

Submission to the Treasury consultation on the Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026

October 2026

The Australian Retail Council (ARC) welcomes the opportunity to provide feedback on the exposure draft of the Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026.

ARC represents the Australian retail sector. Valued at \$444 billion, retail supports more than 1.4 million jobs, including employing more young Australians than any other industry. Retail is embedded throughout the economy and plays a critical role in the supply chain of Australian businesses. ARC advocates for policies and reform that drive growth, resilience, and long-term prosperity for Australian retail and the millions who rely on it.

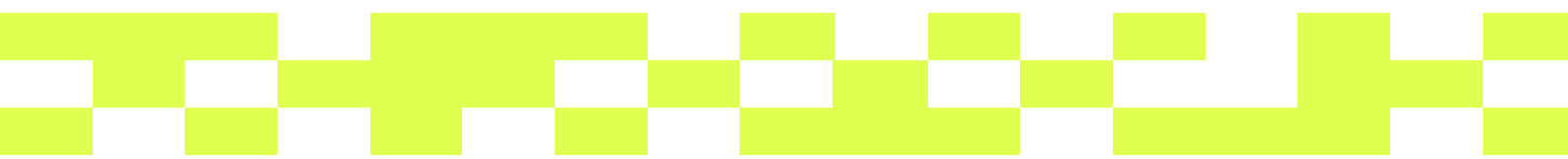
Executive summary

ARC submits that aspects of the exposure draft represent a significant expansion of the reforms originally proposed to address barriers to worker mobility and is concerned that the broader framework does not appropriately balance worker mobility with the legitimate interests of employers. In particular, ARC is concerned that the exposure draft would:

- prohibit non-compete terms for employees at or below the high income threshold, and all casual employees and pieceworkers, under proposed sections 333Z and 333ZA of the *Fair Work Act 2009*
- prohibit co-worker non-solicitation terms for all employees under proposed sections 333ZF to 333ZH
- prescribe the legitimate interests for which otherwise permitted post-employment restraints may be used under proposed section 333ZJ(1) to (4)
- prohibit cascading restraint clauses under proposed section 333ZJ(5)
- expand the cartel provisions of the *Competition and Consumer Act 2010* to cover no-poach and wage-fixing provisions under proposed section 45ADA.

The retail industry has changed substantially in recent years. Competitive advantage increasingly derives from data, technology, pricing and promotional strategies, supply chain capability, customer insights, organisational knowledge and, importantly, people. An employee's remuneration does not necessarily reflect their responsibility, access to commercially sensitive information or capacity to cause significant commercial harm following their departure.

ARC recommends targeted amendments to ensure the final framework appropriately balances worker mobility with legitimate business interests.



Summary of Policy Recommendations

ARC recommends that the Australian Government:

1. High income threshold: proposed sections 333Z to 333ZB

Retain the high income threshold as the general rule but introduce a narrow exception allowing a restraint below the threshold where an employer demonstrates that the employee's responsibilities or access to commercially sensitive information creates a legitimate need for protection and the restraint satisfies section 333ZJ.

2. Co-worker non-solicitation: proposed sections 23C and 333ZF to 333ZH

Replace the blanket prohibition with a threshold-based approach. At minimum, permit reasonable co-worker non-solicitation clauses for employees above the high income threshold, subject to section 333ZJ.

3. Legitimate business interests: proposed section 333ZJ(2)

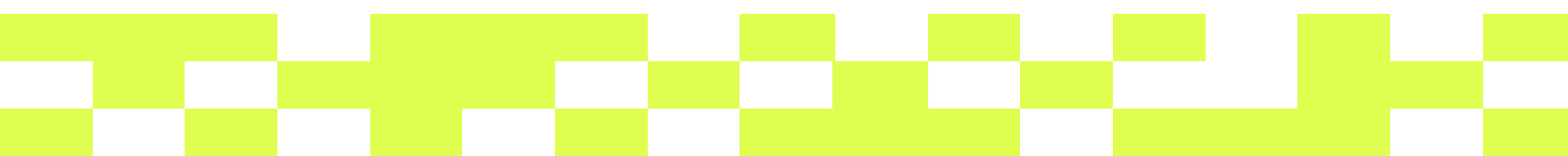
Recognise workforce stability as a legitimate business interest where there is a demonstrated risk of material workforce disruption and retain limited flexibility for courts to recognise other substantial legitimate business interests, subject to the statutory necessity and reasonableness requirements.

