

MTAA RESPONSE TO:

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

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MOTOR TRADES ASSOCIATION OF AUSTRALIA

Executive summary

MTAA supports measures that genuinely promote labour mobility, competition and productivity. However, reforms in this area must appropriately balance those objectives against the legitimate interests of employers who invest substantially in workforce development, customer relationships and business capability.

The exposure draft represents the most significant statutory intervention in Australia's restraint-of-trade framework in recent decades. While Government has identified concerns regarding the use of restraint provisions in some labour markets, MTAA remains concerned that the proposed reforms extend well beyond addressing those concerns and may create unintended economic and operational consequences, particularly for industries facing persistent workforce shortages.

For Australia's automotive industry, the reforms risk:

- undermining business value and investment in innovation and business development by making intellectual property, business systems and work-process improvement and client relationship/data-base information more vulnerable to competitors and prospective competitors
- reducing incentives for long-term investment in workforce development;
- increasing workforce instability in already constrained labour markets;
- creating significant uncertainty regarding existing contractual arrangements;
- creating uncertainty regarding apprenticeship and workforce development arrangements;
- imposing disproportionate compliance burdens on small businesses; and
- removing established protections without providing an accessible alternative mechanism for dispute resolution.

MTAA's principal concern remains unchanged from its earlier submission. The exposure draft significantly narrows the circumstances in which restraint provisions may be relied upon but does not establish an affordable and effective alternative mechanism through which employers and employees can resolve disputes regarding their validity or enforceability.

Accordingly, MTAA recommends that Government:

- expressly recognise that the protection of IP is a legitimate business interest and not a needless constraint on labour mobility or restraint-of-trade measure
- establish a dedicated restraint-of-trade dispute resolution framework through the Australian Small Business and Family Enterprise Ombudsman (ASBFEO);
- retain workforce stability as a legitimate business interest;
- reconsider the blanket prohibition on co-worker non-solicitation clauses;

- preserve a reasonableness-based framework informed by established common law principles;
- provide targeted protections for small businesses; and
- preserve grandfathering of existing restraint provisions unless the restraint provision itself is amended or replaced.

MTAA is also concerned that the proposed earnings-threshold model may unintentionally disadvantage small businesses where employees performing critical commercial functions and possessing significant customer relationships, goodwill and business knowledge earn below the high-income threshold simply because remuneration structures differ from larger organisations.

About MTAA and the automotive Industry

MTAA represents Australia's state and territory motor trades associations and, through them, approximately 15,000 automotive businesses across Australia.

The broader automotive sector comprises approximately 70,000 businesses, contributes around $40 billion to the national economy and employs more than 360,000 Australians. The industry includes dealerships, repairers, collision repair businesses, fuel retailers, tyre retailers, dismantlers and associated automotive service providers. Approximately 96 to 97 per cent of automotive businesses are small and family-owned enterprises.

The sector also experiences persistent workforce shortages across a range of technical and specialist occupations. Industry workforce research has demonstrated ongoing shortages of automotive technicians and related occupations, with vacancy fill rates remaining below national averages and employers receiving substantially fewer applicants per vacancy than many other industries.

These workforce conditions provide important context when considering the likely impact of reforms affecting workforce retention and labour mobility.

1. Preserving an appropriate balance

Australia's restraint-of-trade framework is governed by a well-developed body of common law that seeks to balance employee mobility with the protection of legitimate business interests.

The current framework does not presume that restraints are enforceable. Rather, employers must establish that restraints are reasonable and necessary in the circumstances.

Australian courts have applied these principles for many years through authorities including Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd, Lindner v Murdock's Garage and Buckley v Tutty. These decisions have allowed courts to distinguish between reasonable protections and excessive restrictions on employee mobility.

MTAA considers that future reforms should build upon these established principles wherever possible.

While there may be merit in clarifying aspects of the existing framework, the exposure draft significantly narrows the categories of interests capable of protection and reduces the flexibility currently available to courts to assess individual circumstances.

MTAA is concerned that this may inadvertently weaken the ability of employers to protect legitimate commercial interests without necessarily providing greater certainty for either employers or employees.

MTAA notes that the Explanatory Materials place significant reliance on "appropriately drafted, targeted confidentiality agreements and non-disclosure agreements" as alternative mechanisms for protecting employer interests. While such arrangements remain important, greater clarity may be required regarding their intended role within the proposed framework.

