BCA
Business Council of Australia

Non-compete clauses and other restraints draft legislation

Business Council of Australia submission on the exposure draft legislation

October 2026

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1. Executive summary

The Business Council of Australia welcomes the opportunity to make a submission on the exposure draft *Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026* (the **draft bill**). The BCA is a member-led organisation, representing more than 120 of Australia's leading employers.

Australia needs stronger productivity growth to lift living standards and a bold vision for the nation to be a top ten investment destination globally. The draft bill would undermine these objectives. It would make routine contracting and business transactions more difficult, discourage investment in employees and innovation, impose substantial red tape and create potential criminal liability for conduct that does not harm competition.

The BCA supports the objectives of improving worker mobility and promoting fair competition. We recognise the case for a targeted prohibition on agreements between businesses that compete in a relevant market not to recruit one another's employees or to fix remuneration or employment conditions, where the agreement is intended to suppress competition and is not reasonably necessary for a legitimate commercial arrangement.

However, the draft bill goes much further than this. Schedule 1 may capture ordinary workforce provisions in service contracts, business sales, joint ventures, secondments, labour-hire arrangements and franchise agreements, even where the parties do not compete. The Schedule can apply even where there is no anti-competitive purpose or effect. Many contractual provisions would be affected, including those that promote safety, service quality, employee protections, investment in training or the efficient delivery of services. The proposed exemptions are narrow and uncertain, and depend on businesses satisfying onerous requirements.

Treasury has acknowledged that it is difficult to estimate the prevalence of no-poach and wage-fixing agreements and that there is limited evidence of their use. This evidence does not justify the breadth of the proposed prohibitions or the exposure of businesses to potential criminal liability.

The proposed ban on non-competes in Schedule 2 creates a further productivity risk. Post-employment restraints are highly fact-specific. Once confidential information is misused or valuable customer or workforce relationships are lost, the resulting harm can be difficult or impossible to remedy. A one-size-fits-all rule cannot account for every circumstance without unintended consequences. Over many decades, courts have developed and applied principles that stop the enforcement of unreasonable restraints, while permitting appropriately tailored restraints where necessary to protect legitimate business interests. The draft bill goes beyond codifying the common law by imposing blanket rules based on income, employment status and form of instrument. It would invalidate some restraints that satisfy the common law requirements, including co-worker non-solicitation and cascading terms, and is likely to discourage investment in training, workforce capability and commercially sensitive work.

The draft bill also conflicts with other Government policies. The Government has separately proposed new criminal penalties for a failure to prevent modern slavery. It is likely that the modern slavery reform would encourage (or potentially require) affected businesses to set and monitor contractual labour standards throughout their supply chains to establish a defence to criminal liability. There is a real risk that those same contractual protections could be characterised as wage-fixing under this draft bill. This creates a serious policy conflict. Businesses may need contractual labour protections to reduce their exposure under the modern slavery reforms, but those same protections could expose them to criminal cartel liability under the draft bill.

There is a more egregious inconsistency in the Government's approach to multi-employer bargaining. Its workplace relations reforms have expanded union-led coordination of wages and conditions across businesses competing for the same customers or work, despite recognised risks to competition and productivity. It is fundamentally inconsistent to protect and expand that coordination while exposing businesses to potential criminal cartel liability for ordinary provisions in commercial agreements between businesses that may not compete, without requiring proof of competitive harm. Multi-employer bargaining can facilitate collusion between businesses that compete; while the draft bill may prohibit (or even criminalise) labour standards being set for businesses that do not compete.

The BCA's primary position is that the proposed Schedule 1 cartel prohibitions should not proceed and, as well, the Schedule 2 rules about post-employment restraints should not proceed – instead the common law should continue to govern post-employment restraints. Clearer public information would complement the existing framework and help employers and employees understand their rights and obligations. Further regulatory intervention would not be the most effective or proportionate way to improve worker mobility and promote fair competition.

If the Government proceeds, the cartel provisions in Schedule 1 should be confined to conduct that presents a genuine competition concern and supported by broad, certain exemptions for legitimate commercial arrangements. If the Government proceeds with Schedule 2, no category of post-employment restraint should be prohibited outright where an employer can demonstrate that it is reasonable and necessary to protect a legitimate business interest.

Criminal sanctions should not apply to the new cartel provisions, and invalidity or unenforceability should be the primary consequence of a non-compliant employment restraint. Businesses should also receive at least two years to implement any reforms, with appropriate protection for existing arrangements. Without substantial amendment, the draft bill will increase the cost of doing business, deter productive activity and expose legitimate commercial arrangements to consequences that are disproportionate to the harm the reforms are intended to address.

2. Key recommendations

Recommendation 1.

The bill should not proceed with the proposed no-poach and wage-fixing cartel prohibitions.

Alternatively, if the Government nevertheless regulates this conduct:

- provisions between businesses that are actual or potential competitors in the same relevant product or service market should be subject only to a targeted civil prohibition where the provisions have the purpose or effect of preventing or restricting the parties from competing independently for employees and are not ancillary to and reasonably necessary for a legitimate commercial arrangement; and
- provisions between businesses that do not compete in the same relevant product or service market should be prohibited only where they have the purpose or effect of substantially lessening competition in a relevant market.

Recommendation 2.

The bill should include a broad service contract exemption, permitting parties to include in their contracts, and give effect to, provisions that would otherwise constitute no-poach or wage-fixing provisions where they form part of a genuine customer-supplier contract, and serve a legitimate purpose connected with delivering the contracted services.

The exemption should cover ordinary personnel provisions, including reasonable recruitment restrictions and provisions concerning the remuneration or employment conditions of personnel involved in delivering the services. It should apply whether the provision is considered alone or together with other provisions, and where the two-party requirement is met only because related bodies corporate are treated as "parties" under section 45AC.

The exemption should apply to all forms of service contracting and should not be confined to labour hire, secondment or joint venture arrangements.

The exemption should not depend on employee consent, prescriptive time limits or other narrow conditions modelled on the proposed labour hire, secondment and joint venture exemptions. To prevent misuse, the exemption should not apply where the customer–supplier arrangement has the purpose of substantially lessening competition.

Recommendation 3.

If the Government retains Schedule 1, the bill should include a broad and certain exemption permitting parties to enter into, and give effect to, genuine minimum labour standards intended to prevent labour exploitation or support compliance with modern slavery obligations. The exemption should cover supplier codes, voluntary standards and contractual requirements passed through multiple levels of a supply chain, including where related provisions are considered together under section 45ADA(4).

Recommendation 4.

The bill should expressly exempt workforce provisions that are ancillary to and reasonably necessary for a business acquisition, whether structured as a share or asset purchase. It should cover provisions concerning recruitment, remuneration, or terms and conditions of employment, including employee transfers, continuity of service and benefits, retention arrangements, pre-completion workforce management, transitional services and reasonable recruitment restrictions. The exemption should not extend to collusive arrangements that are unrelated to, or not reasonably necessary for, the acquisition.

Recommendation 5.

The exemptions in Schedule 1 should provide broad and certain safe harbours. A provision should be protected where it is genuinely connected with and reasonably related to facilitating a legitimate joint venture, secondment or labour hire arrangement, and the arrangement does not have the purpose of substantially lessening competition.

Employee consent should not determine whether an exemption from cartel prohibitions is available. If employee transparency is required, written notice should be sufficient, with a proportionate civil consequence for non-compliance.

The fixed time limits proposed in the draft bill should be replaced with a requirement that any restriction operate for no longer than is reasonable having regard to the nature and duration of the arrangement.

Recommendation 6.

The bill should expressly protect provisions in franchise agreements that would otherwise constitute no-poach or wage-fixing provisions, where they are ancillary to, and reasonably necessary for, the legitimate operation of a franchise network. The exemption should cover reasonable recruitment restrictions and legitimate minimum workforce standards concerning matters such as training, safety, qualifications and employment conditions. The exemption should not apply where the arrangement has the purpose of substantially lessening competition.

Recommendation 7.

To ensure consistent treatment of coordination over labour costs, the *Fair Work Act* should be amended so that an employer cannot, without its consent, be required to bargain with other employers or be added to an existing supported bargaining or single interest employer agreement. This is particularly important where the employers compete in the same product or service market.

Alternatively, if non-consensual participation is retained, section 243 of the *Fair Work Act* should be amended so that a non-consenting employer cannot be included in a supported bargaining authorisation unless a majority of its affected employees wishes to bargain. This would extend to supported bargaining the safeguard that already applies to non-consenting employers in single interest bargaining.

The Fair Work Commission should also be required to assess the likely effects on product market competition, productivity, innovation and market entry when making or varying an authorisation, approving a multi-enterprise agreement, adding an employer to an existing agreement or determining unresolved terms in a workplace determination.

Recommendation 8.

The bill and explanatory materials should expressly confirm that ACCC authorisation under section 88 of the Competition and Consumer Act remains available as a residual safeguard for proposed arrangements that fall outside the statutory exemptions but are likely to produce a net public benefit. Authorisation should not be treated as a substitute for clearly confined prohibitions and broad, workable exemptions.

Recommendation 9.

Before commencement, the ACCC should publish guidance and worked examples covering service contracts, sale of business transactions, franchise networks, joint ventures, secondments and labour hire. The guidance should explain how the ACCC will interpret and enforce the new provisions, and should supplement clear statutory exemptions.

Recommendation 10.

