The Law Society
OF NEW SOUTH WALES

Our ref: BLC:RMsh030726

3 July 2026

Reducing barriers to business dynamism inquiry
Productivity Commission
LB2 Collins Street East
Melbourne Vic 8003

By email: BusinessDynamismInquiry@pc.gov.au

Dear Sir/Madam,

REDUCING BARRIERS TO BUSINESS DYNAMISM IN AUSTRALIA

The Law Society of NSW appreciates the opportunity to provide feedback to the Productivity Commission's "Reducing barriers to business dynamism in Australia" call for submissions paper. The Law Society's Business Law Committee contributed to this submission.

Our comments in response to the focus issues identified by the Commission are set out in the attached table.

Any questions in relation to this letter should be directed in the first instance to Sonja Hewison, Policy Lawyer, on (02) 9926 0219 or sonja.hewison@lawsociety.com.au.

Yours faithfully,

Ronan MacSweeney
President

Attachment.

No.	Areas of focus	Law Society comments
Regulatory and Administrative Burdens		
1.	**Administrative and regulatory costs of starting a business** *These include the requirements a firm must meet to start or grow a business.*	In our members' experience, businesses in Australia must engage with multiple, often uncoordinated layers of government to establish even a relatively simple enterprise. This includes Commonwealth requirements such as ABN registration, ASIC incorporation and ATO obligations; State and Territory obligations such as payroll tax, workers' compensation insurance and industry licensing; and local government approvals such as development consents and operational registrations. The duplication of information requirements, overlapping registration and approval processes, and differing renewal and reporting cycles impose recurring compliance costs throughout the business lifecycle. The Law Society has consistently emphasised the regulatory burden that these arrangements impose and that they operate as a material barrier to business entry and expansion.[1] Our concern lies not only in the volume of regulation, but also in fragmentation between regimes and the limited opportunities to reduce duplication. A recurring example is the inconsistent treatment of the concept of "small business". The Law Society has previously identified the use of disparate definitions within and across jurisdictions as a practical impediment to businesses navigating compliance requirements and accessing regulatory benefits.[2] The concept is variously defined by reference to employee headcount and turnover thresholds that themselves differ across multiple statutory and policy frameworks. For example, the *Fair Work Act 2009* (Cth) uses the headcount test of fewer than 15 employees for small business employers,[3] while NSW Treasury identifies fewer than 20 full time equivalent employees as one preferred definition of small business (the other being the $10 million aggregated annual turnover threshold test discussed

[1] Law Society submission to the Law Council of Australia, *Productivity Commission Inquiry: Creating a more dynamic and resilient economy*, 9 September 2025. https://www.lawsociety.com.au/sites/default/files/2025-10/PC%20Inquiry%20-%20Creating%20a%20more%20dynamic%20and%20resilient%20economy.pdf; Law Society submission to the NSW Small Business Commissioner, *Review of small business experiences with regulatory policymaking*, 10 July 2024, online, https://www.lawsociety.com.au/sites/default/files/2024-07/Letter%20to%20Small%20Business%20Commissioner%20-%20Discussion%20Paper%20%E2%80%93%20Review%20of%20small%20business%20experiences%20with%20regulatory%20policymaking%20-%2010%20July%202024.pdf, [2.1]; Law Society submission to ASIC *Regulatory Simplification (REP 813)*, 17 October 2025, online, https://www.lawsociety.com.au/sites/default/files/2025-11/Ltr%20to%20ASIC%20-%20Regulatory%20Simplification%20-%20Rep%20813%20-%2017.10.25.pdf [20].

[2] Law Society submissions, *Review of small business experiences with regulatory policymaking* and *Regulatory Simplification*, ibid.

[3] *Fair Work Act 2009* (Cth) s 23.