Confidential information and commercially sensitive business knowledge are not always capable of precise identification in contractual documentation, and existing legal protections may extend beyond information expressly described in contractual terms. MTAA is concerned that the Explanatory Materials may be interpreted as implying a narrower conception of protectable confidential information than currently exists at law. Clarification is therefore desirable to avoid uncertainty regarding the continued protection of confidential information obtained during the course of employment.

Recommendation

Retain a reasonableness-based framework informed by established common law principles.

Clarify the intended interaction between the proposed framework and existing confidentiality obligations to ensure the reforms do not unintentionally narrow existing protections for confidential information.

2. Workforce stability remains a legitimate business interest

One of the most significant changes proposed by the exposure draft is the exclusion of workforce stability from the categories of legitimate business interests capable of supporting post-employment restraints. MTAA remains concerned about this approach.

For many automotive employers, workforce stability is not merely a commercial preference but an operational necessity.

Businesses routinely invest in:

- apprenticeships;
- OEM training programs;
- technical accreditation;
- diagnostic capability development; and
- ongoing professional development.

These investments often occur over several years and are essential to maintaining service capability. In industries experiencing ongoing workforce shortages, the coordinated departure of skilled employees can significantly affect business continuity, customer outcomes and training capacity. MTAA therefore considers workforce stability to remain a legitimate interest capable of protection in appropriate circumstances.

MTAA notes that the Explanatory Materials expressly recognise workforce stability as an interest that has been accepted in existing restraint-of-trade jurisprudence before concluding that it should no longer be recognised under the proposed statutory framework.

While MTAA acknowledges the Government's objectives, it remains concerned that the rationale for excluding a category of interest previously recognised by courts has not been sufficiently established, particularly in sectors experiencing persistent workforce shortages and long training pathways.

Recommendation

Retain workforce stability as a recognised legitimate business interest.

3. Productivity and labour mobility outcomes require further examination

MTAA acknowledges the Government's objective of improving labour mobility and competition. However, increased labour mobility should not automatically be equated with increased productivity. The automotive industry continues to face structural labour shortages rather than an oversupply of labour. In these circumstances, increased movement of employees between businesses may simply redistribute an already limited workforce rather than increase productive capacity.

The potential implications include:

- reduced workforce stability;
- increased recruitment costs;
- intensified competition for scarce skills;
- reduced incentives for workforce development; and
- diminished returns on employer-funded training investments.

MTAA is also concerned that uncertainty regarding the breadth of the proposed definition of non-compete provisions may create unintended consequences for workforce retention initiatives. Where employers are uncertain whether particular employment arrangements may be captured by the legislation, they may become less willing to offer certain workforce-support measures or retention initiatives. Greater clarity within the legislation would assist both employers and employees.

MTAA considers that these risks warrant further consideration before the proposed reforms are implemented.

MTAA is also concerned that the proposed earnings-threshold model may create legal uncertainty for both employers and employees. The Explanatory Materials expressly contemplate circumstances in which a restraint provision may become enforceable, later become unenforceable and subsequently become enforceable again due solely to changes in remuneration or annual indexation of the high-income threshold. Such outcomes are unusual in Australian contract law and may undermine the objective of providing greater certainty regarding the enforceability of restraint provisions.

Recommendation

Undertake additional industry-specific analysis regarding the productivity, training and workforce impacts of the proposed reforms.

4. Small business considerations

The automotive sector is overwhelmingly comprised of small and family-owned enterprises. Unlike larger employers, small businesses often operate without dedicated legal, human resources or compliance functions. As a result, regulatory complexity and legal uncertainty can impose disproportionate costs.

MTAA remains concerned that the cumulative impact of threshold monitoring, contract review obligations, transitional uncertainty and compliance requirements may be particularly burdensome for smaller employers. These impacts should be recognised within the design of any final legislative framework.

MTAA remains concerned that the proposed high-income threshold operates as an imperfect proxy for access to customer relationships, confidential information and commercially sensitive business knowledge. Within many small and family-owned businesses, employees with significant customer contact, supervisory responsibilities or access to commercially valuable information may earn below the threshold despite performing functions broadly equivalent to employees in larger organisations who exceed the threshold. The effect may be that access to legitimate restraint protections differs according to business size and remuneration structures rather than the nature of the role performed.

