Australian Institute of Company Directors

Level 5,
No.1 Martin Place
Sydney NSW 2000

1300 739 119
contact@aicd.com.au
aicd.com.au

ABN 11 008 484 197

3 July 2026

Productivity Commission
Level 8, Two Melbourne Quarter
697 Collins Street
Docklands Vic 3008, Australia

Via online form

Dear Commissioners,

Productivity Commission Inquiry into reducing the barriers to business dynamism

Thank you for the opportunity to provide a submission in response to the Productivity Commission's (**Commission**) call for views on barriers to business dynamism in Australia.

The Australian Institute of Company Directors (**AICD**)'s mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 54,000 includes directors and governance leaders of not-for-profits, large and small businesses and the public sector.

Over the past 12 months the AICD has engaged extensively in different processes to examine opportunities to promote improved economic growth and productivity in Australia, including the Commission's 'Five Pillars of Productivity' inquiries. The AICD is also a member of the Alliance of Industry Association, which now includes over 30 groups representing Australia's small, medium and large businesses, universities, farmers, retailers and the investment community. The group came together to work on productivity solutions to improve living standards for all Australians.

We welcome the Government's release of the Whole of Government Regulatory Reform Agenda in the 2026/27 Federal Budget as an important first step in reducing regulatory drag and promoting productivity growth. However, there is more to be done. The 2025 research commissioned by the AICD from economics advisory firm Mandala Partners (**Mandala**) makes it clear that Australia's federal regulatory system is burdensome and a barrier to new business creation and business expansion.

The Commission's inquiry presents an opportune moment to build on the findings and recommendations of the 'Five Pillars of Productivity' inquiries to further the compelling case for genuine reform to unlock productivity growth across the economy.

1. Executive Summary

The AICD welcomes the Commission's focus on reducing barriers to business dynamism in Australia. The AICD and our membership have long standing concerns that there are entrenched regulatory barriers that make Australia an increasingly difficult place to start and expand a business, including attracting capital, expanding into new markets, and efficiently winding up unviable businesses.

Due to poor productivity performance over the past two decades, there is an inherent speed limit at which the Australian economy can grow without an outbreak of inflation. Given this environment our strong view is that one of

the most effective options is to expand the supply-side of the economy through greater ambition on the stock of regulation and better regulation in the future. Well targeted proportionate regulation should address market failures and externalities but continue to have sufficient room for individuals and businesses to take risks to start new businesses, launch new products and expand into new markets.

In this submission the AICD has focused on providing high level comments on the broader policy settings relating to barriers to business dynamism, principally as they relate to Australian boards.

We anticipate being able to provide further detailed comments following the Commission's release of its Interim Report later this year. This submission will be supported by further economic research with Mandala that we are currently undertaking and will share with the Commission in advance of the Interim Report.

Regulatory and administrative burdens

- Australia's layered and complex federal regulatory system is a barrier to business dynamism. The weight of regulation in Australia across all levels of government stymies business dynamism, including launching and expanding a business and innovating through new products and services.
- An economy-wide regulatory federal reform agenda could have a fundamental impact on the ease of starting, growing, restructuring and transferring businesses.
- The current, layered director liability environment is a component of the regulatory accumulation that is crowding out board focus on strategy and innovation and is also disincentivising the opening of new businesses.
- The AICD has the following specific recommendations for regulatory reform to boost economic dynamism:
    - A broad and comprehensive review of the *Corporations Act 2001* (Cth) (**Corporations Act**).
    - The implementation of the recommendations from the Australian Law Reform Commission's Final Report, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*.
    - A whole-of-government statement on regulation that details how the Government will prioritise removing or improving inappropriate regulation (Recommendations 2.1 – 2.2. Pillar One).
    - Greater cabinet scrutiny of new federal regulation (Recommendation 2.3 Pillar One).
    - An empowered Office of Impact Analysis to apply a more thorough analysis of new policy proposals (Recommendation 2.4 Pillar One).
    - Examination of small business thresholds and definitions across state and federal regulation, including payroll tax, with the objective of harmonisation or alignment where practical.

Human capital and National Competition Policy

- The AICD supports greater ambition in the scope of the National Competition Policy and the funding available under the National Productivity Fund to incentivise states to tackle complex and resource intensive productivity and dynamism enhancing reforms, including occupational entry requirements form as set out in recommendations 4.1, 4.2 and 4.4 of the Commission's *Pillar Two - Building a skilled and adaptable workforce*.

The design, operation and integrity of insolvency frameworks

- The AICD strongly supports a comprehensive review of Australia's insolvency regime. The AICD appreciates that the Commission is not currently undertaking such a review, however our view is that the Commission should assess whether such a review is a necessary next step.
- The insolvency regime in Australia is costly and complex. There is an opportunity for the Commission to consider the key insolvency elements of the Corporations Act and put forward recommendations to simplify the regime, reduce complexity and increase harmonisation. In particular the Commission should:
    - Examine the appropriateness of the director liability insolvent trading threshold being lifted to 'wrongful trading' in line with other jurisdictions.
    - Encourage swift implementation of the outstanding recommendations of the Safe Harbour Review, noting the limited implementation to date.
    - Examine the possible harmonisation of the Safe Harbour and the Business Judgement Rule under the Corporations Act.
- The Commission should consider whether the patchwork of insolvency laws that is relevant to governance of the NFP and charitable sectors requires simplification and consolidation.
- The Commission should assess possible amendments to the small business restructuring regime to improve its effectiveness and accessibility for directors of small and medium enterprises (**SMEs**).
- The Commission should examine the Australian Taxation Office's (**ATO**) role in the insolvency regime, including the use of its powers, such as Director Penalty Notices, and the alignment between this role and other aspects of the regime, including the Insolvency Safe Harbour.