The common law should continue to govern post-employment restraints, including for high-income employees.

If the Government proceeds with a statutory regime, no category of restraint should be prohibited outright. A restraint should remain available where an employer can demonstrate that it is reasonable and no broader than necessary to protect a legitimate business interest.

Regardless of whether the proposed statutory regime proceeds, the Government should fund a national education initiative for employers and employees. If the existing law is retained, the initiative should explain the current principles governing enforceability and the protections already available. If a statutory regime is introduced, it should explain the new rules, their interaction with the common law and their application to existing contracts. The initiative should be developed and delivered through government information channels and other appropriate mechanisms.

Recommendation 11.

The bill should expressly permit notice periods, paid gardening leave during employment and appropriate confidentiality and non-disclosure obligations during and post-employment. It should confirm that a genuine retention payment, deferred incentive or ordinary loss of an unvested benefit is not a non-compete merely because it encourages an employee to remain until the benefit vests.

The bill should expressly protect remuneration arrangements adopted under APRA CPS 511 and the Financial Accountability Regime, including reasonable clawback and deferral periods that exceed the prescribed minimum for legitimate prudential or governance reasons.

Recommendation 12.

The bill should expressly permit a tailored restraint where it is reasonable and necessary to prevent a genuine conflict of interest or protect the integrity of an audit, procurement process or commercial transaction.

Recommendation 13.

Enforceability should not be determined by an earnings threshold.

Alternatively, if the Government decides to retain an earnings threshold:

- the earnings measure should reflect total remuneration, including compulsory employer superannuation and variable remuneration;
- the inclusion of a non-compete term should not be prohibited solely because the employee is below the earnings threshold when the employment arrangement is made. Whether the term can be enforced should be determined by the employee's earnings immediately before employment ends; and
- the bill should provide a limited exception below the threshold where the employee's role creates a material risk to a specified legitimate business interest and the employer demonstrates that the restraint is reasonable and necessary to protect that interest.

Recommendation 14.

If the bill retains an income threshold, it should apply to casuals. The threshold should be applied using annualised full-time equivalent earnings where a reliable rate can be established.

Recommendation 15.

Co-worker non-solicitation terms should not be banned outright, but instead should continue to be governed by common law.

Alternatively, if the Government proceeds with a statutory regime, these terms should remain available where an employer can establish that the particular restraint is reasonable and necessary to protect a legitimate business interest. At a minimum, they should remain available for high-income employees, and employees in senior or strategically influential positions.

The Bill should expressly provide that section 45ADA does not apply to a contract of employment or another arrangement between an employer and an individual employee, including a former employee. Any statutory regulation of employment restraints should be dealt with exclusively under Schedule 2.

Recommendation 16.

Cascading restraints should not be banned outright, but instead should be subject to the same necessity and reasonableness test as other restraints. Alternatively, courts should be required to read a clause down to a reasonable scope.

Recommendation 17.

Client, customer and supplier non-solicitation terms should remain governed by the common law. If proposed section 333ZJ is retained, it should preserve the legitimate interests and flexibility already recognised by the courts.

The Bill should expressly exclude genuine restraints contained in shareholder, employee equity and sale of business agreements.

Recommendation 18

An existing restraint should remain governed by the current law until it is varied by agreement or the relevant contract is terminated or replaced. A remuneration review, promotion, restructure or other change that leaves the restraint unchanged should not bring it within the new regime.

Recommendation 19.

The bill should provide at least two years between enactment and commencement. Regulations and regulator guidance should be finalised well before commencement, including examples, model notices where notices are required.

Commercial and employment arrangements entered into before commencement should receive appropriate grandfathering or transitional protection.

Recommendation 20.

Criminal sanctions should not apply to the proposed no-poach and wage-fixing cartel provisions. If civil or criminal penalties are retained, they should commence only after businesses have had adequate time to implement the final legislation and the statutory exemptions and regulator guidance have been settled.

The Schedule 2 employment restraint prohibitions should not be civil remedy provisions. A non-compliant restraint should instead be invalid or unenforceable. If penalties are retained, the Act should include a defence where the employer reasonably believed that the term could lawfully be enforced.

3. Labour market cartel provisions

The BCA recognises the case for a targeted prohibition on businesses that compete in a relevant market agreeing not to recruit one another's employees or to fix remuneration or employment conditions, where the agreement is intended to suppress competition and is not reasonably necessary for a legitimate commercial arrangement.

Cartel laws ordinarily address coordination between businesses that would otherwise compete independently in a specific market. The proposed prohibitions depart from that fundamental principle by treating arrangements between non-competing businesses as cartel conduct. These cartel prohibitions apply without proof of a substantial lessening of competition. Removing the usual competition condition is a significant expansion. Ordinary provisions between non-competing businesses may attract cartel liability even if they were not intended or likely to harm competition.

The definitions of prohibited conduct are very broad. A no-poach provision can include any term that prevents or places conditions on one party recruiting another party's employees. A wage-fixing provision can include a term that controls any aspect of the remuneration or employment conditions of employees of two or more parties. These definitions can capture ordinary provisions in numerous service contracts, joint ventures, labour hire and secondment arrangements, and business sale agreements.[1]

In those commercial settings, provisions dealing with recruitment, remuneration or employment conditions are likely to serve legitimate purposes. They may protect investments in recruitment and training, enable businesses to share employees and expertise, reduce the risk of labour exploitation in the supply chain, support the efficient delivery of a project, or ensure continuity and fair treatment for employees transferring with a business.

The bill may treat provisions of this kind as cartel conduct even though they may not substantially lessen competition. If no exemption applies, such a provision may attract civil penalties and potentially criminal liability. Treating conduct as unlawful without requiring proof of harm to competition may be justified for coordination between competitors that is inherently anti-competitive. It is much harder to justify for provisions forming part of legitimate commercial arrangements that benefit businesses, employees and the wider economy.

The availability of limited exemptions relating to secondments, labour hire arrangements and joint ventures does not address these concerns. The exemptions are narrow, uncertain, highly conditional and are likely to impose significant compliance costs on businesses. They are not general exclusions for these categories of commercial activity. Among other things, the relevant provision must be reasonably necessary for the arrangement, prescribed time limits must be observed, the arrangement must not have the purpose of substantially lessening competition, and applicable transparency requirements must be satisfied. Before a business gives effect to the provision, affected employees must receive written notice and consent to being affected. Businesses seeking to rely on an exemption would bear the burden of establishing that all applicable requirements were met. Compliance with some conditions, such as providing written notice, would be readily ascertainable. Other conditions, such as the 'reasonably necessary' test, could remain subject to legal debate years after the agreement is made.

The exemptions' restrictive criteria and uncertain application mean that businesses may be unable to determine confidently whether ordinary commercial arrangements are permitted. Other legitimate arrangements, including service contracts and business sales, are likely to fall outside the three principal exemptions altogether.

Recommendation 1.

The bill should not proceed with the proposed no-poach and wage-fixing cartel prohibitions.

Alternatively, if the Government nevertheless regulates this conduct:

[1] The no-poach definition may also extend to co-worker non-solicitation terms in an individual's employment contract. This issue is addressed in section 4.7.

- provisions between businesses that are actual or potential competitors in the same relevant product or service market should be subject only to a targeted civil prohibition where the provisions have the purpose or effect of preventing or restricting the parties from competing independently for employees and are not ancillary to and reasonably necessary for a legitimate commercial arrangement; and
- provisions between businesses that do not compete in the same relevant product or service market should be prohibited only where they have the purpose or effect of substantially lessening competition in a relevant market.

Our recommendations regarding appropriate exemptions are outlined below.

3.1 Service contracting

The draft bill's broad approach has potentially significant adverse consequences in the context of service contracting. Service contracts are a routine and essential part of the economy. Government entities and businesses in every sector engage specialist providers for services such as security, cleaning, technology, maintenance, logistics, construction and professional advice. The BCA's central concern is that ordinary personnel provisions in these contracts could be characterised as wage-fixing when considered together, exposing businesses to potential criminal cartel liability even where the provisions have a legitimate purpose and no apparent anti-competitive purpose or effect.

Service contracts commonly specify minimum standards for the personnel delivering the services. For example, a contract for security services may require guards to be properly trained and equipped, and to receive appropriate remuneration and work under appropriate employment conditions. These requirements help the customer manage safety, service quality, regulatory compliance, and workforce continuity at its premises. They are ordinary safeguards connected with service delivery, not collusion between competing employers.

Under proposed section 45ADA(3), a term is only a wage-fixing provision if it fixes or controls the pay or employment conditions of employees of *at least two parties* to an agreement. At first glance, a term dealing with staff on only one side of a service contract should not meet that test. However, section 45AC treats a company's related bodies corporate as parties to the agreement, even if they did not sign it. In other words, if one company signs a contract, its related companies are also counted as separate "parties" under the cartel rules. The note to proposed section 45ADA(1) confirms that this rule applies to the new prohibitions. **Example 1** below illustrates the practical problems this may create.

Example 1: A mining company contracts with a catering company to provide meals at a remote work site. The catering company uses its subsidiary to help deliver the services. The contract requires the catering company to ensure that every catering worker receives a specified site allowance. Some workers are employed by the catering company, and others by its subsidiary.

Section 45AC treats *both* the catering company and its subsidiary as parties to the contract. The allowance requirement therefore controls the pay of employees of *two parties*, even though it affects only workers in the catering company's corporate group, and does not affect the mining company's employees. The allowance clause would therefore likely be a wage-fixing provision under proposed section 45ADA(3). Unless an exemption applies, entering into or giving effect to the provision would be prohibited under the cartel laws.

