

17 October 2024

Director
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Treasury
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Dear Sir/Madam,

Revitalising National Competition Policy

Robust competition settings are critical to ensuring that all businesses – including small and family businesses – can readily form, grow, enter a new market, or improve their position in an existing market. Business creation and entrepreneurship are essential to driving economic growth, generating jobs, increasing economic efficiency and boosting innovation.

Revitalising National Competition Policy for contemporary society is critical, especially given that small businesses are facing structural challenges including sophisticated scams and cybersecurity attacks, pressures in supply chains and (in many cases) greater international competition owing to the ubiquitous use of digital marketplaces.

While small businesses collectively account for 32% of Australia's total GDP and 42% of private sector employment today, these figures have declined significantly in the past two decades. This decline also coincides with a decrease in the proportion of small business owners aged under 30, which may indicate there are significant barriers and low incentives for Australians to start small businesses today.¹

The ASBFEO appreciates this opportunity to provide insights from the experiences of small businesses operating in today's economy and how the Australian Government can improve business conditions by considering the following recommendations. The ASBFEO's recommendations and positions are set out according to the themes of the consultation paper.

Reform theme 1: Promoting a more dynamic business environment.

Enforcement of competition law

Recommendation 1: National Competition Policy needs to have effective supporting legislative measures in place for fair/efficient competition that small business can rely upon and have enforced.

The Harper Review affirmed that:

[T]he CCA [Competition and Consumer Act] is not directed at protecting competitors but rather competition. This requires competition law to balance preventing anti-competitive

¹ Australian Small Business and Family Enterprise Ombudsman (ASBFEO) analysis of ABS, *Australian Industry, Small business matters*, ASBFEO, Australian Government, June 2023, p. 1.

behaviour that undermines competition against not inhibiting behaviour that is part of normal vigorous competition.²

The Harper Review recommended changes to strengthen the misuse of market power provision in the *Competition and Consumer Act 2010* 'to improve its clarity, force and effectiveness so that it can be used to prevent unilateral conduct that substantially harms competition.'³

The Harper Review also observed that:

Private enforcement of competition laws is an important right. However, there are many regulatory and practical impediments to exercising this right. The Panel considers it important to find ways to reduce those impediments ...

Small businesses face significant practical difficulties in exercising rights of private enforcement. Understandably, the ACCC is not able to take proceedings in respect of all complaints brought to it.⁴

Almost a decade later, the ASBFEO can attest that the effectiveness of the range of requirements under industry codes of practice is limited owing to the ability (or willingness) of small businesses to raise issues and enforce requirements under the codes.

Mandatory alternative dispute resolution under the codes is important and generally effective in dealing with a broad range of disputes. However, it does not necessarily resolve all aspects of disputes; and, where disputes do not resolve, the next step is commonly either to engage in formal legal action (if able with all the associated costs, risks and delays) or abandon the dispute altogether.

Unfair trading practices are types of commercial conduct that are not prohibited by law; yet they can nevertheless distort competition and significantly harm consumers and small businesses.

It is the ASBFEO's view that an unfair trading (or business) practice typically occurs when there is a power imbalance, and when a person or group(s) of person who:

- acts, or fails to act, to the detriment of another party
- acts in a manner that is not reasonably necessary to protect its legitimate commercial interests
- does not follow the intent of the agreement as struck and related expected or agreed practices
- undertakes a practice that could be an unfair contract term if became a term of a written contract, including applying/enforcing duties and/or obligations not reflected in but accompanying a contract
- conducts itself in a manner (including through a third party) that disadvantages the other business.

In August 2023, Treasury ran a consultation to gather evidence and data on the extent of unfair trading practices and to seek views on policy options. Treasury proposed four options:

² Australian Government Competition Policy Review (Harper Review), *Final report*, March 2015, p. 536.

³ Australian Government Competition Policy Review (Harper Review), *Final report*, March 2015, p. 10.

⁴ Australian Government Competition Policy Review (Harper Review), *Final report*, March 2015, p. 416.



- Option 1: Status quo.
- Option 2: Amend statutory unconscionable conduct.
- Option 3: Introduce a general prohibition on unfair trading practices.
- Option 4: Introduce a combination of general and specific prohibitions on unfair trading practices.

The ASBFEO favours ‘option 4’, consistent with the SME Committee and the Australian Consumer Law Committee of the Law Council of Australia, as well as the Queensland Law Society.⁵ Introducing specific prohibitions, in addition to a general prohibition, would help ensure that specific forms of unfair conduct are captured, both in the intent and the drafting of the provisions.

Further, the ASBFEO considers that this dual approach strikes a suitable balance between:

- identifying and addressing egregious practices
- maintaining flexibility to respond to emerging behaviour arising from new business models and technological change – including the growing importance of digital platforms.

The EU, the UK and Singapore have a combined general and specific prohibition.

