



2 October 2026

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Dear Sir/Madam,

Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026

The Australian Financial Markets Association (**AFMA**) represents the interests of over 140 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations and traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets.

We are pleased to make a submission on the Exposure Draft of the Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026 released for consultation on 7 September 2026 (**Exposure Draft**). Our submission addresses the key provisions of the Exposure Draft affecting AFMA's membership.

Executive Summary

AFMA's key recommendations in relation to the Exposure Draft are as follows:

- The proposed measures in the Exposure Draft create incentives for globally-mobile firms to locate critical roles offshore in order to manage the risk of knowledge transfer to competitors and of offshore poaching. This outcome cuts against the Government's stated objectives of using artificial intelligence as a productivity driver, building critical technology skills and advancing the broader innovation agenda;
- The threshold to determine the high-income threshold needs to include variable remuneration as well as base salary;

- The proposed ban on non-solicitation terms, if it is to proceed, should have an income threshold that is aligned to the threshold for non-compete terms, (i.e. including variable remuneration) with non-solicitation terms being respected where the term is necessary to protect a legitimate business interest;
- The proposed codification of “legitimate business interests” should reinstate a stable workforce as a recognised interest, as currently determined under the common law;
- In respect of existing employment arrangements, existing post-employment restraints should continue to apply unless there is a material variation to the employment contract, as opposed to a mere variation;
- There is no basis for the imposition of penalties merely due to the existence of a prohibited term in a contract.

AFMA Policy Position

AFMA has had a longstanding interest in the Government’s proposed reforms of non-compete clauses and other employment restraints. As previously articulated, AFMA’s view is that the current legal framework strikes the appropriate balance between the protection of employers’ legitimate interests and the rights of employees, particularly in relation to those employees that hold valuable intellectual property and confidential information. The Government has not properly made the case for reform in this area, especially in relation to the finance industry where protection of intellectual property is fundamental. The appropriate, and likely, behavioural response from AFMA’s members that operate in multiple jurisdictions will be to hold confidential information/intellectual property outside of Australia in a jurisdiction where it can be properly protected, such as competitor financial centres like Singapore and Hong Kong. This will result in Australian businesses/employees undertaking only low-value functions, completely undermining the Government’s current productivity agenda.

In forming the view that the current legal framework is appropriate, AFMA acknowledges that where an employer seeks to rely on a restraint, the burden to demonstrate that the restraint is reasonable and protects the legitimate business interest sits with the employer. That is, the default position is to respect employee mobility except in circumstances where the employer can justify the legitimacy of the restraint.

AFMA maintains that non-disclosure agreements alone are insufficient to protect highly mobile, knowledge-based industries, with breaches only provable after the fact, once the highly valuable intellectual property has been transferred. Commercially valuable knowledge is not limited to source code, documents or identifiable confidential information, with employees developing deep knowledge of algorithms, trading strategies, research priorities and proprietary technology that could be applied for the benefit of a direct competitor without any physical information being transferred. As such, non-competes are an important and, in some circumstances, necessary mechanism to proactively protect confidential information and intellectual property. The Government appears to have accepted this proposition through the inclusion of a high-income threshold for the preservation of valid non-compete clauses, albeit in a way that does not work for the finance industry.

Given that the Government appears committed to reform in this area, the focus of AFMA's submission to the Exposure Draft is to focus on this issues that would be most problematic for AFMA's members.

General Comments on Post-Employment Restraints of Trade in Financial Services

Post-employment restraints of trade in financial services are distinct from those used in many other industries, for reasons that the Exposure Draft does not adequately reflect. Financial services firms generate and maintain highly valuable intellectual property and proprietary information, including bespoke trading algorithms, quantitative investment strategies, risk management systems and client relationship networks, that represent the product of significant investment, often developed on a global scale. This intellectual property and proprietary information is central to the way in which our members deliver services to their customers and to the efficiency and competitiveness of Australia's wholesale financial markets, and its protection is a core operational concern for AFMA's membership.

From an employer's perspective, post-employment restraints, including non-compete and non-solicitation obligations, encourage investment in proprietary systems and strategies that drive innovation and competitive performance in financial services. Without adequate protections, the risk that a departing employee will take sensitive information or recruit key personnel to a competitor reduces the incentive to develop and share proprietary material internally. Several AFMA members with global operations have specifically selected Australia as the base for their Asia-Pacific offices on the strength of the legal framework supporting these protections. Any material erosion of that framework will cause these firms to reassess both the location of specialised functions and the employment conditions offered to Australian staff and will incentivise those with Australian and overseas operations to engage employees with access to the highest value confidential information outside of Australia.