Proposed section 45ADA(4) creates a separate uncertainty. It allows a term to be considered together with other terms in the same agreement (see **Example 2** below). It also allows the term to be considered with provisions in a separate agreement if the two agreements have at least one party in common (see **Example 3** below).

Example 2: A bank contracts with a security company to provide guards at its premises. The contract requires the security company to pay guards a site allowance while they work at the bank and to maintain specified rostering arrangements. It requires the bank to: (a) appoint a dedicated employee as contract manager, make that employee available outside ordinary working hours and retain that person in the role for the duration of the

contract unless the security company agrees to a replacement; and (b) investigate complaints made by guards about bank employees and, where a complaint is substantiated, remove or reassign the relevant bank employee.

The first group of provisions controls the remuneration and working arrangements of the security company's employees. The other provisions may control the hours, duties, work location or assignment of the bank's employees. Proposed section 45ADA(4) allows these provisions to be considered together. Collectively, they could be characterised as controlling the employment conditions of employees of both parties and, consequently, as a wage-fixing provision under section 45ADA(3).

Although the provisions in Example 2 support safe and effective service delivery, the example shows how the breadth of the definition of a 'wage-fixing provision', combined with the requirement to consider the provisions together in section 45ADA(4), could bring legitimate customer–supplier arrangements within the cartel provisions, even where there is no attempt to coordinate employment conditions or restrict competition.

Example 3: Consider two contracts between an IT company and a cleaning company:

1. The IT company engages the cleaning company to clean its offices. The contract contains a term about the pay or conditions of the cleaners working there.
2. Under a separate contract, the cleaning company engages the IT company to provide technology services. That contract contains a term about the pay or conditions of the IT technicians performing the work.

The first term concerns only the cleaning company's employees. The second concerns only the IT company's employees. Neither term, considered on its own, regulates the employees of two parties. However, proposed section 45ADA(4) permits the terms to be considered together. Taken together, the terms concern the workforces of both companies, even though each contract relates to a different service and each term serves a legitimate purpose.

The draft bill does not explain whether two such provisions, neither of which is wage-fixing when considered separately, can satisfy the wage-fixing definition when considered together. That possibility remains open under the current drafting, creating significant uncertainty.

The potential consequences of this uncertainty are substantial. Large businesses operate through extensive and interconnected networks of customer, supplier, subcontracting and procurement agreements. If this legislation proceeds, businesses and service providers could be required to review thousands of contracts, including both contracts for the supply of services and those for the purchase of goods and services.

Businesses may also respond by reducing or eliminating terms relating to recruitment, wages and conditions in service contracts. This could result in a reduction in the quality of services provided across the economy. Services to customers could suffer. Businesses would also have less confidence that they would be able to address labour standards through their supply chain (see details in section 3.2). They may not be able to promote or require better wages, conditions and training for their contractors' employees. A measure designed to assist employees may end up being harmful to their wages and conditions.

Because provisions in separate agreements may also be considered together, large businesses could be required to review thousands of customer and supplier contracts. This will create substantial red tape across the economy, including where separate agreements have no meaningful commercial connection and there is no apparent risk of anti-competitive collusion. A reform intended to improve productivity should not impose an economy-wide contract review exercise that is disconnected from identifiable competitive harm.

These consequences cannot be adequately addressed through guidance or narrow drafting clarifications. To address these issues, the bill should include a broad service contract exemption. The exemption should permit parties to use provisions that would otherwise constitute no-poach or wage-fixing provisions where they form part of a genuine customer-supplier contract, and serve a legitimate purpose connected with delivering the contracted services. It should apply whether the provision is considered alone or together with other provisions under section 45ADA(4), and where the two-party requirement is met only because related bodies corporate are treated as "parties" under section 45AC.

The exemption should apply to all forms of service contracting and should not be confined to labour hire, secondment or joint venture arrangements. It should cover ordinary provisions concerning personnel involved in delivering services, including provisions directed to safety, service quality, regulatory compliance, workforce standards and continuity, as well as reasonable recruitment restrictions and terms addressing their remuneration or employment conditions. The exemption should not depend on employee consent, prescriptive time limits or other narrow conditions modelled on the proposed labour hire, secondment and joint venture exemptions. To prevent misuse, the exemption could be unavailable where the customer–supplier arrangement has the purpose of substantially lessening competition.

Recommendation 2.

The bill should include a broad service contract exemption, permitting parties to include in their contracts, and give effect to, provisions that would otherwise constitute no-poach or wage-fixing provisions where they form part of a genuine customer-supplier contract, and serve a legitimate purpose connected with delivering the contracted services.

The exemption should cover ordinary personnel provisions, including reasonable recruitment restrictions and provisions concerning the remuneration or employment conditions of personnel involved in delivering the services. It should apply whether the provision is considered alone or together with other provisions, and where the two-party requirement is met only because related bodies corporate are treated as "parties" under section 45AC.

The exemption should apply to all forms of service contracting and should not be confined to labour hire, secondment or joint venture arrangements.

The exemption should not depend on employee consent, prescriptive time limits or other narrow conditions modelled on the proposed labour hire, secondment and joint venture exemptions. To prevent misuse, the exemption should not apply where the customer–supplier arrangement has the purpose of substantially lessening competition.

3.2 Modern slavery and other unintended consequences

The draft bill could have the unintended consequence of discouraging businesses from including in their contracts provisions designed to minimise or eliminate labour exploitation, including modern slavery.

Businesses commonly require suppliers to meet minimum labour standards and to impose equivalent requirements on their subcontractors. As noted above, a provision affecting only one party's employees should not, by itself, satisfy the definition of a wage-fixing provision. However, proposed section 45ADA(4) leaves it unclear whether provisions affecting different workforces under overlapping contracts can be considered together and collectively satisfy the requirement that employees of at least two parties be affected. Given the potential criminal consequences, businesses may decide to remove or narrow legitimate labour-standard provisions rather than accept that uncertainty.

This risk arises in the context of a separate Government consultation on a proposed criminal offence for failing to prevent modern slavery. The proposal is not yet law, but would apply to large corporations and could potentially provide a defence where a corporation can demonstrate that it took reasonable steps to prevent modern slavery in its supply chain. Contractual labour standards may form part of the reasonable steps businesses take to prevent exploitation.

Example 4:

Company A contracts with company B and requires minimum labour standards to apply to B's workforce and its subcontractors. Company B then passes those requirements on through its subcontract with company C. The A–

B contract affects the conditions of B's employees, while the B–C contract affects the conditions of C's employees. Because the two contracts have company B in common, proposed section 45ADA(4) may allow their provisions to be considered together. The bill does not make clear whether that would be sufficient to characterise a provision in the B–C contract as controlling the employment conditions of employees of both B and C.

Unless this interaction is clarified, the two reforms could create conflicting incentives. Potential cartel exposure may discourage businesses from imposing legitimate labour standards, while the proposed "failure to prevent" modern slavery offence would encourage businesses to implement effective measures to prevent exploitation. In stark terms, the risk is that setting labour standards could be criminalised, while failing to set those same standards could also be criminalised.

The draft bill contains a limited exemption for a wage-fixing provision that gives effect to a requirement imposed by codes that set minimum labour standards (see Explanatory Memorandum (EM) at 1.47). However, this exemption does not cover businesses' own supplier codes, voluntary standards or other contractual measures adopted to prevent exploitation. The bill should include a broad and certain exemption for genuine minimum labour standards intended to prevent labour exploitation or support compliance with modern-slavery obligations, including requirements passed through multiple levels of a supply chain.

Recommendation 3.

If the Government retains Schedule 1, the bill should include a broad and certain exemption permitting parties to enter into, and give effect to, genuine minimum labour standards intended to prevent labour exploitation or support compliance with modern slavery obligations. The exemption should cover supplier codes, voluntary standards and contractual requirements passed through multiple levels of a supply chain, including where related provisions are considered together under section 45ADA(4).

3.3 Business sales and acquisitions

Business sale processes routinely require workforce protections. These provisions support the orderly transfer of a business, preserve its workforce, protect confidential information obtained during due diligence, and protect affected employees. Parties may agree not to solicit each other's employees while due diligence is underway and for a limited period after completion or termination of the proposed transaction.

Employees do not generally transfer automatically with the assets of a business. Asset sale agreements therefore commonly require the purchaser to offer employment to affected employees, often on the same or substantially similar terms and on the basis that they will not be worse off overall. They may also preserve service and benefits, allocate responsibility for employee entitlements and regulate recruitment during the transition. These provisions could be characterised as wage-fixing or no-poach provisions depending on their structure. For example, an obligation to preserve remuneration and conditions may be treated as controlling the conditions of the seller's current employees and the purchaser's future employees. On that interpretation, it would control the remuneration and conditions of staff at two parties.

In a share sale, the target company remains the employer, so employees do not ordinarily transfer. Nevertheless, share sale agreements commonly restrict material changes to remuneration, benefits, hiring or dismissals before (and sometimes after) completion. They may also contain employee retention arrangements, workforce separation or integration provisions, transitional services and restrictions on the seller recruiting target employees after completion. Depending on their terms and the structure of the transaction, these provisions could also be characterised as no-poach or wage-fixing provisions, particularly where related provisions are considered together under proposed section 45ADA(4), or the transfer involves multiple entities in a corporate group, each considered a "party" under section 45AC.

