



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

8 May 2023

The House of Representatives Standing Committee on Economics

Inquiry into promoting economic dynamism, competition and business formation

PO Box 6021

Parliament House

CANBERRA ACT 2600

via email: economics.reps@aph.gov.au

Dear Sir/Madam,

Identifying barriers to entrepreneurship to better support Australia's economic dynamism

Business creation and entrepreneurship are essential to driving economic growth, generating jobs, increasing economic efficiency and boosting innovation. Entrepreneurship, including self-employment, also provides alternative pathways for individuals who may not thrive in the traditional labour market, or require additional flexibility in their work.¹ However, the Productivity Commission's report *Advancing Prosperity* report included several indicators pointing to a loss of economic dynamism over the last decade.² Research by the Reserve Bank of Australia has also found that since the mid-2000s, market concentration and mark-ups have increased, firms are less likely to enter and exit, and the largest firms in industries have become more entrenched.³

Business formation and the development of entrepreneurs are key to a dynamic economy, as they can bring new or significantly improved products or processes that disrupt stagnant markets, apply competitive pressure to comfortable incumbents, and boost productivity and real incomes. In some cases, new entrants can embody innovations that generate entirely new industries. Yet a 2023 survey by CPA Australia indicated that only 14.3 per cent of Australian small businesses stated that they would introduce a new product, process or service that is unique to their market or the world in 2023. This was the lowest of all markets surveyed and significantly below the average of 34.4 per cent.⁴

Australia's entrepreneurial culture must be supported and developed to ensure we maintain and expand the ongoing economic benefits of innovative new businesses. The determinants of entrepreneurship and business creation are multi-faceted and interrelated, encompassing policies and regulations across levels of government, as well as broader social conditions, such as cultural attitudes to risk-taking and economic autonomy.⁵ We offer the following recommendations to the Australian Government as useful steps towards identifying and addressing barriers that are hampering Australia's economic dynamism.

¹ Organisation for Economic Co-operation and Development, *OECD Studies on SMEs and Entrepreneurship*, 2020, OECD Publishing, Paris.

² Productivity Commission, *Advancing Prosperity*, 2023.

³ Hambur, J. and Andrews, D., *Doing Less, with Less: Capital Misallocation, Investment and the Productivity Slowdown in Australia*, Research Discussion Paper, March 2023. Reserve Bank of Australia.

⁴ *ibid.*

⁵ Organisation for Economic Co-operation and Development, *International Compendium of Entrepreneurship Policies*, 2020, OECD Studies on SMEs and Entrepreneurship, OECD Publishing, Paris.



1. The cumulative benefits or burdens of policies, regulations and market designs on the small business and entrepreneurial ecosystem should be quantified in a ‘Small Business Health Index’ and made available to policymakers and industry

Australia has performed reasonably well over the last decade in international reviews and comparisons of the regulatory environment for businesses, including by the OECD and the World Bank.⁶ However, cultivating a deeper understanding of the array of factors affecting entrepreneurialism will help identify opportunities to make improvements to the small business ecosystem, including policies and regulations.

Currently, governments utilise the Business Longitudinal Analysis Data Environment (BLADE). BLADE enables researchers to understand the factors that drive business performance, innovation, job creation, competitiveness and productivity and provides insights into the development and evaluation of government programs and services.

Additionally, as previously recommended by this office, the Australian Government should consider tasking the Productivity Commission with developing a ‘Small Business Health Index’ to specifically measure the policy environment for entrepreneurship and to track its health over time.⁷

This framework could draw inspiration from The MetLife & U.S. Chamber of Commerce Small Business Index, which surveys small business owners each quarter to deliver a quantitative snapshot of the small business sector. It also distinguishes how different regions are performing across the United States across various economic measures, providing some insight into how regional differences may require different solutions to improve the policy environment for small businesses and entrepreneurs.

2. Ensure that new regulatory requirements are right-sized for entrepreneurs and small businesses

We recommend that governments implement right-sized regulation and that regulatory agencies consult with small business representative bodies – both to create ‘fit-for-purpose’ regulations and to ensure awareness among the small business sector of changes.

We also encourage the government to apply a ‘regulation implementation assessment’ model focused on consultation and feedback for implementing proposed changes with minimum effective intervention, particularly where regulatory impact assessment processes are incomplete or bypassed.

