MINERALS COUNCIL OF AUSTRALIA

Submission to the Commonwealth Treasury

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

Exposure draft legislation

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OVERVIEW AND RECOMMENDATIONS

The Minerals Council of Australia (MCA) welcomes the opportunity to comment on the exposure draft *Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026* (**the draft bill**), as the leading advocate for the Australian mining industry. This submission is in response to the consultation process on the draft bill conducted by the Commonwealth Treasury.[1]

The MCA supports the government prioritising productivity growth, including through removing potential barriers to labour mobility. Improving productivity is the only sustainable way to grow real wages and living standards. Australia's productivity performance remains stagnant, with whole-of-economy labour productivity falling 0.2 per cent in the year to June 2026 and remaining only around 1 per cent above its 2015–19 average.[2]

Background – the government's policy intent

The policy intent for the draft bill was announced in the 2025-26 Budget, in the following terms:

> ***Banning non-competes for low- and middle-income workers***
>
> *Non-compete clauses prevent or restrict workers from moving (or attempting to move) to a competing employer, or from starting or operating a competing business, with a specific geographic location and for a certain duration. They are often broad in scope and significantly reduce worker mobility, especially for lower-paid workers.*
>
> *The Government's Competition Review found compelling evidence that non-compete clauses are now a common and growing feature of Australia's labour market, and are suppressing the wages of many workers, including many lower-paid and vulnerable workers. The review found the clauses are often being used indiscriminately across income levels and occupations including for child care workers, construction workers and hairdressers.*[3]

The MCA broadly supports the government's intent to remove barriers to labour market mobility and enable wages growth, especially for lower-paid and vulnerable workers, through a targeted approach. However, the approach in the draft bill is not targeted. Instead of focussing on unfair and restrictive terms, it will have a range of unintended consequences that will adversely impact many legitimate arrangements.

Competition law amendments are unworkable and must not be proceeded with

The government presented its restraint reforms package as a productivity-enhancing measure, relying on 2024 Productivity Commission modelling.[4] However, the Productivity Commission did not model the Competition Law measures contained in the exposure draft bill. It assumed a reform that *'restricts the use of non-compete clauses which are considered unreasonable or inefficient'* and its modelling did not include *'effects that could decrease labour productivity (such as a reduction in training)'*.[5] The MCA is concerned that the implementation of the government's legislation under the draft bill could have broader impacts that negate any potential productivity gains, by criminalising ordinary and legitimate commercial arrangements, including in the mining industry.

Of particular concern is the operation of the proposed new 'cartel' provisions that prohibit 'wage-fixing' and 'no-poaching' agreements. 'Wage-fixing' is defined broadly as an arrangement that:

> *…has the purpose, or has or is likely to have the effect, of directly or indirectly fixing, maintaining, decreasing or controlling:*
>
> *(a) remuneration; or*

[1] Commonwealth Treasury, Reform to non-compete clauses and other restraints – draft legislation: https://consult.treasury.gov.au/c2026-801178.
[2] Austral[2] Budget Paper 1, 2025-26 (page 24): https://archive.budget.gov.au/2025-26/bp1/download/bp1_2025-26.pdf
[3] Budget Paper 1, 2025-26 (page 24): https://archive.budget.gov.au/2025-26/bp1/download/bp1_2025-26.pdf
[4] The Hon Jim Chalmers MP, Senator the Hon Murray Watt and the Hon Dr Andrew Leigh MP, '*Cracking down on non-compete clauses to boost wages and productivity'*, Joint Media Release, 25 March 2025: https://ministers.dewr.gov.au/chalmers/cracking-down-non-compete-clauses-boost-wages-and-productivity
[5] Productivity Commission, *National Competition Policy: Modelling Proposed Reforms (2024)*, p 118.

(b) terms and conditions of employment;

of the current or future staff of 2 or more parties to the contract, arrangement or understanding.[6]

Contrary to the way these measures were represented in the government's initial announcement, these new prohibitions have been drafted with a wide scope and narrow exemptions, such that they could reach into common commercial arrangements across the mining industry. This includes mining industry service contractors, who employ approximately 40 per cent of the industry workforce.

Arrangements with service contractors typically include some terms governing the organisation of their workforce. These workforce arrangements are crucial to the productivity and adaptability of the mining industry, and their disruption could have adverse unintended consequences for the way businesses organise, deploy and invest in their workforces. In some cases, they risk jeopardising new projects entirely.

This is one of a number of adverse consequences of the draft bill in its current form. What began as a policy aimed at better supporting low- and middle-income earners could instead have the effect of stifling multibillion-dollar resources investments.