3.3.1 Uncertainty regarding the application of the existing acquisition exemption

Existing section 45AT of the Competition and Consumer Act provides a cartel exemption for share or asset sales. However, it does not automatically exempt every cartel provision contained in a share or asset sale agreement. It applies only where the particular provision directly or indirectly provides for the acquisition (i.e. it is a step in carrying out the acquisition).

Some workforce provisions may fall within section 45AT, but that is not clear. A requirement in a sale of business contract to offer employment on substantially equivalent terms may be necessary in an asset sale but is not a step in providing for the transfer of the assets. Similar uncertainty arises for retention arrangements, pre-completion workforce controls and recruitment restrictions.

The draft bill retains section 45AT but does not explain how it applies to the types of workforce provisions referred to above. Paragraph 2.34 of the EM does not resolve the issue. It concerns whether a sale of business restraint is an employment non-compete term under Schedule 2. It does not confirm that workforce provisions in sale agreements are outside the Schedule 1 no-poach and wage-fixing prohibitions.

The draft bill also prevents the existing exclusion in section 51(2)(e) of the Competition and Consumer Act from applying to the new no-poach and wage-fixing provisions. Allowing that exclusion to apply would be of benefit, but it would not adequately address the problem because it is confined to provisions solely protecting the purchaser in respect of the goodwill of the business. Standard workforce provisions may also facilitate the transaction, protect transferring employees or preserve business continuity, and may therefore fall outside that exclusion.

The bill therefore does not provide clear or comprehensive protection for standard workforce provisions in business sales. Given the risk of criminal cartel liability, this could increase transaction costs, delay acquisitions and discourage businesses from including provisions intended to protect transferring employees and preserve employment. The result could be fewer protections for employees affected by a business sale.

Given these issues, the bill should expressly exempt workforce provisions that are ancillary to and reasonably necessary for the acquisition of a business, shares or assets. The exemption should cover provisions concerning recruitment, remuneration, or terms and conditions of employment, including:

- offers of employment and employee transfers;
- continuity of service, remuneration, benefits and employment conditions;
- commitments that transferring employees will not be disadvantaged;
- pre-completion workforce management;
- employee retention, allocation and integration;
- transitional services; and
- reasonable restrictions on recruiting employees affected by the transaction.

The exemption would not protect collusive arrangements that are unrelated to, or not reasonably necessary for, the acquisition. This would provide certainty for ordinary provisions needed to complete a transaction and manage the workforce transition.

Recommendation 4.

The bill should expressly exempt workforce provisions that are ancillary to and reasonably necessary for a business acquisition, whether structured as a share or asset purchase. It should cover provisions concerning recruitment, remuneration, or terms and conditions of employment, including employee transfers, continuity of service and benefits, retention arrangements, pre-completion workforce management, transitional services

and reasonable recruitment restrictions. The exemption should not extend to collusive arrangements that are unrelated to, or not reasonably necessary for, the acquisition.

3.4 Joint ventures, secondments and labour hire

The proposed exemptions recognise that joint ventures, secondments and labour hire arrangements may legitimately require provisions that would otherwise fall within the no-poach or wage-fixing definitions. However, the exemptions are too narrow, uncertain and onerous to provide businesses with reliable safe harbours.

A business seeking to rely on an exemption must establish every applicable requirement. These include demonstrating that the provision is "reasonably necessary" for the arrangement, complying with strict time limits and any prescribed transparency requirements, and establishing that the arrangement does not have the purpose of substantially lessening competition. The business must give each affected employee written notice of the provision and its consequences, and each employee must consent to being affected. Joint ventures must also concern the production, supply or acquisition of goods or services and be carried on jointly by the parties, either directly or through a company jointly controlled or owned by them.

These are cumulative requirements. If a business cannot prove any one of them, the relevant exemption will not apply. The business may then face the risk of civil or criminal cartel liability if the conduct contravenes the new cartel prohibitions. In practice, the exemptions therefore operate less like clear safe harbours and more like complex defences that must be established if a contravention is alleged.

The requirement to prove that a provision is "reasonably necessary" is problematic. Whether a provision was necessary, and whether a less restrictive alternative was available, may be open to legitimate disagreement between businesses, regulators and courts. It may also be judged with the benefit of hindsight. A business entering into a major project or workforce arrangement cannot know with sufficient certainty whether its commercial assessment will later be accepted if challenged. That uncertainty is disproportionate where an incorrect assessment introduces the risk of criminal liability.

The employee consent requirement creates a separate and more fundamental problem. It is not enough for a business to design an arrangement that satisfies all the substantive requirements of the exemption. Whether the business can lawfully implement the provision for each relevant employee ultimately depends on the decision of that employee.

The draft bill provides: 'before the corporation gives effect to the cartel provision: (i) each staff member of the corporation who is to be affected by *that instance of giving effect to the cartel provision* is given written notice…'. It is unclear whether consent given at the beginning of an arrangement covers the provision's continuing operation, or whether fresh consent is required when the provision is applied again, the employee's role or placement changes or the arrangement is extended. The draft bill also does not address whether consent may be withdrawn or the consequences of withdrawal.

In a large joint venture, secondment or labour hire program, employees may regularly join, leave or move between assignments. Each change could require the business to provide fresh notice and obtain consent, or determine whether an existing consent remains effective. An employee who does not consent may need to be excluded from the relevant work, or the provision would need to be disapplied for that employee. A mission-critical employee could potentially hold up an entire agreement. At scale, these requirements could make reliable use of the exemption administratively impractical.

The difficulties are compounded in multi-party arrangements. Although each employer appears responsible for obtaining consent from its own employees, the arrangement may depend on every party being able to give effect to the relevant provision. Parties may therefore need to obtain assurances, and monitor one another's compliance, even though they cannot control whether another party's employees consent. A failure by one party could delay or disrupt the wider arrangement.

The fixed duration limits create further difficulty. A three-month limit for a no-poach provision may not be sufficient to protect legitimate investments in recruitment, training, knowledge transfer or project mobilisation. We note that the draft bill does not propose a general three-month limit on restraints applying to employees above the high-income threshold. The appropriate period will depend on the nature, scale and duration of the particular arrangement.

Overall, meeting the cumulative conditions for the exemptions would impose substantial administrative requirements across large joint ventures and secondment and labour hire programs. More importantly, they would prevent businesses from determining with confidence, before entering into an arrangement, whether the exemption will be available.

The exemptions should be recast as broad and certain safe harbours. A provision should be protected where it is genuinely connected with and reasonably related to facilitating a legitimate joint venture, secondment or labour-hire arrangement, and the arrangement does not have the purpose of substantially lessening competition.

Employee consent should not be required as a condition of the exemption from cartel prohibitions. Written notice, with a proportionate civil consequence for non-compliance, should be sufficient to ensure transparency. A business should not lose the protection of the exemption for otherwise legitimate conduct affecting an employee merely because that employee has not consented.

The fixed time limits should also be replaced with a requirement that any restriction operate for no longer than is reasonable having regard to the nature and duration of the arrangement. This would preserve protection against anti-competitive conduct while giving businesses the certainty needed to undertake legitimate workforce arrangements.

Recommendation 5.

The exemptions in Schedule 1 should provide broad and certain safe harbours. A provision should be protected where it is genuinely connected with and reasonably related to facilitating a legitimate joint venture, secondment or labour hire arrangement, and the arrangement does not have the purpose of substantially lessening competition.

Employee consent should not determine whether an exemption from cartel prohibitions is available. If employee transparency is required, written notice should be sufficient, with a proportionate civil consequence for non-compliance.

The fixed time limits proposed in the draft bill should be replaced with a requirement that any restriction operate for no longer than is reasonable having regard to the nature and duration of the arrangement.

3.5 Franchise arrangements

Franchise businesses compete as networks. To compete effectively, a franchisor may need to set common minimum standards across its network. These may include requirements concerning staff training, safety, uniforms, qualifications and minimum employment standards, as well as consistent recruitment and personnel processes. Such requirements can support service quality, regulatory compliance, brand reputation and the network's ability to attract workers.

For example, a franchisor may require each franchisee to pay its employees a bonus if a network-wide customer service target is achieved. The requirement benefits employees and supports consistent service across the network. However, it also controls part of employees' remuneration. Proposed section 45ADA(4) allows equivalent provisions in separate franchise agreements with a common franchisor to be considered together. This leaves open the possibility that the provisions could collectively be characterised as controlling the remuneration of employees of multiple franchisees and therefore as wage-fixing, despite being intended to reward employees rather than suppress their pay or restrict competition.

Faced with potential criminal cartel liability, franchisors may avoid setting legitimate workforce standards across their networks. This could weaken service quality, employment standards and the ability of franchise networks to compete effectively. The bill should expressly protect provisions in genuine franchise agreements that establish legitimate standards relating to recruitment, pay or conditions that are reasonably related to the operation of the network. The protection should not extend to provisions that have the purpose of substantially lessening competition. Franchise arrangements should not attract potential criminal cartel liability merely because they include a restriction on recruitment, pay or conditions serving a legitimate commercial purpose.

The bill already recognises, through its targeted exemption for professional sporting leagues, that recruitment restrictions and remuneration arrangements can serve legitimate system-wide objectives, including maintaining competitive balance. Sporting leagues and commercial franchise networks are not equivalent, but the same underlying principle is relevant: a workforce provision should not be treated as inherently anti-competitive without considering its commercial context and purpose.