The Australian Government Privacy Act Review Report (published on 16 February 2023) makes 116 proposals, with an estimated 95 of these having a direct or indirect effect on the privacy obligations of small businesses. The ASBFEO has provided an initial submission (forthcoming) advising the government to proceed cautiously to avoid adverse unintended consequences and ensure requirements are right-sized, proportionate to risk, harmonised across jurisdictions, and consistent with cyber-security best practice and consumer data right rules.

Similarly, the government’s proposal to extend the powers of the Fair Work Commission to include ‘employee-like’ forms of work must be judiciously crafted to avoid curtailing the freedom and

⁶ Organisation for Economic Co-operation and Development, *Financing SMEs and Entrepreneurs 2022: An OECD Scoreboard*, 2022, OECD Publishing, Paris and The World Bank, *Doing Business 2020*. 2020, Washington, DC: World Bank.

⁷ Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Submission to Measuring What Matters*, Inquiry by Treasury, 31 January 2023.



flexibility of self-employment, which is an arrangement preferred by approximately 1.6 million Australians.⁸ Further, any new regulation of ‘gig economy’ work should employ a framework that is sufficiently precise and circumscribed to avoid inadvertently entangling an ever-growing number of entrepreneurs and small businesses who use digital platforms to their advantage.

3. Address unfair business practices disadvantaging entrepreneurs and small businesses by introducing a Federal Small Business and Codes List into the Federal Circuit Court of Australia

Small businesses and entrepreneurs can face significant power imbalances when engaging with their larger business counterparts. This can be accompanied by unfair business practices, which reduce competition, efficiency and consumer choice. Unfair business practices are regularly not illegal under existing legislation, including under the *Competition and Consumer Act 2010* (Cth) (CCA) and *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), and typically work in favour of larger businesses owing to their advantage in bargaining power.

Unfair business practices are often not captured within the unfair contract terms regime and do not reach the high legal bar of ‘unconscionability’. Two examples where small business may be suffering from unfair business practices and required help from our office’s assistance function are presented below.

ASBFEO case study one: Financial budgeting application

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) received a request for assistance from a small business start-up and developer of a financial budgeting application. The financial budgeting application was presented to a major bank as a prototype. Following the presentation, the business owner attended numerous meetings with senior staff at the bank who requested a copy of the pitch deck, which sets out the design concept and key features of the application.

The developer maintained that they provided this information to the bank in the hope of facilitating a partnership for further development of the application, and that they believed an implied obligation of commercial in confidence existed between the parties. However, the developer advised that the bank stopped responding to correspondence from them.

Shortly afterwards, the bank launched its own financial budgeting application in partnership with a large financial technology company. The developer maintains that the bank’s application is almost identical to theirs, noting that it included two key features of their prototype.

The ASBFEO wrote to the bank, which maintained that there was no obligation of confidence.

The parties agreed to case appraisal to investigate the circumstances of the case and, subject to the outcome, to participate in conciliation.

⁸ ASBFEO, *Small business data portal*, Resources and Tools Centre, viewed 24 April 2023.



ASBFEO case study two: Unpaid town planning work

A small start-up business undertook town planning and engineering design work for a regional council. The council was to receive a \$4 million grant from the Commonwealth for an infrastructure project. The small business maintains that it performed work on the project to the value of almost \$500,000 on the assumption that the small business would be included in the Funding Agreement.

Shortly afterwards, the relationship between the council and the project developers broke down and council voted to refuse the Commonwealth grant and did not pay the small business for its work.

The small business took legal action against the council, but was unsuccessful and ordered to pay the council's legal costs. The small business also complained to the relevant state's Ombudsman, but the Ombudsman was not prepared to review the case while the legal action was in progress. The small business had also attempted seek payment from the Commonwealth via a complaint with the Commonwealth Ombudsman. Given that there was no direct contractual relationship with the small business, the Commonwealth was not required to pay the small business.

After the legal action concluded, the relevant state Ombudsman accepted the matter for review which is currently being investigated.

Introducing a Federal Small Business and Codes List into the Federal Circuit Court of Australia would provide a low-cost alternative for small businesses and regulators to seek redress and timely enforcement action from unfair conduct by large entities in a cost-effective and timely manner.⁹ Disputes appearing on the list would be capped at \$1 million (award or fine) and delivered via online hearings, significantly reducing the time and cost burden on a small business.

Critically, the list would:

- operate as a 'no costs' jurisdiction
- include a reduced or capped 'court book' evidentiary entitlement
- provide a guaranteed turnaround time
- include compulsory pre-hearing alternative dispute resolution.

