly acknowledge the continued right of employers to rely on NDAs as a legitimate mechanism for protecting proprietary and commercially sensitive information. However, policymakers must also remain vigilant to the potential for NDAs to impose obligations that functionally resemble those of NCCs, particularly where they restrict former employees from engaging in post-employment activities that may lead to competitive harm. The use of NDAs as de facto NCCs raises significant policy concerns, as such practices may undermine the legislative intent behind the prohibition of non-competes. Accordingly, it is recommended that policymakers consider extending the scope of regulatory reform to prohibit any contractual provision that, in effect, operates as a non-compete regardless of its formal classification.[195]

Another critical issue that policymakers should address is the potential prohibition of extending restrictive covenants, whether in the form of NDAs for low-income earners or NCCs for high-income earners, beyond the protection of employers' legitimate business interests or trade secrets. While restrictive covenants are intended to safeguard proprietary information, which may encompass more than trade secrets, there is currently no clear limitation on the scope of interests that may be protected through such agreements. Instead, the determination of what constitutes a protectable interest is largely left to the contracting parties' discretion. This lack of regulatory guidance creates the risk of overly broad or unjustified restrictions that could unduly limit employees' economic opportunities. Therefore, policymakers should consider implementing clear legal parameters to ensure that restrictive covenants are confined strictly to protecting legitimate business

[194] The elements of that equitable action were recently restated in *Pennytel Australia Pty Ltd v Engelke* [2025] FCA 1384, [18].

[195] Australian authorities illustrate that a reform confined to NCCs may leave employees exposed to other post-employment restraints. In *Ecolab Pty Ltd v Garland* (2011) 216 IR 410, the Court refused to enforce a non-compete restraint but restrained the former employee from breaching a non-solicitation covenant. Moreover, "solicitation" may be fact-sensitive and does not necessarily depend on who initiated contact: *Hellmann Insurance Brokers v Peterson* [2003] NSWSC 242; *Entello Pty Ltd v Firooztash* [2016] QDC 50. However, the broader regulation of non-solicitation clauses falls beyond the scope of this article.

interests.[196] This has been approved by Pembroke J in *Seven Network (Operations) Ltd v James Warburton (No 2)*, where his Honour opined that

> the categories of case in which covenants in restraint of trade are enforceable are neither rigid nor exclusive. They included … any case where the covenantee has a legitimate interest of whatever kind to protect and where the covenant is no wider than necessary to protect that interest.[197]

The repercussion of this scenario is that there is a possibility of extending the scope of restrictive covenants to cover employee know-how or general stock of knowledge acquired through their prolonged employment. This may result in impeding employees' rights to successfully utilise employment-related knowledge in subsequent employment. Therefore, Van Caenegem highlights the need to define the 'scope and extent of the categories of protectable interests'.[198]

To remedy this, the protectable interest of restrictive covenants should be defined through a legislative provision. However, introducing an overarching limitation on the protectable interest may hinder the employers' ability to contract and protect their legitimate business interests, such as trade secrets. Therefore, in balancing the interests of both employers and employees, policymakers may consider including a provision such as the following:

> An employer has a protectable interest when [and only when] the employee (i) has access trade secrets of the employer or (ii) has access to competitively sensitive confidential information that otherwise would not qualify as a trade secret, including product development plans, product launch plans, marketing plans and sales plans.[199]

At the same time, legislation may introduce a list of exclusions or information that cannot be protected by restrictive covenants. Such a list may include general skill, knowledge and general job training acquired by an employee during his or her tenure. Such a provision may strengthen the position of employees in two ways. First, it may establish that employers can prove that they have possessed a protectable interest under a restrictive covenant only if an employee has access to trade secrets or other related confidential and sensitive information. Second, employees may be able to successfully utilise their skills, knowledge and general

---

[196] A similar concern underpins Arup et al's reform proposal that employers should be required to identify with precision the position from which the employee is restrained, the interest worthy of protection, and the temporal and territorial limits of the restraint. See Arup et al (n 26) 25.
[197] (2011) 206 IR 450, 470 [68].
[198] Van Caenegem, *Trade Secrets and Intellectual Property* (n 9) 218–20.
[199] See *Non Competition Agreements*, *2017 ORS 653.295,* Oregon Revised Statutes 2017.

training in subsequent employment. This may lead to empowering employees by ensuring that the application of restrictive covenants may not circumscribe their ability to successful realisation of their right to work.