Recommendation 6.

The bill should expressly protect provisions in franchise agreements that would otherwise constitute no-poach or wage-fixing provisions, where they are ancillary to, and reasonably necessary for, the legitimate operation of a franchise network. The exemption should cover reasonable recruitment restrictions and legitimate minimum workforce standards concerning matters such as training, safety, qualifications and employment conditions. The exemption should not apply where the arrangement has the purpose of substantially lessening competition.

3.6 Inconsistent treatment of labour market coordination

Regulation should be coherent, proportionate and directed at identified harm. The draft bill does not meet that standard. It may expose businesses to criminal cartel liability for ordinary workforce terms in contracts between businesses that do not compete. At the same time, the Government's workplace relations reforms have expanded multi-employer bargaining, allowing wages and employment conditions to be coordinated across businesses competing for the same customers or work.

This is fundamentally inconsistent with the established principles of competition policy. Competition law focuses on coordination between competitors because it replaces independent business decisions with common action. Coordination of wages and conditions across competing businesses through multi-employer bargaining is closer to the conduct cartel law is designed to address than a workforce term in a contract between a non-competing customer and supplier. Yet the draft bill directs the harshest legal consequences at conduct that is further removed from the core competition concern.

Multi-employer bargaining can have a distinct workplace relations purpose. Agreements generally establish minimum conditions rather than maximum remuneration and businesses remain free to offer more favourable terms. However, those features do not eliminate the potential effects on product market competition, innovation and productivity. Nor do they explain why those risks are accepted and managed under the workplace relations system, while the draft bill treats a much broader range of commercial provisions as cartel conduct without requiring proof of competitive harm.

This comparison exposes the inconsistency in the Government's approach: it has expanded union-led coordination of wages and conditions across competing employers, despite recognised risks to competition and productivity, while proposing criminal cartel liability for ordinary commercial provisions between businesses that may not compete, without requiring proof of competitive harm.

The Productivity Commission noted in 2023, "Forcing unwilling employers or employees into multi-enterprise agreements in which they had no bargaining role may limit these shared productivity and other benefits. This

may not just affect individual employers, but employees too may relinquish beneficial changes in working arrangements or higher wages".[2]

If multi-employer bargaining agreements have the practical effect of establishing sector-wide conditions, that would create significant risks to productivity and competition, the very things the current legislative package is meant to avoid. As the Productivity Commission found:[3]

> 'A multi-enterprise agreement may act as a de-facto source of collusion... For example:
>
> - if an agreement required participating employers to set the same wages and conditions, as well as the same rates of increase, this would preclude price competition over time that might arise were any given firm to offer smaller wage increases...
> - if an agreement limited the ability of employers to adopt innovative employment practices — such as alternative forms of incentives and remuneration for workers, or changing the deployment of different groups of workers — then the agreement may limit innovation and competition (to the detriment of consumers). Both workers and employers have incentives to create such agreements as the gains from reduced competition can be shared across shareholders, managers and incumbent workers.'

Most recently, the Fair Work Commission dismissed an application for a multi-employer bargaining authorisation in the electrical contracting industry, supported by the CEPU (ETU), finding that the available information raised concerns that the proposed bargaining arrangement could result in reduced competition and lower productivity.[4]

For more than two decades, inquiries into the construction industry have documented the adverse effects when genuine enterprise bargaining is displaced by standardised industry terms and concentrated industrial power. The Cole Royal Commission found[5] that pattern bargaining could displace genuine enterprise-level negotiation and impede productivity. The Trade Union Royal Commission (TURC) argued that the CFMEU was pressuring businesses to adopt identical (pattern) agreements across an industry, and this had anti-competitive outcomes.[6] The TURC cited evidence that major contractors signed identical enterprise agreements conferring benefits on the CFMEU, and then the CFMEU targeted any contractors that refused to sign the agreement. Most contractors signing the agreement had no particular desire to do so but felt they did not have any practical choice.[7]

The TURC also noted the following:

- Contractors with a CFMEU-approved industry agreement felt it was "necessary to prevent competition from other contractors" without an industry agreement.[8]
- Intercepted communications indicated ACT bricklayers were applying pressure to another lower-cost bricklayer to adopt an industry agreement and increase prices.[9]
- There were reports that a union-organised meeting heard that scaffolding companies needed to raise prices to accommodate the costs of an industry agreement.[10]
- A recorded conversation described pressure being applied to a new crane operator with lower quotes than incumbents to adopt an industry agreement.[11]

In the Rotting from the Top Report, Watson stated, "the way in which the CFMEU controlled the EBA system was anti-competitive and economically damaging for Victoria."[12] Marda Dandhi, an Indigenous labour-hire firm with

[2] Page 123 of Productivity Commission (2023) *5-year Productivity Inquiry: A more productive labour* market.
[3] See pages 21–22 of Productivity Commission (2023) *5-year Productivity Inquiry: A competitive, dynamic and sustainable future*.
[4] *Application by Fredon Industries Pty Ltd & Ors* [2026] FWC 3685 at [54] (appeal pending).
[5] Cole Royal Commission, Final Report (2003), vol 1, pp 27–28.
[6] Pages 344–349 and 352 of Volume 5, ch 6
[7] Page 346 of Volume 5.
[8] Page 336 of Volume 3
[9] Pages 236ff of Volume 3. See particularly pages 240–1.
[10] Page 227 of Volume 3
[11] Pages 241–243 of Volume 3
[12] Page 59 of Geoffrey Watson SC, Rotting From the Top – The CFMEU in Victoria During the Setka Era

an AWU agreement, reportedly lost business because it could not obtain a CFMEU agreement. A union official's refusal to support its application operated as a veto. The company subsequently entered liquidation.[13] Watson also stated, "those already in the market became willing to do what was necessary to keep the market closed to newcomers".[14]

These reports show why coordination between competitors through the workplace relations system cannot be assumed to be harmless. When industrial power is misused or safeguards fail, that coordination can weaken competition, shut businesses out of markets and severely damage productivity. The unredacted version of the Watson report provided a rough estimate that the cost to the Victorian economy of the anti-competitive bargaining system in construction alone was $15 billion.[15]

Despite those recognised risks, the Government has expanded and protected union-led coordination among competing employers. At the same time, the draft bill proposes to expose businesses to the risk of criminal cartel liability for entering into, or giving effect to, ordinary workforce provisions in genuine commercial contracts, even where the parties do not compete in any relevant product or service market.

The evidence does not justify this approach. Treasury has acknowledged that the prevalence of the relevant agreements (no-poach and wage-fixing agreements) in Australia is difficult to determine and that Australian evidence is limited. The quantified evidence relied upon by Government largely concerns overseas examples of deliberate collusion between competitors.[16] That evidence supports a targeted prohibition on that conduct. It does not support the breadth of the bill.

If the Government is serious about productivity-driving competition reform, it should apply the same principles regardless of whether coordination occurs through a commercial agreement or through union-led bargaining. It should identify the relevant market, distinguish collusion from legitimate cooperation and consider the purpose and competitive effect of the conduct.

Recommendation 7.

To ensure consistent treatment of coordination over labour costs, the *Fair Work Act* should be amended so that an employer cannot, without its consent, be required to bargain with other employers or be added to an existing supported bargaining or single interest employer agreement. This is particularly important where the employers compete in the same product or service market.

Alternatively, if non-consensual participation is retained, section 243 of the *Fair Work Act* should be amended so that a non-consenting employer cannot be included in a supported bargaining authorisation unless a majority of its affected employees wishes to bargain. This would extend to supported bargaining the safeguard that already applies to non-consenting employers in single interest bargaining.

The Fair Work Commission should also be required to assess the likely effects on product market competition, productivity, innovation and market entry when making or varying an authorisation, approving a multi-enterprise agreement, adding an employer to an existing agreement or determining unresolved terms in a workplace determination.

Unless the imbalance referred to above is corrected, the draft bill will lack credibility as principled competition reform. It will protect union-led coordination across competing employers while exposing legitimate commercial arrangements, including agreements between businesses that do not compete, to potential criminal cartel liability.

[13] Op cit, page 68
[14] Op cit, page 72
[15] Page 6, paragraphs 28–34 of the redacted version of the Watson report.
[16] Australian Treasury, Worker non-compete clauses and other restraints—Issues Paper, 2024, pp 33–38; Australian Treasury, Reform to non-compete clauses and other restraints on workers—Consultation Paper, 2025, section 6, consultation materials.

3.7 Authorisation and regulatory guidance

Legitimate commercial arrangements must be primarily protected by clear and certain statutory exemptions. Businesses should not have to seek case-by-case ACCC authorisation before using ordinary provisions in service contracts, business sale transactions and other routine commercial arrangements.

Nevertheless, the existing ACCC authorisation process under section 88 of the Competition and Consumer Act should remain available as a residual safeguard for arrangements that are not suited to a general statutory exemption but are likely to produce a net public benefit. Although the draft bill appears to retain this process, the bill and explanatory materials should confirm this expressly. Case-by-case authorisation is not, however, a substitute for clearly confined prohibitions and broad, workable exemptions.