The MCA is concerned that the proposed cartel provisions also conflict with obligations imposed on employers under other government legislation and policy. For example, Modern Slavery laws can require businesses to assess and address modern slavery risks in their supply chains, including through contractual and due-diligence measures concerning suppliers. Similarly, the proposed 'Secure Australian Jobs Framework' would establish expectations related to 'fair wages and conditions' in Commonwealth procurement. On current drafting, a business engaging with its contractors and suppliers regarding wages and conditions for such purposes could inadvertently engage in conduct that amounts to a criminal cartel under the 'wage-fixing' prohibition.

***Fair Work Act* amendments must be substantially reconsidered**

The draft bill would introduce a number of broadly-worded prohibitions, rather than taking a more targeted approach. It would amend the *Fair Work Act* to ban non-compete terms for employees below the high-income threshold and restrict non-compete terms above that threshold in various ways.

It would ban all clauses related to the solicitation of co-workers, regardless of income levels. It would prohibit restraint clauses that courts currently consider to be warranted on the basis that they support workforce stability – and it would prohibit cascading restraints. These changes are not targeted to *'lower-paid and vulnerable workers'* but will also regulate restraints involving higher-paid employees.

While the MCA recognises the importance of ensuring restraint clauses are not misapplied, or that their effect is not overstated in a way that discourages employees from pursuing better employment opportunities, there has been insufficient recognition of the legitimate role they have in incentivising long-term investment in people, training and high-performing teams. By adopting a broad rather than a targeted approach, the draft bill will unintentionally reduce the incentive for employers to invest in stable, long-term, secure jobs.

Compliance burdens will reduce productivity and deter investment

The MCA is concerned that the compliance burden associated with implementing the measures in the draft bill is significantly understated. While the reforms would operate prospectively, the draft bill would apply the new rules to existing contracts that are subsequently varied, meaning that small contractual variations could potentially affect an existing restraint even where the restraint itself is unchanged. This creates a substantially greater compliance task than simply grandfathering existing arrangements. It will require businesses to identify and review potentially large numbers of contracts and consider whether alternative protections are required. The prospect of civil and criminal penalties also substantially increases the compliance risks for businesses and boards, in

[6] Draft bill, s 45ADA(3).

circumstances where recent research suggests compliance is now consuming 55 per cent of board time.[7] Accordingly, the MCA cannot support legislation in its current form, particularly given the expansive reach and uncertainty created by the new cartel provisions.

Recommendations

1. The proposed use of the criminal cartel provisions of the *Competition and Consumer Act* is not appropriate and should be abandoned.
2. The proposed draft amendments to the *Fair Work Act* should be substantially revised and targeted to the government's original intent, which was primarily aimed at supporting lower-paid and vulnerable workers.
3. The government should pursue more targeted approaches and preserve existing common law tests for what is a 'reasonable' and 'necessary' restraint, rather than attempting to replace such tests with prescriptive statutory rules that are likely to have unforeseen consequences.

[7] Australian Institute of Company Directors, *$160 billion and counting The cost of Commonwealth regulatory complexity*, November 2025.

AMENDMENTS TO THE *COMPETITION AND CONSUMER ACT* – NEW CRIMINAL 'CARTEL' PROVISIONS

Background – Competition Law is not appropriate to regulate such conduct

The draft bill proposes a novel expansion of the criminal cartel provisions of the *Competition and Consumer Act 2010* (the Competition Law) to prohibit a range of conduct, specifically:

1. 'No-poaching' arrangements that would prohibit any arrangement that

   …has the purpose, or has or is likely to have the effect, of directly or indirectly:

   (a) preventing a party from recruiting, soliciting, or hiring another party's current, former or future staff; or

   (b) imposing notification or other requirements before a party can conduct any part of, or complete, a process that results in the recruiting, soliciting or hiring of another party's current, former or future staff.[8]

2. 'Wage-fixing' arrangements that would prohibit any arrangement that:

   …has the purpose, or has or is likely to have the effect, of directly or indirectly fixing, maintaining, decreasing or controlling:

   (a) remuneration; or

   (b) terms and conditions of employment;

   of the current or future staff of 2 or more parties to the contract, arrangement or understanding.[9]

This is not an appropriate way to regulate employment arrangements. The prohibitions against 'wage-fixing' are so broad that they would potentially impact on thousands of typical commercial and employment arrangements that, to some extent, 'control' or 'manage' wages or conditions of employment between multiple parties. Indeed, much of the existing system of employment regulation in Australia is predicated on the desirability of 'managing' and 'controlling' such matters to provide for consistency or uniformity between multiple employers. Moreover, much of the government's policy agenda since 2022 has been focussed on increasing the level of control and management of terms and conditions of employment across employers, as is outlined below.