C *Demarcating Employee Know-How from Trade Secrets: Embracing the Memory Rule*

As stated, there is a risk that trade secrets law may catch within its ambit the information that is in the memory of the employees. For instance, in the Australian context, where there are no clear rules to demarcate trade secrets from employee know-how, there is a possibility that the law may embrace information that is purely in the memory of the employee.[200] The consequence may be that employees may not be able to successfully engage in their subsequent employment. As stated in the Massachusetts case of *Marcam Corp v Orchard*:

> [An ex-employee] does not go with a *tabula rasa* with respect to … significant business information of [the former employer]. It is difficult to conceive how all this information stored in [the ex-employee's] memory can be set aside as he [or she] applied himself [or herself] to a competitor's business and its products.[201]

The solution that was suggested to resolve this issue by the United States courts was to apply the 'inevitable disclosure' doctrine.[202] The inevitable disclosure doctrine proposes that an employee 'may be enjoined by demonstrating that the employee's new job duties will inevitably cause the employee to rely upon knowledge of the former employer's trade secrets'.[203] In other words, this doctrine is based on the proposition that it may be inevitable that an employee reveals trade secrets of an ex-employer to a new employer since an employee might not be able to compartmentalise the information, knowledge and experience gleaned through the previous employment from their knowledge on the trade secrets of the ex-employer. The doctrine of inevitable disclosure seeks to protect trade secrets from threatened misappropriation, allowing courts to grant preliminary injunctions to forbid an

[200] Ibid.
[201] 885 E Supp 294 (D Mass 1995), 297. However, *Marcam* predates the Massachusetts Noncompetition Agreement Act, which now imposes additional limits on employee non-compete agreements entered into on or after 1 October 2018. It is therefore relied on here only for the broader point that information retained in an employee's memory may complicate the distinction between general skill and knowledge and protectable confidential information, not as a statement of current Massachusetts non-compete law.
[202] See *PepsiCo, Inc v Redmond* 54 F 3d 1262, 1272 (7th Cir, 1995).
[203] *Whyte v Schlage Lock Co,* 101 Cal App 4th 1443, 1446 (2002).

immediate threat.[204] However, this doctrine may prejudicially affect public interest in that employers should be free to hire whomever they please and employees should be free to work for whomever they please.[205] Consequently, this may affect the mobility of labour, the right to earn a living, as well as the dissemination of knowledge.

Even though there is no such doctrine in Australia, a similar result may follow the application of the current laws in Australia. That is, given the practical difficulty in demarcating employee know-how and trade secrets, there is a risk that courts may take an overly expansive interpretation of the protected information, thereby restricting the use of employee know-how in subsequent employment. This paper proposes that policymakers consider the 'memory rule' to resolve the problem of drawing lines between trade secrets and employee know-how. An 18th century English case, *Merryweather v Moore*, may provide a foundation for this argument. In this case, Kekewich J held that 'if he [an employee] can carry them in his head, no one can prevent his doing that and making use of them'.[206]

Yuval Feldman, building on this statement, argues that the judicial approach should be to enjoin merely the 'use of information that was copied down prior to the termination of the employment' but not the use of the knowledge carried out in the heads of departing employees.[207] This seemingly simple concept has been forgotten by the common law world,[208] but may be a way of successfully drawing a line between employers' protectable trade secrets and employees' know-how, which is allowed to be used in subsequent employment. Feldman, having empirically investigated this proposition, suggests that the tangibility of information is the most important determinant in a trade secrets misappropriation case.[209] In other words,

---

[204] Elizabeth A Rowe, 'When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine' (2005) 7 *Tulane Journal of Technology and Intellectual Property* 167, 172–3.
[205] See *Bimbo Bakeries USA Inc v Botticella*, 613 F 3d 102 (3rd Cir, 2010).
[206] [1892] 2 Ch 518, 524.
[207] Yuval Feldman, 'The Behavioral Foundations of Trade Secrets: Tangibility, Authorship and Legality' (2006) 3(2) *Journal of Empirical Legal Studies* 197, 203. While Feldman did not mention the *Merryweather v Moore* case specifically, he attempted to rely on an analysis of Pooley, which did: see James H A Pooley, M A Lemley and Peter J Toren, 'Understanding the Economic Espionage Act of 1996' (1997) 5 *Texas Intellectual Property Law Journal* 177, 189–90. However, Pooley, Lemley and Toren did not deal with the memory rule per se.
[208] See Ronald McCallum and Andrew Stewart, 'The Duty of Loyalty: Employee Loyalty in Australia' (1999) 20 *Comparative Labour Law and Policy Journal* 155, 163. They argue that there is no fundamental difference between memorised and downloaded information in the Australian context.
[209] Feldman (n 207) 231. Feldman, based on the data collected from a non-random multi-sourced sample of 260 high-tech employees in Silicon Valley, suggests an alignment of 'law with people's [employees'] intuitions' or what people think is right or wrong. According to this view, social support is required for the long-term functionality, legitimacy and credibility of the law. He identified that the memory rule is such a legal principle that is supported by persons, ie, employees.