Post-employment restraints also serve important interests from an employee perspective. The ability of firms to protect their intellectual property through appropriate restraints creates a direct incentive to expose employees to that intellectual property, training them in proprietary systems, strategies and methods that significantly enhance their professional development and prospects. Those investments begin with costly employee screening, monitoring and evaluation and extend to skills development, team-building and the identification of collaborative or "joint production" effects among employees. If employers cannot protect against the transfer of that material to a competitor, they will naturally become more guarded about sharing it, which limits the quality of training and development available to employees. The loss of these protections also creates a free-rider problem: firms become incentivised to recruit from competitors rather than developing their own talent pipelines, reducing innovation and productivity through investment in workforce capability across the sector.

Effective post-employment restraints also support better remuneration outcomes for employees. An employer who cannot protect against the transfer of valuable intellectual property will discount the value attributed to an employee or resort to at-risk deferred compensation structures, such as extended vesting conditions on bonuses, to provide some protection against departure. Appropriate post-employment restraints reduce the need for such structures, allowing remuneration to be paid in a more straightforward and certain manner. This is consistent with the experience of AFMA

members, who generally pay employees during the non-compete period, ensuring that individuals are financially supported throughout the period of restraint. In this light, we note that further clarity is needed as to the ongoing validity of deferred compensation arrangements, particularly in respect of payments that continue post the cessation of the employment relationship and are contingent on compliance with lawful obligations.

Post-employment restraints, and non-compete clauses in particular, also provide more effective and efficient protection for intellectual property than alternative mechanisms such as confidentiality agreements or non-disclosure clauses alone. The limitations of confidentiality obligations as a substitute for non-compete protections are well established and have been recognised by courts in Australia and comparable jurisdictions for decades. Where an employer is forced to rely solely on such obligations, the costs of enforcement are significantly higher and the prospects of meaningful protection materially lower.

It is also worth noting that post-employment restraints in financial services are typically the product of genuine negotiation between commercially sophisticated parties. Our members' employees are, as a general matter, highly educated, experienced in the industry and knowledgeable about the nature and effect of post-employment obligations. Competition for talent in financial services is intense, remuneration packages are substantial, and employees regularly negotiate the terms and scope of restraints, often successfully securing higher remuneration in exchange for accepting them. In this environment, post-employment restraints are far from the standard-form impositions on vulnerable workers that have animated the policy concerns driving these reforms.

These points are supported by a substantial body of academic literature and industry commentary examining the role of post-employment restraints, including their function in protecting confidential information, supporting investment in workforce development and enabling employers to offer more competitive remuneration packages.¹ The weight of evidence does not support the characterisation of post-employment restraints in financial services as exploitative or anti-competitive, and the Draft Bill's reforms, if implemented as proposed, risk causing significant and disproportionate harm to this sector.

Specific Submissions on the Exposure Draft

1. The income threshold approach for non-compete terms needs to cater for variable remuneration

The Exposure Draft permits non-compete terms for employees earning above the high-income threshold (currently \$190,100) is incompatible with the remuneration arrangements for the finance industry, particularly in respect of those employees that have access to intellectual property/confidential information.

¹ Jonathan Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. Chi. L. Rev. 953 (2020); Geoffrey A. Manne & Dirk Auer, *Comments of the International Center for Law & Economics Regarding Contract Terms that May Harm Fair Competition* 10 (September 30, 2021); Evan P. Starr, et al., *Noncompete Agreements in the US Labor Force*, 64 J. L. & Econ. 53, 53 (2021); see also U.S. Chamber of Commerce, *Comment Letter on Non-Compete Clause Rule* (April 17, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-19345>; Business Roundtable, *Comment Letter on Non-Compete Clause Rule* (April 17, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-19341>.

The draft Explanatory Memorandum notes that earnings³ is defined in Section 332 of the Fair Work Act to include wages, amounts that are guaranteed in advance, salary-sacrificed amounts, and the agreed value of non-monetary benefits. Importantly, payments that cannot be determined in advance, such as bonuses and incentive-based payments, are excluded. This proposed definition detrimentally impacts the financial services industry, which has a well-established industry practice of rewarding employees on a variable remuneration basis to reflect performance. The proposed test would bring a disproportionate number of such employees within scope of the reforms, notwithstanding that they are clearly “high-income” earners, merely by virtue of the structure of their remuneration packages.