2. Regulatory and administrative burdens

While regulation is only one component that influences business dynamism, it is the principal area that AICD members have highlighted as a touchpoint in unlocking opportunities for growth and innovation. It is also an area where all governments have an opportunity to make a meaningful difference, as opposed to cultural, social or technological factors influencing dynamism that may be outside the control of government policy.

Federal regulatory accumulation creates barriers to business dynamism

The AICD is supportive of well-designed and proportionate regulation that addresses market failures in an effective way. However, we have become increasingly concerned that the pendulum has swung too far in Australia where there can be a rush to legislate extensive new requirements with limited assessment of the costs on organisations and low confidence that the policy benefits will outweigh these costs.

Consistent feedback from directors is that Australia is an increasingly difficult place to do business with the weight of regulation being a significant factor limiting the appetite to start new businesses, the risk appetite of businesses for significant capital investments, entry to new markets and product and service innovation. Regulation is making it harder for workers to change jobs and for businesses to find the right workers. Regulation disproportionately impacts small and medium businesses, making it harder for them to expand, causing less dynamic and more concentrated markets.

It is clear from the Commission's final pillars reports and AICD research there is now a material impact on business dynamism from regulatory volume, complexity and density. This is borne out in the AICD's Director Sentiment Index with board time spent on compliance having more than doubled from 24 per cent to 55 per cent in 10 years.[1]

Our strong view is that this dynamic not only weighs down all incumbent organisations with material compliance costs it also often serves as a barrier to entry for both young firms and established organisations looking to expand or enter new markets. The 'red tape impulse' across all levels of government may contribute to a cultural mindset that it is 'too hard' or 'not worth the effort' to start a business. As the Commission highlighted in 2025 in the Interim Report on *Creating a more dynamic and resilient economy,* a would-be café owner in Brisbane has to go through 31 regulatory steps before opening.[2] This dynamic is not confined to small hospitality businesses. We highlight an example below of a private health insurer needing over two years and more than 30 separate regulatory interactions before obtaining approval to offer a new insurance product.

The Federal Government faces a challenging environment: high inflation, low productivity, fiscally constrained, a turbulent global economy, and relatively weak economic growth and business investment. In this environment, the focus of policy should be to expand the supply-side of the economy through a comprehensive deregulation agenda. Such an agenda – outlined below – will grow the economy through higher investment and productivity and lower cost-of-living pressures by expanding supply, competition and easing prices.

AICD and Mandala research on federal regulatory accumulation

As the Commission is aware, the AICD engaged Mandala to assess the current scale and impact of federal regulation in Australia on businesses, and the economy. The research, published in November 2025, finds strong evidence that Australia's federal regulatory system has become more complex and burdensome.

The research's headline finding was that Australian organisations now spend $160 billion a year (or 5.8 per cent of GDP) to comply with federal regulation, up 40 per cent as a share of GDP in the last decade. While all businesses must meet these obligations, small and new businesses often lack the resources and expertise to do so. They also face disproportionate costs and a lack of clarity around regulatory obligations when compared to incumbents. This disproportionate impact means higher costs as a percentage of revenue when compared to larger incumbents.[3]

This change has been driven by two primary factors: increasing regulation (see Figure 1), including the complexity of this regulation (see Figure 2), and secondly greater spending by organisations to meet compliance with regulation. To meet the growing weight and complexity of federal regulation Mandala finds that spending on