ASBFEO position 1: The Australian Government should complement the Fair Work Commission’s new powers to deal with disputes involving ‘employee-like’ workers, by introducing a Federal Small Business and Codes List into the Federal Circuit and Family Court of Australia, that would allow for timely, affordable and restorative outcomes.

The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* created a new jurisdiction for unfair contracts remedies that applies to independent contractors under the contractor high income threshold (\$175,000).

However, the commission may only make orders where it is satisfied that a services contract includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters (broadly replicating section 8 of the Independent Contractors Act). This means that other matters pertaining to contractual performance or disputes between businesses will not be covered, irrespective of the income level of the independent contractor.

In particular, the Fair Work Commission does not have jurisdiction in relation to:

- unfair contract terms in services contracts that would not, in an employment relationship, relate to workplace relations matters
- unfair contract terms in services contracts where the party’s income exceeds the contractor high-income threshold
- unfair deactivation or termination of persons whose work was performed or arranged via a digital platform, where the party’s income exceeds the contractor high-income threshold, or
- performance disputes or contested views on contractual duties, obligations, adherence or delivery and resulting consequences.

⁵ Law Council of Australia, *Unfair trading practices – Consultation Regulation Impact Statement*, Treasury 12 December 2023.



Our experience points to numerous examples of grievance and disputation that can arise during the course of the engagement, that would not be addressed by the Fair Work Commission's new jurisdiction.

Some specific case examples that the ASBFEO Assistance function has dealt with include:

- payment disputes with customers serviced by the small business, where platforms simply reverse payments based on the customer's complaint, without small businesses being able to effectively appeal or have their matter reviewed (or through use of bank chargebacks, so the dispute gets 'lifted' from the platform and becomes one between the small business, its bank and the ultimate customer)
- being on multiple platforms that can result in exclusion from a particular platform depending on how a small business arranges its affairs (also allegations of sharing accounts with family members or others)
- insurance/accident issues where equipment (e.g., trucks) are damaged and there is a question who should pay for damage/excess
- faulty/fraudulent reviews/complaints that can also result in exclusion from platform
- exclusion from a platform based on the perceived type of business (e.g. may be viewed as 'dodgy' or may compete with other activities of the platform owner).

The commission has noted that applications to the Federal Court for an unfair contracts remedy remain available under the *Independent Contractors Act 2006* for independent contractors who earn above the contractor high income threshold.⁶ However, this option is likely to be expensive, lengthy and impractical for the bulk of small-business contractors, as is the situation of any case a small business may seek to pursue through the Federal Court.

ASBFEO's assistance services see many small and family business complainants in dispute with and commercial harmed by conduct that could well infringe existing Competition and Consumer Act, Australian Consumer Law and Code protections. Individual matters, no matter how egregious, are most unlikely to satisfy regulator investigation and enforcement guidelines or be deemed a priority for scarce publicly funded litigation budgets.

Accordingly, the ASBFEO proposes that the Australian Government introduce a Federal Small Business and Codes List into the Federal Circuit and Family Court of Australia, to provide small businesses with more feasible and timely means of enforcing legal rights, as well as facilitate enforcement action by regulators.

Such a List could potentially also offer a low-cost mechanism to finalise other claims such as unfair dismissal or adverse action claims that are unable to be resolved by the Fair Work Commission through no fault of the employer; for example, because the employee refuses consent to conciliation or arbitration, which would normally progress to the Federal Court.

⁶ Fair Work Commission, *Implementation Report: Unfair deactivation, unfair termination for regulated workers; Unfair contracts jurisdiction for independent contractors*, 5 July 2024, p. 10n.



Further, this jurisdiction would cover matters that fall outside the Fair Work Commission's jurisdiction and provide a holistic timely and cost-effective resolution mechanism.

Disputes appearing on the list could be capped at \$1 million (award or fine) and delivered via online hearings including pre-hearing mediation, significantly reducing the time and cost burden on a small business. The list could also operate on an 'own costs' basis and allow application for 'no adverse costs' orders, like that of Part IV of the Competition and Consumer Act.

Right-sized regulation

Recommendation 2: Incorporate a new principle into National Competition Policy to facilitate competition and improve allocative efficiency, through government:

- a. consulting with affected parties throughout the process of policy development**
- b. pursuing minimum effective interventions that are proportionate to the risk being managed**
- c. ensuring regulations are right-sized for small and family businesses**
- d. taking a disciplined approach to assessing the impacts of policy and regulatory changes**
- e. aligning/synchronising requirements across government/agencies wherever possible**
- f. making use of existing natural business systems wherever possible.**

Regulations affecting small businesses are becoming more in number and greater in complexity. The cumulative compliance burden and fear of doing something wrong is having a chilling effect on entrepreneurship.

One of the reasons the ASBFEO was created was to ensure that policy makers and regulators could be supported in their work informed by practical insights and input from small and family businesses so that decision makers were more responsive to small business circumstances.