he asserts that while trade secret law should cover downloaded or deliberately collected information (which is employers' information) by a leaving employee, the law should not cover memorised information (which can be freely used by employees).[210] In summary, despite the fact that the information was confidential, if it had been absorbed by an employee during his or her employment, it should be recognised as a part of his or her general knowledge and expertise.

The central challenge in operationalising the memory rule lies in translating its intuitive logic into legally workable language. This article argues that the rule be given effect through a two-limbed test applicable in the employment context, distinguishing between: (i) information that has been passively absorbed and retained in the unaided memory of the employee in the ordinary course of performing their duties; and (ii) information that was deliberately recorded, copied, extracted, or memorised by the employee prior to or upon the cessation of employment.[211] Only the latter category would attract the protection of trade secrets law. Information falling within the first limb would be treated as forming part of the employee's general stock of knowledge and expertise, freely available for use in subsequent employment. To give this test legal efficacy, it is proposed that the memory rule be expressed in the following statutory terms:

> Information shall not constitute a trade secret, or be treated as confidential information protectable against use by a former employee, to the extent that such information has been retained solely in the unaided memory of that employee and was not deliberately recorded, copied, extracted, or memorised by the employee prior to or upon the cessation of the employment relationship.

This formulation has several features that make it legally operative. First, the requirement of 'unaided memory' confines the protection to information that the employee could not carry in their head without deliberate effort, thereby excluding passively absorbed know-how. Second, the qualifier 'deliberately recorded, copied, extracted, or memorised' imports a fault element that aligns with the equitable basis of trade secrets protection, which has always required some element of unconscionable conduct or breach of confidence.[212] Third, the formulation does not require the employee to prove a negative; rather, the burden of establishing deliberate extraction falls on the employer seeking to enforce the restriction,

[210] Ibid 224, 231.

[211] This two-limbed formulation draws on Feldman's empirical analysis (n 207) 197 and the foundational principle stated in *Merryweather v Moore* (n 206) 524.

[212] See, eg, *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47–8 (Megarry J).

consistent with general principles governing the enforceability of post-employment restraints.[213]

Nonetheless, it might be argued that proposing the memory rule might be undermined in the rare case of an employee having an eidetic memory. As such, there may be a risk that an employee with an eidetic memory may carry trade secrets such as a recipe or a formula in his or her mind when leaving an employer. However, at least, the memory rule can be regarded as a practical measure that may resolve the problem of uncertainty of demarcating employee know-how from trade secrets by providing that protected information does not extend to the general stock of knowledge of an employee with normal memory. In simple terms, then, if information cannot be deleted from the head of the employee, so far as the employee does not make any additional effort to store particular information relating to trade secrets in their head, it may be fair to consider that this knowledge is theirs.

D *Advocating for Garden Leave as a Mandatory Compensation Mechanism for Restricted Employees*

As explained, restrictive covenants are a common tactic used by employers to protect their trade secrets, requiring (ex-)employees not to compete with them by using their trade secrets. In practice, this measure restricts the employees' rights to change their employment and ultimately the right to earn a living.[214] Also, this may be regarded as a unilateral measure that forces employees to bear the primary burden (of protecting trade secrets) without receiving anything in exchange. In other words, one of the major deficiencies of non-competes may be that they do not provide provisions for making a payment to an employee who is restricted to working for a certain (reasonable) time period.