Historically, there has always been a clear distinction between competition legislation and legislation regulating employment terms and conditions. Competition legislation regulates commercial conduct and arrangements between businesses while the employment legislation governs arrangements between businesses and their employees. The two are fundamentally distinct. The Competition Law and its predecessor legislation have always included an exemption for conduct relating to terms and conditions of employment, recognising that such arrangements may otherwise be 'anti-competitive', and are already subject to their own extensive system of regulation. The broad nature of this exemption is outlined below.

The draft bill would reverse this long-standing exemption by expanding existing anti-cartel provisions of the Competition Law and applying them to employment conditions, for which they were never designed and are fundamentally ill-suited. The practical effect will be to risk criminalising a vast range of legitimate commercial arrangements between businesses that, to some extent, 'manage' or 'control' even a small range of 'conditions' of employment, for entirely legitimate reasons.

[8] Draft bill, s 45ADA(2).
[9] Draft bill, s 45ADA(3).

The employment exemption under the Competition Law

Section 51 of the Competition Law exempts a broad range of employment-related conduct, as follows:

> *(2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:*
>
> *(a) to any act done, or concerted practice, to the extent that it relates to the remuneration, conditions of employment, hours of work or working conditions of employees; or*
>
> *(aa) to:*
>
> *(i) the making of a contract or arrangement, or the entering into of an understanding; or*
>
> *(ii) any provision of a contract, arrangement or understanding;*
>
> *to the extent that the contract, arrangement, understanding or provision relates to the remuneration, conditions of employment, hours of work or working conditions of employees; or*
>
> *(b) to any provision of a contract of service or of a contract for the provision of services, being a provision under which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which he or she may engage during, or after the termination of, the contract;*

The provisions are drafted too broadly and will criminalise normal commercial activity

The draft bill includes new cartel provisions that have broader application than the government's earlier announcement suggested.

In its joint media release of 25 March 2025, the government set out its intention as follows:

> *We will also close loopholes in competition law that currently allow businesses to:*
>
> - *Fix wages by making anti-competitive arrangements that cap workers' pay and conditions, without the knowledge and agreement of affected workers.*
> - *Use 'no-poach' agreements to block staff from being hired by competitors.*[10]

By contrast, the provisions of the draft bill are considerably broader, as outlined below.

Unworkable definition of 'wage-fixing'

The 'wage-fixing' prohibition in s. 45ADA(3) of the draft bill is not limited to arrangements that are *'anti-competitive'*, or that *'cap workers' pay and conditions'*. Rather, it captures any arrangements or undertakings that have the purpose or likely effect of *'directly or indirectly fixing, maintaining, decreasing or controlling'* remuneration or terms and conditions of employment, or engagement of each other's current or future staff. Unlike the existing cartel provisions in the Competition Law, the draft bill does not include any requirement that there be any anti-competitive intent behind such arrangements.

The definition will capture workplace arrangements between employers in the mining industry that simply set out basic requirements for the organisation of work. These include commercial agreements that contain negotiated requirements related to:

- Hours of work, roster patterns or staff availability
- FIFO and DIDO arrangements
- Access to site facilities

[10] The Hon Jim Chalmers MP, Senator the Hon Murray Watt and the Hon Dr Andrew Leigh MP, '*Cracking down on non-compete clauses to boost wages and productivity'*, Joint Media Release, 25 March 2025. https://ministers.dewr.gov.au/chalmers/cracking-down-non-compete-clauses-boost-wages-and-productivity

- Provision of training

Each of these, and potentially other provisions, could breach the cartel provisions if they have, even indirectly, the likely effect of 'controlling' or 'maintaining' a term or condition of employment or engagement of the staff of two or more parties.

Example: Service contractor agreeing with principal on access to facilities and rostering of staff

Under a commercial arrangement involving the supply of services at a mine site, a service contractor agrees with a mining company that its employees will have access to on-site facilities that are shared with the principal's directly employed workforce.

The commercial agreement may contain provisions governing access to those facilities, including the terms or times at which they may be used. The employees of each business may also have terms in their respective employment contracts or supporting policies that determine their rights to use those facilities at work.

Such an arrangement could potentially trigger the proposed prohibition on 'wage-fixing'. Proposed s 45ADA(4) allows relevant provisions in different contracts to be considered together. The combined effect of the commercial agreement and the relevant employment conditions for each group of employees could therefore potentially be characterised as having the 'likely effect' of 'indirectly' 'controlling' a term or condition of employment for the purposes of the cartel provision in proposed s 45ADA(3).

Similar scenarios could arise in relation to ordinary commercial arrangements governing rostering, hours of work, staff availability and other aspects of how work is organised and coordinated between businesses. Criminal cartel conduct is punishable by a maximum of 10 years imprisonment.