There is a need to refocus and renew a commitment to right-sized and transparent regulation, including how regulators and government formulate policy, programs and legislation, and how laws are implemented and administered, including the help, support and educative posture that enables resource-constrained small business owners to meet their obligations.

The ASBFEO considers that there is significant scope to improve the measurement of the burden of new policies and regulations on small businesses more rigorously and consistently. A thorough regulatory burden assessment is imperative to understanding the true costs of doing businesses, and is relevant to understanding start-up costs, barriers to entry, and how the international competitiveness of Australian businesses can be improved.

Existing guidance published by the Office of Impact Analysis takes account of:

- Administrative costs, including the time taken to create and maintain records, notifying the government of certain activities, making applications and paying license fees.
- Substantive compliance costs, such as the costs of providing training to employees, purchasing and maintaining equipment, providing information to customers, engaging professional services and purchasing permits.
- Delay costs, which consist of expenses and loss of income incurred by:



- the time taken to complete an administration application, and/or
- the time taken by the regulator to assess and communicate a decision.⁷

The ASBFEO has observed a decline in discipline and consistency in the process of analysing policy and regulatory impacts. There is scope to emphasise the need for identification of minimum effective interventions. The Office of Impact Analysis recommends that: ‘[T]he Impact Analysis should consider all practical policy alternatives that can be implemented to achieve the policy objective and address the identified problem.’⁸ All too often, however, practical alternatives are not being considered – a problem exacerbated by increasingly tight consultation times and narrower scope for officials to incorporate insights from affected businesses.

ASBFEO observes the continuation of ‘silos’ across Departments and agencies where adjacent and interconnected regulatory requirements are inadequately considered. There is a need to better explore opportunities for alignment and synchronisation of requirements on respondents to see where existing compliance actions or reporting may be suitable to satisfy policy objectives. Examples are illustrated in ASBFEO’s work on right-sizing and clarifying ESG reporting obligations for smaller businesses imposed by government and other businesses (‘white tape’) (see below) and the Simplified Trading System work where it was identified that trading entities may need to seek multiple ‘fit and proper person’ designations from peer agencies via separate processes.

Further, the ASBFEO considers that measuring the stock of existing regulation is as important as measuring the flow, especially given that small businesses have less capacity than their larger competitors to deal with regulatory burden and complication.

The ASBFEO acknowledges the regulatory reform work being undertaken by the Department of Finance and we shall continue to encourage and assist the government’s efforts to make regulatory obligations both easy to comply with and hard to avoid.

Reform theme 1: Promoting a more dynamic business environment.

Reform theme 3: Lowering barriers to labour mobility.

Addressing impediments to doing business across Australia

Recommendation 3: The Australian Government to encourage a seamless national economy through National Cabinet, including by:

- improving local government regulation**
- addressing inefficient inconsistencies between jurisdictions, notably by harmonising occupational licensing requirements and plastics regulation**
- ensuring financial incentives under National Competition Policy are fit-for-purpose and effective.**

While states are sovereign in their own sphere, there are significant benefits to consumers and businesses of reducing the costs of cross-border or overlapping regulation, as well as enhancing

⁷ Office of Impact Analysis, *Regulatory Burden Measurement Framework*, Department of the Prime Minister and Cabinet 6 February 2024.

⁸ Office of Impact Analysis, *User Guide to the Australian Government Guide to Policy Impact Analysis*, Department of the Prime Minister and Cabinet, 30 November 2023, p 24.

workforce mobility. In 2009, the Commonwealth, states and territories agreed to facilitate and reward the delivery of reforms to achieve:

[M]ore consistent regulation across jurisdictions and address unnecessary or poorly designed regulation, to reduce excessive compliance costs on business, restrictions on competition and distortions in the allocation of resources in the economy.⁹

Fifteen years later, there are outstanding cases of regulatory inconsistency between jurisdictions that impose an undue compliance burden on small and family businesses. Accordingly, the ASBFE O considers it timely for the Australian Government to again prosecute the case for a seamless national economy through National Cabinet.

Local government

The Harper Review recommended that: ‘All Australian governments should review regulations, including local government regulations, in their jurisdictions to ensure that unnecessary restrictions on competition are removed’.¹⁰

In Western Australia, local governments in metropolitan and regional areas have introduced ‘buy local’ campaigns and the created online business platforms to better connect small business owners and reduce red tape. The Western Australian Small Business Development Corporation’s \$2.2 million Small Business Friendly Approvals Program was initiated to:

[S]treamline the process of obtaining business licences and trading permits from local government authorities ...