Figure 1: Growth in federal regulation

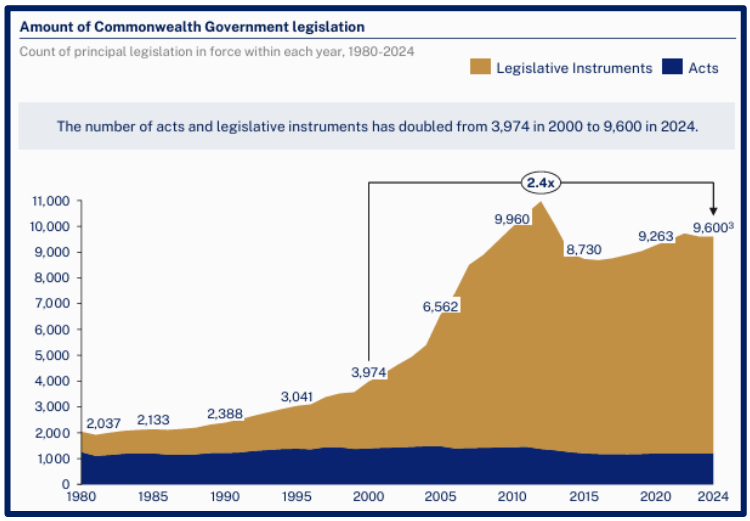
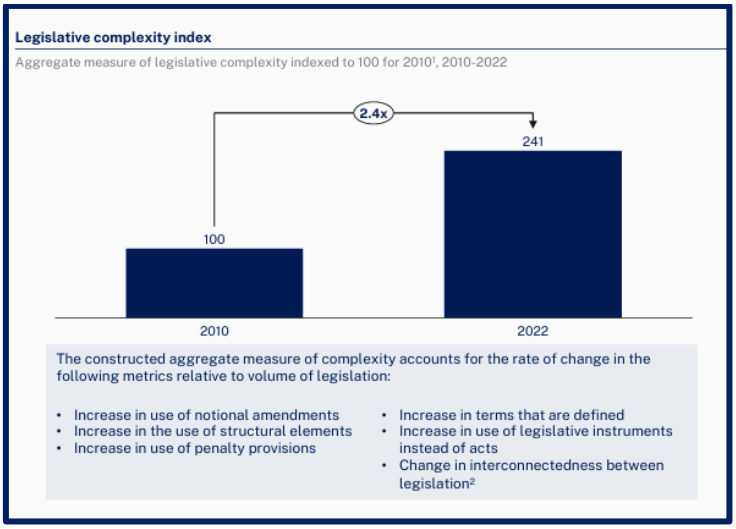


Figure 2: Mandala legislative complexity index



[1] AICD Mandala Report, page 23.

[2] Interim Report, page 4.

[3] Douglas, Justin, and Amy Land Pejoska. "Regulation and Small Business." Department of the Treasury, August 28, 2017. https://treasury.gov.au/publication/p2017 t213722a

external legal services grew three times between 2010 and 2024 (from $6 billion to $16 billion), a 39% increase as a percentage of GDP.

These findings add to the body of research that makes it clear that the regulatory burden is a barrier to new business and business expansion. For example, Mandala details how spending on compliance indirectly hampers business investment. A 0.1 per cent increase in the share of compliance workers, similar to the change over the past decade, is associated with a $10.4 billion reduction in investment.[4] The research finds that insufficient weight is given to growth and dynamism when making or implementing regulation, resulting in reduced business investment and weaker overall economic performance.[5]

Case study – Private health insurance market innovation

The AICD has been given details of the regulatory challenges a private health insurer faced after launching an innovative product into the Australian market. The total process, from beginning to end, took two years, involved three different regulators (sometimes with different views on a single topic) and involved over thirty different interactions with the regulators.

The issues commenced in November 2023 when the insurer began selling an innovative policy "Product X." The regulators each formed views on what type of policy Product X was under the Life Insurance Act 1995. The main issues in contention were:

- whether Product X is a "Health insurance product" or a "Life insurance product"; and
- a disagreement between two of the three regulators about the form of Product Disclosure Statement for Product X.

These issues required the insurer at various times to:

1. minimise sales of Product X;
2. provide voluminous and detailed information to the regulators justifying its categorisation of Product X (including copies of actuarial advice on Product X since its inception);
3. update the Product Disclosure Statement for Product X; and
4. broker agreement between two regulators on the final form of the Product Disclosure Statement (as one of the regulators did not agree with changes requested by the other regulator).

As this drawn-out process included sales and marketing restrictions being placed on Product X while negotiations with the regulators continued, there were considerable costs to the insurer from loss of sales. This is in addition to the extremely significant administrative burden put on the insurer in complying with requests for information, advice and evidence from three different regulators.

Research on the impact of regulation on business dynamism

There is a substantial body of research showing that regulatory burden and regulatory complexity can act as barriers to both business entry and business growth. We highlight the following key research:

1. CEDA's 2026 report, Hustling, not hiring: Why fewer Australians are starting a business (2026), which found that over the past two decades the rate of new businesses with employees has declined significantly across all states. CEDA concluded that the administrative burden of starting and running a business is a significant barrier to dynamism. The report found that rising regulatory costs and barriers are a key factor that deters new businesses: "*ongoing administrative and compliance requirements impose significant costs that disproportionately affect small and new firms*."[6]

2. The e61 Institute 2025 research, 'New firms power Australia's economy, while small old firms drag it down,[7]' which found that young businesses power economic dynamism through employment and value creation. The

[4] AICD Mandala Report, at page 4.
[5] Ibid, page 6.
[6] Hustling, not hiring: Why fewer Australians are starting a business (2026), CEDA, pg. 7.
[7] New firms power Australia's economy, while small old firms drag it down, e61 INSTITUTE

research concludes that while new firm creation matters it is the growth of these firms that is key to business dynamism.

3. The 2026 OECD paper, 'Regulatory compliance costs and productivity: new task-based evidence'[8], which found that higher regulatory compliance costs are associated with '*weaker labour productivity and business dynamism*.' The paper concluded that there is a need for better regulatory policies to manage the stock of existing regulations, and for limiting unnecessary compliance burdens.[9]

4. The 2025 OECD analysis, 'Time for a regulatory reset? Clearing the path for productivity and dynamism,'[10] which found that 'higher regulatory compliance costs are linked to workers producing less per hour and to new businesses making up a smaller share of employment,' and calls for a regulatory reset.