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		further below).[4] The unfair contract terms regime applies a threshold of fewer than 100 employees (or the $10 million turnover test) for the application of the regime to a given transaction.[5] Regarding turnover thresholds more broadly, different figures apply according to their purpose. For example, Commonwealth regimes use a $3 million annual turnover threshold for the *Privacy Act 1988* (Cth) small business operator threshold,[6] a $10 million aggregated turnover threshold for small business entity status,[7] and a $50 million aggregated turnover threshold for company tax base rate entity status.[8] State and local government frameworks apply different monetary triggers again, including the NSW payroll tax threshold of $1.2 million in annual taxable wages[9] and procurement thresholds based on the prescribed value of the goods or services being procured, such as the $250,000 threshold for direct engagement with small and medium businesses.[10] An entity's legal obligations shift depending on whether it is hiring staff, managing data, or filing corporate tax returns. In our view this fragmentation increases complexity and uncertainty. It may also create a disincentive for businesses to grow where expansion would trigger additional regulatory obligations under different statutory regimes, since the time and cost of meeting those additional obligations is a matter to be considered against the benefits of growth. Insurance availability and affordability should also be recognised as a practical barrier to business entry and continuity. Our members are aware of instances of small businesses experiencing difficulty obtaining insurance due to significant increases in premiums. This is particularly acute for those that are more vulnerable to climate change risks.

[4] NSW Treasury, *TPP22-08 Small Business Definition* (Treasury Policy and Guidelines Paper, 28 February 2022 (status: Active), online, https://arp.nsw.gov.au/tpp22-08-small-business-definition.
[5] *Competition and Consumer Act 2010* (Cth) sch 2, s 23(4); *Australian Securities and Investments Commission Act 2001* (Cth) s 12BF(4)(a), s 12BF(4)(b)(i).
[6] *Privacy Act 1988* (Cth), s 6DA.
[7] *Income Tax Assessment Act 1997* (Cth) s 328-110.
[8] *Income Tax Rates Act 1986* (Cth) s 23AA.
[9] *Payroll Tax Act 2007* (NSW) ss 6 - 8 and sch 1, especially sch 1 cl 1, which defines the "threshold amount" and sets it at $1.2 million for financial years commencing on or after 1 July 2020.
[10] NSW Procurement Board, *PBD 2023-03 Procurement opportunities for small (and medium) businesses* , 8 December 2023, cl 1, online, https://www.info.buy.nsw.gov.au/news/2023/new-procurement-board-direction-pbd-2023-03-procurement-opportunities-for-small-and-medium-businesses.

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		We understand that small business insurance premiums have regularly risen in recent years, with the increasing frequency and intensity of natural disasters identified as a significant driver of this upsurge.[11]
2.	**Australia's innovation ecosystem** *This includes support and incentives for innovation and entrepreneurs, rules and stigma regarding business failure and risk protection systems to support entrepreneurs.*	The Law Society notes that Australia's innovation ecosystem is shaped not only by regulatory constraints, but also by broader attitudes to business failure. Australia's insolvency framework distinguishes between personal insolvency under the *Bankruptcy Act 1966* (Cth) and corporate insolvency under the *Corporations Act 2001* (Cth). While personal insolvency law is commonly described as providing a "fresh start", that objective is principally given effect through discharge from debts rather than through an explicit rehabilitative framework directed to business re-entry. In our members' experience, the "fresh start" objective is not reflected in the practical and reputational consequences of business failure insofar as personal insolvency processes are concerned.[12] By contrast, the safe harbour and small business corporate insolvency reforms have expressly emphasised restructuring, enterprise preservation and the survival of viable businesses.[13] Our members observe that this distinction is significant for small business owners, whose personal and corporate liabilities often overlap, and for whom the stigma of failure may discourage entrepreneurship and timely engagement with restructuring options. We also note the safe harbour reforms were expressly framed by Government as part of an agenda to reduce the adverse perceptions associated with business failure and to encourage directors to respond early to financial distress.[14] In our view, maintaining an appropriate balance between creditor protection, director accountability and business rescue is important if regulation is to support business dynamism while maintaining confidence in the system. Comparable jurisdictions may provide useful reference points. For example, in the United States the concept of a "fresh start" for the honest debtor is expressly stated as a primary purpose of bankruptcy law, while recent United Kingdom insolvency policy places strong emphasis on rescue, restructuring and avoiding insolvency where possible.