Alternatively, the 'garden leave' or 'gardening leave' doctrine can be regarded as a fairer mechanism than non-competes, and may serve the same purpose. Garden leave can be defined as 'an employer insisting an employee, who has given notice, stay away from work for the duration of the notice period, whilst continuing to receive the employee's remuneration'.[215] Thus, rather than immediately beginning work for a competing enterprise after leaving the previous employment, the employee is paid to remain at home and, at least metaphorically, work only in the

---

[213] This is consistent with the general principle that the party seeking to enforce a post-employment restraint bears the onus of establishing its reasonableness. See *Lindner v Murdock's Garage* (1950) 83 CLR 628.
[214] See above Part IV.
[215] *Bearingpoint Australia Pty Ltd v Hillard* [2008] VSC 115, [84] (Habersberger J).

garden.[216] From an employer's perspective, garden leave may be a measure to protect them against the misappropriations of trade secrets and competition from leaving employees. From an employee's perspective, while the doctrine of garden leave still restricts the mobility of an employee, it nevertheless compensates him or her for the period of the restraint. Employers may not attempt to restrict leaving employees routinely since they have an immediate and tangible cost in enforcing a garden leave agreement. As such, they may be cautious to apply gardening leave only to the employees plausibly exposed to trade secrets. Therefore, garden leave may be considered as striking a fair balance between employers and employees.[217] This compensation-based rationale has also been recognised by Arup et al, who note both the practical use of gardening leave and the possibility of requiring payment during the restraint period as a means of reducing the burden on employees.[218]

Implementing garden leave, rather than relying on a remunerated post-employment restraint, may offer important doctrinal and practical advantages in the employment context. Its main doctrinal advantage is that the employment contract remains on foot during the notice period. The employee, therefore, continues to owe duties of fidelity, loyalty and exclusive service, while the employer may lawfully remove the employee from access to confidential information, strategic developments and client connections.[219] This distinction was illustrated in *Harden v Willis Australia Group Services Pty Ltd*,[220] where Sackar J treated the employment contract as continuing during the notice period, with the result that the employee remained subject to continuing contractual obligations, including the duty of fidelity and an implied duty of good faith. The case usefully confirms that garden leave derives its force from the subsisting employment relationship, whereas, once that relationship has ended, the employer must instead rely on an enforceable post-employment restraint.[221] This is what distinguishes garden leave from a post-termination non-compete, which can only operate once the employment relationship, and with it the ordinary duty of fidelity, has come to an end.[222] As Rajiv Passi observes, the appeal of garden leave

216 Norman D Bishara and Michelle Westermann-Behaylo, 'The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility' (2012) 49 *American Business Law Journal* 1, 26.
217 *Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414, [65]–[66]; *Grace Worldwide (Australia) Pty Ltd v Alves* [2017] NSWSC 1296, [39], [48]–[69].
218 Arup et al (n 26) 11, 26–7.
219 See *Robb v Green* [1895] 2 QB 315, 316–7; *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 136–7.
220 [2021] NSWSC 939.
221 Ibid [510]–[514].
222 See *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 136.

lies precisely here: it shields the employer from competitive harm while leaving the employee's pay and contractual status intact during the period of exclusion.[223]

What makes garden leave especially attractive is that the reform discussed above leaves it untouched.[224] The proposed prohibition applies only to restraints that operate after the employment relationship has ended. It says nothing about how an employer may lawfully direct an employee who remains under contract. Garden leave does its work while the contract is still on foot, during the notice period, when the employee continues to be paid and continues to owe the duties of fidelity and exclusive service examined above.[225] It is therefore not a post-employment restraint at all, and falls outside the class of clauses the announced ban is designed to strike down.[226] The practical consequence is significant. As the prohibition removes the non-compete from the employer's toolkit for the great majority of workers, garden leave stands among the few protective mechanisms left intact.

This conclusion should not be overstated, however. Garden leave is not a freestanding entitlement; its protective force depends on the contract conferring an express power to withhold work. That qualification matters, because for skilled employees, whose professional standing and marketability depend on actually doing the job, the courts have recognised an implied obligation on the employer to provide work unless the contract clearly states otherwise.[227] Even where such a clause is in place, the protection holds only so far as it is properly drafted and confined to what is reasonably necessary, as the authorities canvassed above insist,[228] and it withstands only the reform as announced, not necessarily any future one, since the consultation has expressly canvassed restraints operating during employment.[229] What can be said in its favour is that a well-drafted clause draws its strength from the continuing employment relationship rather than from a more fragile post-employment covenant, the very function the English Court of Appeal acknowledged long ago in *Provident Financial Group plc v Hayward* when it treated garden leave as