An example shared with the AICD and detailed in the case study above demonstrates the multiple regulatory interactions that occurred when a private health insurer launched an innovative product into the Australian market. It is instructive of the complexity of existing legislative frameworks and the layering of regulations and regulators that can be involved in launching a new product: a two-year process, three different regulators and over thirty regulatory touchpoints. Costly and lengthy regulatory engagement of this nature detract from the ability to explore new products and considerably reduce the ability for organisations to deploy resources towards growth, research and development.

Overall, the research literature consistently finds that the scale and complexity of regulation can reduce business entry, hinder business expansion, and weaken economic dynamism.

Australia's director liability environment disincentivises risk taking

The liability environment faced by all Australian directors should be considered as a component of the regulatory barriers that can disincentivise Australians from starting a business. It is very common for the founders or owners of young businesses to also be the directors of the business. Australia's complex director liability environment is one important component of a weight of regulation that may contribute to a cultural mindset that it is not worth taking the risk to start a business.

Our strong view is that this environment also imposes a risk aversion mindset of boards that limits a focus on strategy, innovation and investment. As noted above, AICD survey results indicate that with board time spent on compliance has more than doubled in the past ten years.

Australian boards operate in one of the most complex liability environments internationally. Allens research from 2025 commissioned by the AICD compared Australia to five other comparable jurisdictions (Canada, Hong Kong, New Zealand and the US) and found that:

- Australia is assessed as the 'high water mark' – the jurisdiction with the most onerous or wide-ranging liability settings compared to peers – when considered holistically.

- Australia imposes higher liability in areas including corporate law (breaches of directors' duties), taxation law (personal liability for company tax offences) and environmental law (personal liability for company contraventions).

- Australia imposes the equal highest liability in areas including cyber security (general cyber and data obligations), consumer protection (misleading or deceptive conduct) and financial accountability (failure to comply with financial accountability obligations).

[8] Regulatory compliance costs and productivity, 28 January 2026, OECD Economics Department Working Papers.
[9] Ibid at page 3.
[10] Time for a regulatory reset? Clearing the path for productivity and dynamism

The research makes it clear that this director liability environment is a component of the regulatory accumulation. Specific director liability provisions are imposed on top of existing directors' duties with this trend growing since 2019. For example, Australian boards face reporting and attestation requirements in areas like sustainability reporting, modern slavery and security of critical infrastructure. This pushes boards closer to the traditional domain of management and encourages a compliance, rather than an innovation focus.

Small businesses

The layering of a myriad of compliance requirements across all levels of government has a particularly profound impact on small business. It constrains their ability to grow, resulting in more concentrated markets, lower productivity, reduced investment, and fewer opportunities for young people given it is small and medium businesses which disproportionately employ this cohort.

A key challenge for small businesses in Australia is navigating a highly fragmented and complex regulatory environment spanning all levels of government. There is no consistent definition of "small business", with multiple thresholds applied across policy domains — such as employee-based measures (for example, fewer than 20 employees), turnover thresholds (such as for tax purposes), and alternative criteria used in workplace law, prudential regulation and financial reporting — meaning businesses must interpret and comply with different rules depending on the regime.

The Business Council of Australia's 2025 Better Regulation Report[11] highlights that this fragmentation contributes to a broader regulatory burden, with duplicative and inconsistent requirements across jurisdictions creating a "patchwork" system that impedes business activity, investment and cross-border expansion. For small businesses in particular, these challenges are magnified: they typically lack dedicated compliance resources and must absorb regulatory obligations alongside core operations. Evidence shows small businesses bear these costs disproportionately, often spending several hours each week on compliance and lacking the internal resources of larger firms to manage complex regulatory systems[12].

The 2025 Council of Small Business Organisations Australia Small Business Perspectives Report[13] found that many small business owners spend more than six hours a week on regulatory tasks, ranking compliance among their top five business expenses. As a result, time and capital is diverted away from core business activity, constraining productivity, innovation and growth.

Bunching and the role of payroll tax

A myriad of different thresholds and definitions is associated with the firm behaviour of 'bunching'. Bunching occurs when firms limit their size or activity to stay below regulatory thresholds that trigger additional obligations or higher compliance costs.

An obvious example in the Australian context is payroll tax, with some evidence indicating that firms may limit employee headcount and salaries to avoid their wage bills exceeding specific thresholds. We note research by e61 Institute in 2024 on payroll tax settings in South Australia following a change in thresholds in 2019.[14] The research found that the number of firms just below the new $1.5 million threshold increased by 21%, while the number just above decreased by 18%. The conclusion was that the policy change created a material barrier to firm growth and employment.

Further examination of bunching is set out in the AICD Mandala Report at page 28.