Before commencement, the ACCC should publish guidance and worked examples covering service contracts, sale of business transactions, franchise networks, joint ventures, secondments and labour hire. That guidance should explain how the ACCC will interpret and enforce the new provisions. Guidance may assist businesses to apply the legislation, but it cannot cure unclear drafting or provide protection equivalent to a statutory exemption. Even if the ACCC indicates that it will not take enforcement action in specific situations, private parties could still seek injunctions or damages, including through class actions. This reinforces the need for clear, workable statutory exemptions because ACCC enforcement discretion cannot protect businesses against private litigation.

Recommendation 8.

The bill and explanatory materials should expressly confirm that ACCC authorisation under section 88 of the Competition and Consumer Act remains available as a residual safeguard for proposed arrangements that fall outside the statutory exemptions but are likely to produce a net public benefit. Authorisation should not be treated as a substitute for clearly confined prohibitions and broad, workable exemptions.

Recommendation 9.

Before commencement, the ACCC should publish guidance and worked examples covering service contracts, sale of business transactions, franchise networks, joint ventures, secondments and labour hire. The guidance should explain how the ACCC will interpret and enforce the new provisions, and should supplement clear statutory exemptions.

4. Post-employment restraints

The BCA's primary position is that common law should continue to govern post-employment restraints, including for high-income employees. As the EM explains at paragraph 2.7, a restraint is *prima facie* unenforceable unless the employer establishes that it is reasonable and no broader than necessary to protect a legitimate interest. This common law test already prevents restraints from being enforced indiscriminately, while allowing employers to protect legitimate interests where the circumstances justify doing so.

4.1 The draft displaces rather than codifies the common law

The explanatory materials describe aspects of the reform as codifying the common law. However, the draft bill goes beyond codification by imposing blanket rules based on an employee's income, employment status and the way a restraint is drafted. By contrast, the common law assesses each restraint in its particular circumstances, asking whether it is reasonable and no broader than necessary to protect a legitimate interest.

The draft bill retains a version of that test for some restraints under proposed section 333ZJ. However, it proposes to prohibit non-compete terms for employees earning at or below the high-income threshold and for all casual employees and pieceworkers. It would also prohibit co-worker non-solicitation terms and cascading terms for all employees. Those restraints would become unenforceable even where an employer could establish that they

satisfy the common law test. Other post-employment restraints, including customer or client non-solicitation terms, could operate only if they are reasonable and necessary for limited, specified business reasons (see proposed section 333ZJ). The draft bill furthermore overrides the common law recognition of 'maintaining a stable workforce' as a legitimate business interest (see EM at 2.115) and does this for no apparent reason.

The draft therefore materially amends the common law. The concerns identified in the explanatory materials, including chilling effects, litigation costs and possible effects on wages, mobility, productivity and competition, may support measures directed at unreasonable or indiscriminate restraints. However, they do not explain why an otherwise reasonable and necessary restraint should be automatically invalidated because of an employee's income or employment status, or because of the way the restraint is drafted.

Recommendation 10.

The common law should continue to govern post-employment restraints, including for high-income employees.

If the Government proceeds with a statutory regime, no category of restraint should be prohibited outright. A restraint should remain available where an employer can demonstrate that it is reasonable and no broader than necessary to protect a legitimate business interest.

Regardless of whether the proposed statutory regime proceeds, the Government should fund a national education initiative for employers and employees. If the existing law is retained, the initiative should explain the current principles governing enforceability and the protections already available. If a statutory regime is introduced, it should explain the new rules, their interaction with the common law and their application to existing contracts. The initiative should be developed and delivered through government information channels and other appropriate mechanisms.

4.2 Business investment, intellectual property and workforce capability

The explanatory materials present confidentiality clauses and appropriately drafted non-disclosure agreements as more targeted ways of protecting legitimate business interests. While contractual confidentiality obligations serve an important function, they are not a complete substitute for a reasonable post-employment restraint.

Courts can grant an injunction to prevent threatened misuse, but the business must discover the threat in time and have sufficient evidence to support an urgent application. This can be difficult once an employee has left because the suspected conduct may occur outside the former employer's knowledge or systems. To establish a breach, the former employer will generally need to identify the information precisely, demonstrate that it was confidential and establish that it was used or disclosed without authority. Its own IT records may show that information was accessed or transferred, but not necessarily whether or how it was later used. Evidence of that subsequent use may be held by the former employee or the new employer. These problems are greater for confidential information that is not in written form, and the unwritten knowledge of a departing employee can be of considerable value.

If the misuse becomes apparent only after a tender is lost, a customer moves to a competitor or a competing product is launched, an injunction may prevent further misuse but cannot restore the information's secrecy or reverse an opportunity already lost. Damages may also be difficult to recover because the business must establish that misuse by the specific employee caused the loss and quantify that loss. In such circumstances, confidentiality obligations may not provide timely or effective protection in practice.

Similarly, other legal duties do not fill this gap. The law of confidence may protect confidential information about customers, employees or the business, but it does not, by itself, protect customer goodwill or the value of an established team. Section 183 of the *Corporations Act* also provides protections, including after employment ends, but only where a person improperly uses information obtained through their position to gain an advantage or cause detriment to the corporation. In all these cases, the law can only be of assistance after the damage

caused by unlawful disclosure has occurred, and still requires the meeting of tests that, as noted above, will be difficult to demonstrate.

Business value extends beyond formally recorded confidential information. Competitive advantage may be derived from employees' knowledge of customers, pricing, tenders, systems and business strategy, or from the relationships and combined capability of a specialist team. Businesses develop those assets through sustained investment in recruitment, training and collaboration. Confidentiality and intellectual property laws may provide only partial protection for that investment.

Remuneration is a poor measure of the commercial sensitivity of an employee's role, particularly in industries where businesses tender for work. Employees below the proposed threshold, including estimators, bid coordinators, procurement personnel and project staff, may have access to sensitive pricing, margins, tender strategies, supplier terms and customer requirements. If an employee moves to a competing bidder during a live tender, that knowledge may provide a material advantage even if no confidential document is disclosed. In appropriate cases, a short and targeted restraint is likely to be reasonable and necessary.

If businesses cannot reasonably protect these interests, they may limit employees' access to sensitive projects, training and commercial relationships, reduce investment in workforce capability, or choose to locate sensitive activities in other countries. That risk is particularly concerning when Australia is seeking to attract investment and increase research and development. The draft bill runs counter to these goals. It puts at risk Australia's rightly gained reputation as a location with strong legal framework and protection of proprietary knowledge.

If knowledge is held and developed outside Australia, this will harm the very employees the draft bill is designed to help, as Australian employees will conduct lower-value work while the higher-value work occurs in other countries with better protections for proprietary knowledge. The reduced value of work in Australia will feed through to lower wage growth, lower productivity and reduced tax revenue.

Properly tailored restraints should therefore remain available where an employer can demonstrate that they are reasonable and necessary to protect a legitimate interest.

4.3 Notice periods, gardening leave, confidentiality and retention

The bill should clearly distinguish post-employment non-compete terms from ordinary arrangements that operate while employment continues or that protect specific information. It should expressly permit notice periods, paid gardening leave during employment and appropriate confidentiality and non-disclosure obligations during and post-employment.

The EM creates uncertainty about retention arrangements. Paragraph 2.36 states that remuneration designed to encourage retention is permitted, while paragraph 2.27 indicates that a term may be prohibited if it indirectly and substantially restricts an employee from accepting other employment. A genuine retention payment, deferred incentive or loss of an unvested benefit may influence an employee's decision to leave, but that does not make it a non-compete. The bill and EM should make clear that a genuine retention payment or deferred incentive is not a non-compete merely because an employee will lose the benefit if they leave before it vests.

Without that certainty, businesses may respond by using longer notice periods, more gardening leave and more extensive confidentiality obligations. The combined effect of those measures could restrict employee mobility for longer than a short and targeted post-employment restraint.

The bill should also expressly protect prudential remuneration arrangements under APRA CPS 511 and the Financial Accountability Regime. That protection should extend to reasonable clawback and deferral periods exceeding the statutory minimum where they are adopted for legitimate prudential or governance reasons.

Recommendation 11.

The bill should expressly permit notice periods, paid gardening leave during employment and appropriate confidentiality and non-disclosure obligations during and post-employment. It should confirm that a genuine

retention payment, deferred incentive or ordinary loss of an unvested benefit is not a non-compete merely because it encourages an employee to remain until the benefit vests.

The bill should expressly protect remuneration arrangements adopted under APRA CPS 511 and the Financial Accountability Regime, including reasonable clawback and deferral periods that exceed the prescribed minimum for legitimate prudential or governance reasons.

4.4 Probity and conflicts of interest

Some post-employment restraints address probity and conflicts of interest, rather than the misuse of confidential information. Examples include: cooling-off periods before an auditor joins an audited business; an employee joins the auditor of their former employer; a purchasing manager joins a supplier over which they exercised direct decision-making power; or a transaction adviser joins another party to the transaction.

The EM (at 2.74) recognises restraints authorised or imposed by legislation, including restrictions on movement between regulators and regulated entities. The bill does not recognise equivalent private-sector probity concerns as a distinct legitimate interest, even though the same underlying risks may arise. If an employee of a government regulator can be restrained from accepting immediate employment at a regulated entity, then similarly an auditor should be able to be restrained from accepting immediate employment at an audited company.

Recommendation 12.

The bill should expressly permit a tailored restraint where it is reasonable and necessary to prevent a genuine conflict of interest or protect the integrity of an audit, procurement process or commercial transaction.