MTAA is also concerned by the operation of the transitional provisions. The Explanatory Materials indicate that existing restraints may become subject to the new framework whenever an employment arrangement is varied, irrespective of whether the variation relates to the restraint provision itself. In practice, this may mean that routine workplace events such as salary adjustments, promotions, enhanced workplace flexibility, revised duties or improved employment conditions alter the legal status of otherwise longstanding contractual arrangements. Such outcomes may create compliance uncertainty and administrative burdens for employers, particularly smaller businesses.

The earnings threshold is a poor proxy for legitimate business interests

MTAA remains concerned that the exposure draft relies on the Fair Work Act high-income threshold as the primary determinant of whether a restraint may be used.

For many automotive businesses, particularly small and family-owned enterprises, income is a poor proxy for access to confidential information, customer relationships or commercially sensitive business knowledge.

Employees occupying critical positions within small businesses frequently have access to information and relationships that are central to the operation of the business despite earning below the high-income threshold.

MTAA is also concerned that the annualised earnings calculation may not adequately capture remuneration structures commonly used throughout the automotive industry, including commissions, incentive-based payments and other forms of variable remuneration. Consequently, employees with substantial commercial responsibilities and actual earnings that exceed the threshold over time may nevertheless be assessed below the statutory threshold. This further reinforces MTAA's concern that remuneration is an imperfect proxy for determining whether legitimate business interests require protection.

In many automotive businesses, the individuals with greatest access to customer relationships, pricing structures, operating systems, supplier arrangements and confidential business information are not owners or executives. They are service managers, workshop controllers, senior technicians, parts managers and customer-facing advisers. Many of these employees earn below the proposed threshold despite holding responsibilities that would justify protection under existing common law principles.

In many automotive businesses, customer goodwill is attached as much to service managers, workshop controllers and customer-facing advisers as it is to the business itself. The loss of these employees may affect not only operational capability, but also long-standing customer relationships developed through significant employer investment over many years.

As a result, the proposal may create an unintended disparity whereby large businesses retain access to restraint protections because particular employees exceed the threshold, while smaller businesses lose access to equivalent protections simply because remuneration structures differ.

The exposure draft therefore risks creating an outcome where the availability of legitimate business protections is determined by business size rather than the nature of the employee's role, responsibilities or access to commercially sensitive information.

Illustrative example

Consider a family-owned automotive dealership employing 25 staff in a regional labour market.

The dealership's Service Manager is responsible for overseeing workshop operations, managing technician performance, supervising apprentices, maintaining key fleet and customer relationships, developing pricing strategies and implementing manufacturer service standards. The individual also has access to customer databases, service histories, pricing information, operating procedures and business performance data.

Despite these responsibilities, the Service Manager earns $145,000 per annum and therefore falls below the proposed high-income threshold.

Under the exposure draft, the dealership would likely be unable to rely on a non-compete provision despite the employee holding substantial customer goodwill, commercially sensitive information and operational knowledge.

By contrast, an employee performing a substantially similar role within a larger metropolitan dealership group may earn above the threshold and therefore remain capable of being subject to restraint protections.

The practical effect is that access to legitimate business protections may depend on the size and remuneration structure of the employer rather than the employee's actual responsibilities, access to confidential information or capacity to materially affect the business following departure.

MTAA considers this outcome inconsistent with the objective of creating a fair and proportionate framework.

For many automotive businesses, particularly those operating in regional areas and employing fewer than 50 staff, the employees most critical to preserving customer relationships, protecting confidential information and maintaining business continuity are frequently those who fall below the proposed threshold. The exposure draft therefore risks disadvantaging small businesses precisely where legitimate business protections are most important.

Recommendations

Provide specific protections and exemptions for businesses employing fewer than 50 employees.

Reconsider the use of the Fair Work Act high-income threshold as the primary determinant of restraint enforceability.

Clarify the high-income threshold calculation to ensure it accurately reflects total remuneration, including relevant variable remuneration arrangements.

If a threshold is retained (based on s.332 of the Fair Work Act), adopt an alternative functional test allowing restraints where an employee has substantial access to confidential information, goodwill, customer relationships or strategic business information irrespective of earnings.

If a threshold is retained, eligibility should be assessed at the time the restraint is entered into rather than fluctuating throughout the life of the employment relationship.

5. Sale of business arrangements require clarification

MTAA notes that non-compete provisions are frequently used in genuine sale-of-business transactions to protect transferred goodwill and commercial value. Such arrangements differ fundamentally from employment restraints because they are intended to protect the value of assets acquired by a purchaser. Greater legislative clarity is required to ensure that legitimate sale-of-business restraints are not inadvertently affected by the proposed reforms.

