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Reforms to restraints: What the Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026 means for employers

As part of a broader campaign to improve wage growth, job mobility and workforce productivity, the Albanese Government has released draft legislation which intends to comprehensively regulate anti-competitive agreements and restraint of trade terms. Ben Motro (Partner), Sophia Bianchini (Lawyer), and Julia Torrisi (Law Clerk) provide a detailed analysis of the proposed Bill and how this may affect employers.

Subject to narrow exceptions, *the Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026* (**Bill**) seeks to strictly regulate no-poach agreements and wage-fixing agreements (as between employers), and otherwise seeks to outlaw or otherwise constrain the use of non-compete clauses and co-worker non-solicitation clauses (as between employers and individual employees). To effect this intention, the Bill operates through two schedules, one of which proposes amendments to the *Competition and Consumer Act 2010* (Cth) (**CCA**) to regulate business to business arrangements, and another amending the *Fair Work Act 2009* (Cth) (**FWA**) to regulate employer and employee relationships.

Schedule 1 – Amendment of the CCA

In an effort to further eliminate what is described as “one of the most egregious forms of anti-competitive conduct”, Schedule 1 to the Bill proposes to amend the existing cartel framework to introduce no-poaching provisions and wage-fixing provisions as new categories of ‘cartel provisions’.

Whilst no-poaching agreements and wage-fixing agreements are akin to other forms of cartel conduct already regulated by the CCA, the existing prohibitions do not sufficiently mitigate the risk of businesses agreeing not to compete in the labour market. This is because existing cartel provisions generally apply to independent contractors, but do not extend to agreements concerning employees. The Bill seeks to remedy this deficiency by specifically addressing the treatment of employees.

Prohibition

Pursuant to the Bill (but subject to some exceptions noted below), no-poach provisions and wage-fixing provisions would be prohibited by the CCA.

Clause 45ADA(2) of the Bill defines a no-poaching provision as a provision that has the purpose, or has or is likely to have the effect, of directly or indirectly preventing a party from recruiting, soliciting or hiring another party’s current, former or future staff, or imposing requirements (such as notification) before a party can engage in such a process.

The Explanatory Memorandum to the Bill confirms that a no-poach agreement may exist despite the absence of a current, direct contractual relationship between an employer and employee. However, unilateral conduct which does not exhibit collusion, such as an employer simply preferring not to hire from a specific competing business, is not a no-poach agreement.

Clause 45ADA(3) expresses wage-fixing provisions to be provisions that have the purpose, or have or are likely to have the effect, of directly or indirectly fixing, maintaining, decreasing or controlling the remuneration or terms and conditions of current or future staff of two or more parties.

In determining whether a provision falls within these definitions, the substance of the provision, including its interaction with other relevant provisions of the same or related agreements, will be considered. The form and description of the provision will not be determinative.

A reference to a "party", if that party is a body corporate, includes a reference to each related body corporate. This ensures that related bodies corporate may make no-poach and wage-fixing agreements that apply internally. However, where one or more related bodies corporate enter into such an agreement with an *unrelated* body corporate, the prohibitions will apply to the extent that the agreement applies to the unrelated body corporate.

The Bill defines "staff" as an employee of a party, ensuring consistent application of the prohibition to all employees irrespective of their employment status (e.g. permanent, casual or part-time). Notably, consistent with the intention to specifically address the deficiency in the existing provisions regarding the treatment of employees, the Bill defines "staff" to the exclusion of independent contractors.

Exemptions

The prohibition of no-poach provisions and wage-fixing provisions, albeit extensive, is not exhaustive.

The proposed amendments permit no-poach and wage-fixing agreements where they are ancillary to legitimate business arrangements not intended to limit competition, and that are likely to have a net benefit to workers and/or the economy. That is, the exemptions recognise certain circumstances in which the public interest is better served by permitting provisions that would otherwise be prohibited.