Our view is that the income test should have regard to the employee’s total average income received over the three years immediately before the termination of their employment, including bonuses and commissions. This recognises the fact that many high-income employees in the finance industry receive a significant portion of their incomes from bonuses and commission, which sums vary from year to year. These employees are well placed to negotiate their contract terms, and they also are usually in possession of valuable confidential information. AFMA notes that the concept of averaging remuneration across multiple years is found in other employment legislation, such as the termination benefits provisions of the Corporations Act 2001 (C’th) and the long service leave provisions of the Long Service Leave Act 1955 (NSW).

As well as being fairer, a three-year formula, as opposed to selecting a pay point at either commencement or termination of employment, provides greater certainty for both employer and employee and a “look back” approach would address the discretionary nature of any prospective bonus.

AFMA also supports the ability for a non-compete term to be enforceable against an employee below the high-income threshold where the restraint period is paid at the employee’s base earnings.

2. The blanket ban on co-worker non-solicitation clauses should be subject, at minimum, to the income threshold applicable to non-compete clauses

Co-worker non-solicitation agreements (NSAs) address a different harm from non-compete clauses. NSAs are not concerned with the individual employee who leaves with knowledge of the firm’s systems or strategies, but the departing employee who actively recruits former colleagues to follow them. In financial services, where teams operate collaboratively and competitive advantage depends on the cohesive expertise of specialised groups, a coordinated departure can cause considerably greater disruption and damage to the business than any individual departure. There is an important distinction between an individual’s freedom to change employer and removing the ability to protect against active, co-ordinated solicitation of specialist employees and teams.

NSAs also protect employers’ confidential information relating to the workforce itself, including performance reviews, compensation data and organisational assessments. Particularly in the financial services industry, a firm’s talent may be just as valuable as its intellectual property. When a departing employee solicits colleagues, unless the departing employee had a pre-existing personal relationship with the solicited individual, the solicitation necessarily relies on confidential employer information about those colleagues’ roles, performance and compensation. That confidential information will be used for the benefit of the new employer unless a targeted NSA is in place to

protect confidential information without preventing employees from changing employers or pursuing their chosen field.

Employers anticipating these risks may respond by reducing hiring, lowering compensation, or investing less in employee development and customer relationships. For global employers in particular, this risk is compounded by the availability of offshore alternatives: where Australian law offers no effective protection against coordinated departures, there is a real risk that such employers will reconsider the scale of their local workforce. Those responses directly harm employees by reducing employment opportunities, pay, training and the quality of the relationships and teams in which they work.

Against that background, the proposed approach in the Exposure Draft is difficult to justify on any principled basis. Non-solicitation obligations are materially less restrictive than non-compete clauses. A non-compete prevents a departing employee from working in their field at all for a defined period. A non-solicitation obligation places no restriction on where the employee works or when; it merely prevents them from actively recruiting former colleagues for a reasonable period of time. The Exposure Draft nonetheless bans non-solicitation clauses entirely for all employees regardless of income, while permitting non-compete clauses above an income threshold. No comparable jurisdiction has taken this approach: regulatory reform of post-employment restraints in the United States, the United Kingdom and across comparable markets has consistently been confined to non-compete clauses, leaving non-solicitation obligations intact.

A further indicator of the disproportionate character of the Exposure Draft's approach is its inconsistency with the way in which courts have historically approached these obligations. The distinction between non-compete clauses and non-solicitation obligations is well established in the case law of Australian courts and those of comparable common law jurisdictions. Because a co-worker non-solicitation obligation does not prevent an individual from leaving their employer, joining a competitor, or pursuing any career opportunity they choose, courts have long regarded such obligations as meaningfully less intrusive than non-compete clauses and have been correspondingly more willing to find them reasonable and enforceable.² The Exposure Draft departs from this settled judicial understanding by treating co-worker non-solicitation obligations as a greater threat to employee freedom than non-compete clauses, an inversion that is without foundation in the case law and that the Exposure Draft's explanatory materials make no attempt to justify.

The case for a blanket ban on co-worker non-solicitation clauses also lacks a sound evidentiary basis. Any prohibition of this kind should rest on a demonstrated finding that the harms of the practice outweigh its benefits across the range of circumstances to which the prohibition will apply. That finding has not been made. The published empirical literature on the effects of co-worker non-solicitation clauses is sparse and its findings are inconclusive: no study has successfully isolated the causal impact of restricting or removing the enforceability of such clauses using a natural experiment or comparable methodology.³ The Government has not pointed to any research that would justify the removal of these protections. AFMA contends that it is difficult to discern any justification for a blanket ban which will impose real and well-documented costs, including suppressed investment in

² See, for example, *In re High-Tech Employee Litigation*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012).