[The program was built] on two successful pilots undertaken with the Cities of Canning and Stirling in late 2019. Undertaken between January 2021 and April 2023, the Approvals Program enabled the SBDC to partner with 20 local government authorities to identify approvals reform initiatives to streamline the approvals process and help small businesses start, relocated and grow in their local communities.¹¹

The Victorian Small Business Commission’s Small Business Friendly Charter outlines shared goals for participating local councils to create a fair and competitive trading environment for small businesses. These goals include:

- paying small business supplier invoices within 14 days
- supporting local businesses in managing disruptions caused by infrastructure projects
- streamlining approval processes for people looking to start a business in the area
- helping set up and support local business networks.¹²

In addition, Victoria has introduced a Better Approvals for Business Program to improve the regulatory and associated approvals processes for businesses, including small businesses. The program comprises delivery of a series of regulatory reform reviews. Each review reform package

⁹ Council of Australian Governments, *National Partnership Agreement to Deliver a Seamless National Economy*, 1 February 2009, p. 3.

¹⁰ Australian Government Competition Policy Review (Harper Review), *Final report*, March 2015, p. 43.

¹¹ Western Australian Small Business Development Corporation, *Small Business Friendly Approvals Program*, Small Business Development Corporation website, access gained 3 October 2024.

¹² Victorian Small Business Commission, *Small business friendly councils*, access gained 3 October 2024.

is co-designed with businesses and industry, regulators and local and state governments to ensure reforms target priority issues affecting businesses and are readily implementable.¹³

Cross-border occupational licensing requirements

To work in some occupations, individuals need to be registered and/or hold a licence in the state or territory where they wish to work.

Each state and territory is responsible for deciding which occupations require a registration or licence and any associated conditions.

Part 3 of the *Mutual Recognition Act 1992* (which is underpinned by state-based laws) establishes a national framework for the operation of the mutual recognition of occupations in Australia. Mutual recognition allows a registration or licence holder in one state or territory to receive another registration or licence in a second jurisdiction for an equivalent occupation.

Part 3A of the *Mutual Recognition Act* sets out the ‘automatic deemed registration’ process by which a worker who is licensed or registered in an eligible occupation in one jurisdiction can be considered registered to perform the same activities in another jurisdiction, without further application processes or fees.¹⁴

In December 2020, the Prime Minister, state premiers and the Northern Territory Chief Minister signed the Intergovernmental Agreement on the Automatic Mutual Recognition of Occupational Registration to implement a uniform scheme from 1 July 2021.

However, the full benefits of a nationally uniform scheme have yet to be realised. Queensland is not currently participating in the Automatic Mutual Recognition Scheme, and other jurisdictions have exempted a range of occupations on safety grounds.

For example, Tasmania has exempted the following occupations from the application of automatic mutual recognition until 1 July 2025:

- Teacher
- Security-sensitive Dangerous Substances Permit
- Responsible Worker status
- High Risk Work Licence Assessor

Further, Tasmania has exempted the following occupations until 1 July 2026:

- Licensed Builder – General Construction – Open
- Licensed Builder – General Construction – Medium Rise
- Licensed Builder – General Construction – Low Rise
- Licensed Builder – General Construction – Domestic.¹⁵

Similarly, Victoria has decided to delay the following occupations from the start of AMR:

¹³ Victorian Government, *Better Approvals for Business Program, Business Friendly Council Approvals Review – Reforms Summary and Implementation Pilot*, 2024.

¹⁴ Department of Employment and Workplace Relations, *Mutual recognition*, 5 September 2024.

¹⁵ Department of Treasury and Finance Tasmania, *Automatic mutual recognition for occupational licences*, 24 October 2023.



- teaching
- building surveyors
- plumbing work
- labour hire
- firearms
- private security
- sex workers including brothel managers.¹⁶

Automatic mutual recognition is currently not available for construction workers in the ACT, including:

- builders
- building assessors
- building surveyors
- drainers
- electricians
- gasfitters
- gas appliance workers
- plumbers
- plumbing plan certifiers
- works assessors.¹⁷

The ASBFEO maintains that there is an urgent need to review the extent of state and territory participation in automatic mutual recognition of occupational registration and the policy justifications for continued exemptions.

National regulation of plastics

In 2021, the Australian Government announced a National Plastics Plan to

- reduce plastic waste and increase recycling rates
- find alternatives to unnecessary plastics
- reduce the amount of plastic affecting the environment.¹⁸

However, business compliance is being hampered by inconsistencies between jurisdictions regarding the phasing and content of single-use plastics bans, the regulation of biodegradable and

¹⁶ Department of Treasury and Finance Victoria, *Automatic Mutual Recognition of Occupational Licensing*, 16 June 2023.

¹⁷ Australian Capital Territory Government Planning, *Mutual recognition*, access gained 8 October 2024.

¹⁸ Department of Climate Change, Energy, the environment and Water, *Plastics: National Plastics Plan*, access gained 8 October 2024.

compostable plastics, waste-collection standards, container deposit schemes, and plastic packaging and recyclability labelling (see Table 1 below).¹⁹

Definitional and regulatory inconsistencies between jurisdictions are especially challenging for small and family businesses, who may struggle to manage varying inventory requirements, including reusable items.