For example, it is acknowledged that joint ventures often permit innovative and efficient activities which are pursued for genuine commercial purposes, but may reasonably involve no-poach or wage-fixing provisions. Other exemptions include secondments, labour-hire arrangements and professional sporting leagues, as well as in relation to government wage-setting and minimum labour standards.

The exemptions are subject to specific conditions. Regarding joint ventures, secondments, and labour-hire arrangements, a no-poach provision may only operate during the arrangement, and for a period of up to 3 months after the day on which the staff member ceases to be involved. Additionally, a wage-fixing provision must not extend beyond the duration of the joint venture, secondment or labour-hire arrangement. In each case, the affected staff member must be given written notice of the provision and its consequences, and must consent to its operation.

For completeness, the Bill does not operate to the exclusion of other concurrent laws. Interestingly, whilst this means that conduct which is permitted or approved under the FWA or other State or Territory industrial laws may be exempted, it equally means that conduct which is not prohibited by the Bill may nevertheless be subject to challenge under, for example, common law.

Consequences for non-compliance

If the Bill receives Royal Assent, the amendments will apply to contracts, arrangements and understandings containing no-poach and wage-fixing agreements made at or after the commencement time. Giving effect to a no-poach or wage-fixing provision at or after the commencement date will also be prohibited, even if the underlying contract, arrangement or understanding was entered into before that time.

The Australian Competition and Consumer Commission (**ACCC**) will be responsible for investigating breaches and enforcing the prohibitions. Where a breach of the cartel provisions is established, the existing civil and criminal penalty provisions in the CCA will apply.

Schedule 2 – Amendment of the FWA

Schedule 2 of the Bill proposes significant amendments to the FWA to uniformly regulate non-compete clauses and co-worker non-solicitation clauses.

Currently, non-compete clauses and similar restraints are governed primarily by the common law (and in New South Wales, the *Restraints of Trade Act 1976* (NSW)). The propensity to draft overly broad, cascading restraints, combined with cost barriers to test the enforceability of such restraints via litigation, has resulted in considerable uncertainty and a "chilling effect" on employee mobility, according to the Explanatory Memorandum. The Bill seeks to address this by introducing statutory prohibitions and clarifying enforceability.

The proposed Bill introduces a prohibition of the inclusion of non-compete terms and co-worker non-solicitation terms in employment arrangements, modern awards, enterprise agreements, workplace determinations, and orders by the Fair Work Commission. To the extent such terms are prohibited, they will be taken to have no effect.

Prohibition – Non-compete

Under clause 23E(1), the Bill defines a "non-compete term" as a term or condition of employment that restricts, prohibits or prevents the employee from, or adversely affects the employee for, seeking to be involved in any business or undertaking, or seeking to commence employment, after their termination. This captures direct and indirect restraints including, for example, terms that purport to deny an employee a severance package if they commence employment with a competing business.

The Bill defines "employment arrangement" broadly to ensure employers cannot circumvent the prohibition by embedding non-compete terms in agreements separate to the employment contract, such as in standalone policies or informal side arrangements.

The prohibition applies equally to all employees, except that it does not apply to employees whose annualised full-time equivalent earnings exceed the high income threshold (currently $190,100). Where earnings subsequently fall to or below the threshold, a previously enforceable non-compete term ceases to have effect, and revives if earnings later exceed the threshold. Employers will not face penalties for the clause's mere presence, but will attract penalties for its enforcement, during such fluctuations.

The prohibition applies to casual employees and pieceworker employees, regardless of the earnings/remuneration level. The justification for this, as set out in the Explanatory Memorandum, is that such workers are likely to be remunerated under the high income threshold, and are likely to concurrently hold employment with other employers as a consequence of their engagement as a casual.

There are certain exclusions from the general prohibition of non-compete terms, including confidentiality agreements, retention incentives, agreed reasonable notice periods, and in some public sector contexts.