³ See Gurun, Stoffman & Yonker, *Unlocking Clients*, 141 J. Fin. Econ. (2020), Clifford & Gerken, *Property Rights to Client Relationships*, 76 J. Fin. 2409 (2021), Ramos & Radoc, 27 *Indus. Rel.* 1 (2026), and Starr, *The Economics of Noncompete Clauses*, 40 J. Econ. Persp. 139 (2026).

workforce development and heightened exposure to disruptive team departures, without any credible evidentiary support.

If the Government proceeds with some form of regulation of co-worker non-solicitation clauses, AFMA's primary position is that the proposed ban should be lifted entirely. If it cannot be lifted entirely, the alternative is that it be limited to low-wage and vulnerable workers, while permitting reasonable NSAs for other employees. This should mean that reasonable NSAs remain valid for employees with the capacity to influence or co-ordinate specialist team movement based on seniority, responsibility and influence over teams. If the Government maintains an income-threshold approach, the threshold should be the same income threshold applicable to non-compete clauses, currently \$190,100, inclusive of variable remuneration. The Government's own rationale for the income threshold approach to non-competes, that employees earning above it are commercially sophisticated and well-positioned to negotiate the terms of their own employment, applies with equal, if not greater force to non-solicitation obligations, which are less restrictive in scope. There is no coherent policy basis for the current disparity in treatment.

Finally, appropriate caveats should be applied to any legislative ban on NSAs. At present, the non-compete provisions in the Exposure Draft are subject to exceptions for confidentiality terms, retention arrangements, garden leave and notice periods. It is appropriate for any ban on NSAs to be similarly caveated. For example, there are a number of express, implied, statutory and sometimes fiduciary duties owed by employees during their notice period/garden leave, including to act with loyalty, fidelity, good faith and in the employer's best interests. Such duties are fundamentally incompatible with an employee being permitted to solicit co-workers to leave their employer.

3. A statutory read-down mechanism should be available for permitted post-employment restraint of trade terms

AFMA does not object to the prohibition on cascading clauses in principle. Cascading clauses are a response to uncertainty about enforceability: employers stack alternative restrictions because they cannot predict which formulation a court will uphold. Clear, single restraints drafted to reflect a genuine and proportionate protective interest are preferable for both employers and employees, and AFMA accepts that a well-functioning regime should not require or encourage that kind of defensive drafting. However, the prohibition on cascading clauses is only workable if accompanied by a statutory read-down mechanism.

The *Restraints of Trade Act 1976* (NSW) has, for nearly 50 years, provided that courts may read down or modify a restraint of trade term to the extent necessary to render it valid and enforceable. The Exposure Draft removes that mechanism entirely for national system employees. Under proposed Section 333ZJ(6), any permitted restraint that goes marginally beyond what is strictly necessary, in duration, geographic scope or description of restricted activities, is rendered wholly void rather than being moderated to a reasonable scope. That produces an all-or-nothing regime which will generate more litigation: neither party can know in advance whether a permitted restraint will survive scrutiny or be voided entirely, which makes disputes about enforceability more likely, not less.

There is also an internal inconsistency in the Exposure Draft's approach. The Government has expressly recognised that non-compete terms are legitimate and commercially appropriate for employees above the high-income threshold, protecting confidential information and client relationships in circumstances where both parties have bargained for the arrangement. Having made

that policy judgment, it is difficult to justify a regime under which a permitted restraint that is legitimate in purpose but marginally over-drafted in scope is struck down in its entirety rather than being moderated to what is reasonable. The appropriate response to a restraint that goes further than necessary is to confine it to what is justified, not to void it altogether and leave the employer with no protection at all. AFMA submits that a statutory read-down provision, consistent with the NSW approach, should be included in the Draft Bill for all permitted post-employment restraint of trade terms.

4. The removal of ‘maintaining a stable workforce’ as a recognised legitimate business interest is disproportionate and will cause particular harm to the financial services sector

The Exposure Draft provides an exhaustive definition of legitimate business interests for permitted post-employment restraint of trade terms, limited to: (a) protecting confidential information; and (b) protecting professional or personal relationships with customers, clients or professional networks (section 333ZJ(2); Explanatory Memorandum paragraph 2.113). The draft Explanatory Memorandum expressly states that this exhaustive list is intended to overturn the decision in *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717 (*Cactus Imaging*), which recognised the maintenance of a stable workforce as a further legitimate business interest (Explanatory Memorandum paragraphs 2.114–2.115). AFMA submits that this is a disproportionate measure, particularly for the financial services sector, where workforce stability is a critical and distinct operational concern.