'No-poaching' provisions are unnecessarily broad

The 'no-poaching' prohibition is similarly broadly drafted and extends beyond the government's previously stated narrow objective of preventing arrangements that '*block staff from being hired by competitors'*. Not only does proposed section 45ADA(2) capture provisions that *'directly or indirectly'* prevent the *'recruitment, solicitation or hiring'* of another party's staff, but it also extends to prohibiting *'notification, consent and fee requirements'* that may apply before any recruitment can occur.

It is difficult to see the justification for attaching *criminal penalties* to conduct that would merely implement a notification requirement – for example, when one employer intends to make an offer of employment to another employer's staff in circumstances where they are actively working at the same mining project. Notification and orderly, pre-agreed processes to manage such movements of employees between employers are essential to support workforce planning and project continuity, particularly where the unplanned departure of key personnel could disrupt operations or require the rapid replacement and retraining of workers.

The draft bill is unworkable

The draft bill not only deals with prohibiting particular types of arrangements that constitute 'wage-fixing' or 'no-poaching' arrangements, but also requires that, in considering the effect of such arrangements, consideration must also be given to provisions in other agreements involving at least one of the same parties.[11]

This means that commercial contracts must be considered alongside individual employment agreements to ascertain their potential combined 'likely effect', whether direct or indirect. This requirement greatly expands the possible permutations of contractual arrangements and agreements that could give rise to potential cartel exposure. A range of routine arrangements in mining ventures

[11] Draft bill, s 45ADA(4).

could be deemed to be criminal cartels. Once again, there is no requirement for any anti-competitive intent to be demonstrated to criminalise such arrangements.

This creates a substantial compliance and risk-management burden, as businesses may need to identify and assess the interaction between provisions across large numbers of employment, service and supplier contracts rather than simply determining whether individual agreements comply with the legislation.

Given the potential criminal consequences, businesses and their boards cannot be expected to simply adapt their commercial practices to reduce their risk of exposure to the new criminal provisions. A range of existing arrangements will simply become untenable.

The proposed 'exemptions' are narrow and impractical

The draft bill recognises that some legitimate commercial arrangements could otherwise be caught by the proposed cartel provisions and therefore creates 'targeted exemptions' for the following arrangements:

- Joint ventures[12]
- Secondments[13]
- Labour hire[14]

The explanatory material states that these exemptions are justified because:

> *…these activities may facilitate economically beneficial outcomes that either benefit the affected workers, or benefit the broader economy with negligible impact on affected workers.*[15]

However, the draft bill will not achieve this objective in practice.

The proposed joint venture exemption, for example, is narrowly framed and cannot provide businesses with confidence that they will be able to avoid the cartel provisions when entering joint ventures. It has several flaws:

- First, it only applies where the joint venture parties establish a specific body corporate to undertake the joint venture. This is not always the case, and it is not uncommon in mining to operate under an unincorporated joint venture structure. Even where a body corporate is established, only that entity will have the protection of the exemption. The joint venture parties may still have separate supply agreements that relate to the venture and involve staffing arrangements.
- Second, the exemption is conditional on the proof of matters that are inherently uncertain, including whether the relevant 'wage-fixing' or 'no-poaching' provision is '*reasonably necessary'* for undertaking the joint venture. This inevitably creates an unacceptable level of commercial risk and uncertainty.
- Third, the exemption can only be utilised if the party undertakes a substantial and onerous process of seeking and obtaining consent from all affected employees. This requires the business to give written notice to individual employees and each employee to give their consent before the exemption can take effect.[16] This is unnecessary 'red tape' that will inhibit rather than enhance productivity.

There is no exemption for mining service contracting

The absence of any exemption for service contracting is a significant gap in the draft bill. Service contractors employ approximately 40 per cent of mining workers and are an integral part of the way

[12] Draft bill, s 45AO(1); s 45AP(1A).
[13] Draft bill, s 45AUB; s 45AUC.
[14] Draft bill, s 45AUD; s 45AUE.
[15] Explanatory material, para 1.29.
[16] Draft bill, s 45AO(3); s 45AP(1B).

mining operations are organised and delivered. They do not simply supply labour. They provide specialised services and capability, which can include full-service mining, civil construction, infrastructure development, equipment maintenance, drilling and exploration, logistics, site services and consultancy.

Agreements between mining project principals and their service contractors will typically include terms that 'manage' or 'control' certain conditions of employment, such as hours of work or directions for the type of work to be performed. These all risk triggering the criminal cartel prohibition under the draft bill.

The rationale for the exemptions for joint ventures should apply equally to service contracting. These arrangements '*facilitate economically beneficial outcomes that either benefit the affected workers, or benefit the broader economy'.* It is unclear why labour hire and joint ventures should receive exemptions while service contracting does not.