Prohibition – Non-solicitation

Under clause 23C, a "co-worker non-solicitation term" restricts or prohibits an employee from recruiting, or attempting to recruit, a co-worker or former co-worker to commence employment or be involved in any business or undertaking subsequent to the co-worker's employment. The term "co-worker" does not require a direct working relationship to have existed, and extends beyond employees to include, for example, contractors and volunteers. The term "recruit, or attempting to recruit" is similarly broad, encompassing conduct such as sending a co-worker business proposals and networking.

Unlike the non-compete prohibition, there is no high income threshold exception. The prohibition is comprehensive, applying to all national system employees and only being exempted where authorised under a Commonwealth, State or Territory statute.

In practical terms, these amendments would give employees significantly greater freedom to maintain and leverage their professional networks after leaving an employer, without the threat of legal action.

Restrictions on post-employment restraints of trade

Where a post-employment restraint of trade term is permitted, the Bill requires it to be reasonable and go no further than necessary to protect legitimate interests. In a departure from the broader common law approach, the Bill proposes the following exhaustive list of "legitimate interests":

- the use or disclosure of confidential information gained through employment; and
- the use or disclosure of professional or personal relationships with customers, clients or professional networks gained through employment.

For public sector employers, a further legitimate interest is preventing prejudice to Australia's defence, national security, or government integrity. Notably absent from this list are interests such as goodwill and trade connections, which have traditionally been recognised at common law.

Consistent with the complete prohibition on non-poaching of co-workers, the Explanatory Memorandum explicitly states that the Bill is intended to reverse the common law position expressed in *Cactus Imaging Pty Ltd v Glenn Peters* [2006] NSWSC 717 (which determined that the maintenance of a "stable workforce" is an interest capable of protection).

The restraint of trade term should go no further than is necessary to protect the relevant interest, and should be reasonable with respect to the relationship between the employer and the employee. In practice, this places a clear onus on employers to justify each restraint on its merits, giving employees a stronger basis to challenge overreaching clauses.

Finally, post-employment restraint of trade terms must not be "cascading". That is, they must not contain multiple alternative geographical or temporal restrictions designed to ensure at least one restriction survives judicial scrutiny. This removes the safety net traditionally relied on by employers.

Consequences for non compliance

If the Bill receives Royal Assent, the amendments will apply to employment arrangements entered into at or after the commencement time. The amendments will also apply to a post-employment restraint of trade term in an employment arrangement entered into before commencement, if the employment arrangement is varied (irrespective of whether the variation relates to the post-employment restraint of trade term).

Contraventions of the Schedule 2 prohibitions are civil remedy provisions under subsection 539(2) of the FWA, and will attract penalties.

Key Takeaways

These changes, if they become law, will have a significant impact on employers. Although the Bill is presently subject to consultation and debate in parliament (and so their final form may very well differ to what has been presently proposed), there are a number of things businesses may need to think about *if these laws are passed*. To summarise:

- Employers should review all template employment contracts, deeds, policies and commercial arrangements to identify no poach and wage-fixing provisions, as well as non-compete and co-worker non-solicitation terms, that may be affected by the Bill.
- Where an employer intends to rely on an exemption to the cartel prohibition of no-poach and wage-fixing provisions, robust processes should be implemented to ensure compliance with notification and consent requirements, as well as duration limits. Employers bear the onus of establishing such compliance, should a dispute arise.
- In relation to permitted post-employment restraints, employers must ensure that they are carefully drafted to remain enforceable. The new Bill requires such restraints to concern a legitimate interest, be reasonable, and not be drafted in a cascading manner. The narrowing of what is considered a 'legitimate interest' means that restraints which have previously been upheld by courts may no longer have a statutory basis.
- Employers may continue to use, for example, confidentiality clauses and non-disclosure agreements. However, employers must ensure that they are not drafted so broadly as to effectively prevent an employee from commencing subsequent employment. Employers should otherwise consider whether their confidentiality arrangements are fit for purpose, particularly in respect of those workers where non-compete provisions will be impermissible.
- Employers should implement processes to stringently monitor employee earnings respective to the high-income threshold (indexed annually) to avoid enforcing or threatening to enforce a non-compete term which, due to a fluctuation in earnings, is no longer permissible.