The House of Representatives Standing Committee on Climate Change, Energy, Environment and Water described the National Plastics Plan as ‘a disjointed compilation of goals’, while noting that Commonwealth, state and territory environment ministers have agreed to:

- develop nationally harmonised definitions to support the elimination of single-use plastics while minimising cross-border costs for businesses
- implement a new mandatory packaging regulatory scheme
- develop a national roadmap to improve harmonisation of kerbside collection
- develop national packaging laws to establish guidelines for packaging design.

Nonetheless, the committee recommended that the Australian Government work with states and territories to update the National Plastics Plan, monitor progress, and harmonise policy actions, standards and schemes.

The ASBFEO considers that federal and state governments should pursue opportunities for harmonisation as a matter of priority, while ensuring that requirements and timelines give due regard to the capacities and pressures faced by small-business owners.

Table 1: State and territory commitments to eliminate single-use plastics

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Lightweight plastic bags	✓	✓	✓	✓	✓	✓	✓	✓
Straws	✓	✓	F 2025	✓	✓		✓	✓
Drink stirrers	✓	✓	F 2025	✓	✓		✓	✓
Cutlery	✓	✓	F 2025	✓	✓		✓	✓
Polystyrene food and drink containers	✓	✓	F 2025	✓	✓		✓	✓
Plates and bowls	✓	✓	F 2025	✓	✓		✓	✓
Cotton buds with plastic stems	✓	✓		✓	✓		✓	✓

¹⁹ House of Representatives Standing Committee on Climate Change, Energy, Environment and Water, *Drowning in waste: Plastic pollution in Australia’s oceans and waterways*, Canberra, May 2024.

Microbeads	✓	✓	F 2025	✓				✓
Heavyweight plastic bags	✓		P 2025	✓	✓			✓
Fruit and vegetable produce bags					✓			✓
Plastic cups and lids					✓			✓
Coffee cups containing plastic					✓			✓
Releasing helium balloons			F 2025	✓				
Plastic takeaway containers					✓			✓

Key: ✓ = Banned F = Forthcoming (ban yet to commence) P = Proposed (subject to consultation)

Source: House of Representatives Standing Committee on Climate Change, Energy, Environment and Water; state entities.

Incentive payments

Under National Competition Policy, the Australian Government made payments to state and territory governments, in recognition that the Commonwealth would receive a disproportionate share of increased revenue because of the larger national income induced by the reforms.²⁰

Similarly, the National Partnership Agreement to Deliver a Seamless National Economy involved:

- ‘facilitation’ payments to compensate the net set-up costs and revenue forgone by the states and territories as a result of implementing the reforms
- a ‘reward’ component, with payment contingent on independent assessment that clearly defined key milestones have been achieved.²¹

The Harper Review observed that incentive payments enhanced the ability of governments to undertake reform, and that the prospect of payments being withheld helped governments to maintain support in the face of opposition to reform. However, the Harper Review also found that ‘their effectiveness across the NCP agenda was limited by not applying to the Australian Government and not consistently being applied to local government.’²²

Further, the Harper Review argued:

The focus on sharing benefits was a crucial feature of the NCP payments, which should be reinstated in any future arrangements. The payments should not be misrepresented as an ‘incentive’ or a ‘bribe’ for the States and Territories (and local government) to undertake

²⁰ Australian Government Competition Policy Review (Harper Review), *Final report*, March 2015, p. 444.

²¹ Council of Australian Governments, *National Partnership Agreement to Deliver a Seamless National Economy*, 1 February 2009, p. 3.

²² Australian Government Competition Policy Review (Harper Review), *Final report*, March 2015, p. 445.

reform. Such an approach has the potential to direct the focus away from the benefits of reform.²³

The ASBFEO urges the Australian Government to revisit the financial incentives under the National Competition Policy to determine if they are still fit for purpose and achieving their original objective. In particular, the government should consider the risk that:

- incentive payments might be inadvertently rewarding laggard jurisdictions
- in the case of state taxation reform, the benefits of incentive payments might be offset by real or perceived redistributions of GST away from those states that increased the efficiency of their tax system, owing to the process of horizontal fiscal equalisation.²⁴

Reform theme 1: Promoting a more dynamic business environment.

Competitive neutrality

Recommendation 4: Ensure government-owned enterprises like Australia Post adhere to the principle of competitive neutrality in their arrangements and conduct with small-business partners.

Competitive neutrality refers to the elimination of resource misallocations arising from public ownership of entities engaged in significant business activities. Government-owned businesses should not enjoy any net competitive advantages – or suffer net disadvantages – by virtue of that ownership.

The Harper Review noted that: ‘Competitive neutrality covers the behaviour of government businesses, not policy or other government decisions that affect markets or competition.’²⁵

As a Commonwealth-owned enterprise, Australia Post (AusPost) should not enjoy net competitive advantages (or suffer net competitive disadvantages) over their private sector competitors.