---

[223] Rajiv Passi, 'Garden Leave Clauses: A Growing Trend in Employment Contracts' (2001) 13(3) *Bond Law Review* 371, 374–6.
[224] See above Part V(A).
[225] See Amanda Coulthard, 'Garden Leave, the Right to Work and Restraints on Trade' (2009) 22(1) *Australian Journal of Labour Law* 87, 88; Greg McCarry, 'Termination of Employment, Payment in Lieu of Notice, Garden Leave and the Right to Work' (1999) 12 *Australian Journal of Labour Law* 1.
[226] Coulthard (n 225) 88.
[227] *BearingPoint Australia Pty Ltd v Hillard* [2008] VSC 115, [88]; *Wesoky v Village Cinemas International Pty Ltd* [2001] FCA 32, [17]. See also Coulthard (n 225) 89–90.
[228] *Seven Network (Operations) Ltd v Warburton (No 2)* (2011) 206 IR 450, 470–73 [68]–[77]; *Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414, 425–28 [37]–[46]; *William Hill Organisation Ltd v Tucker* [1999] ICR 291, 298–9; *Evening Standard Co Ltd v Henderson* [1987] ICR 588, 593–4.
[229] Treasury (Cth), *Reform to Non-Compete Clauses and Other Restraints on Workers* (Consultation Paper, July 2025).

a powerful tool available to employers during the notice period.[230] Garden leave is best understood, then, not as a settled safe harbour, but as the more durable and defensible of the available mechanisms on the current state of the law. [231]

E *Legislative Provisions and Guarantees Not to Be Excluded by Contracts*

Policymakers may consider including a provision to eliminate the possibility that an employer may exclude the application of legislative provisions through contractual measures. Such a guarantee may be important to protect employees who may be otherwise vulnerable to employers who have stronger bargaining power. Therefore, legislation may introduce a provision stating:

> A term of a contract is void to the extent that the term(s) purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying (a) the application of all or any of the provisions of this legislation and (b) the exercise of a right conferred by the provisions of this legislation.[232]

The purpose of such a provision is to prohibit the possibility of contracting out of the progressive statutory measures introduced to establish a balanced approach concerned with the rights of employers and employees. Employees may be protected by the legislative provisions irrespective of the fact they were compelled by an employer to sign an 'opt out contract'.

VI CONCLUSION

Restrictive covenants such as NCCs have become increasingly prevalent across Australian industries, driven by the desire to protect employers' legitimate business interests in a competitive market. However, the growing use of NCCs, often imposed indiscriminately and without regard to income level or actual business risk, has raised serious concerns about their adverse effects on employee mobility, economic fairness, and innovation. Recognising the wide-ranging implications of NCCs, the federal Government has announced a plan to implement a prospective ban on NCCs for the majority of Australian workers, particularly those earning below the high-income threshold, with the reform expected to take effect from 2027. While this marks a positive shift towards promoting fairness and productivity, this article argues that a blanket prohibition, though well-intentioned, may be insufficient on its own to resolve the deeper systemic challenges posed by restrictive employment practices. A more effective and equitable approach requires policymakers to engage

[230] *Provident Financial Group plc v Hayward* [1989] ICR 160, 164–5.
[231] See Coulthard (n 225) 89–90.
[232] Cf *Competition and Consumer Act 2010* (Cth) s 64.

with the nuanced legal and practical realities that underpin the use of NCCs. In particular, the reform agenda should include clearly defining and limiting the scope of protectable employer interests in NCCs, ensuring that only legitimate commercial concerns such as trade secrets and confidential information warrant restriction. It should also involve drawing a principled and practical distinction between an employee's general know-how and an employer's proprietary trade secrets, potentially through the adoption of the 'memory rule' as a guiding test for enforceability. Furthermore, the introduction of garden leave provisions as a mandatory compensatory mechanism for employees subject to post-employment restraints would help to mitigate the economic harm caused by such clauses while ensuring proportionality and fairness.

By offering these targeted reforms, this article provides a roadmap for constructing a more balanced legal regime: one that safeguards commercial confidentiality without unduly compromising employee rights and economic mobility. Ultimately, rethinking non-competes through a comprehensive and principled lens presents an opportunity not just to improve individual working conditions, but also to enhance national productivity and strengthen trust in the employment law system.