4. No-poach and wage-fixing arrangements: proposed section 45ADA of the *Competition and Consumer Act 2010*

Ensure the provision and associated exemptions provide clear protection for legitimate commercial arrangements containing incidental workforce provisions, supported by detailed ACCC guidance before commencement.

5. Existing arrangements: Schedule 2, item 9, proposed clauses 143(2) and (3)

Apply the new regime to an existing restraint only where the restraint itself is introduced or materially varied after commencement, preserving the legal treatment of existing restraints where other, unrelated terms of the employment arrangement are subsequently varied.



1. The high income threshold is not an appropriate stand-alone proxy for business risk

Proposed sections 333Z, 333ZA and 333ZB

The high income threshold is not an indicator of seniority, responsibility or access to commercially sensitive information.

In retail, employees below the threshold may manage substantial teams, have significant commercial decision-making responsibilities or have access to sensitive information concerning pricing, promotional strategies, supplier negotiations, product pipelines, sourcing arrangements, customer insights, operational systems and future business strategy. For example, member feedback indicates that roles such as sales representatives and business development managers may fall below the proposed threshold while having access to confidential customer information, pricing strategies, commercial terms, market intelligence and key customer relationships.

This limitation is particularly significant because the proposed test operates as a bright-line threshold. For private sector employers, there is no capacity below the threshold to demonstrate that an employee's particular responsibilities or access to commercially sensitive information warrant a reasonable and proportionate restraint. The result is that employees presenting materially different levels of commercial risk are treated in the same way based principally on remuneration.

ARC recommends retaining the high income threshold as the general rule but providing a narrow exception where an employer can demonstrate that a restraint is reasonably necessary because of the employee's particular responsibilities or access to commercially sensitive information and satisfies the reasonableness requirements in proposed section 333ZJ.

This would preserve the Government's intended protection for most low and middle-income employees while recognising that remuneration alone cannot anticipate every circumstance in which a legitimate business interest may require protection.

Recommendation 1

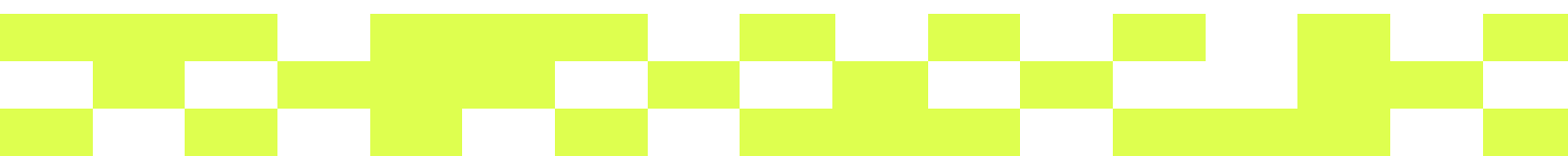
Retain the high income threshold as the general rule but introduce a narrow exception allowing a restraint below the threshold where an employer demonstrates that the employee's responsibilities or access to commercially sensitive information creates a legitimate need for protection and the restraint satisfies section 333ZJ.

2. Confidentiality protections do not always address the same risk as a non-compete

Proposed sections 23E and 333ZJ

ARC supports the preservation of targeted confidentiality and non-disclosure protections. However, confidentiality obligations and non-compete restraints address different risks.

The practical difficulty is that confidential information is not something an employee can necessarily separate from the knowledge and experience they carry with them. This is particularly relevant for employees with detailed knowledge of customer relationships, pricing, commercial terms and market intelligence, regardless of whether their remuneration exceeds the high income threshold.



Confidentiality protections can provide a remedy where misuse or disclosure can be established. However, by that point, commercially sensitive information may already have been used or disclosed, and the resulting harm may be difficult to reverse. A carefully targeted restraint can instead manage the risk before that harm occurs.

This distinction matters because removing preventative mechanisms may lead employers to rely increasingly on alternative means of protecting sensitive information. This may include longer contractual notice periods, paid gardening leave or restricting access to sensitive information within the organisation. Proposed section 23E(2)(c) expressly preserves agreed notice periods and the explanatory materials contemplate paid gardening leave as falling outside the non-compete prohibition.

Those alternatives may impede mobility for longer during employment or reduce information-sharing and employee development, rather than producing the more efficient labour market outcome sought by the reforms.