Recommendation

Expressly preserve the operation of legitimate sale-of-business restraints designed to protect transferred goodwill and commercial value.

6. Existing protections are being restricted without an effective alternative

MTAA's primary concern from earlier consultation processes remains unresolved.

The exposure draft significantly restricts the circumstances in which restraint provisions may be relied upon while simultaneously removing co-worker non-solicitation protections and narrowing recognised business interests.

However, it does not establish a practical alternative mechanism through which disputes can be resolved. For many businesses, particularly small businesses, the major challenge is not identifying legal rights but enforcing them. Court proceedings remain expensive, complex and often inaccessible in practice.

Rather than removing established protections before creating an alternative framework, MTAA considers that Government should first implement a low-cost and accessible dispute resolution process specifically designed to address restraint-of-trade disputes.

MTAA notes that the proposed competition law reforms prohibit certain forms of labour-market coordination while preserving exemptions for conduct authorised under workplace relations legislation and government wage-setting arrangements. MTAA does not necessarily oppose these exemptions, however their coexistence with significant new competition law penalties warrants further consideration to ensure the framework operates consistently.

MTAA is also concerned that the proposed anti-poaching and wage-fixing provisions do not expressly address the unique role of Group Training Organisations. Group Training Organisations play a critical role in supporting apprenticeship commencements, completions and workforce development, particularly for small businesses. Greater certainty is required to ensure ordinary Group Training Organisation arrangements are not inadvertently captured by the proposed competition law prohibitions.

Recommendation

Expressly exclude Group Training Organisations from the anti-poaching and wage-fixing prohibitions or provide clear statutory guidance confirming that ordinary Group Training Organisation arrangements are not captured.

A better alternative: an ASBFEO framework

MTAA continues to support a specialist restraint-of-trade dispute resolution framework administered through the Australian Small Business and Family Enterprise Ombudsman.

Such a framework could provide:

- low-cost dispute resolution;
- specialist expertise;
- timely guidance regarding enforceability;

- reduced reliance on litigation; and
- improved access to justice for both employers and employees.

The framework should include:

1. Mandatory conciliation.
2. Voluntary arbitration by agreement.
3. Practical guidance regarding restraint enforceability.
4. Specific small business support mechanisms.

MTAA considers that such a framework should be established and evaluated before the proposed prohibitions commence.

Conclusion

MTAA supports the objective of promoting labour mobility, competition and productivity. However, the exposure draft does not yet achieve an appropriate balance between those objectives and the legitimate interests of employers who invest in workforce development, customer relationships and business capability.

The reforms represent a significant departure from Australia's established restraint-of-trade framework and may have unintended consequences for industries experiencing significant workforce shortages and skills constraints.

Most importantly, the exposure draft removes and restricts existing protections without first establishing an affordable and effective alternative dispute resolution mechanism.

MTAA therefore urges Government to revise the exposure draft and adopt a more balanced framework that:

- preserves workforce investment incentives;
- maintains flexibility through reasonableness-based assessment;
- recognises the needs of small businesses; and
- establishes an ASBFEO-led dispute resolution process before the reforms commence.

MTAA is particularly concerned that the proposed earnings-threshold model and transitional arrangements may produce unintended consequences for small and family-owned businesses without materially advancing the Government's stated policy objectives.

Priority recommendations

1. Establish an ASBFEO restraint-of-trade dispute resolution framework before implementation.
2. Retain workforce stability as a legitimate business interest.
3. Reconsider the blanket prohibition on co-worker non-solicitation clauses.
4. Preserve a reasonableness-based common law framework.
5. Provide specific protections for businesses employing fewer than 50 employees.

6. Reconsider the use of the high-income threshold and adopt a functional test based on access to confidential information, goodwill and customer relationships.
7. Existing restraint provisions should remain grandfathered unless the restraint provision itself is amended or replaced.
8. If a threshold is retained, eligibility should be assessed at the time the restraint is entered into rather than fluctuating over the life of the employment relationship.
9. Clarify the high-income threshold calculation to ensure relevant variable remuneration arrangements, including commissions and incentive payments, are appropriately recognised.
10. Expressly preserve legitimate sale-of-business restraints and clarify that ordinary Group Training Organisation arrangements are not captured by the anti-poaching and wage-fixing prohibitions, and clarify the intended interaction between the reforms and existing confidentiality obligations

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