[11] Law Society submission to the Law Council of Australia, *Impact of Climate Risk on Insurance Premiums and Availability*, 12 August 2024, online, https://www.lawsociety.com.au/sites/default/files/2024-09/Letter%20to%20Law%20Council%20of%20Australia%20-%20Impact%20of%20Climate%20Risk%20on%20Insurance%20Premiums%20and%20Availability%20%E2%80%93%208%20August%202024.pdf.
[12] Similar observations were made by the Law Council of Australia in its submission to the Commonwealth Attorney-General, *Personal Insolvency Consultation*, 6 October 2023,online, https://lawcouncil.au/publicassets/f5569cee-0667-ee11-948b-005056be13b5/4430%20-%20S%20-%20Personal%20Insolvency%20Consultation.pdf, [42] – [43].
[13] See Parliamentary Library, *Corporations Amendment (Corporate Insolvency Reforms) Bill 2020* (Bills Digest No 38 of 2020–21), online, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2021a/21bd038;Treasury, *Review of the insolvent trading safe harbour, Final Report*, tabled 24 March 2022, online, https://treasury.gov.au/sites/default/files/2022-03/p2022-p258663-final-report.pdf,.
[14] Treasury, *Review of the insolvent trading safe harbour, Final Report*, Ibid, 36, 39-40.

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		Consideration of those approaches may assist in assessing whether Australian frameworks give sufficient practical effect to rehabilitation and business re-entry.[15] In addition, we suggest small businesses facing prohibitive insurance premiums, reduced insurance availability, or insurance withdrawal may be less able to absorb the risks associated with innovation and business expansion. Our members have also reported that increasing complexity, compliance requirements and uncertainty surrounding the Research and Development Tax Incentive may reduce the practical accessibility of innovation support for some small businesses.
3.	**Human capital and management capability** *This includes managers' and owners' abilities to start and grow a business, covering things such as skills and risk appetite.*	Our members' experience suggests that many new business owners would benefit from clearer guidance and support when navigating business formation requirements. Where businesses are unable to obtain early professional advice, they may adopt unsuitable legal structures, rely on inadequate contracts, or fail to establish proper governance and record-keeping practices. These deficiencies create barriers to securing finance, business expansion, and transferring ownership. Insurance constraints may compound these challenges. When insurance is expensive or restricted, businesses have more difficulty managing risk and, therefore, may need more complex advice which potentially increases cost and difficulty overall. In our view, business capability is not solely a question of skills. It is also a function of good regulatory design, access to professional support, and the availability of practical risk-management tools, including adequate insurance. While regulatory simplification is an important part of the solution, access to practical guidance and support including, for example, digital decision-making tools and improved referral pathways to professional advisers, may assist new businesses to make informed decisions about business structure, governance and compliance from the outset.
4.	**Capital markets** *This includes firms' ability to use bond and equity markets, private equity, venture capital and angel investment to access finance. We will also*	Capital markets The Law Society recognises that access to capital is a central determinant of business dynamism. Regulatory settings that affect the cost, complexity and risk of participation in capital markets directly influence business decisions to raise capital, remain private, or seek public listing. We have noted in previous advocacy that declining initial public offerings and reduced willingness to list may be driven, in part, by the increased complexity, risk and cost associated with

[15] *See United States Courts, Bankruptcy Basics,* describing the purposes of US bankruptcy law as giving an honest debtor a "fresh start", online, https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/process-bankruptcy-basics; *Insolvency Service, Annual Plan 2023 to 2024,* describing the UK insolvency framework as supporting businesses in financial difficulty to avoid insolvency where possible, online, https://www.gov.uk/government/publications/insolvency-service-annual-plan-2023-2024/insolvency-service-annual-plan-2023-to-2024.

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	consider firms' ability to access capital outside of capital markets, including through bank finance.	regulatory compliance in public markets. By contrast, the growth of private markets has occurred alongside comparatively "lighter-touch" regulatory settings. These observations suggest at least a correlation, and possibly a relationship of influence, between regulatory burden and capital formation and investment decisions.[16] While we acknowledge the importance of investor protections in promoting market integrity and confidence, there is also merit in considering whether some measures to remove unnecessary disincentives to participation and capital formation may be warranted. This could include reviewing whether the compliance obligations applicable to crowd-sourced funding (**CSF**) are proportionate to smaller capital raisings. We also suggest reviewing whether aspects of the retail investment framework unnecessarily limit the pool of potential investors available to emerging businesses. In our members' experience, the cumulative disclosure and ongoing reporting obligations associated with CSF and retail investor offers may constrain access to capital for early-stage businesses. For example, raising capital from retail investors requires more extensive disclosure, documentation and compliance than wholesale fundraising, which may be unavailable to early-stage businesses without established investor networks.[17] While these obligations serve important investor protection objectives, their burden may, in some circumstances, be disproportionate to the size and risk profile of smaller capital raisings. <u>Access to finance</u> Access to finance outside capital markets is also critical to business growth. Reducing complexity and improving certainty in secured financing arrangements may assist businesses to access debt finance more efficiently. For example, consistent with the Whittaker Review's emphasis on simplification,[18] consideration could be given to whether the consequences of minor *Personal Property Securities Act 2009* (Cth) registration defects are proportionate to the nature of the error, particularly where no material prejudice is caused to third parties.