ARC recommends that the narrow exception proposed under sections 333Z and 333ZA discussed above expressly accommodate employees with access to commercially sensitive information where an employer can establish that confidentiality obligations alone would not reasonably protect the relevant interest and the restraint satisfies section 333ZJ.

This would establish a substantially higher threshold than merely demonstrating that an employee had access to confidential information, while preserving access to a targeted restraint where confidentiality protections alone cannot adequately protect the employer's legitimate business interests.

Accordingly, ARC's proposed narrow exception under Recommendation 1 is intended to address circumstances where confidentiality protections alone are insufficient to protect a legitimate business interest.

3. A blanket prohibition on co-worker non-solicitation clauses is disproportionate

Proposed sections 23C and 333ZF to 333ZH

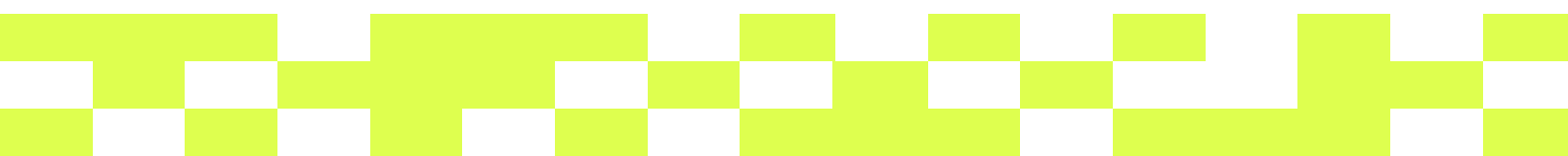
The Government's original policy announcement identified co-worker non-solicitation clauses as an area for further consultation, rather than part of its initial commitment to prohibit non-competes for workers below the high income threshold.

Co-worker non-solicitation clauses also operate differently from non-competes. A non-compete can prevent an employee from moving to a competitor altogether. A co-worker non-solicitation clause allows the employee to move but can prevent them from actively recruiting employees from their former employer.

This distinction is significant for retail businesses. People, organisational knowledge and effective teams can provide significant operating and competitive advantages. The deliberate recruitment of multiple employees by a departing employee may therefore cause materially greater disruption than an individual employee choosing to change jobs.

ARC recommends that co-worker non-solicitation clauses be subject to the same threshold and safeguards as non-compete clauses, rather than prohibited for all employees. Where permitted, such clauses should remain subject to the necessity and reasonableness requirements in proposed section 333ZJ.

This would provide a more proportionate approach. Under the current drafting, an employer may potentially impose a reasonable non-compete on a senior employee above the high income threshold, preventing them from joining a competitor altogether, but cannot adopt the less restrictive alternative of allowing that employee to move while temporarily preventing them from actively soliciting their former team.



Recommendation 2

Replace the blanket prohibition with a threshold-based approach. At minimum, permit reasonable co-worker non-solicitation clauses for employees above the high income threshold, subject to section 333ZJ.

4. Workforce stability should remain capable of being a legitimate business interest

Proposed section 333ZJ(2)

This is a deliberate change to existing law. The explanatory materials acknowledge that maintaining a stable workforce has been recognised as a legitimate business interest at common law, including following *Cactus Imaging Pty Ltd v Peters* [2006] NSWSC 717. The explanatory materials state expressly that under the amendments maintaining a stable workforce would no longer constitute a legitimate business interest.

ARC considers that removing workforce stability entirely is unnecessary to achieve the Government's objective.

The proposed framework already requires a restraint to be both necessary and reasonable under section 333ZJ(1), with section 333ZJ(3) requiring consideration of whether it goes further than necessary and whether it is reasonable having regard to the employer-employee relationship. Those safeguards provide a mechanism for distinguishing legitimate, proportionate protections from unreasonable restraints.

Removing workforce stability from consideration altogether means that even where an employer can demonstrate a genuine risk of coordinated employee solicitation and propose a narrow restraint directed specifically at that risk, the interest itself cannot support the restraint. This is particularly difficult to reconcile with the blanket prohibition on co-worker non-solicitation clauses.

ARC is also concerned that making the interests in section 333ZJ(2) exhaustive may prevent the law from responding to future changes in work and business models. Competitive advantage increasingly derives from combinations of people, data, proprietary systems, technology, supplier relationships, operating models and organisational capability. The common law has historically been able to develop in response to changing commercial circumstances, with the recognition of workforce stability itself illustrating that evolution.