This reform would reduce barriers to justice for small businesses and entrepreneurs by supporting them in protecting their own commercial interests in a way that is affordable, timely and able to deliver adequate sanctions, interventions and recompense from counterparties engaging in anti-competitive or unfair conduct.

4. Enhance small business access to finance through the exploration of alternatives to using real estate or personal assets/guarantees as required collateral for loans

Small businesses often have fewer reliable alternative sources of funding than their larger counterparts, with debt financing more expensive, on average, for small businesses as they are typically considered to be riskier investments.¹⁰ To reduce the costs of borrowing or increase their

⁹ ASBFEO, *Submission to Treasury's Treasury Laws Amendment (Competition and Consumer Reforms No. 1) Bill*, 26 August 2022

¹⁰ McCowage, Madeleine, and Laura Nunn, *The Current Climate for Small Business Finance*. 2022. Reserve Bank of Australia.



loan size, or in many cases, just be considered a viable borrower, small business owners are regularly required to use their residential property, often the family home, as collateral.¹¹ The dependence on residential property as collateral disproportionately impacts younger generations for whom house ownership is in decline.¹² This system also disadvantages First Nations business owners, who tend to be younger, have lower incomes, and have less personal and family wealth.¹³

One area of exploration could be investigating if the Personal Property Security Register is supporting small businesses to use different assets as securitisation for loans effectively.

5. Ensure existing grants are effectively targeted and promoted to support small businesses and entrepreneurs in starting, growing and transforming their business

There are an array of government grants and investment programs across Australia that have the potential to support small businesses and entrepreneurs at all stages of the business lifecycle. Collaboration and communication between local industry and all levels of government is necessary to boost the efficacy of grants, and case studies promoting pathfinder businesses should be shared to increase awareness of opportunities and celebrate entrepreneurship within Australia. The Australian Government should explore opportunities to leverage these existing programs to further encourage entrepreneurship and raise awareness of their availability.

For example, the 2021 Cooperative Research Centres (CRC) Grants program is a collaboration between the Australian Government, industry and private investment, with the government having invested \$1.5 billion since 1991, and other partners a further \$15.8 billion. The CRC program evaluation, released in January 2023, found that this program was particularly effective, with every dollar invested by the Australian Governments seeing a \$7.73 return in economic benefits.¹⁴ The CRC-Projects element, introduced in 2015 with the aim of encouraging greater SME involvement, while early in its analysis, has also been found to have produced significant economic benefits.¹⁵ However, CRC funding has decreased year-on-year since the mid-2000s. Given the clear benefits of the program, we suggest the government consider expanding the CRC or replicating its successful elements to enhance other existing or future financial grants.

Further, it is important that grants are made accessible for entrepreneurs in regional, rural and CALD communities, and tailored, where appropriate, to directly address inequities or local needs. This should also include specific support for microbusinesses, such as businesses that are not actively remitting GST and self-employed business owners with no additional employees. These businesses and their important contributions are often invisible as they are omitted from some key business counts.

6. Institute mechanisms to efficiently resolve disputes involving digital platforms

Digital platforms have fundamentally changed the way in which Australian entrepreneurs and small businesses connect and sell to their customers. Digital platforms serve as single points of contact for businesses to reach a significant portion of the Australian and international markets. Many small and family businesses rely heavily on these platforms and any prolonged loss of access can cause irreparable damage to their financial viability and reputation.

¹¹ *ibid.*

¹² Australian Bureau of Statistics, *Owning a home has decreased over successive generations*, media release, 20 October 2022.

¹³ Evans M and C Polidano, 'First Nations Businesses: Progress, Challenges and Opportunities', 2022, *RBA Bulletin*.

¹⁴ ACIL Allen, *Cooperative Research Centres Program: Impact Evaluation*, p. 93, prepared for the Australian Government Department of Industry, Science, Energy and Resources, November 2021

¹⁵ *ibid.* p. xi



When the ASBFEO becomes involved in cases involving digital platform platforms, it regularly leads to satisfactory outcomes with a very quick turnaround, which is commonly just a few days. We accomplish this through our developed relationships with all the major platforms so that we expedite critical business issues for small and family enterprises in a practical and responsive way. While a small business is waiting for an outcome, the ASBFEO has the appropriate resources and tools available to help small business owners who often feel overwhelmed and require support.

Since many small businesses with problems with digital platforms conduct all or a major part of their business on the platforms, the return to normal business operations is important for their ongoing viability and is certainly highly appreciated by them. This is especially the case given that bodies able to provide determinative outcomes (such as the Telecommunications Industry Ombudsman) would require far longer periods to achieve essentially the same result.