Routine commercial transactions risk becoming criminalised

The mining industry is characterised by regular asset sales, mergers or acquisitions, which can occur during the life cycle of almost any long-term mining project. Even the most innocuous terms of agreements for such transactions are likely to be captured by the 'cartel' provisions.

For example, a typical business sale agreement in which the acquirer of an asset agrees to take on the existing employees of the project and maintain their existing terms and conditions of employment is likely to constitute unlawful 'wage-fixing' given the agreement involves directly or indirectly 'fixing', 'managing' and 'controlling' remuneration and conditions of employment.

Recommendations

1. The proposed use of the criminal cartel provisions of the Competition and Consumer Act is not appropriate and should be abandoned.

AMENDMENTS TO THE *FAIR WORK ACT* – PROHIBITIONS ON CONTRACTUAL RESTRAINT TERMS

The draft bill will make a number of amendments to the *Fair Work Act 2009* to prohibit or regulate certain terms in employment contracts. The key amendments are:

1. Employees whose earnings are at or below the high-income threshold (currently $190,100) would have a right to be free of 'non-compete' terms.[17] Such terms would have no effect.[18]
2. For employees above the threshold, a non-compete term would only be enforceable if it is reasonable and necessary to protect confidential information or professional or personal relationships with customers, clients or professional networks.[19]
3. Employees regardless of earnings would have a right to be free of 'co-worker non-solicitation' terms and such terms would be prohibited and have no effect.[20]
4. The legitimate business interests for which restraints of trade are permitted would be codified, with the effect that 'workforce stability' could no longer constitute a legitimate business interest.[21]
5. Cascading restraint terms would not be permitted and would have no effect.[22]
6. Civil penalties would apply to employers entering into a contract of employment or other workplace arrangements that include a prohibited non-compete term or co-worker non-solicitation term.[23]
7. Civil penalties may also apply where an employer threatens to enforce a non-compete term that is unenforceable.[24]

It is important to note that, unlike the proposed amendments to Competition Law, these measures are not introducing a new legal regime but are amending an existing, well-established body of law that already deals with such matters.

The current common law already places significant limits on the use of post-employment restraints. At common law, a restraint is *prima facie* unenforceable, and an employer seeking to enforce it must establish that it is reasonable and no wider than necessary to protect their legitimate business interest. Australian courts have applied this approach for decades and routinely refuse to enforce restraints that go beyond what is reasonably required. The current law is already weighted in favour of employees (which the MCA supports) and businesses that seek to use restraints already face serious limits.

The government has identified a concern that the mere inclusion of a restraint may have a 'chilling' effect, by discouraging employees from seeking alternative employment even where the restraint would ultimately be unenforceable. This is a legitimate concern, and the MCA would support proportionate changes to address it, such as measures to improve employers' and employees' understanding of the existing legal limits on restraints.

The government's initial announcement referred to its intent to '*ban non-compete clauses for most workers that have no justification'*[25] (emphasis added). However, the draft bill goes much further.

[17] Draft bill, s 333ZA.
[18] Draft bill, s 333ZB.
[19] Draft bill, ss 333Z, 333ZJ(2).
[20] Draft bill, ss 333ZF, 333ZG, 333ZH.
[21] Draft bill, s 333ZJ(1)–(4).
[22] Draft bill, s 333ZJ(5), (6).
[23] Draft bill, ss 333ZA, 333ZG.
[24] Draft bill, s 333ZC.
[25] The Hon Jim Chalmers MP, Senator the Hon Murray Watt and the Hon Dr Andrew Leigh MP, 'Cracking down on non-compete clauses to boost wages and productivity', Joint Media Release, 25 March 2025: https://ministers.dewr.gov.au/chalmers/cracking-down-non-compete-clauses-boost-wages-and-productivity

Rather than addressing the unreasonable use of post-employment restraints, it would prohibit entire categories of restraints regardless of whether a particular restraint is reasonable in the circumstances. This approach replaces the flexible, case-by-case approach under the common law, which has functioned successfully to date, with prescriptive statutory rules and penalties which create both foreseeable and unforeseen consequences.

The fundamental concern with this approach is that it is not attempting to address a real mischief but to replace a functioning and fit-for-purpose common law principle with an unwarranted and complex new statutory test. This test contains two fundamental flaws:

1. It replicates some elements of existing common law principles but not all, with no apparent rationale for this selective approach
2. No statutory test is flexible enough to deal with every individual scenario that may arise in employment contract disputes.

The draft bill should be substantially reconsidered.

Most importantly, any revised draft bill should fully preserve the existing common law discretion for courts to judge each case on its facts and merits. The legislation should not attempt to replace established and refined common law tests with a new statutory test.