ARC recommends that proposed section 333ZJ(2) recognise workforce stability as a legitimate business interest where there is a demonstrated risk of material disruption and the restraint is necessary and reasonable. Section 333ZJ(2) should also include a limited residual category allowing another substantial legitimate business interest to be recognised where the party seeking to enforce the restraint demonstrates that the restraint is necessary and reasonable to protect that interest.

These changes would not create an automatic right to restrain employees. The evidentiary burden would remain on the party seeking to enforce the restraint and the statutory necessity and reasonableness requirements would continue to apply.

Recommendation 3

Recognise workforce stability as a legitimate business interest where there is a demonstrated risk of material workforce disruption and retain limited flexibility for courts to recognise other substantial legitimate business interests, subject to the statutory necessity and reasonableness requirements.

5. No-poach and wage-fixing provisions require clear safeguards for legitimate commercial arrangements

Proposed section 45ADA of the *Competition and Consumer Act 2010*

ARC supports action against genuine collusion between competitors designed to suppress employee remuneration or artificially restrict workers' employment opportunities.

However, the proposed treatment of no-poach and wage-fixing arrangements as cartel conduct carries significant civil and criminal consequences. Given the breadth of proposed section 45ADA, it is critical that legitimate commercial arrangements containing incidental workforce provisions are clearly distinguished from deliberate anti-competitive conduct.

ARC recommends that the Treasury ensure proposed section 45ADA is appropriately confined to genuinely anti-competitive or collusive conduct and that the statutory exemptions adequately protect legitimate commercial arrangements requiring incidental workforce provisions.

ARC also recommends that the ACCC publish detailed compliance guidance, including practical examples, before commencement.

Recommendation 4

Ensure the provision and associated exemptions provide clear protection for legitimate commercial arrangements containing incidental workforce provisions, supported by detailed ACCC guidance before commencement.

6. Existing contracts and transitional arrangements require greater certainty

Schedule 2, item 9, proposed clause 143

ARC is concerned that an existing employment arrangement containing a non-compete term may become subject to the new framework if the arrangement is varied after commencement, irrespective of whether the variation relates to the restraint itself.

Existing restraint provisions were entered into by employers and employees under the legal framework applying at the time and, where valid, on the understanding that they would provide protection for legitimate business interests. Employers could not reasonably have anticipated the proposed reforms when those arrangements were entered into or implemented alternative protections in their place.

Large employers routinely vary employment arrangements for reasons unrelated to post-employment restraints, including changes to remuneration, working arrangements, duties or other terms and conditions. ARC submits that there is no clear policy reason why these routine changes should affect the operation of a restraint that was lawfully agreed before commencement.

In particular, routine changes to remuneration, role or working arrangements should not, of themselves, alter the legal treatment of an existing restraint. Doing so would create uncertainty and potentially disadvantage employers that reasonably relied on the legal framework applying when the restraint was agreed.

ARC recommends that proposed clauses 143(2) and (3) apply only where the post-employment restraint itself is introduced or materially varied after commencement.

This would preserve the prospective application of the reforms while providing greater certainty for employers and employees and ensuring routine and unrelated employment changes do not alter the legal treatment of existing restraint provisions.

ARC also recommends that the Treasury provide clear transitional guidance before commencement to assist employers to identify affected arrangements and make any necessary changes.

Recommendation 5

Apply the new regime to an existing restraint only where the restraint itself is introduced or materially varied after commencement, preserving the legal treatment of existing restraints where other, unrelated terms of the employment arrangement are subsequently varied.

About ARC

ARC represents the Australian retail sector. Valued at \$444 billion, retail is the nation's largest private sector employer, supporting more than 1.4 million jobs, including more young Australians aged 15 to 24 years than any other industry. ARC's membership is diverse. From family-owned small and independent businesses, comprising 95 per cent of our membership, to large national and international retailers supporting communities across metropolitan and regional Australia. With more than 155,000 retail outlets nationwide and a growing online presence, the retail sector is embedded throughout the economy, playing a critical role in the supply chain of Australian businesses. ARC advocates for policies and reform that drive growth, resilience, and long-term prosperity for Australian retail and the millions who rely on it. At a time of rapid change, from technological disruption and international competition to shifting consumer behaviour and sustainability expectations, effective policy settings are critical for retailers, workers, consumers, and communities.