Financial services firms, particularly those engaged in trading, quantitative investment strategies and other highly specialised activities, are uniquely vulnerable to coordinated team departures. A departing employee who actively recruits an entire team of specialists to join a competitor can disrupt complex investment operations, harm client outcomes and undermine years of investment in talent and technology development. Workforce stability is accordingly a significant concern for our members, whose competitive advantage depends on the collaborative and cohesive capacity of specialised teams. The loss of co-worker non-solicitation protections, discussed in detail above, compounds this concern significantly. The combination of no permissible co-worker non-solicitation obligation and no recognised stable-workforce justification for any post-employment restraint leaves financial services firms with no effective mechanism to protect against coordinated team raids.

The Government’s rationale for applying an income threshold to non-compete clauses is that employees earning above it are commercially sophisticated, well-remunerated and capable of negotiating their own employment conditions on an informed basis. AFMA accordingly submits that the list of legitimate business interests in section 333ZJ(2) should either be expanded to include the maintenance of a stable workforce or expressed as a non-exhaustive list, consistent with the established approach under the common law.

5. The grandfathering provisions are unduly fragile and create a perverse incentive for employers to freeze employee remuneration

Part 25 of Schedule 1 to the Exposure Draft provides that existing post-employment restraint of trade terms will be grandfathered and will continue to apply under the pre-commencement regime unless and until the employment arrangement is varied. However, sections 143(2)-(3) and 143(7)-(8) of the Exposure Draft provide that the new regime applies to an existing non-compete or co-worker non-solicitation term after any variation of the employment arrangement, “irrespective of whether the

variation relates to the post-employment restraint of trade term.” AFMA submits that this drafting creates two serious and practically significant problems.

First, the grandfathering protection will be effectively illusory for employers who regularly adjust their employees’ compensation or terms of engagement. Any salary increase, change to bonus structure, promotion, or routine amendment to employment conditions could constitute a ‘variation’ that triggers the new regime (draft Explanatory Memorandum paragraph 2.133). For financial services firms, which typically review and adjust employee compensation annually, and which in many cases are required to do so to remain competitive in a tight labour market, this means that the grandfathering period will be in practice very short and that the reforms will effectively apply retrospectively. Furthermore, in connection with the cascading clause prohibition in section 333ZJ(5), employers whose existing contracts contain cascading clauses will find that those clauses become wholly void as soon as the employment arrangement is varied, even for unrelated reasons. Given the widespread use of cascading clauses in Australian employment contracts, many financial services employers will effectively be required to replace their entire suite of employment contracts upon the first routine amendment, a logistically and commercially significant undertaking.

Second, the current drafting of the grandfathering provisions creates a perverse incentive for employers to refrain from increasing employee salaries. An employer who has a legitimate interest in maintaining a non-compete or co-worker non-solicitation obligation for an employee, particularly one earning below the high income threshold, for whom any replacement non-compete or co-worker non-solicitation provision would be prohibited under the new regime, will be incentivised never to vary that employee’s terms, including by temporarily or indefinitely postponing adjustments to base salary, in order to avoid triggering the new regime and losing grandfathered protection. The result is lower wages and reduced employee mobility, the direct opposite of what the legislation intends.

Existing employment contracts are essentially contractual rights negotiated by employers and employees in good faith and should be respected until such time as a further negotiation is to occur. AFMA submits that the grandfathering provisions should be amended to provide that the new regime is triggered for existing employment arrangements only by a material variation, such as a change in role, as opposed to any variation of the employment arrangement. This amendment would allow employers to continue adjusting employee remuneration, benefits and other terms without inadvertently losing grandfathered protections.

6. There is no basis for penalties to be applied merely by virtue of the inclusion of a prohibited term

AFMA reiterates its view that imposing penalties on employers for including non-compete clauses or other restraints is unnecessary, counter-productive and unjust. It is more than sufficient to mandate and publicise that non-compete clauses are unenforceable. Imposing penalties would create a cause of action where the relevant conduct does no harm to any party to the contract, given that the clause itself would be of no legal effect.

Allowing third parties to bring suits seeking access to penalties in cases where there is the presence of a non-compete in employment contracts is unjust and will further encourage vexatious litigation to the extent that the litigants have suffered no damage.

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Please contact me on (02) 9776 7996 or rcolquhoun@afma.com.au if you have any queries about this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Colquhoun', written in a cursive style.

Rob Colquhoun
Chief Operating Officer