Unintended consequences for industry

Given how broad the changes are, the proposed restrictions may have significant unintended consequences that will not become apparent until after implementation. Some potential unintended consequences are outlined below.

Workforce instability and business disruption

Mining businesses depend on experienced teams to perform the diverse and often complex work required for mining. Some mining work cannot legally commence unless qualified people fill statutory safety roles. If individuals or entire teams with critical skills and responsibilities leave an employer within a short period, particularly at a crucial stage of a project, the business may not be able to replace them quickly enough to avoid disruption.

Even where staff can be rapidly replaced, they may need time to learn the role and work effectively. Post-employment restraint clauses, as enforced by the common law, may play a role in managing such workforce risks. While there may be other contingencies available to employers to guard against business disruption related to staffing, these may carry costs that have not been accounted for in assessing the productivity benefits said to accrue from these proposals.

It is also important to note that in industries that compete for employees with specialised skills, such as mining, employees are well-remunerated for their skills. They often have significant bargaining power of their own and freely enter into restraint terms in return for higher remuneration. This is a positive consequence of healthy competition for their services. If any such restraint terms turn out to be unreasonable, then they can be either challenged or ignored by the employee.

The explanatory memorandum to the draft bill[26] states that it is intended to overturn the effect of a 2006 decision of the New South Wales Supreme Court that recognised that workforce stability was a legitimate business interest.[27] However, no explanation is given as to why this is considered desirable and why this particular business interest is now regarded as illegitimate.

Impact on investment in skills, teams and culture

Mining businesses invest heavily in recruiting, training and developing employees and building high-performing teams, often over many years. That investment also supports workplace cultures based on mutual long-term commitments and permanent, secure jobs – outcomes that align with the

[26] Explanatory material, paragraphs 2.114–2.115.
[27] Cactus Imaging Pty Ltd v Glenn Peters [2006] NSWSC 717.

government's policy of promoting 'job security', which is now also enshrined as an object of the *Fair Work Act*. Both employees and businesses benefit from these arrangements – employees have the benefit of the business investing in their upskilling, while the business has confidence that it will receive a return on its investment. In the mining industry, an employer's investment in its most skilled employees can be as important to its operations as its investments in its most valuable plant and equipment. The business has a legitimate interest in being able to retain each of them.

The Explanatory Memorandum of the draft bill acknowledges that '*The need for an employer to maintain a stable workforce has been identified as a legitimate business interest'*.[28] However, the draft bill would make it unlawful for any employer to attempt to protect such an interest. It does not attempt to impose any 'reasonable' or 'necessary' limits on such attempts. No explanation is given for this approach.

The inability to contractually manage the risks and costs of abruptly losing staff and capabilities may affect decisions about how businesses recruit, train and develop their workforces. Treasury's productivity analysis does not address these significant costs and downsides.

Potential to encourage disruptive recruitment strategies

The draft bill in its current form will remove existing legal protections for businesses that enable them to take reasonable action to protect their workforces from aggressive 'poaching' intended to undermine the business. The draft bill would enable undermining conduct, such as the calculated use of recruitment to undermine competitors. For example, a business could recruit several members of a competitor's project team at a critical point in a project, knowing that their departure could disrupt the competitor's operations.

While recruiting employees from competitors is a legitimate form of competition, removing existing restraints will make it easier to use predatory conduct to disrupt a competitor's workforce. The existing common law allows for businesses to design some level of protection against this. The draft bill would not allow for any protection.

Other increased business costs

Businesses may respond to the proposed changes by relying more heavily on other mechanisms to manage workforce risks, including longer notice periods, 'garden leave', fixed-term contracts, confidentiality obligations and retention arrangements. These measures may impose unaccounted-for costs on both employers and employees without providing the same targeted protection as a reasonable contractual restraint.

The cumulative impact will be a reduction in productivity due to greater commercial uncertainty and an increase in compliance activity.

Contract 'variations' and the need to protect existing arrangements

The draft bill creates uncertainty about whether existing employment arrangements will become subject to the new regime. The draft bill's prohibitions would apply where an existing employment arrangement is 'varied' after commencement.[29] However, employment arrangements are routinely changed in minor ways without any intention to revisit post-employment restraints, for example through promotions, changes in duties, changes to incentive plans or other employment terms or annual remuneration reviews. Any of these changes may result in a contract 'variation' that means the original restraint becomes invalid.

This creates a significant practical problem for businesses with large workforces and long-standing employment contracts. If routine changes are sufficient to invalidate an existing restraint under the new regime, businesses may need to review and restructure large numbers of existing contracts

[28] Explanatory material, para 2.8.
[29] Draft bill, s 143.

simply because employees receive promotions, remuneration increases or other agreed changes to their employment.