We recommend that the Australian Government provide similarly efficient and effective dispute-resolution agency support to equip small and family businesses with the tools to protect themselves. This may be achieved by retaining the ASBFEO's efficient and timely processes for critical business disruptions with the ability to escalate to another agency to provide a determination should direct early resolution not be possible. We expect that escalation would be required in only a limited number of cases and would necessarily entail a longer timeframe for resolution.

7. Continue efforts to provide adequate connectivity for regional, rural and remote small businesses and entrepreneurs to support and drive a dynamic economy

Non-metropolitan areas often do not have the benefits of large local markets, easy access to public research and facilities, high quality infrastructure or networking opportunities that are available in major cities.¹⁶ New and emerging technologies have facilitated small businesses in reaching new customers and to grow and transform their business by extending beyond the traditional bricks-and-mortar business model. Fast and reliable internet is an essential service for most small businesses and especially for the more than 700,000 small businesses operating in regional and remote parts of the country.¹⁷ However, many small businesses in regional and remote areas are unable to take full advantage of online opportunities owing to insufficient levels of connectivity.

We are encouraged by the Australian Government's October 2022-23 Budget allocation of \$2.4 billion over four years for the NBN Repair Job, which will see over 660,000 regional premises being provided 'world-class internet speeds'.¹⁸ This is in addition to the \$656 million commitment to improve regional communications as part of the *Better Connectivity Plan for Regional and Rural Australia*.

We encourage the government to continue making improvements to ensure that regional and remote small businesses have competitive access to the digital economy, in line with the recommendations from the 2021 Regional Telecommunications Independent Committee report: *2021 Regional Telecommunications Review – A step change in demand*.

¹⁶ Organisation for Economic Co-operation and Development, *International Compendium of Entrepreneurship Policies*, 2020, OECD Studies on SMEs and Entrepreneurship, OECD Publishing, Paris.

¹⁷ ASBFEO Calculations, Australian Bureau of Statistics, customised data, 2022.

¹⁸ Treasury, *Budget Paper Number 1*, 2022, Treasury 1:21.



8. Reform Australia's current insolvency practices to enhance economic dynamism

There are many reasons why a small business may become insolvent, many of which are outside of the business' control. Entrepreneurs with great ideas do not always succeed the first time, with many of Australia's greatest companies and inventions started by people who did not succeed initially. However, existing insolvency processes are onerous, complicated, expensive and often dragged out over extended time periods, discouraging and restricting entrepreneurs from future business endeavours. Insolvency is particularly devastating for small businesses, which have less cash flow to mitigate against disruptions, are often underinsured, and have fewer options and legal tools and protections than larger companies.

Firstly, current insolvency practices should be reformed to increase the likelihood of a business restructuring and returning to profitability. Often, insolvency practices don't consider the unique characteristics and challenges of the small business sector. The system does not encourage the possibility that, through restructuring or assistance, the company could return to profitability and preserve the interests of creditors, investors, business owners and other key stakeholders. Insolvency practitioners are typically only paid approximately one-third of the fees to restructure a business compared to what they are paid under a liquidation appointment.

Secondly, we recommend the committee consider mechanisms to help small businesses improve their financial acumen and early awareness of insolvency risk. Improved access to appropriate and timely expert advice for small businesses will help small businesses apply a resilience and adaptation lens to business planning, development, and leadership as they evolve from the start-up phase to navigating succession and exit. A lack of financial acumen for small business owners can lead to insolvencies that might have been avoided, had the issue been understood and addressed earlier.

Thirdly, we suggest the committee consider, as previously recommended by this office, the benefits of establishing a Small Business Debt Hibernation program, which encapsulates protocols such as moratoriums, tax and other fees freezes, and government financial support.¹⁹ Certainty of protocols to support viable small businesses in future emergency scenarios, such as pandemics, natural disasters, global conflicts, or other crises should be established to avoid adverse impacts on Australia's economic dynamism. While governments may offer a raft of packages to support small businesses and allow them to recover from such shocks, the assistance is not guaranteed, and is inconsistent across jurisdictions. The introduction of 'known support' would provide confidence for small businesses to continue trading when an external shock impedes their operation.

Thank you for the opportunity to comment. If you would like to further discuss this submission, please contact Mr Jake Thomas on 02 5114 6146 or at jake.thomas@asbfeo.gov.au.

Yours sincerely

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman

¹⁹ ASBFEO, *Submission to the Parliamentary Joint Committee on Corporations and Financial Services*, 2 December 2022.