The role of payroll tax inhibiting firm growth and hiring is made even more complex by the different thresholds that exist – thresholds vary significantly across the different states and territories. We strongly support announced

[11] BCA Better Regulation Report at pg 27
[12] COSBOA 2025 Small Business Perspectives Report
[13] COSBOA 2025 Small Business Perspectives Report
[14] e61 Institute, 'A Counterproductive tax cut? How size-based payroll taxes can create a roadblock to firm growth', August 2024, available here.

efforts to harmonise payroll tax administration across states and territories as an important step to provide some relief to organisations that operate across state borders.

3. Human capital

Human capital is key to business dynamism as investing in people, strategy and skills is ultimately a key driver for growth and greater productivity. Much of this is about labour market matching: having the right worker in the right job. This requires workers to be mobile, both geographically and between jobs.

For boards the oversight of human capital is integral to its core responsibilities. Workforce capability, capacity, safety and organisational culture determine whether strategy can be executed and whether risks are being properly managed. We have received consistent feedback from our members that Australia faces significant skills and human capital challenges that are a handbrake on business investment and productivity.

We recognise that access to skilled employees and strong management capability is a key element of a business growing and expanding. Our comments in this submission focus on reform of burdensome and costly occupational entry requirements, however we look forward to engaging on this topic further following the Interim Report.

Occupational entry requirements reform

The AICD believes that progressing the Commission's recommendations for reform of occupational entry requirements (**OER)** will incentivise business growth and facilitate new businesses. As previously highlighted by the Commission, there is strong evidence that excessive and inconsistent OERs are a handbrake on labour mobility, deprive businesses of critical workers, lower the productivity of impacted firms and contribute to overall skill shortages across the economy.

We are concerned by the observations in the Commission's Pillar Two Interim Report that the prevalence of OERs may be increasing and that licencing regimes are more stringent in Australia as compared to similar countries. We note, for example, that individual engineers are required to obtain separate qualifications or pay multiple fees to work in each state and there are additional costs for engineering firms.[15] These forms of regulation adversely affect the ability to start and grow businesses, employ appropriate skills and expand into other states and territories.

Our starting point is that for many occupations and professions, relying on general laws is a more efficient and effective regulatory approach than establishing discrete and complex licences that are challenging to monitor and enforce. Genuine national OER reform has the potential to result in a greater appetite for business growth across the economy particularly in sectors that face persistent skills shortages.

We strongly support the first steps to address genuine OER reform via the National Competition Policy (**NCP**), including the focus on engineering, electrical trades and separately national harmonisation of care worker standards and screening.

Our strong view is that greater ambition in OER reform via the NCP and the National Productivity Fund (**NPF**) is necessary to incentivise genuine reform efforts by states and territories, including compensating states for foregone licensing revenue.

4. AICD recommendations – regulatory and administrative burdens

The AICD provides the following recommendations in respect of the regulatory and administrative burden that is impeding business dynamism. We recognise that a number are consistent with the findings and recommendations of the Commission under the *Pillar One - Creating a more dynamic and resilient economy*.

15 Engineers Australia, Submission to the Productivity Commission - Building a skilled and adaptable workforce, June 2025.

Our strong view is that these recommendations retain currency and warrant a formal Government response, particularly in respect of establishing the processes to make balanced and growth enhancing policy in the future.

Better regulation

1. A broad and comprehensive review of the Corporations Act. At over 4,000 pages, the corporations law has become far too complex and leviathan for users to navigate in an effective and cost-efficient manner without costly external legal advice. The legal obligations that apply to all Australian business owners and directors should not be an impenetrable quagmire that promotes a mindset that avoids risk taking for fear of incurring regulatory scrutiny and the threat of personal liability.

2. The implementation of the recommendations from the Australian Law Reform Commission's Final Report, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, which found that for businesses, the high degree of legislative complexity in Australia, including within the Corporations Act, makes it 'harder to operate and innovate' and that reducing this complexity could achieve 'economic efficiencies and enhanced productivity'.[16]

3. Examination of small business thresholds and definitions across state and federal regulation, including payroll tax, with the objective of harmonisation or alignment where practical.

4. A whole-of-government statement on regulation that details how the Government will prioritise removing or improving inappropriate regulation and adopting a pro-growth mindset to new regulation with an accompanying annual regulation review (Recommendations 2.1 – 2.2.Pillar One).

5. Greater cabinet scrutiny of new federal regulation consistent with the current rigour applied to budget proposals and clearer direction to regulators on accounting for growth and dynamism in the rules and policy making processes (Recommendation 2.3 Pillar One).

6. An empowered Office of Impact Analysis (**OIA**) to apply a more thorough analysis of new policy proposals across departments and regulators, including the appointment of a Statutory Commissioner to oversee the work of the OIA (Recommendation 2.4 Pillar One).

Human capital and National Competition Policy

7. Greater ambition in the scope of the NCP and the funding available under the NPF to incentivise states to tackle complex and resource intensive productivity and dynamism enhancing reforms. A key starting point is broadening the agreed number of occupations covered under existing OER reform via the NCP. We reiterate our strong support for the following recommendations in *Pillar Two - Building a skilled and adaptable workforce*:

    - Replace excessive occupational entry regulations with less burdensome alternatives (Recommendation 4.1);

    - Better target qualification requirements to risk (Recommendation 4.2); and

    - Incentivise occupational entry regulation reform through National Competition Policy (Recommendation 4.4)

[16] Australian Law Reform Commission (January 2024) Complexity: Reforming Corporations and Financial Services Legislation (ALRC Report 141). Pages 48-49. Available here.