Accordingly, the Australian Government must insist on adequate AusPost performance standards, fairer business practices and sustainable franchisee, licensee, and independent contractor commission structures to support the viability of the AusPost and its associated small business delivery partners.

A consequence of current AusPost licensee arrangements is that small businesses often need to diversify into ‘in conjunction’ retail, hospitality, or other products and services to maintain a viable business. While diversification may strengthen a smaller enterprise’s profitability, AusPost may well also identify these and /or adjacent opportunities to bolster its own financial position and performance. AusPost, in pursuing these commercial opportunities, can place itself in direct competition with its smaller commercial partners and undermine these relationships. Examples include AusPost displacing licensee stationary retailing activity with its own on-line stationary offering, that included fulfilment via the same licensees.

AusPost is rightly devising and implementing strategies to meet its service obligations and strengthen its sustainable financial performance and position alongside the natural decline in the

²³ Australian Government Competition Policy Review (Harper Review), *Final report*, March 2015, p. 445.

²⁴ See Commonwealth Grants Commission, *Occasional paper no. 2: GST distribution and State tax reform*, 2021; NSW Independent Pricing and Review Tribunal, *Review of State Taxation, Report to the Treasurer, Other Industries – Final Report*, October 2008.

²⁵ Australian Government Competition Policy Review (Harper Review), *Final report*, March 2015, p. 255.



number of physical letters being sent, particularly by businesses and government. However, AusPost should not rely upon displacing commercial activities and opportunities of its partnering small businesses and small business customers to prop up its own commercial viability.

For its partnering small business licensees and franchises, the growing dependence on these customer-facing small businesses to engage in income-producing ancillary services reinforces the need for AusPost performance standards, and franchisee and licensee commission structures, to be designed to support viable small business licenced post offices. These small businesses also require support from AusPost to ensure their premises have capacity to hold a growing number of parcels and securely handle cash on hand from bank customer deposits and to facilitate bank customer withdrawals. AusPost should update its franchise model to support viable small businesses franchises that do not need to so heavily rely upon robust ‘in conjunction’ businesses to secure their profitability or face AusPost as a potential competitor.

There is also scope for competing parcel businesses to argue that AusPost’s customer-facing network should be subject to an access declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth) (CCA). Such a declaration could enable competitors, on reasonable commercial terms, to leave at the local postal outlet, parcels unable to be delivered to a recipient and left securely at the delivery address. This may also provide an additional revenue stream for AusPost licensees and benefits to consumers via increased competition in fulfillment services.

Recommendation 5: The Australian Government should continue to pursue reforms to support small-business entry and enhance competition in Commonwealth procurement, including by simplifying entry processes and refreshing government panels more than every three years.

Winning a government contract can be life-changing for a small business. The Australian Government procured goods and services worth \$75 billion in 2022-23 yet small business suppliers accounted for only \$8 billion, or 11%, by value.

The ASBFEO was asked by successive Coalition and Labor Governments to independently examine procurement rules and processes and bring fresh thinking to this long-standing area of contention and frustration for small business. Actions already taken have not shifted the dial.

The overwhelming response from our consultations with Australia’s small business community was that too many felt excluded from the chance to tender for government contracts because they are not part of the ‘in-crowd’.

Repeatedly, small suppliers have told us the existing system was bewildering and just not working. The process involved in bidding was too complicated, not conducive to competition, opaque, inefficient, and incongruent with private sector processes.

The ASBFEO consulted extensively with current and aspiring small business suppliers, government departments, procuring officials and agencies in developing specific, constructive, and practical recommendations to maximise opportunities for small businesses to compete.

The ASBFEO’s inquiry report on 1 July 2022 changes to Commonwealth Procurement Rules made 11 specific, constructive and practical recommendations to:

- remove complications in procurement
- maximise opportunities for small businesses to compete



- enable impartial, timely and consequential reviews of decisions
- build the confidence of officials through increasing competence and improved support
- consistently measure outcomes to achieve policy objectives.

The ASBFEO is encouraged by improvements to Commonwealth procurement that the Australian Government has made since the ASBFEO completed its inquiry, which address some of the key issues we raised. These changes include:

- requiring that 25% of procurements below \$1 billion, and 40% of procurements below \$20 million, must be sourced from SME
- raising the SME exemption threshold raised from \$200,000 to \$500,000
- requiring that at least one SME must be approached for every request for quote from the mandated Management Advisory Services Panel and the People Panel
- introducing a flexibility allowance to allow agencies to source 5% of their spending through the Management Advisory Services and People Panels directly from First Nations businesses not on those panels
- clarifying that benefits for SMEs will only apply to independent entities, rather than small or medium-sized entities that are supported by the resources of a larger entity
- launching the Procurement and Contract Management Profession through the Australian Public Service Commission.