[16] Law Society submission to ASIC, *Australia's evolving capital markets: A discussion paper on the dynamics between public and private markets*, 2 May 2025, online, https://www.lawsociety.com.au/sites/default/files/2025-05/Ltr%20to%20ASIC%20-%20Australia%27s%20evolving%20capital%20markets%20-%20Discussion%20paper.pdf.
[17] See Australian Securities and Investments Commission (ASIC), *Regulatory Guide 254: Fundraising: Offer documents*, January 2020, RG 254.10 - RG 254.14 (distinguishing between regulated disclosure to retail investors and unregulated wholesale exceptions).
[18] Bruce Whittaker, *Review of the Personal Property Securities Act 2009- Final Report*, tabled 18 March 2015, online, https://treasury.gov.au/publication/p2015-682313. The Australian Government accepted 345 of the 394 recommendations made by the Whittaker Review and released a package of proposed reforms for consultation in 2023; https://consult.treasury.gov.au/c2023-682313-govt-response. We note the broader simplification reforms recommended by the Review have not yet been fully implemented.

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The design, operation and integrity of insolvency frameworks		
The design of Australia's insolvency frameworks:		
5.	*The principles and objectives that underpin Australia's insolvency frameworks and the extent to which they support suitable outcomes for people and businesses, and enable economic growth*	In our view formal insolvency consequences should be aligned with clear policy objectives and evidence, and should not operate merely as a routine debt collection mechanism. We endorse the Law Council of Australia's previous advocacy that those policy objectives should function to balance creditor protection, preservation of viable enterprise, efficient allocation of resources, and deterrence of misconduct.[19] Insolvency frameworks should also be sufficiently simple and accessible to encourage timely engagement with restructuring pathways. This is particularly important where small business owners may face overlapping personal and corporate insolvency exposure. The availability and affordability of insurance may also affect business resilience before insolvency arises. For example, uninsured or underinsured businesses are more exposed to loss and therefore at increased risk of business interruption and financial distress.[20]
6.	*Whether further harmonising Australia's corporate and personal insolvency frameworks would create a net benefit, particularly for small business owners*	We suggest that consideration of greater harmonisation of aspects of Australia's personal and corporate insolvency is warranted, particularly in the context of small businesses where personal and business liabilities frequently overlap or coincide.[21] The need to navigate separate concepts, procedures and thresholds may increase cost and complexity and reduce the timeliness of intervention. For example, our members report that while a single insolvency practitioner may act across multiple companies within a corporate group, additional complexity can arise where a small business owner faces both personal and corporate insolvency. In those circumstances, considerations of independence and potential conflicts of interest may require separate practitioners to administer the personal and corporate estates, increasing costs, complexity and duplication. We also suggest harmonisation is appropriate where personal and corporate insolvency regimes pursue similar policy objectives. For example, consideration could be given to whether differences in the treatment of voidable transactions

[19] Above n 12.
[20] .Above n 11.
[21] See Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency in Australia - Report*, July 2023, ch 5, [5.1] - [5.4], noting that the separation of personal and corporate insolvency regimes may create complexity for small and medium businesses where personal and business debts overlap, and discussing calls for greater harmonisation of insolvency law.