The bill should make clear that an existing restraint clause continues to be governed by the law applying when it was agreed, unless the restraint itself is varied by agreement. Unrelated variations or other changes to employment should not, by themselves, cause an existing restraint to become subject to the new regime.

Recommendations

2. The proposed draft amendments to the *Fair Work Act* should be substantially revised and targeted to the government's original intent, which was primarily aimed at supporting lower-paid and vulnerable workers.
3. The government should pursue more targeted approaches and preserve existing common law tests for what is a 'reasonable' and 'necessary' restraint, rather than attempting to replace such tests with prescriptive statutory rules that are likely to have unforeseen consequences.

CONFLICT WITH OTHER COMMONWEALTH LAWS AND GOVERNMENT POLICIES

The proposed cartel provisions in the draft bill may also conflict with other government laws and policies under development that require or encourage businesses to engage with suppliers on wages, conditions and workforce practices. Modern slavery obligations, for example, can require businesses to use contractual and due-diligence measures to adjust terms of employment in their supply chains. The proposed 'Secure Australian Jobs Framework' would similarly promote fair wages and conditions in Commonwealth procurement and supply chains. However, conduct that businesses will be required to undertake under these policies will also expose them to criminal liability for 'wage-fixing' under the draft bill.

Secure Australian Jobs Framework

The government is currently conducting a separate consultation process on its proposed 'Secure Australian Jobs Framework' through the Department of Finance and the Department of Employment and Workplace Relations. [30]

The policy is based on the principle that private businesses that receive Commonwealth funding be required to '*deliver safe and secure work with good conditions for workers*.' [31]

It proposes to enforce this obligation by imposing a range of workplace obligations on businesses as a condition of them tendering for Commonwealth Government contracts. In almost all cases, they will require those businesses to either agree with the Commonwealth, or agree with their own contractors, to engage in conduct that is 'wage-fixing' under the draft bill.

The proposed Code will require businesses to '*structure their business's workforce arrangements to support secure work*.' These requirements under the Code will include, amongst other things: [32]

- Entering into agreements with any labour hire contractors for their employees to receive the same pay as the employees of the business itself.
- Entering into agreements with the Commonwealth to fix wages for certain employees at specific levels, in 'government-funded sectors'.
- Entering into agreements with their contractors to limit fly-in, fly-out (FIFO) or drive-in, drive-out (DIDO) arrangements unless they are 'genuinely necessary'.
- Employing the same employees on the same terms and conditions as the previous contractor when the business is awarded a new Commonwealth contract.

On the one hand, such conduct is encouraged by the Commonwealth under its 'Secure Australian Jobs Framework', yet on the other hand the exact same conduct would otherwise attract criminal liability, including potential imprisonment, under the draft bill. It is impossible to reconcile these two contradictory positions. There is inherent confusion in the government's approach.

'Community Benefit Principles' under the 'Future Made in Australia' policy

The government's 'Future Made in Australia' legislation introduced new rules for government funding of certain private sector projects. These include 'Community Benefit Principles' with which funding recipients must comply. These will also include a requirement to '*Promote safe and secure jobs that are well paid and have good conditions*.'[33]

[30] https://consultations.dewr.gov.au/secure-australian-jobs-framework-draft-framework
[31] '*Secure Australian Jobs Framework – Draft September 2026*', Department of Employment and Workplace Relations (page 2).
[32] '*Secure Australian Jobs Framework – Draft September 2026*', Department of Employment and Workplace Relations (pages 5–6).
[33] '*A Future Made in Australia Bill will build a stronger, cleaner economy*', Prime Minister media release, 5 July 2024: https://www.pm.gov.au/media/future-made-australia-bill-will-build-stronger-cleaner-economy

The government has stated that '*to the extent possible, requirements under this Principle will align with the requirements of the Secure Australian Jobs Code*.'[34] In practice, this may also require businesses to coordinate with their suppliers to ensure they adopt certain workplace terms and conditions for their own employees, such that they trigger the 'wage-fixing' provisions under the draft bill.

***Modern Slavery Act* – proposed amendments**

Australian businesses are already subject to obligations to monitor their conduct in relation to their supply chains in order to meet certain employment standards under the *Modern Slavery Act 2018*.

At the same time as the Treasury's current consultation on the draft bill, the Attorney-General's Department has also conducted a separate consultation process on expanding various obligations under the *Modern Slavery Act*.[35] This will include introducing new criminal offences for businesses that '*fail to prevent modern slavery in their supply chains*'.[36]

The specific proposals would include the following obligations:[37]

- A positive duty to investigate all elements of a supply chain to assess whether any 'labour, materials or inputs' in any element are the result of 'modern slavery' practices.
- If so, to then take 'reasonable steps' to modify relevant terms and conditions of work within their supply chain.

