

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

Consultation on reforms to
non-compete clauses and
other restraints

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About AMT

Established in 1966, the Association of Massage Therapists (AMT) is a not-for-profit professional membership association dedicated to advancing massage therapy within Australia's healthcare system. AMT promotes evidence-based practice, professional standards, safe and ethical care, and appropriate recognition of massage therapy within the broader health system.¹

AMT represents massage therapists, remedial massage therapists and myotherapists. Practitioner membership includes nationally recognised qualifications ranging from the Certificate IV in Massage Therapy to the Diploma of Remedial Massage and Advanced Diploma of Myotherapy.² Members must comply with AMT's Code of Practice and Code of Ethics and with applicable State, Territory and Federal laws.³

1 Association of Massage Therapists, Who are we, <https://www.amt.org.au/amt/who-are-we.html>

2 Association of Massage Therapists, Who is eligible, www.amt.org.au/join-amt/who-is-eligible.html

3 Association of Massage Therapists, Code of Practice and Code of Ethics, www.amt.org.au/amt/code-of-practice.html

Executive summary

AMT supports the objective of preventing unreasonable restraints from limiting workers' mobility and productive use of their qualifications, skills and experience. AMT's principal concern is that the exposure draft protects only employees from non-compete terms and does not extend equivalent protection to independent contractors and subcontractors.⁴

In a 2024 AMT workforce survey, 14 per cent of respondents reported being engaged as subcontractors, more than twice the proportion who reported employment under the relevant award (less than 7 per cent).⁵ These are survey responses, not estimates of AMT's entire membership or the wider profession. The employee-only scope of the draft leaves this distinct group of workers outside the proposed protection.

AMT recommends that the Bill protect individual contractors and subcontractors who principally supply their own labour, skill and professional expertise, while retaining appropriate safeguards for genuinely commercial arrangements and legitimate business interests. If Treasury does not wish to extend the outright ban to contractors, AMT recommends, at minimum, that the conditions the Bill sets for permitted employee restraints (proposed at 333ZJ) also apply to individual contractors. Under those conditions, a restraint has no effect unless it is necessary to protect confidential information or client relationships, is reasonable, and is not drafted in a cascading manner.

4 Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026, Exposure Draft (3 September 2026) ('Exposure Draft'), Sch 2, item 7 (proposed ss 333Z, 333ZA of the *Fair Work Act 2009* (Cth)).

5 AMT, 2024 workforce survey (internal survey data).

Why subcontractors should be included in the amendments

Massage therapy is local and client-facing. A restraint that prevents a practitioner from working at another clinic within a specified radius, establishing a practice or continuing to serve their community, can significantly affect their livelihood. For an individual contractor, the cost and uncertainty of obtaining advice or challenging a restraint may itself deter mobility, even if the term may ultimately be unenforceable. The Explanatory Materials recognise this chilling effect in relation to employees, noting that enforceability often remains untested because of prohibitive litigation costs, and that many workers stay in unfavourable jobs for fear of court action.⁶

AMT regularly sees subcontracting agreements brought to it by members. In the agreements AMT has reviewed, non-compete terms have consistently appeared. This observation reflects AMT's experience with agreements presented to it - it is not a prevalence estimate for all industry contracts. It nevertheless demonstrates the practical importance of extending the reform to individual subcontractors.

6 Explanatory Materials, Exposure Draft, Competition and Fair Work Legislation Amendment (Banning Unfair Non-Competes) Bill 2026 ('Explanatory Materials'), paras 2.9 - 2.10.

The exposure draft leaves a significant policy gap

Treasury's July 2025 consultation paper expressly asked whether the ban should apply to workers who are not employees, including independent contractors, particularly where their role and conditions are comparable to employment.⁷ The 2026 explanatory materials now state that the proposed Fair Work Act protections will not apply to workers who are not employees.⁸ The operative provisions reflect this: the prohibition applies where an employer enters into an employment arrangement with an employee, and "employment arrangement" is defined by reference to the employer-employee relationship.⁹

For the profession represented by AMT, that approach leaves a significant gap between the policy objective and the practical coverage of the reform.

The exposure draft also recognises that modern workplaces extend beyond the traditional employment relationship. In the co-worker non-solicitation provisions, it refers expressly to contractors and subcontractors, employees of contractors or subcontractors, labour-hire workers, outworkers, apprentices, trainees and volunteers.¹⁰ AMT asks Treasury to adopt a similarly practical approach to identifying those who should receive protection from unreasonable non-compete restraints.

7 Australian Treasury, *Reform to non-compete clauses and other restraints on workers*, Consultation Paper (25 July 2025) s3.2.

8 Explanatory Materials, para 2.24.

9 Exposure Draft, Sch 2, item 3 (proposed s23D, definition of "employment arrangement") and item 7 (proposed s333ZA); Explanatory Materials, paras 2.22 and 2.48.