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		remain justified, given that both regimes seek to unwind transactions that improperly diminish assets available to creditors in insolvency.[22]
The operation of Australia's insolvency frameworks and the extent to which they achieve the principles and objectives:		
7.	*How the various corporate and personal insolvency pathways can be improved*	The Law Society acknowledges the significance of the small business restructuring process introduced by the 2021 corporate insolvency reforms to support the restructuring of viable small businesses in financial distress.[23] We note ASIC's 2023 review of the restructuring process identified low initial uptake and suggested possible reasons including eligibility settings, complexity, insurance or licensing consequences, and cost.[24] While ASIC's 2025 review records a significant increase in uptake and concludes that, on balance, the process is starting to deliver on its policy objective,[25] our members report that aspects of the current regulatory framework continue to impose significant compliance burdens on insolvency practitioners, the costs of which are either passed on to creditors or borne by the practitioners themselves. We would support a review of whether the costs associated with regulatory compliance are justified by the policy benefits achieved. Examples include the remuneration reporting requirements imposed on corporate insolvency practitioners when seeking creditor approval of remuneration,[26] and the obligation on liquidators to report suspected misconduct to ASIC.[27] While these requirements serve important transparency, accountability and integrity objectives, we suggest the extent and level of detail required for practitioners to discharge those obligations should be proportionate to identifiable regulatory outcomes, which in our members' experience are not always apparent. We also suggest that the Commission might wish to consider reviewing available data on the prosecution of reported misconduct and successful enforcement outcomes when reviewing the proportionality of reporting obligations.

[22] *Corporations Act 2001* (Cth) pt 5.7B (including ss 588FA - 588FF)*; Bankruptcy Act 1966* (Cth) ss 120 - 122.
[23] *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth).
[24] ASIC, Report 756: *Review of small business restructuring process*, January 2023, online, https://download.asic.gov.au/media/31okxjmd/rep756-published-17-january-2023.pdf.
[25] *ASIC, Report 810: Review of small business restructuring process: 2022 – 24*, June 2025, online, https://download.asic.gov.au/media/b2ofqop2/rep810-published-27-june-2025.pdf.
[26] *Corporations Act 2001* (Cth), Sch 2 (Insolvency Practice Schedule (Corporations)), ss 60 - 10 and 70 - 45.
[27] *Corporations Act 2001* (Cth), s 533(1)(b)(ii), (d) - (e).

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The integrity of Australia's insolvency frameworks and the extent to which they sufficiently deter misconduct:		
8.	*A review of the operation of Schedules 1, 3 and 4 of the Treasury Laws Amendment (Combatting Illegal Phoenixing) Act 2020 (Cth)*	We acknowledge measures addressing illegal phoenixing activity are necessary to maintain confidence in corporate regulation and to protect creditors and honest businesses. However, we also agree with the view of the Law Council of Australia that anti-phoenixing regimes should be framed so as not to have a "chilling" effect on legitimate restructuring and good faith transactions or to operate inconsistently with safe harbour objectives.[28] In our view, any review of the Act should focus on precision in the scope of enforcement powers to ensure they are targeted, workable and directed to misconduct, without making lawful restructuring more difficult or uncertain than necessary.
9.	*Whether the prohibition of insolvent trading and the safe harbour provisions appropriately balance integrity and rehabilitation of viable businesses*	The Law Society notes that the insolvent trading prohibition[29] imposes significant potential personal liability on directors of financially distressed companies. For owner-directors of small and medium enterprises, that liability may add to already significant personal exposure arising from guarantees and other commitments, without necessarily encouraging timely use of the safe harbour provisions. In our members' experience, the deterrent effect of the insolvent trading prohibition is likely to be less effective where cost, complexity or uncertainty creates practical barriers to directors accessing restructuring pathways that may avert financial distress before insolvent trading risk arises. While the safe harbour provisions[30] were introduced to support business restructuring, our members report they are more commonly utilised by larger enterprises and may be difficult for small businesses to access due to cost and administrative complexity. The limited judicial consideration of the safe harbour provisions also contributes to ongoing uncertainty regarding its practical operation.

[28] Law Council submission to Senate Standing Committee on Economics, *Treasury Law Amendment (Combating Illegal Phoenixing) Bill 2019*, 13 March 2019, online, https://lawcouncil.au/publicassets/777586a9-f849-e911-93fc-005056be13b5/3599%20-%20Treasury%20Law%20Amendment%20Combating%20Illegal%20Phoenixing%20Bill%202019.pdf, [3.1], [3.5].
[29] *Corporations Act 2001* (Cth), s 588G.
[30] *Corporations Act 2001* (Cth), s 588GA.