5. The design, operation and integrity of insolvency frameworks

The AICD has advocated over many years for reform of insolvency law as a key, and often underappreciated, area of microeconomic reform that can promote a focus on effectively and efficiently winding up unviable businesses and these resources being deployed to more productive economic uses.

The AICD has long supported a comprehensive review of Australia's insolvency regime. A comprehensive review was a central recommendation of the Safe Harbour Review.[17]

We appreciate that the Commission is not undertaking such a review, however our view is that the terms of reference provide the Commission sufficient scope to consider how the regime is performing, including in comparison to similar international jurisdictions, and closer consideration of the interaction between other elements of the Corporations Act, for instance the business judgement rule, taxation, bankruptcy laws and the application to charities and not-for-profits (**NFPs**). Following the conclusion of this inquiry it may be appropriate for the Commission to consider whether a standalone independent review of the regime is necessary as a component of its final recommendations.

An insolvency regime that provides room for directors and owners to attempt to turnaround struggling businesses and separately windup unsuccessful businesses in an efficient and effective manner is ultimately a key part of a dynamic economy.

Wrongful trading threshold

We encourage the Commission to consider whether increasing the threshold of the insolvent trading director duty to 'wrongful trading' in line with the UK warrants further analysis as a mechanism to increase business dynamism. Under the relevant provisions of the UK's *Insolvency Act 1986*, the threshold for director liability requires *actual knowledge or negligence* that there was no reasonable prospect of the company avoiding liquidation and they did not take steps to minimise losses to creditors. By contrast, section 588G of the Corporations Act is based on a lower threshold of needing to prove only that there was *reasonable suspicion* in the mind of the director that the company was insolvent.

A lifting of the threshold would support all organisations and encourage innovation and appropriate risk-taking. A higher threshold would be a significant step in reducing personal director liability and promote a measured focus on risk taking and turnaround. The AICD also considers that it would not blunt any incentive on directors to restructure businesses but rather provide greater comfort that they could take measured risks and seek innovative solutions to viability challenges without the threat of personal liability. Further, an adjustment of the threshold would also have the benefit of simplifying a subjective and complex component of the directors' duties framework in the Corporations Act.

The Safe Harbour Review cited a number of submissions from key industry stakeholders, including the Law Council, who were supportive of lifting the threshold as a potential mechanism to resolve the existing complexity and ambiguity with how the insolvent trading director duty interacts with other elements of corporate law, including director duties contained in Part 2D.1 of the Corporations Act.18 While the Safe Harbour Review found there was appeal in lifting the threshold its appropriateness to Australia should be closely considered and was beyond the scope of its review.19 The AICD recommends the Commission consider what steps should be taken to assess changes to the threshold.

[17] The Treasury, Review of the insolvent trading Safe Harbour - Final report, March 2022, page 5.
[18] The Treasury, Review of the insolvent trading Safe Harbour - Final report, March 2022, page 84.
[19] Ibid.

Complexity and high costs

The insolvency regime in Australia is costly and complex and there is an opportunity for the Commission to put forward recommendations to simplify the regime and reduce complexity. Focus areas in any simplification agenda should encompass the current insolvent trading threshold, implementation of the Insolvency Safe Harbour Review recommendations, and an assessment of opportunities for aligning the Business Judgement Rule with the Safe Harbour regime, as detailed further below.

Insolvency Safe Harbour Review Recommendations

The AICD was a strong supporter of the introduction of the Safe Harbour, and our view is that it has been a successful insolvency policy reform that has promoted a board focus on restructuring businesses.[20]

The AICD welcomed the Safe Harbour Review findings that the Safe Harbour provisions have been a positive corporate law reform that has improved governance and economic outcomes and delivered real turnaround options to directors of listed, large, and some medium companies.[21] The Safe Harbour Review made a number of recommendations, including legislative amendments to improve its operation.

The previous Government noted or accepted the recommendations in full in its response in March 2021.[22] To date there has only been limited action on the legislative category of recommendations, in relation to ASIC guidance. The AICD calls on the Commission to urge the Government and regulators to progress and implement these recommendations. The legislative amendments will improve the operation of the Safe Harbour and resolve key areas of ambiguity.

Business Judgement Rule

The Business Judgement Rule (**BJR**) under section 180(2) of the Corporations Act is a key element of Australia's director duty framework. The BJR operates as a defence to an alleged breach of the director duty of care and diligence, protecting directors from liability if they make a decision in accordance with the statutory conditions in 180(2) (including acting in good faith and rationally believing they were acting in the company's best interests), even if the outcome is poor.

In its intent the BJR resembles the Safe Harbour in that it reflects that directors often make decisions with imperfect information and should be protected from sensible commercial risk taking.