4.5 Earnings threshold

The explanatory materials do not provide a sufficient economic basis for using the Fair Work Act high income threshold as the dividing line for non-compete terms. The high income threshold appears to have been selected for drafting convenience, without evidence that it is an appropriate dividing line for regulating non-compete terms.

The bill uses the indexed threshold rather than a fixed $190,100 amount; the explanatory materials identify $190,100 for 2026-27.

A single threshold would operate differently across industries, regions, businesses and job families. Employees in strategy, sales, tender, procurement and contract-negotiation roles may hold highly sensitive information despite earning below it. The preferable approach is a case-specific exception that allows a restraint below the threshold where it is necessary and reasonable to protect a specified legitimate interest.

The exclusion of variable remuneration from the calculation is problematic. This may encourage a shift from performance-based to fixed pay for employees near the threshold. A reduction in performance pay would likely harm productivity. A 2023 survey reported a performance was approximately 24% higher under incentive pay than fixed or hourly pay,[17] with an earlier study showing similar results.[18] This is not what Australia needs when we are experiencing a period of negligible productivity growth.

ABS Employee Earnings data for August 2025 provides context but does not measure coverage under proposed section 333Y. BCA analysis of ABS data shows about 15 per cent of employees earned $80 or more per hour, equivalent to about $158,000 on a simple annualised basis. About 6.7 per cent earned $3,500 or more per week

[17] Fulmer, I. S., Gerhart, B., & Kim, J. H. (2023). "Compensation and performance: A review and recommendations for the future". *Personnel Psychology*, 76, 687–718.
[18] Condly, S.J., Clark, R.E. and Stolovitch, H.D. (2003) "The Effects of Incentives on Workplace Performance: A Meta-analytic Review of Research Studies", *Performance Improvement Quarterly*, 16: 46-63

in their main job, equivalent to about $182,000 on the same basis.[19] These figures suggest the large majority of employees may fall below the threshold, but the precise number covered by the bill is not known. As a broad estimate, more than 85 per cent, or at least 11.4 million employees may fall below the threshold. The Government should publish a more precise estimate, supported by a transparent methodology.

If the threshold is retained:

- The earnings measure should reflect total remuneration, including compulsory employer superannuation and variable remuneration. Compulsory superannuation is excluded even though it has a clear value, is commonly understood as deferred remuneration,[20] and industrial courts often factor in superannuation increases when making wage determinations.
- The threshold should be tested at a single specified point, either when employment ends or when enforcement is sought. A single test would avoid a term switching on and off as the employee's earnings and the indexed threshold change, as currently contemplated (see EM at 2.56). If this does not occur, the threshold will be unworkable for employees with earnings close to the earnings threshold who could be moving in and out of the regime. Employers without a dedicated HR function would face difficulty in getting this right. An employer should be allowed to include a term for an employee who may later earn above the threshold, with enforceability determined at the statutory testing point.

Recommendation 13.

Enforceability should not be determined by an earnings threshold.

Alternatively, if the Government decides to retain an earnings threshold:

- the earnings measure should reflect total remuneration, including compulsory employer superannuation and variable remuneration;
- the inclusion of a non-compete term should not be prohibited solely because the employee is below the earnings threshold when the employment arrangement is made. Whether the term can be enforced should be determined by the employee's earnings immediately before employment ends; and
- the bill should provide a limited exception below the threshold where the employee's role creates a material risk to a specified legitimate business interest and the employer demonstrates that the restraint is reasonable and necessary to protect that interest.

4.6 Casual employees and independent contractors

Casual employees should not be subject to a blanket ban on non-compete terms. The statement in the EM (at 2.44) that it is infeasible or complex to estimate annualised income for casuals is unpersuasive, and does not justify their complete exclusion. The high income threshold can be applied to casuals by reference to annualised full-time-equivalent earnings where a reliable rate can be established. The Fair Work Commission has, for example, annualised the earnings of a casual employee with a regular and systematic work pattern.[21] Section 329(2) of the Fair Work Act also uses a full-time-equivalent concept for some non-full-time employees. These examples do not resolve every variable-hours case, but they show that annualisation can be workable and undermine the assertion in the EM that it is infeasible.

[19] Source: Table 3 of ABS Employee Earnings, August 2025.
[20] "The founding purpose of universal superannuation is to provide workers with a dignified retirement through deferred wages earned." – Page 1 of ACTU submission to Treasury consultation on Retirement Income Covenant.
"Superannuation ('super') is money that is paid to you while you're working, but it is set aside in a separate account for after you retire." – see: https://www.australianunions.org.au/factsheet/superannuation/
[21] See *Daulerio v Recruitment Solutions (A Division of Chandler Macleod) Pty Ltd* [2023] FWC 1758. See [36]–[43], especially [43].

The BCA supports excluding independent contractors from the proposed employment restraint regime and new cartel definitions. Contractors are not in the same position as employees and may have remedies under the Fair Work Act, the Independent Contractors Act 2006 and the Competition and Consumer Act.

Recommendation 14.

If the bill retains an income threshold, it should apply to casuals. The threshold should be applied using annualised full-time equivalent earnings where a reliable rate can be established.

4.7 Co-worker non solicitation

4.7.1 Schedule 2 ban on co-worker non-solicitation clauses

The BCA does not support an outright ban on co-worker non-solicitation terms. These terms are materially different from non-competes because they do not prevent an employee from leaving, joining a competitor or establishing their own business. Instead, a co-worker non-solicitation term typically prevents the departing employee, for a limited period, from actively recruiting former colleagues. It does not prevent those colleagues from changing jobs of their own initiative.

Businesses clearly can have a legitimate need for this protection where a senior or strategically influential employee has substantial knowledge of, and influence over, a team. This knowledge, which may not be in written form, can include roles, skills, relative performance and relative pay of members of the team. If that person leaves and actively recruits key (or all) members of the team for a competitor, the former employer may lose capability developed through years of recruitment, training, mentoring and collaboration. This is different from ordinary employee turnover or an employee independently choosing to pursue another opportunity. As noted in section 4.2, this problem is unlikely to be addressed by the other options available to businesses – it would be near impossible for a business to enforce the remaining intellectual property protections for unwritten IP held by a team that departs to a competitor.

The draft bill does not distinguish between a non-solicitation clause imposed on a junior employee and a targeted clause preventing a senior executive from orchestrating the recruitment of a specialist or management team. It would prohibit both, which is difficult to justify when the draft bill continues to permit a non-compete for an employee whose earnings exceed the high-income threshold, particularly given that non-competes are generally more restrictive than non-solicitation terms. Parliament has previously decided that employees above the high-income threshold are subject to fewer employment protections, such as fewer restrictions on fixed-term contracts, reduced coverage of unfair dismissals, and potential for fewer award protections. It is unclear in that context why high income earners must still be protected from non-solicitation clauses.

Permitting a senior executive to orchestrate the recruitment of a key team from a former employer could disrupt that business and, more broadly, affect competition. Where the team holds scarce expertise or capability that cannot be replaced quickly and is critical to a current project, tender or other time-limited commercial opportunity, its coordinated departure could materially weaken the former employer's ability to bid, innovate or serve customers. This could reduce the number or strength of effective competitors, weakening customer choice and competitive pressure on price, quality and innovation.

The common law provides a more proportionate safeguard. An employer seeking to enforce a clause must establish a legitimate interest and demonstrate that the restraint is reasonable and no broader than necessary. This flexible approach allows a court to consider the conduct restricted, the duration of the restraint, the employees it covers and its practical effect on voluntary employee movement. Australian courts have already considered the circumstances in which protecting workforce relationships may justify a restraint and the limits

that should apply.[22] The bill should not replace that case-specific assessment with either a blanket prohibition or a new prescriptive test.

4.7.2 Schedule 1 no-poach cartel provisions

The draft bill creates a further issue because a co-worker non-solicitation clause in an employment contract could be regulated both as an employment restraint under Schedule 2 and as cartel conduct under Schedule 1, with potential criminal sanctions.

For example, an employment contract may provide that, for 12 months after leaving, the employee must not solicit, recruit, employ or engage any of the employer's employees. The clause may directly or indirectly prevent or restrict the employee, after their employment ends, from recruiting, soliciting or hiring the employer's staff. It could therefore fall within the definition of a no-poach provision in proposed section 45ADA(2).

The ordinary exemption for provisions in employment contracts under section 51(2) of the Competition and Consumer Act would not resolve this problem, because the draft bill expressly prevents that exemption from applying to the new no-poach and wage-fixing provisions.

The explanatory materials describe Schedule 1 of the draft bill as regulating agreements "between businesses" or "between employers". However, proposed section 45ADA is not confined to agreements between businesses. Given the potential criminal consequences, businesses should not have to rely on the explanatory materials or ask a court to read such a limitation into the legislation.

Recommendation 15.

Co-worker non-solicitation terms should not be banned outright, but instead should continue to be governed by common law.

Alternatively, if the Government proceeds with a statutory regime, these terms should remain available where an employer can establish that the particular restraint is reasonable and necessary to protect a legitimate business interest. At a minimum, they should remain available for high-income employees, and employees in senior or strategically influential positions.

The Bill should expressly provide that section 45ADA does not apply to a contract of employment or another arrangement between an employer and an individual employee, including a former employee. Any statutory regulation of employment restraints should be dealt with exclusively under Schedule 2.