On the one hand, failure to comply with these obligations could constitute a criminal offence under the government's proposed *Modern Slavery Act* amendments, punishable by a penalty of up to $36 million. Yet attempting to comply could also constitute cartel conduct under the draft bill, with potential criminal sanctions.

Multi-employer bargaining

Under the government's 2022 amendments to the *Fair Work Act* that introduced involuntary multi-employer bargaining, competing employers can be compelled by unions to engage in multi-employer bargaining against their will, with the intent that those businesses agree to fix uniform wages and conditions across their workforces.

In the first case to apply this legislation, three competing coal mining businesses in New South Wales (each a member of the MCA) were compelled to engage in multi-employer bargaining with one union with a view to setting common wages and conditions.[38] This required them to engage in conduct that would otherwise constitute criminal cartel 'wage-fixing' under the draft bill.

The government's policy intent is confused conduct that would be criminalised under the draft bill is actively supported when authorised as multi-employer bargaining under the *Fair Work Act*.

'Same job, same pay'

Under other amendments to the *Fair Work Act* made in 2023, the government introduced the 'same job, same pay' regime that enables the Fair Work Commission to issue 'Regulated Labour Hire Arrangement Orders' that require labour hire businesses (and potentially service contractors) to pay the same wage rates as 'host' businesses, known as the 'Protected Rate of Pay'. These orders have often required businesses to enter into agreements or arrangements to determine the relevant 'protected' rates of pay. A further objective of the legislation was to encourage host businesses and

[34] See, for example, guidance provided by the Department of Industry, Science and Resources: https://consult.industry.gov.au/future-made-in-australia-community-benefit-principles-draft-public-guidance/cbp-1-and-2-webinarPrinciples: draft public guidance - Department of Industry, Science and Resources
[35] https://consultations.ag.gov.au/crime/modern-slavery/
[36] https://ministers.ag.gov.au/media-centre/albanese-government-combatting-modern-slavery-16-07-2026
[37] '*Strengthening Australia's legislative response to modern slavery in supply chains'* Consultation Paper, Attorney-General's Department, August 2026: https://consultations.ag.gov.au/crime/modern-slavery/user_uploads/consultation-paper.pdf
[38] *APESMA V Great Southern Energy Pty Ltd T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd* [2024] FWCFB 253: https://www.fwc.gov.au/documents/sites/b2023-1339/2024fwcfb253.pdf

contractors to voluntarily agree to fix the same rates of pay. This conduct could also be criminalised as 'wage-fixing' under the draft bill, notwithstanding its 'exemption' for labour hire.

'Wage-fixing' – separate treatment for unions and businesses

There is a fundamental inconsistency in the government's approach to wage competition. Since 2022, the government has introduced a series of workplace relations reforms that either create or expand opportunities for unions to pursue common wage outcomes across multiple businesses, including:

- Voluntary multi-employer bargaining agreements
- Involuntary multi-employer bargaining, known as 'Single Interest Employer Authorisations'
- 'Same job, same pay' orders
- 'Contractual chain orders' in the road transport industry

Each of these activities constitutes a form of centralised wage-fixing, which should be regarded as having an associated productivity cost. They were implemented under the rationale that wage competition between businesses should be discouraged – for example, in 2022, then Minister for Employment and Workplace Relations Tony Burke defended multi-employer bargaining on the basis that businesses should not compete on who can pay the lowest wage.[39]

On the other hand, the government's approach to the draft bill starts from the opposite position – that competition for employees on the basis of wages improves and supports productivity. In announcing the policy, the relevant Ministers stated that *'our changes will make it easier for workers to switch to a better job will boost wages'*.[40]

The MCA supports healthy competition between businesses to attract and retain employees. Such competition has helped to enable Australian mining to become the nation's highest-paying and most productive industry. It is also an industry characterised by broad opportunities for employee mobility and advancement. Unfortunately, the draft bill in its current form would have a range of unintended consequences. These will serve to increase risk, criminalise routine corporate arrangements, discourage investment in staff, increase unnecessary compliance activity and ultimately reduce productivity.

[39] Hon Tony Burke MP, speech to the National Press Club, 16 November 2022.
[40] The Hon Jim Chalmers MP, Senator the Hon Murray Watt and the Hon Dr Andrew Leigh MP, '*Cracking down on non-compete clauses to boost wages and productivity'*, Joint Media Release, 25 March 2025: https://ministers.dewr.gov.au/chalmers/cracking-down-non-compete-clauses-boost-wages-and-productivity