Allens research commissioned by the AICD found significant shortcomings with the operation of the BJR, including that it provides little real assistance to directors in litigation, and is not performing its intended function of encouraging risk-taking in business.[23] Given the similarities between the BJR and the Safe Harbour, which promotes directors turning around businesses rather than unnecessarily placing them in administration or liquidation, there is an opportunity to jointly assess these two important arms of Australia's corporate governance framework. We note the Safe Harbour Review's observations on this point and that a number of submissions to that process raised this issue:

Notwithstanding the conceptual similarities, Parliament has maintained the narrowed scope of operation of the business judgment rule to the director's duty of care and diligence. Although, in the years since its enactment, there have been calls for the business judgment rule (or something like it) to be extended to the insolvent trading regime in the Act.232 The reigniting of these calls in the submissions received by this Panel highlight the utility of this matter being reconsidered as part of a holistic review of the insolvent trading framework.[24]

[20] AICD BCA submission, October 2021, available here.
[21] Review of the Insolvent Trading Safe Harbour
[22] Government Response to the Review of the insolvent trading Safe Harbour, March 2022, available here.
[23] AICD research: *Time to reconsider Australia's business judgment rule*, August 2021, available here.
[24] Review of the Insolvent Trading Safe Harbour, pages 82 – 83.

Application of the insolvency regime to NFPs and charities

The AICD has had long standing concerns with the application of the insolvency regime to directors of charities and NFPs. There is a patchwork of state and Commonwealth legislation that is relevant to governance of the NFP sector with application varying on whether an NFP is an incorporated association under a state or territory law, or whether it is a company limited by guarantee and subject to the Corporations Act. In addition, there is the Australian Charities and Not-for-profits Commission (**ACNC**) requirements via Governance Standard 5: Duties of Responsible Persons that place an obligation on a responsible person (i.e. directors and senior managers) to not allow a charity to trade while insolvent.

AICD members have previously provided feedback that this legislative complexity and ambiguity has raised uncertainty about how to approach decision making around solvency and administration – an obvious barrier to business dynamism. This is a particularly pronounced issue for the NFP sector where there is often limited financial resources and external funding arrangements are key to whether an organisation is viable.

While the Safe Harbour Review provided clarity that directors of NFPs that are companies limited by guarantee can access the Safe Harbour, it recognised that broader challenges with the insolvency regime's application to NFPs exist. In particular, the concept of 'solvency', where a NFP often has limited capital and relies on grants or donations.

Directors of SMEs and the interaction with personal bankruptcy

The AICD has received feedback from stakeholders on the challenges small business owners and directors face navigating the insolvency regime and attempting to turnaround businesses that includes the interaction with individual finances.

The complexity, rigidity and high barriers for use of Australia's insolvency regime for SME directors and advisers was recognised in the small business restructuring (**SBR**) regime which commenced in January 2021. The SBR regime was designed for businesses with liabilities under $1 million and promised a director-controlled, streamlined restructuring pathway to avoid traditional voluntary administration for financially distressed but commercially viable businesses. Despite the clear policy case to improve options for directors of SMEs in navigating the insolvency regime, anecdotal evidence suggests that the SBR regime may not have yet achieved its full objectives. Although there has been increasing uptake of the regime, AICD engagement with advisors and restructuring experts has indicated that there needs to be an analysis of whether the regime achieves the goal of supporting sustainable businesses.

The ATO is in most cases the key participant in any SBR process due to the presence of often significant tax liability. We understand that whether a SBR plan is accepted is often dependent on the ATO and it is unclear on what basis the ATO reviews restructuring plans and what quantum of return the ATO is prepared to accept.

The AICD recommends that the Commission explore options to review the SBR regime, including whether there needs to be further changes to simplify and promote its use, including examining the role of the ATO.

The AICD also notes the significant interaction between business insolvency and personal bankruptcy in the context of SMEs. This is a complex area of law and any legislative changes need careful consideration, particularly given that family law considerations often also apply in personal insolvency cases. The AICD considers that it is inevitable that SME owners will continue to put personal equity into their businesses. The AICD believes that there continues to be a lack of understanding around the interaction between the two regimes and calls for clear ATO and ASIC information and education targeted to directors of SMEs on the operation of the regimes and the risk of personal liability continues to have utility.

Role of the Australian Tax Office

The ATO plays a central role in Australia's insolvency regime, and we encourage the Commission to examine its role and the consistency of this role with other objectives of the regime, including the Safe Harbour.

The ATO is generally regarded as the largest and most influential creditor in the economy, frequently holding the majority of debt in distressed SMEs. In many insolvencies, ATO liabilities are the principal trigger for external administration, and the ATO is often the largest or only material unsecured creditor, meaning its actions can determine whether a company restructures or is wound up.

Despite this central role, the ATO's approach to insolvency appears to be largely governed by internal administrative guidance rather than a transparent framework and is exercised on a case-by-case basis. While practice statements outline factors relevant to decisions, they provide only high-level guidance and preserve broad discretion for the Commissioner. As a result, stakeholders often face uncertainty as to how the ATO will exercise its powers in a given case. This issue could be addressed by the publication of clear and transparent guidance on the ATO's policies around insolvency, ideally following engagement with industry advisers and experts.