10 Exposure Draft, Sch 2, item 3 (proposed s23C(2)); Explanatory Materials, para 2.87.

Existing competition law does not fill this gap

The Explanatory Materials state that the reforms do not extend to independent contractors because arrangements relating to them are generally already capable of being addressed under the existing cartel provisions in Part IV of the Competition and Consumer Act 2010.¹¹ AMT respectfully submits that this reasoning addresses a different problem from the one raised here.

The passage appears in the chapter dealing with no-poach and wage-fixing agreements between businesses. Its point is that competing businesses who collude over the engagement or pay of contractors can already be caught, because contractor work falls within the definition of “services” and is not covered by the industrial relations exemption in section 51(2)(a) of the Consumer and Competition Act, which is confined to employees.¹² It does not address a restraint imposed by a single business on an individual practitioner.

¹¹ Explanatory Materials, para 1.17.

¹² Explanatory Materials, paras 1.9 and 1.18–1.19; Exposure Draft, Sch 1, item 4 (definition of “staff” in proposed s 45AB) and items 26–27 (amending s51(2) of the *Competition and Consumer Act 2010* (Cth)).

In that situation, the cartel provisions are unlikely to help. They apply only to arrangements between parties who are, or would be but for the arrangement, competitors.¹³ Even then, the arrangement must have a prohibited purpose, such as dividing up customers or territories. To AMT's knowledge, it is untested whether a non-compete in an individual service agreement meets that test. A practitioner would probably have to go to court to find out, so they cannot know before signing or leaving whether a restraint binds them. AMT repeatedly hears this concern from members who fear litigation over non-compete terms in their subcontracting agreements.

The remaining avenues (i.e. restraint of trade at common law, the general prohibition on agreements that substantially lessen competition, and unfair contract terms protections) share a common weakness: each depends on after-the-fact litigation. The Explanatory Materials themselves identify that dependence as the source of the chilling effect on mobility.¹⁴ That reasoning applies with equal force to an individual subcontractor who cannot afford to test a restraint before deciding whether to leave.

The question is not therefore whether some legal avenue exists in theory but whether an individual practitioner has certainty, before signing or leaving, about whether a restraint binds them. Under the draft, an employee does. A contractor performing the same clinical role does not.

13 Competition and Consumer Act 2010 (Cth) s45AD(4) (the "competition condition").

14 Explanatory Materials, paras 2.9–2.10

Recommended approach

Primary recommendation

AMT recommends that Treasury amend the Bill so the protections extend to an individual who provides services as a contractor or subcontractor where the individual's principal contribution is their own labour, skill and professional expertise.

The framework could use clear criteria to distinguish labour-dependent practitioners from genuinely commercial business-to-business arrangements. Relevant considerations may include whether the individual personally performs the services, depends materially on that work for income, has limited bargaining power, and works in circumstances comparable to an employee.

Any extension can preserve proportionate protection for confidential information, intellectual property and other legitimate business interests. The exposure draft already treats confidentiality terms as outside the definition of a non-compete term,¹⁵ and the Explanatory Materials confirm that restraints in a sale of business are not captured.¹⁶ The aim should be to prevent contractual form alone from producing materially different protection for practitioners doing substantially equivalent work.

¹⁵ Exposure Draft, Sch 2, item 3 (proposed s23E(2)(a)); Explanatory Materials, paras 2.31–2.33.

¹⁶ Explanatory Materials, paras 2.34–2.35.

Alternative: minimum safeguards

If Treasury does not extend the outright prohibition to contractors, AMT asks it to consider a more targeted extension. Proposed section 333ZJ requires that a permitted post-employment restraint be necessary to protect confidential information or client relationships, be reasonable, and not be drafted in a cascading manner, failing which it has no effect.¹⁷ Those requirements currently apply only to employment arrangements.

AMT recommends that equivalent requirements apply to restraints in service agreements with individual contractors and subcontractors who principally supply their own labour, skill and professional expertise. This approach would:

- preserve genuine protection for confidential information and client relationships
- remove cascading geographic and temporal clauses, which are particularly common in local, client-facing professions and consistently feature in the contracting agreements that AMT has seen
- give individual practitioners a clear statutory standard rather than reliance on costly litigation
- leave commercial business-to-business arrangements, and restraints connected with the genuine sale of a business, outside its scope.

This would not equalise treatment of employees and contractors but it would materially narrow the gap identified by AMT's workforce survey data.

¹⁷ Exposure Draft, Sch 2, item 7 (proposed s333ZJ(1)–(6)); Explanatory Materials, paras 2.109–2.124.

Conclusion

AMT survey data shows that subcontracting is a material working arrangement among AMT respondents. If contractors and subcontractors remain outside the Bill, workers subject to restrictive agreements will receive no direct protection from the proposed reforms.

AMT respectfully asks Treasury to include individual contractors and subcontractors within the final legislation, subject to carefully framed safeguards for legitimate commercial arrangements or, at a minimum, to apply the section 333ZJ requirements to restraints imposed on them. AMT would welcome the opportunity to provide further information about contracting practices across the profession and to participate in further consultation.



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