4.8 Cascading restraints

The BCA does not support a blanket prohibition on cascading terms. Under the common law, a restraint is enforceable only to the extent that it is reasonable and no broader than necessary to protect a legitimate business interest. The draft bill would nevertheless prohibit cascading terms outright, even where one of the alternative restrictions would be reasonable and necessary under the bill's own test. No case has been made for this outcome, particularly for employees above the high income threshold. As noted above, Parliament has determined that various employee protections are loosened above the high income threshold. In this context, it is unclear why these high income employees should still need a blanket ban on cascading restraints.

Cascading terms address a practical problem, that when an employment contract is signed, the parties cannot know exactly what a court may later consider reasonable or how the employee's role may change.

[22] See, for example, *A T Kearney Australia Pty Ltd v Crepaldi* [2006] NSWSC 23 at [58].

Employment contracts often continue as a person's responsibilities, seniority or geographic scope expand, without a new contract being signed. Cascading alternatives allow the reasonable restraint to be identified at departure without requiring a new contract after every promotion or restructure.

Courts have previously upheld appropriately drafted cascading restraints.[23] The bill should preserve that approach or require a court to read a clause down to a reasonable scope. Otherwise, employers must choose between a term too narrow to protect business interests and a term that may fail entirely because it is too broad. Requiring a new restraint after every promotion or substantial change of role could also discourage internal mobility.

Current law already allows courts to reject excessive restraints while enforcing a reasonable alternative. In NSW, legislation allows a restraint to operate to the extent that it is reasonable, whether or not its terms are severable. In that jurisdiction, courts can modify a restraint of trade term to the extent necessary to make it valid. It appears the draft bill overrides this for no apparent reason. The EM does not explain why the NSW approach is not being adopted – particularly noting that this approach could address both business and employee concerns.

Elsewhere, properly drafted cascading clauses create separate restraints, allowing unreasonable alternatives to be severed under the common law. The draft bill would replace these established, case-specific approaches with a blanket rule that a cascading term has no effect, even where one of its alternatives would be reasonable and necessary.

It is also hard to justify voiding a narrow restriction in a cascading clause that would, apart from this bill, be both necessary and reasonable.

Recommendation 16.

Cascading restraints should not be banned outright, but instead should be subject to the same necessity and reasonableness test as other restraints. Alternatively, courts should be required to read a clause down to a reasonable scope.

4.9 Other permitted restraints and related agreements

Client, customer and supplier non-solicitation terms do not prevent an employee from seeking or accepting another job. They protect relationships and goodwill developed through the employer's investment and should remain governed by the common law. If proposed section 333ZJ is retained, it should not narrow the legitimate interests or flexibility already recognised by the courts.

The statutory definition should be confined to restraints imposed through the employment relationship. It should expressly exclude genuine restraints contained in shareholder, employee-equity and sale-of-business agreements. The EM recognises aspects of this distinction, but the operative provisions should do so expressly.

Recommendation 17.

Client, customer and supplier non-solicitation terms should remain governed by the common law. If proposed section 333ZJ is retained, it should preserve the legitimate interests and flexibility already recognised by the courts.

The Bill should expressly exclude genuine restraints contained in shareholder, employee equity and sale of business agreements.

[23] In *Hanna v OAMPS Insurance Brokers Ltd* [2010] NSWCA 267, the employer successfully defended a cascading restraint concerning client solicitation and dealing. See [4]–[5] and [9]–[17].

5. Implementation transition and enforcement

5.1 Contract variation and existing arrangements

The draft bill proposes that the new provisions apply when an existing employment arrangement is varied by mutual agreement after commencement. It is unclear how this rule applies to routine employment changes. A promotion may involve an agreed change to duties and remuneration, while an annual salary increase may simply be implemented unilaterally under the existing contract. In either case, the restraint itself may remain unchanged. The bill should confirm that an existing restraint is not brought within the new regime unless the parties agree to vary the restraint itself.

One BCA member reported approximately 1,500 contracts containing cascading restraints, together with annual remuneration reviews and regular restructures. If routine variations trigger the new regime, many existing contracts could be affected in a single review cycle. Businesses would then need to review contracts, communicate with employees, obtain new approvals and change remuneration, notice or information-protection arrangements.

Existing restraints should continue to operate until the relevant contract is terminated or replaced. A remuneration review, promotion or administrative change that does not alter the restraint should not bring it within the new regime. At a minimum, the new rules should apply only when the restraint itself is varied by agreement.

Recommendation 18

An existing restraint should remain governed by the current law until it is varied by agreement or the relevant contract is terminated or replaced. A remuneration review, promotion, restructure or other change that leaves the restraint unchanged should not bring it within the new regime.

5.2 Commencement and implementation period

Businesses need at least two years between enactment and commencement. This period is necessary to identify affected employment and commercial contracts, obtain legal advice, consult employees, redesign templates and systems, train decision-makers and implement alternative protections. Schedule 1 may require review of service and transaction contracts across multiple business units and supply chains. This submission highlights the extensive effect this Schedule could have on numerous contracts across the whole economy. Schedule 2 may require review of large numbers of employment contracts.

The Government should finalise legislation, regulations and regulator guidance well before commencement. A staged implementation process should include worked examples, model notices where notices are required, and a clear statement of the treatment of arrangements entered into before commencement.

The commencement and transition periods proposed in the draft bill are inadequate. The substantive changes would commence at the start of the next quarter following Royal Assent – potentially as soon as the following day, and no more than three months later. Businesses may face civil and criminal liability under Schedule 1 (no poach and wage fixing) immediately. Penalties under Schedule 2 for enforcing (or threatening to enforce) non-competes apply immediately, and there is a delay of six months for entering into an employment arrangement containing a prohibited non-compete or non-solicitation term.[24]

The BCA submits these timeframes are unworkable. Schedule 1 is particularly problematic because a business could face civil or criminal penalties from commencement for continuing to apply a term in an existing contract

[24] See EM paragraphs 1.80–1.83 and 2.129–2.135 and proposed section 333ZC.

that is caught by the new cartel prohibitions. The implementation burden would be especially significant for smaller businesses without in-house legal, human resources or competition law expertise.

Recommendation 19.

The bill should provide at least two years between enactment and commencement. Regulations and regulator guidance should be finalised well before commencement, including examples, model notices where notices are required.

Commercial and employment arrangements entered into before commencement should receive appropriate grandfathering or transitional protection.

5.3 Proportionate penalties

The BCA does not support attaching criminal sanctions to the Schedule 1 cartel offences. Criminal liability is disproportionate while the boundaries of the new provisions remain uncertain and legitimate agreements between customers and suppliers may be captured. The Government should narrow the prohibitions and provide clear statutory exemptions before any criminal liability applies.

Given these substantial uncertainties, if penalties are retained, they should not apply immediately on commencement. A delayed commencement for penalties would be consistent with previous reforms in which obligations took effect before associated penalty or enforcement provisions. For example, the unfair contract term rules came into effect in 2010 while penalties did not apply until 2023. The Payment Times Reporting Act came into effect a year before penalties applied. A staged approach was also adopted for pay secrecy changes and the positive duty to prevent workplace sexual harassment.

The draft bill would make the Schedule 2 employment restraint prohibitions civil remedy provisions. The BCA does not support this approach. Instead, we consider invalidity or unenforceability, supported by clear guidance and a workable transition, is a sufficient response to a non-compliant restraint. Civil penalties should not apply merely because an employer included a term it reasonably considered lawful or sought to test its enforceability in court. If penalties are retained, the Act should include a defence where the employer reasonably believed that the term could lawfully be enforced.

Recommendation 20.

Criminal sanctions should not apply to the proposed no-poach and wage-fixing cartel provisions. If civil or criminal penalties are retained, they should commence only after businesses have had adequate time to implement the final legislation and the statutory exemptions and regulator guidance have been settled.

The Schedule 2 employment restraint prohibitions should not be civil remedy provisions. A non-compliant restraint should instead be invalid or unenforceable. If penalties are retained, the Act should include a defence where the employer reasonably believed that the term could lawfully be enforced.

6. Conclusion

The BCA's primary position is that the Schedule 1 cartel prohibitions and Schedule 2 restraint reforms should not proceed, and that post-employment restraints should remain governed by the common law. If the draft bill proceeds in its current form, it would create serious uncertainty for ordinary commercial arrangements and remove targeted protections for legitimate business interests. Its effects would extend well beyond non-compete clauses to service contracting, business sales, joint ventures, secondments, labour hire, franchise networks, probity, workforce capability and existing contracts.

The existing law already provides substantial and fit-for-purpose safeguards against unreasonable post-employment restraints. A restraint is presumed to be unenforceable unless the employer proves that it is reasonable and no broader than necessary to protect a legitimate interest. Courts have developed and applied these principles across a wide range of industries, employment relationships and commercial circumstances. This case-specific approach can distinguish a legitimate restraint from an unjustified restriction in a way that blanket statutory prohibitions cannot. Clearer public information would complement the existing framework and help employers and employees understand their rights and obligations. Further regulatory intervention would not be the most effective or proportionate way to improve worker mobility and promote fair competition.

If the Government nevertheless proceeds, the bill should be confined to conduct that presents a genuine competition or mobility concern. It should provide broad and certain exemptions for legitimate commercial arrangements, preserve reasonable and necessary restraints, clarify ordinary lawful employment arrangements, and provide an adequate implementation period. Those changes are necessary to avoid imposing substantial compliance costs and disproportionate criminal or civil exposure on legitimate business activity.

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