Director Penalty Notices

A key ATO enforcement tool is the issuance of Director Penalty Notices (**DPNs**). Advisors have indicated that, in their opinion, DPNs can sometimes be issued in an arbitrary and inconsistent manner. This is notable in the context where the ATO has significantly increased recovery efforts to recoup outstanding tax debts by issuing record numbers of DPNs.[25]

As a DPN attaches personal liability to a director connected to taxation and superannuation liabilities of a business it can have major ramifications for the viability of a business and the finances of an individual SME director. If DPNs are applied unilaterally or through a blunt approach, then the impact can be unduly harsh on directors and influence their behaviour. Blunt use of DPNs can lead to a business being prematurely placed into liquidation with resulting impacts on customer, employees and suppliers.

The AICD accepts there are circumstances where the use of a DPN may be appropriate, for instance repeated failure to make superannuation guarantee payments. However, the AICD is concerned that the increased and inconsistent use of DPNs is not aligned with broader reforms to the insolvency regime in recent years, notably the Safe Harbour and SBR regime, that have sought to promote directors restructuring businesses, rather than placing them prematurely in administration or liquidation to avoid personal liability.

The AICD encourages the Commission to consider how the ATO approaches issuing DPNs, including whether there is sufficient guidance and consistency of application.

Power to settle unfair preference claims

Since 1 March 2011, the ATO has been able to seek an indemnity against directors under section 588FGA of the Corporations Act when certain payments are set aside by a court or ASIC under the laws around voidable transactions. If the ATO seeks an indemnity, legal action needs to be taken to settle unfair preference claims and directors are joined as a party to the legal proceedings.

This provision effectively gives the ATO a deemed preference in the case of company liquidations. In circumstances where a turnaround plan for the company does not work, directors may be personally liable to the ATO. This liability exists even where the liquidator settles the claim with the ATO without the involvement of the director. Given that directors may not be able to be involved in the outcomes of claims that give rise to their liability, the lack of guardrails around the ATO's use of this provision and the potential conflict with Safe Harbour provisions, the AICD believes that the appropriateness of this form of director liability should be considered by the Commission.

[25] Over 84,000 DPNs were issued in FY25, a 136% increase compared with 26,700 in FY24. Source.

6. AICD recommendations – The design, operation and integrity of insolvency frameworks

The AICD provides the following recommendations in respect of the design and operation of Australia's insolvency regime.

1. The Commission should:
    a. Examine the appropriateness of the director liability insolvent trading threshold being lifted to 'wrongful trading' in line with other jurisdictions.
    b. Encourage swift implementation of the outstanding recommendations of the Safe Harbour Review, noting the limited implementation to date.
    c. Assess the interaction of the Safe Harbour and the Business Judgement Rule under the Corporations Act.
2. The Commission should consider the application of insolvency law to charities and NFPs, particularly where these organisations frequently have uncertainty on financial position due to the nature of funding streams.
3. The Commission should assess possible amendments to the SBR regime to improve its effectiveness and accessibility for directors of SMEs.
4. The Commission should examine the role of the ATO, including the use of DPNs and the power to seek an indemnity against directors and the consistency with this role and other elements of the insolvency regime, including the Safe Harbour and SBR.

7. Operation of Treasury Laws Amendment (Combatting Illegal Phoenixing) Act 2020 (Cth)

The AICD has strongly supported appropriate measures to prevent phoenixing, including in our submission to consultation on the *Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2019*. We have provided long standing support for the rollout of Director Identification Numbers (Director IDs) and linking Director IDs to the ASIC companies register, including building awareness of this significant change amongst AICD members. Despite implementation challenges, the AICD believes this is an important practical step that in time may help in the identification and prevention of phoenixing activity.

The AICD does not believe that any further legislative changes are necessary to the Corporations Act to address phoenixing activity at this time, including new avenues for personal liability on directors. While we recognise that phoenixing continues to be an economic problem that imposes costs on society and government, we would like to see full enforcement of the existing law and penalties before law change is considered. Adding additional layers of regulation is not as effective as properly enforcing the existing law to the fullest.

Rather, we strongly support a greater focus by ASIC and the ATO on the enforcement of existing legislative provisions.

Role of ASIC

The AICD encourages appropriate resourcing of ASIC to effectively enforce existing legislative provisions to combat phoenixing (for example, the powers under the Corporations Act relevant to the Fair Entitlements Guarantee (**FEG**)). This could encompass both direct ASIC action and greater support to external professionals via the Assistance for External Administration program and Assetless Administration Fund.

By way of example, we note recent public commentary that ASIC has taken limited public enforcement activity, including disqualifying directors, relative to the estimated size of the misuse of the FEG program.[26] Further, ASIC has not once disqualified a director due to an association with repeated FEG access.

Regulators should be first looking to exercise their existing powers to combat phoenixing activity and send a deterrent signal to perpetrators, including directors engaged in illegal activity.

8. Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Simon Mitchell, Head of Policy (smitchell@aicd.com.au) or Ilana Waldman, Senior Policy Advisor (iwaldman@aicd.com.au).

Yours sincerely,

Louise Petschler GAICD
General Manager, Governance & Policy Leadership

[26] Australian Financial Review, 'Easy money': regulators lax on a scam that costs the economy $5b a year', 28 February 2025.