One outstanding opportunity for improvement relates to panels (fixed lists of suppliers). Australian Government procurement panels are usually established for at least 3 years and may provide an opportunity for existing supplier to update their offer, and new suppliers to join the arrangement through a ‘refresh’ option. However, there is not compulsory schedule for refreshing a panel. Rather, the timeframe can vary according to the nature of goods or services to be provided, the size of the panel, and consultation with industry. While this appears to be an efficient approach to managing panel arrangements, it is having an unintended consequence of creating a barrier to competition and stifling innovation.²⁶

As part of ASBFEO Procurement Inquiry some submissions to this inquiry noted that established lists of suppliers – known as panels – are often numerous and extensive, making it difficult for small businesses to join and then stand out against larger competitors. Some submissions noted that after successfully joining a panel (and after investing significant time and resources into the tender process), they have never received an RFQ. Consequently, this has resulted in concerns being raised by suppliers on the use of panels by officials and the lack in transparency regarding requests for quotes, and how many suppliers were approached.

Additionally, panels do not have standard requirements to be reviewed and refreshed at regular intervals, further restricting opportunities for SMEs to join and compete, while stifling innovation.

Reform theme 5: Leveraging the economic opportunities of data and digital technology.

Digital Millennium Copyright Act (DMCA)

²⁶ Australian Small Business and Family Enterprise Ombudsman Procurement Inquiry Final Report, December 2015, p. 18, 50.



Recommendation 6: The Australian Government should investigate how the weaponization of the notice-and-takedown provisions of the DMCA are being used by competitors of Australian small businesses engaging in ecommerce in the United States and how this may be impeding Australian small businesses to expand into overseas jurisdictions.

The Digital Millennium Copyright Act 1998 (DMCA) is an appendix to Title 17 the Copyright Act in the United States Code. it aims to protect original works of authorship from reproduction or communication. The DMCA amended US copyright law to address the relationship between copyright and the internet. A key feature of the DMCA is the safe harbour provision for online service providers, enabling owners of original works to issue a takedown notice to an online service provider where the infringement of copyright may have occurred.

The Copyright Act covers: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. Copyright protection for an original work of authorship does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.²⁷

To give an example of how the DMCA can affect businesses based here, an Australian small business in 2023 contacted the ASBFEO regarding a takedown notice that had been issued against one of their wholesalers by a US competitor. The eCommerce provider removed the content without investigating the legitimacy of the copyright infringement claim.

Further, the Australian business received notification from several of their other distributors that had also received takedown notices. This resulted in loss of sales and reputational damage because a US competitor weaponised the copyright safe harbour provisions which require an online service provider to remove the copyright infringing material for a period until the business can provide information that they have not infringed copyright law or lodge a counter notice.

The weaponization of the DMCA notice-and-takedown system may be an area of growing concern as US based competitors are able to exploit the low awareness and understanding of Australian businesses of US copyright law. While we recognise the DMCA has limited application outside of the US, it can have consequences for Australian businesses who engage in ecommerce on digital platforms. We encourage the Australian Government to monitor and investigate if the weaponisation of the DMCA is having detrimental effects on Australian businesses to compete in overseas markets when selling on ecommerce platforms. Additionally, we encourage IP Australia and Austrade to work with the ASBFEO to help lift small businesses awareness and understanding of copyright laws in different jurisdictions.

Other matters

Insurance

ASBFEO position 2: The Australian Government to work urgently and decisively with the insurance industry and small-business representatives, to ensure that essential insurances for small businesses are understandable, accessible and affordable.

²⁷ Copyright Law of the United States (Title 17), Chapter 1: Subject Matter and Scope of Copyright



Access to adequate insurance cover at commercially viable terms is a significant challenge for many of Australia's small businesses. Many small businesses now consider insurance costs to be a greater concern over taxes, energy costs, wages and general business expenses.²⁸ Unlike households that, for various reasons, might choose to be uninsured or underinsured and have options about the level and nature of the risk protection policies they subscribe to, a small business must have insurance covering areas such as public liability. If a small business is not insured, it cannot engage in trade and commerce.

There are various factors contributing to the availability of affordable insurance. Risk is a key issue, including climate risk, along with personal injury risk. The insurance sector has attributed the problems facing Australian small and family businesses to a hardening of the global market, with the high cost of insurance correlating with the high cost of risk transfer across industries over the last decade.

Be that as it may, many small and family businesses are individually doing what's being asked of them but are seeing no benefits to cost and availability of insurance cover. The ASBFEO considers that insurers should recognise potential savings from risk-mitigation steps undertaken by their small business customers and share these benefits with them.

The Caravan Industry Association of Australia undertook stakeholder engagement and collaboration to examine the insurance landscape in the caravan park industry and present a 5-point strategy to address its current challenges related to affordability and accessibility. This approach used data-driven risk-mitigation measures and analysis to understand the industry's risk profile to answer insurance challenges in the sector.²⁹

The ASBFEO implores the insurance sector to help small businesses in other sectors by mapping out pathways to solutions to give small business owners the chance to stay in business.

A contributing and related factor affecting small business, such as those who host live music or reside in the amusement, leisure and recreation industry, is the requirement to pay for access to Australian Standards. Small businesses and festival operators may either be unaware of relevant and up-to-date standards, or unable to gain access to them, and as a result use or provide 'compromised' products. This can in turn lead to increased claims and rising premiums.

The Australian Competition and Consumer Commission has affirmed that the continued charging for Australian Standards that are referenced in Australian laws is a barrier to compliance, particularly for small businesses. The ACCC considers that referenced standards should be freely available and published on the internet by Standards Australia.³⁰

The ASBFEO has advanced the following recommendations to improve the availability and affordability of insurance for Australian small and family businesses:

²⁸ Business NSW, *NSW Business Conditions: A cautious start to 2024*, Business NSW, NSW Government, March 2024, p.15.

²⁹ Caravan Industry Association of Australia, *Industry Roadmap Insuring Caravan Parks A Strategic Blueprint to Improve Industry Wide Insurance Affordability and Accessibility*, 10 August 2023.

³⁰ The Australian Competition and Consumer Commission, *ACCC submission to Standards Australia's discussion paper on the Disruption and Licensing Policy Framework*, ACCC, Australian Government, 21 August 2019.



- the insurance sector to work with small businesses and their industry representatives to identify solutions and risk-mitigation strategies
- the Australian Government should encourage industry-led solutions and where appropriate support discretionary mutual funds
- the Australian Government should ensure that mandatory Australian Standards are freely available
- improving and extending protections of the Code to small business customers, including have a small business representative on the Governance Committee
- the Australian Government continue to monitor the effects of the Cyclone Reinsurance Pool and investigate whether it should be expanded to cover all declared emergencies
- improving disaster preparedness and resilience from land-use planning to hardening of critical infrastructure
- supporting further engagement and investment from overseas insurers and reinsurers

Advice to Australian Government on ESG considerations for small businesses

In June 2024, the ASBFEO provided advice to the Australian Government on environmental, social and governance (ESG) considerations for small businesses, having regard to the Australian Government's mandatory climate-related financial disclosure requirements for large businesses and the Sustainable Finance Strategy. In preparing this advice, the ASBFEO drew on views heard at the ESG for SMEs symposium run by the ASBFEO in March 2024.

While some small businesses are familiar with ESG considerations by virtue of their industry (e.g., tourism, mining) or activities (e.g., participation in government procurement), many are unfamiliar with ESG factors and may misperceive them as a new set of onerous regulatory requirements.

This misperception can be overcome by reframing and promoting ESG considerations as 'business benefiting' with a focus on practical elements contributing to improved business durability.

Small businesses are already seeking to enhance their durability and meet the rising expectations of customers, employees, suppliers, regulators and financiers. These include actions to reduce energy consumption, better manage waste, be an employer of choice, demonstrate contributions to the community, and improve internal processes.

Nonetheless, many small businesses can expect a growing burden in responding to information requests from large organisations seeking to fulfil their own reporting obligations, whether they relate to modern slavery reporting (required since 1 January 2019) or mandatory climate-related financial disclosures (prospective) or nature-related financial disclosures (currently voluntary).

The ASBFEO has advanced recommendations aimed at:

- clarifying and streamlining what government and regulators require small businesses to do
- ensuring cascading information requests from large organisations are reasonable
- providing tailored support to small businesses at relevant points of decision.

Energising Enterprise: 14 Steps to boost Australia's small and family businesses

The ASBFEO released '14 Steps' to energise enterprise on 8 August 2024.



The publication highlighted key insights and recommendations that the ASBFEO has consistently advanced, as well as two new proposals and data from the ASBFEO Pulse composite index.

The '14 Steps' document identifies actions to recalibrate the risk-reward balance for creating or growing a small business; and address the Ombudsman's concern that Australia is 'sleepwalking towards a big corporate economy'.

Small businesses' share of the economy has dropped from 40% to 33% over past 18 years; and the sector's share of private sector employment has fallen from 53% to 42% in the same period.

The actions outlined in '14 Steps' encompass:

- exploring tax settings for start-ups
- improving regulatory processes and culture, as well as centralising guidance and support
- publicly recognising entrepreneurship
- reforming Commonwealth procurement
- mandating least-cost routing of debit-card transactions
- addressing the availability and cost of insurance
- right-sizing the regulation of workplace relations
- enhancing procedures used by digital platforms
- honouring good business payers (of wages, taxes and contracts)
- enabling better information management by small businesses.

The document is available at www.asbfeo.gov.au/14-steps

If you would like to discuss this matter further or require any further information, please contact the ASBFEO via email at advocacy@asbfeo.gov.au.

Yours sincerely

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman