



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman



COVID-19 Recovery Plan

May 2020

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Foreword

Small businesses have never done it tougher.

The ongoing drought in parts of the country, floods in other parts, and the devastating bushfires that started in June 2019 have been eclipsed by the COVID-19 pandemic.

The collapse in local employment, tourism, the economies of our trading partners and the flow of goods and services around our country has led to economic conditions never before seen. Small business people are wondering how they will survive, and more importantly, whether it is worth continuing in business at all. For many, navigating the complex Federal, State and Territory, and Local Government requirements to run their businesses has always been a challenge. Now, these complexities appear to many as insurmountable obstacles.



As our Federal, State and Territory Governments consider the easing of restrictions, they must consider the ongoing operating environment for small and family businesses and what changes we can make to improve it. Without changes, many small businesses will fail, leaving employees looking for work, communities lacking services, and an economic black hole at a time when Australia needs everyone pulling towards recovery.

This recovery plan presents a comprehensive, but by no means exhaustive, package of reforms that will improve the legal, regulatory and compliance environment for small business and the Australian economy more generally. Some of the proposals in this paper are straightforward and long overdue. Some are more complex. All are essential.

The statistics around the small business sector are well known. Adopting the tax definition of small business as those businesses with a turnover of less than \$10 million, there are around 3 million small businesses in Australia – 98% of all Australian businesses – with an economic contribution nearing \$400 billion, employing well over 5 million Australians¹ and the single largest employer in eight of Australia's biggest industries whilst providing positions for more apprentices than any other sector.

Perhaps even more importantly, small businesses provide the bulk of the services that, while sometimes not 'essential', are the things people miss most during the pandemic lockdowns. They are the cafes that provide us with our morning coffees and sunny Sunday brunches; the restaurants that give us a special place to mark occasions with family and friends over a delicious meal; the gyms that we rely on to give us an endorphin buzz while we catch up with friends; the florists we use to send special bunches of flowers to those we love; and the boutiques in which we find treasures that make us smile.

Small business brings colour to our lives, and we need them now more than ever to continue trading as the economy comes back to life.

The key to restarting the economy is to get people back to work and build economic confidence. Small business provides the foundation for economic activity – to construct a secure future for themselves, their families and their employees. Small and family businesses need clarity, certainty, and a secure regulatory framework. Small businesses in this country, more than 98% of all businesses, are shoehorned into working in an environment designed to meet the needs of and

¹ Speech by ATO Deputy Commissioner Deborah Jenkins, 2 November 2018, <https://www.ato.gov.au/Media-centre/Speeches/Other/What-the-ATO-is-seeing-in-the-small-business-market/>.

benefit large business. Government needs to carve out a system that suits the small business sector to achieve significant productivity and employment growth.

Trade-offs need to be made. As with the introduction of superannuation, greater burdens for business owners must only be imposed alongside productivity gains for those same businesses. Asking small business to act as the Government's tax collector and compliance officer must be balanced against ease of doing so and consequent productivity gains. Seeking small business to drive a recovery to our former way of life (which business owners are desperate to do) must be balanced by supporting them to achieve.

Productivity gains are key to business development and survival.

Government needs to look at innovative ways to increase participation rates, particularly amongst women and the mature-aged cohort, to ensure productivity increases and businesses can benefit. There are a number of ways for Government to do this, including making childcare tax-effective to encourage both parents to participate in the fulltime workforce, and delivering support programs for mature-age workers to retrain, develop skills, and adjust to a new way of working.

This document provides the framework to build essential support for Australia's small businesses and family enterprises and a future that all Australians can be proud of.

A handwritten signature in black ink, appearing to read 'Kate Carnell', is positioned above a light green rectangular stamp.

Kate Carnell

Australian Small Business and Family Enterprise Ombudsman

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COVID-19 Recovery Plan

Recommendations

Taxation

- Permanent small business instant asset tax write-off of \$150k.
- Optional single payment to the ATO to cover PAYG(W), superannuation guarantee and GST.
- Period of review for small business tax returns to be one year following lodgement.
- Abolish Fringe Benefits Tax for small business.



Access to Justice

- Create a Federal small business claims tribunal with ASBFEO to provide triage services.
- ASBFEO to refer to independent, binding arbitration.
- Unfair Contract Terms automatically void in contracts up to \$10 million.



Small business friendly environment

- Introduce a government provided revenue-contingent small business loan.
- Ensure least cost routing for electronic payments.
- Legislate 30 day payment terms for small businesses.
- Reduce small business disruption by Government infrastructure projects.
- Improve the farm debt mediation system and ensure that it is nationally consistent.
- Improve access to skills for small business.
- Fund "Buy Small Business Australia" campaign.
- Retain National Cabinet to deal with cross border regulatory and other barriers.



Turnaround and Insolvency

- "Fit for business" advice service for small business, with a grant in FY20/21 and 21/22.
- Increase thresholds for statutory demands to \$5,000 with a response required within 45 days.
- Administrators working with small business to help identify ways to make the business viable.
- ASIC to ensure costs of an insolvency are proportionate.
- ASBFEO to provide financial difficulty concierge services.



Government Procurement



- Create a small business procurement panel for any Government contract under \$10m.
- Government to actively monitor contracts managed through a prime contract.
- Government procurement processes to be fully digitised by 2025.
- By FY 2021/22, all Commonwealth entities will procure by value a minimum 33% from small business.
- Government to utilise the OECD 'smart specialisation' policy.

Industrial relations

- Introduce a new Small Business Award.
- An Awards reg-tech solution providing fully compliant advice.
- Permit employees to easily move between awards and classifications.
- Fair Work Ombudsman and Safe Work Australia to provide guidance that small businesses can rely on.



Access to skilled workforce

- Expedite the *Delivering Skills for Today and Tomorrow* package announced in 2019.
- Workers who have returned overseas should have visas processed in two weeks.
- Government processing of new visa applications within one month.



In order to adequately support the small business sector and implement the range of measures outlined in this paper, we propose the introduction of a Small and Family Business Act. This Act would govern small business engagement with a range of legislative and regulatory aspects of doing business in Australia.

Taxation

Dealing with the ATO is one of the most stressful and time-consuming parts of running a small business. Ensuring compliance with overly complicated processes while balancing cash flow puts undue stress on already time poor business owners. Small businesses need to be released from the burden of unnecessary regulation and overbearing compliance requirements, the fear of ATO recovery action and penalisation, and acting as the ATO's unpaid tax collectors.

Recommendations

1. Replace depreciation schedules with a permanent instant asset tax write-off for small business of \$150,000, indexed annually and reviewed every 3 years.
2. Allow small businesses to make a single payment to the ATO to cover PAYG(W), superannuation guarantee and GST payments in line with their Single Touch Payroll reporting, with the ATO distributing superannuation to the relevant funds.
3. Reduce the period of review for small business tax returns to one year following lodgement.
4. Remove Fringe Benefits Tax from small business.

Replace depreciation schedules with a permanent instant asset tax write-off for small business of \$150,000, indexed annually and reviewed every 3 years

The frequent changes to thresholds and uncertainty over whether the instant asset tax write-off (IAWO) will apply in any year has complicated what should be a straightforward incentive for small businesses to invest in plant and equipment. Recent thresholds of \$20,000 and \$30,000 are too low for primary producers and manufacturers. While the increase to \$150,000 in March 2020 is welcomed, it comes at a time when most small businesses are more concerned with survival than significant expenditure on equipment. Even where a small business purchases equipment it may not meet the IAWO requirements to be installed and ready for use by 30 June 2020 due to slowed freight deliveries and restricted site attendance by installers. The write-off limit is due to revert to \$1,000 on 1 July 2020.

Status quo

Uncertainty around the write-off doesn't allow small businesses to effectively plan major asset spends and draws them into complicated tax rules. This burden only delays the valid deductions of small business since the same cost is otherwise amortised over a longer period of time.

Example

After receiving solid April rain on the farm, the Martinez family decides to buy a second-hand combine harvester for \$120,000 for a forecasted bumper spring crop. If purchased before 30 June 2020, they can claim a tax deduction of \$120,000. But if they wait until the new financial year, closer to when they will get income from the harvest, the tax deduction for the same asset reduces from \$120,000 to \$1,000 plus annual depreciation over an extended period.

Allow small business to make a single payment to the ATO to cover PAYG(W), the superannuation guarantee and GST payments in line with their Single Touch Payroll reporting, with the ATO distributing superannuation to the relevant funds

The taxation system creates an administrative burden for small business, which represent 73% of the overall lodgement population², making it hard for them to fully comply with their obligations. Over recent decades, small business owners have been further burdened with the requirement to

² ATO Annual report 2018-19 p 29

withhold tax from employees' wages (PAYGW), the additional and separate expense of Superannuation Guarantee (SG), and, since 2000, the Goods and Services Tax (GST). The burden of administration on behalf of the government has been shifted to small businesses as the ATO's unpaid tax collectors with the potential for severe penalties and interest even where honest errors are made.

The status quo

Reporting to the ATO is an enormous administrative burden for small business owners. The ATO receives data from Single Touch Payroll (STP), Superannuation Funds and Activity Statements and identifies those businesses that have either not lodged, or lodged but not paid, their tax obligations. A series of letters is issued, often only to the tax agent representative, reminding and then demanding lodgement and payment. Taxpayers are 'invited' to engage with the ATO to establish payment arrangements for PAYGW and GST. For the Superannuation Guarantee, as soon as the due date has passed, the obligation becomes a Superannuation Guarantee Charge return which includes administrative fees, nominal interest and converts into a non-tax deductible expense.

Recommended approach

The ATO should develop a reg-tech solution by which employer obligations – PAYG(W), GST and superannuation guarantee – are paid in a single payment to the ATO on each payroll run. The distribution of the payment is administered by the ATO, recognising that two of the payments are to the ATO and the ATO has full information on superannuation accounts for taxpayers. This approach will need to be phased in to provide businesses with an opportunity to manage their cash flow appropriately. It may also need to be accompanied by an initial supporting payment.

Example

When Sophie the builder gets paid late by her clients, she uses PAYGW and SG to help manage her cashflow. She pays out \$16,000 monthly in wages and withholds \$4,000 in PAYGW and another \$1,900 in SG. Sophie only lodges with the ATO once a quarter, she uses the withheld money as working capital. But at the end of the quarter, a payment she was counting on doesn't come through and she is unable to pay the lump sum of \$17,700 that is due to the ATO and her employees' super funds. Now she is in debt to the ATO, has General Interest Charges compounding daily and is also subject to the non-tax deductible SG Charge and minimum 100% penalty.

Reduce the period of review for small business tax returns to one year following lodgement

ATO reviews and audits can be conducted effectively up to five years in arrears and despite the fact that 90% of small businesses use registered tax agents.³ These processes are extremely disruptive and stressful for small business taxpayers, and typically only recoup small amounts of money. The Ombudsman has dealt with numerous complaints about the handling of reviews, audits, and disputes by the ATO typically concerning extended process timelines, poor communication, and a lack of understanding of small business commercial matters.

³ ATO media release, 27 August 2019, <<https://www.ato.gov.au/Media-centre/Media-releases/ATO-reveals-almost-90-of-income-tax-paid-by-small-business-is-paid-voluntarily/>>.

The status quo

The current system is disruptive for small business and costly for government. While steps have been taken to address the incidence and difficulty of small business tax disputes⁴, more is needed.

Recommended approach

The Government should remove unnecessary regulation to help small business avoid recovery action and penalisation by the ATO, while ensuring businesses meet their tax responsibilities. The ATO has sufficient relevant and timely data to identify non-compliant taxpayers within one year of lodgement⁵. Where an unintentional error is found, it should be drawn to the taxpayer's attention and able to be easily corrected.

Example

A new small business runs a social media advertising service. The business owner makes an unintentional mistake in their reporting to the ATO in the first year of operation. Four years later, the ATO contacts the business owner, advises the business owner that they underpaid their tax, and that they need to make good the under payment, as well as penalties and interest that have been backdated four years. This amount will put the business owner out of business, but the small business owner does not have the resources to challenge the decision in the AAT.

Remove Fringe Benefits Tax for small business

Fringe Benefits Tax (FBT) is paid on many items which employers use as a method to retain and recognise the efforts of their employees – for example, childcare, gym memberships, short holidays and meals. Many small businesses running childcare, gyms, restaurants and tourism activities also profit from these benefits being provided to employees.

The status quo

Small businesses pay FBT on items that large businesses provide in-house. A large business is able to provide on-site childcare, access to a gym located within their premises and on-site lunches and café services solely to their people, whilst claiming some services as business expenses and not paying FBT on any. When small business provides these same benefits to their teams offsite, FBT is payable.

Example

Mark is looking to hire two new consultants for his boutique consulting firm. To compete with the large firms, Mark offers his staff a gym membership, attracting FBT. The large consulting firms have in-house gyms, and do not have to pay FBT on this benefit for their employees.

⁴ The Government has established a Small Business Tax Concierge service within the Ombudsman's Office, the Administrative Appeals Tribunal's new Small Business Taxation Division, and free Tax Clinics in universities around Australia.

⁵ The ATO collects and holds enormous volumes of data on taxpayers and now also has the real time Single Touch Payroll system. Data-matching with other government agencies and external organisations provide further intelligence on the activities and reporting of businesses. Through its Tax Integrity Centre, the ATO receives information on 'Suspected Black Economy' activities including illegal phoenixing and tax evasion.

Government procurement

Government procurement processes preference large business. Tenders often require multiple elements which do not need to be included in a single procurement exercise, despite it being easier for governments to do this. Procurement methods require so much time, effort, and compliance to participate in that it is simply not financially viable for many small businesses. By creating a procurement system which discourages small business participation, Government does not achieve 'best value' and denies small businesses opportunities to innovate, employ, and grow.

Recommendations

1. Create a small business procurement panel with streamlined appointment to the panel for small businesses with less than a \$10m turnover whereby:
 - a. Where a Government contract has to go to tender, and it is under an annual value of \$10 million it must be offered through the Small Business Panel before being opened to the wider market.
 - b. If the Small Business Panel is not used, procurement officers must publish on a public website and report to the Australian Small Business and Family Enterprise Ombudsman their justification before the tender is offered to the wider market.
 - c. For contracts issued through the Panel, e-invoicing is the default method of invoicing.
2. Where government agencies use prime contractors, the government agency must actively monitor these contracts, with visibility and data for each subcontractor in the supply chain. Contractual frameworks must be developed for mandatory use by all businesses in a government contract supply chain, including standard contract clauses that are required to be used such as 30 day (or better) payment timeframes, protection of small business intellectual property, and fair termination clauses, whilst the contracts must not otherwise include unfair contract terms.
3. Government procurement processes to be fully digitised by 2025.
4. By FY 2021/22, all Commonwealth entities will procure by value a minimum 33% from small business (defined as businesses with a turnover of less than \$10m).
5. Government procurement to increase the demand for innovative solutions by utilising the OECD 'smart specialisation' policy and a focus on the priority industries identified by the National COVID-19 Coordination Commission (NCCC) of health, defence, cyber security, gas and renewable energy, and water and food.

Small business participation in government procurement is a vital lever for the government to support the creation of jobs and boost economic growth and innovation. Despite previous inquiries, subsequent refinement of the Commonwealth Procurement Rules (CPRs), and initiatives such as the Business Research and Innovation Initiative (BRII)⁶ significant barriers still remain for Australian small businesses participating in government procurement. These include:

- Significant costs associated with participating in government procurement. Small businesses do not have the resources required to complete overly burdensome tender documentation, especially where multiple contracts or projects are condensed into one large tender.
- Application of procurement policies, for example 'value for money', is often misinterpreted. Small business can be disadvantaged by being unable to offer the lowest price, even if the business is competitive overall and would succeed if broader value for money criteria were used.

⁶ BRII, support for SMEs to develop innovative solutions to government challenges.

- Minimisation of risk in government procurement. Contracts often go to large companies, even when there is a history of contract price and time limit overflow. This limits the development of innovative ideas and technologies by Australian small businesses.⁷

We believe that government agencies are increasingly relying on larger firms to manage and deliver parcels of government work as well as manage associated supply chains. Small businesses that accept a role as a sub-contractor do not have the same protections and remedies afforded to principals under Commonwealth contracts and are generally subject to more restrictive contractual terms, higher levels of risk and longer payment terms. A Government agency does not have visibility of the supply chain, whilst responsibility and accountability is delegated. This creates real risks to delivery.

The status quo

The total number of Commonwealth government contracts awarded to small and medium enterprises in 2018/19 was 26%⁸. However, 94% of total Government contracts are valued under \$1 million, with 59% below \$80,000. There is a clear opportunity for small business to have a larger share of procurement and produce a better return for Government. However, the current CPRs deliver a non-prescriptive description for procurement processes. Other jurisdictions, domestically and internationally, are explicit about engaging domestic small businesses in their government procurement processes.

Recommended approach

We must use government procurement to drive small businesses growth and innovation. The new small business procurement panel will provide preferential selection processes and allow Government to benefit from small business expertise and products. For the purposes of the panel, small business will be defined as businesses with a turnover of less than \$10m. Appointment to the panel will be rigorous without being onerous; it will ensure those small businesses on the panel are tax compliant, genuine small businesses and appropriately resourced and insured. Responsibility for government procurement and the panel should lie with a single Minister for oversight.

Where procurements still require lead contractors, contractual frameworks will apply which include standard contract clauses such as on payments terms, liability, confidentiality, and termination, whilst ensuring that small business intellectual property is protected. Government agencies will be required to monitor treatment of the supply chain within large contracts, to ensure compliance with the contractual frameworks. This approach will alleviate Government agencies abrogating their responsibilities by passing large contracts to major service providers (MSPs) to manage.

The COVID-19 pandemic has led to the recognition that Australia should have a degree of self-sufficiency in key industries such as certain types of manufacturing. The National COVID-19 Coordination Commission (NCCC) Taskforce's priority areas are health, defence, cyber security, gas and renewable energy, and water and food. The OECD's "Smart Specialisation" policy framework, is designed to enhance the scale and effectiveness of entrepreneurial processes to develop local potential.⁹ The Australian Government should provide a 'lead customer' to foster the development of Australian small businesses, in line with the industries identified by the NCCC Taskforce.

Generally, Government agencies should improve the use of technology throughout their procurement and contract management processes. E-invoicing must become the standard, while use of technology-based solutions will lead to standardisation and streamlining and speed.

⁷ In 2015-16 Australia ranked 70th out of 144 countries on how government procurement fosters innovation.

⁸ <https://www.finance.gov.au/government/procurement/statistics-australian-government-procurement-contracts->

⁹ <https://s3platform.jrc.ec.europa.eu/what-is-smart-specialisation->

Example

The Department of Defence is responsible for a large portion of Government procurement. In 2018-19 based on AusTender records, 67% of the Commonwealth government contracts awarded by value were awarded by the Department of Defence. The Defence Policy for Industry Participation, issued in 2019, states that:

“The primary goal of all Defence procurement is the delivery of capability through a value for money solution. Within the context of this primary goal, Defence will maximise opportunities for Australian industry participation, to the greatest practical extent, across all categories of Defence procurement.”

However, some areas in Defence are moving away from working directly with local small and medium enterprises towards outsourcing the processes to primes and MSPs. This then relies on primes and MSPs dealing with small businesses in the manner in which the Government would expect. There is evidence that this is not the case.

Access to justice

Small business needs more effective ways to resolve disputes outside the formal legal system, such as arbitration. Small businesses are not resourced to deal with a dispute through the courts, especially where there is a power imbalance. However, small businesses often are not able to access more the cost effective and less formal State-based tribunals due to their low value jurisdictional limits and where disputes involve interstate or international trade. To have the confidence to reopen their doors and trade, small businesses need fair contracts and access to dispute resolution that is accessible, timely, affordable and, where possible, focussed on maintaining business relationships.

Recommendations:

1. Introduce a Federal small business claims tribunal to hear matters not falling within the current state and territory tribunal framework or where the value is up to \$10 million. The Australian Small Business and Family Enterprise Ombudsman should be empowered to provide a triage service for small businesses involved in disputes within the Federal Tribunal system. The tribunal should be a no costs jurisdiction.
2. Introduce changes to the *Australian Small Business and Family Enterprise Ombudsman Act 2015 (Cth)* to provide the Ombudsman power to refer to independent, binding arbitration where matters are not already afforded arbitration through Codes of Conduct. Codes of Conduct should also include a good faith requirement in any dispute resolution clause.
3. Unfair Contract Terms
 - a. Unfair Contract Terms should be automatically void, rather than voidable, with substantial penalties and compensation payments.
 - b. Lift cap to \$10 million, regardless of term of contract.
 - c. The ACCC or (for financial matters) ASIC should be able to make findings of Unfair Contract Terms, levy civil penalties and ensure action.
 - d. The Unfair Contract Terms regime should apply to all contracts, including with Government.

Federal small business claims tribunal

Small businesses suffer from asymmetry of power when interacting with larger businesses and government as they have comparatively less financial and other resources for dispute resolution. Decisions and directives, in and out of court, are largely left to the parties to honour – if the more powerful chooses not to fulfil a directive, the small business must return to court for enforcement.

State Tribunals are valuable for small businesses but each state or territory tribunal has different thresholds for the value of a dispute they are able to hear. Further, the tribunals generally only deal with matters where each party is domiciled in the same state or territory, excluding cross-border and international disputes. For example, a Queensland blueberry farmer who deals with a New South Wales based processor would be unable to seek a resolution to a dispute in either the Queensland or New South Wales Tribunals.

The status quo

The power imbalance between large and small businesses allows large businesses to leverage the legal system to take advantage of small businesses. Where a matter is for an amount less than around \$100,000, the costs of launching and maintaining formal court proceedings makes the activity economically unviable for a small business. Above that value, small businesses still need to think seriously about embarking on a formal legal action due to likely costs, extended time timeframes and risk over outcomes.

Recommended approach

By introducing a Federal Small Business Claims Tribunal, Government would provide a clear path for cost-effective and timely dispute resolution for small businesses. Such a Tribunal would provide confidence to small business owners in the event of a dispute that they will be able to access a suitable dispute resolution mechanism where, since the tribunal would operate as a no costs jurisdiction, they would not risk being lumbered with the other party's costs.

As part of a Federal Small Business Claims Tribunal, the Government should empower the Australian Small Business and Family Enterprise Ombudsman to provide a triage service for small businesses involved in disputes within the Federal Tribunal system. This service should include access to one-hour's subsidised legal advice on their dispute before lodgement with the Tribunal and one hour paid legal advice once they have lodged a dispute with the tribunal. The service should be modelled on the existing Small Business Tax Concierge and will allow disputes to be progressed more quickly, efficiently and effectively.

Codes and independent binding arbitration

Currently, the Ombudsman can refer matters to mediation, but is unable to refer to a binding arbitration process. While the majority of cases the Ombudsman currently refers to mediation are successfully resolved, issues can arise where a binding determination is unable to be made without recourse to the court system. The recent introduction of arbitration within the Dairy Code has shown that the Commonwealth can, in certain instances, require a binding dispute resolution process. Independent and binding dispute resolution processes are extremely helpful in bringing complex ongoing disputes to finalisation.

The status quo

Where industry codes provide a dispute resolution process for disputes that fall under a code, the majority of these disputes are successfully resolved. Where a clear dispute resolution process is not provided for, businesses often feel unsure about raising an issue with the other party in case it leads to a protracted and expensive legal dispute. This can lead to breakdowns in business relationships that could otherwise be quickly repaired. Further, where mediation is provided for in a code, those mediations sometimes break down even where only one part of a dispute is unable to be resolved, leading to a complete breakdown in the mediation process and business relationship.

Recommended approach

The Ombudsman should be empowered to refer matters to independent, binding arbitration where matters are not already afforded arbitration through Codes of Conduct. This would be managed in the same way that the Ombudsman's mediation (and other alternative dispute resolution) service operates. A panel of suitably qualified and vetted arbitrators would be established, with the Ombudsman able to refer matters or parts of matters to arbitrators where appropriate and agreed to by the parties to the dispute. The Ombudsman's current powers to publish failure of a party to participate in an alternative dispute resolution process should be extended to those who refuse to participate in arbitration.

All Codes should also require that parties who are bound by a code are required to enter dispute resolution proceedings in good faith, and not simply as a 'check box' exercise. The Dairy Code currently contains such provisions, as do other codes. The Ombudsman's power to adversely publicise where a party has failed to act in good faith should be extended to arbitration processes.

Unfair Contract Terms

The vast majority of contracts on which we provide assistance to small business contain clauses that the Australian Competition and Consumer Commission has identified as unfair. The current Unfair Contract Terms (UCT) regime provides insufficient protection to small businesses. For example, unilateral variation clauses that are commonly still used put small businesses in a vulnerable position when dealing with large companies. However, to have such clauses declared void requires a small business to have this determined by formal legal process via a tribunal or court.

The status quo

The Ombudsman assists many small businesses in contractual disputes where unfair contract terms are relied on by the other party. The current cap for the UCT regime to apply (eg. an annual contract value of \$300,000) is too low and leaves many important small businesses unprotected. Further where a contractual term is unfair, a small business needs to apply to a court to enforce its rights. Given the low likelihood a small business will go through that process, large businesses are not incentivised to address UCTs in their contracts.

Recommended approach

Unfair Contract Terms must be made automatically void, rather than voidable. This will allow small businesses to avoid costly and protracted processes to enforce their rights in relation to these terms. The unfair contract terms provisions must be expanded to include all contracts up to \$10 million and Government must be seen to be leading by example in its own procurement practices by having its contracts fully compliant within the UCT regime. Determinations on fairness should be able to be made by the ACCC and, for financial matters, ASIC. These bodies should be able to levy civil penalties for breaches.

Turnaround and Insolvency

When insolvency processes commence, the person who knows the most about the business itself (i.e. the small business owner) is cut out of the process whilst costs eat away at any remaining business value. Insolvency processes should be more efficient so that businesses are able to continue trading wherever possible, and creditors are paid.

Recommendations

1. Introduce a "fit for business" service for small businesses, delivered through their registered professional advisers. Provide a one-off grant for small businesses to be able to seek such business advice during the 20/21 and 21/22 financial years
2. Require the Administrator in voluntary administrations to work with the small business owner to identify ways to make the business viable.

3. A small business liquidation product to be developed, with a maximum charge (possibly \$5,000) and a 30 day maximum timeframe for completion.
4. Increase thresholds for creditors being able to issue a statutory demand on a company under the *Corporations Act 2001* from \$2,000 to \$5,000. The statutory timeframe for a company to respond to a statutory demand should be increased to 45 days.
5. ASIC to ensure that costs charged are proportionate to the size of the business and complaints against liquidators are investigated properly.
6. The Australian Small Business and Family Enterprise Ombudsman to act as concierge to businesses undergoing financial and other difficulties, modelled on the Small Business Tax Concierge service.

The COVID-19 pandemic has placed many small businesses into financial stress, some of them severely so. When small business owners begin to consider exiting their business, they are often unaware of the number of matters that must be considered to achieve an orderly sale or close. This includes leave entitlements and superannuation guarantee payments due to their staff who may be receiving JobKeeper payments.

ASIC reports that:

- The majority of businesses liquidated are small businesses, with more than 62% having 5 or fewer employees and an additional 14% with between 5 and 19 employees.
- 83% have assets of less than \$100,000 and 76% have liabilities under \$1 million.
- In 91% of liquidations, unsecured creditors, including the ATO, receive zero cents in the dollar.

Business owners have to rely on the advice provided by 'experts'. Owners do not normally check to see if an adviser is regulated, or whether there is access to dispute resolution or compensation if advice taken proves to be not in the best interests of the business, or even illegal. When seeking help to work through times of financial stress business owners are often recommended the Voluntary Administration process. Business owners willingly enter the process on the understanding they will be protected from claims by creditors while they work with the registered liquidator to restructure and turnaround their business. Even where the administrator has that intent, the current framework creates personal liability for administrators and requires them to make decisions that maximise the return for creditors, not turnaround a business.

The status quo

The 'hibernation' approach to managing the COVID-19 situation sees debts being deferred and temporary reductions of rent, which will soon disappear. On re-opening, small businesses face an increased level of debt that will need to be serviced from a possibly reduced cash flow. Even if a business does not re-open that debt remains, and once possible redundancy payments to staff are included, can increase.

There are many unregulated business advisers whose primary interest is to maximise their commission. Liquidators work to realise assets where proceeds cover their costs, then where further recoveries may be possible, follow those through to pay a select group of creditors. Where that may require selling the personal assets of the business owner, the owner is forced into bankruptcy. There is no requirement for consideration to be given to a restructure that could save jobs or keep the viable part of the business going and retain commercial relationships.

Creditors police the actions of a liquidator through a voting process. For many creditors it is their first experience of administration and the volume and legalistic nature of information is overwhelming. The decisions are driven by large creditors who vote on points of law, not in consideration of the best economic outcome for the business, its employees, and smaller creditors.

With the expectation that many businesses will not survive the current arrangements, or reopen while technically insolvent, it is likely that we will see some owners abandoning their businesses.

The safe harbour currently provided through the moratorium on trading insolvent provides owners a time to plan and prepare to either exit or reopen their business. This moratorium should be extended by 12 months. The current business environment also means that many creditors, suppliers and landlords may show a greater degree of flexibility towards a restructure even if they must forego past debts.

Recommended approach

The Ombudsman will develop and publish a “fit for business” checklist which provides information and considerations for small business owners when they are considering the complete financial position of their business. This could be used as a triage service for small businesses to be directed to registered professional advisers who can provide advice on the viability of continuing business.

In the current and the next financial years (FY 2020/21 and 2021/22), the Government should provide a grant for any small business owner who wants to undertake this process. The grant should cover the fee, which should be capped at \$5,000.

The Ombudsman will continue to provide the Small Business Tax Concierge service and should be empowered to also act as a concierge for businesses undergoing financial and other difficulties.

Where a business enters administration, small businesses will be able to create a proposal to be lodged with a registered liquidator on how to deal with the assets and liabilities of their business. The proposal must consider both a rescue and the sale of the business and may be in a standard format and attract a fixed fee for services. The registered liquidator will review and estimate the net benefit, or return, to all creditors for each option. Where the registered liquidator considers the proposal in the best interests of all creditors, the owner will be empowered to commence implementation in tandem with the registered liquidator advising creditors of the proposal. During the process there must be a moratorium on all creditors commencing recovery proceedings.

ASIC will be given responsibility for monitoring the actions of a liquidator and will undertake regular practice reviews. ASIC will also assess remuneration reports against the expected net benefit to all creditors.

The increase to the trigger of external administration through statutory demands should be retained at \$5,000 or greater and allow 45 days to satisfy or have set aside a claim.

Industrial Relations

Complexities in the current system mean there is a disincentive to employ permanent employees. As Australia recovers, small business needs to keep current staff employed, easily employ new staff and be able to comply with legal liability for matters such as workers compensation. But in the uncertain times of the next 2 years, small businesses will need flexibility or they will not employ.

Recommendations

1. Introduce a new Small Business Award
 - a. There will be a single category within this award for all staff, irrespective of duties to be performed, with a single minimum hourly rate and loadings for weekend, public holiday, and late-night rosters.
 - b. The award will work on a Better Off On Average Test over and above current awards, where the test will consider the average earnings for an employee over the previous 12 months.
 - c. The award will include the provision for “permaflexi” staff who are employed on a permanent basis but with flexible hours each week.

2. A reg-tech solution should be created, accredited by FWO, that provides a technology driven method for small business to adhere to the current awards system, contracts, conditions, and dismissal processes. Where the reg-tech solution has been followed, the small business is provided a safe harbour from prosecution for non-compliance.
3. Outside the Small Business Award, legislate to permit employees to easily move between awards and classifications without negative outcomes for the small business employer.
4. Implement the recommendations of the Ombudsman's August 2019 review of the Small Business Fair Dismissal Code.
5. The Fair Work Ombudsman and Safe Work Australia to provide clear, consistent, and guidance that small businesses can rely on, assuring small business of compliance with occupational health and safety and other compliance to help returning to regular business.

Complexities in the current system creates high compliance costs for small businesses and is a disincentive to employ, particularly permanent employees. Small business needs to be able to get certainty from the Fair Work Ombudsman and Safe Work Australia. Instead, small businesses are expected to seek expensive legal advice in an overly complex system with the real possibility of getting it wrong and incurring significant penalties. It is clear that large businesses, with dedicated payroll teams and software, are still getting it wrong, and given the state of the system it is unreasonable to expect small and family businesses to get it right all the time. This undermines business confidence, exposes all businesses to penalties, and ultimately hurts employees.

The status quo

The National Australia Bank Business Confidence Index, the main survey of business confidence in Australia, is currently the lowest ever recorded since the survey began in 1989.¹⁰ While business confidence will start to pick up over coming months, this will take time. If we maintain current policy settings, many people who would have planned to grow their business or start a new one simply will not. Confidence needs to be boosted to ensure businesses continue to invest and provide jobs so that the economy can recover. To do that, we need to counteract the significant negative effects of COVID-19 on employment with positive changes that make it easier for businesses to start, grow and employ.

Australia has more than 100 industry or occupation awards, with many hundreds more classifications within those individual awards. For small business employers, understanding the award structure is complex with significant penalties for non-compliance, as well as the added inconvenience for staff not being paid appropriately. Small business owners genuinely want to pay their staff the correct amount, but the system currently makes that difficult. Although theoretically, where awards are difficult for small businesses, they can opt to develop an Enterprise Agreement (EA). However, this flexibility is not practically available to small and family business due to the heavy red tape that governs negotiation and approval of EAs.

Recommended approach

The Government needs to introduce a system which makes it easy for small business employers to employ and manage staff with the confidence that they will be protected in the event of honest mistakes. Government should do this in an efficient way, with minimal changes to existing rules to avoid strong opposition.

¹⁰ <https://www.afr.com/policy/economy/business-confidence-collapses-to-worst-ever-20200414-p54jmw>

Example

Barry wants to open a small airline offering sightseeing flights. He wishes to immediately hire seven full-time ground staff. The Airline Operations – Ground Staff Award under which these staff are to be employed contains 38 classifications Barry must understand to pay his staff correctly. The classification criteria for those employees in the clerical, administrative and support stream are provided as an indicative guide only. There are 24 variables Barry must consider when paying his apprentices under the same award, in addition to two pilots who will be covered by a different award. Barry can't get definitive advice that he can rely on from the Fair Work Ombudsman. After spending many hours looking into the matter, Barry is faced with the option of seeking out expensive legal advice before he has any revenue or making his own best efforts and risking penalties or even prosecution down the track.

Small Business Award

A dedicated Small Business Award will be a simpler award than existing Awards, and available to all Small Businesses on an 'opt in' basis, allowing them to stay with existing awards should they wish. The Award should have minimum standard pay rates, which can include penalty rates but not overtime, ie loaded rates.

The Award will cover all staff, irrespective of the duties that a staff member will perform, providing the business owner the flexibility to ensure duties can be performed as and when they are needed without moving a staff member to a different classification under a current Award.

The Small Business Award will include a "Permaflexi" classification, where an employee will be given the security of a permanent position, while the employer receives the flexibility needed for rostering. While Permaflexi will receive a lower loading than a casual employee, the position will attract standard forms of leave such as personal and sick leave, and holiday pay.

Beyond these basic requirements, the composition of the Award would be subject to negotiations between relevant stakeholders. However, the general principle would be to avoid duplication with the National Employment Standards wherever possible and avoid complexity.

The Small Business Award is a broadly similar concept to that of 'Enterprise Contracts' that was previously proposed by the Productivity Commission to allow greater access to award flexibilities.

Regtech Solution and clear, consistent, and reliable guidance

Where a small business owner has decided to stay within the current Awards structure, they must be able to receive comprehensive advice regarding their responsibilities under those Awards. The Fair Work Ombudsman should endorse a (or several) reg-tech solution(s) where accurate conditions and pay scales can be ascertained. It should be integrated with payroll software to make it easy for Small Business to pay their employees with confidence. Government should not duplicate services already available in the market, but should partner with the private sector, and could initially focus on the largest awards/sectors.

Given that the current system includes inherent difficulties for businesses to be fully compliant, the government should 'de-risk' the landscape for Small Business by providing a 'safe harbour' where they have acted in good faith. Initially, this safe harbour should be achieved through ensuring that, where an eligible business has made a mistake after relying on tools, information or advice provided by government, that business is able to 'make good' without any additional penalties unless it can be reasonably shown that they did not act in good faith. This can be made easier to enforce and regulate by digitising existing tools and providing greater functionality for business accounts with the

Fair Work Ombudsman. Once a suitable reg-tech solution has been endorsed, a business that uses such a solution would be granted the safe harbour provision.

Permit employees to easily move between awards and classifications

The current allowances due to COVID-19 for staff to move between awards without detriment to employees has shown that this approach can work. This feature should remain part of Australia's industrial relations system for small businesses.

Small business friendly environment

As the economy recovers from COVID-19, an opportunity exists to develop a regulatory and legislative environment which supports small businesses and encourages them to re-open, grow and thrive, and to support their employees.

This section provides a raft of measures which can achieve these aims. We consider a HECS-style revenue contingent loan. Australia needs legislated payment terms for small business as well as the introduction of least cost routing for electronic payments. We call for the promotion of local industry, produce, and tourism. Regulation of interstate trade and the recognition of trade qualifications have been historical barriers to the movement of people and skills, and we provide recommendations in these areas. In addition, we need to ensure that small businesses can secure the essential services that they need to run their enterprise successfully, such as bank trading accounts and business insurance.

Recommendations (see additional detail in following sections)

1. Introduce a government provided revenue-contingent small business loan to allow for the phase out of JobKeeper payments.
2. Ensure least cost routing for electronic payments to address increased costs of touch & go payments.
3. Legislate 30 day payment terms for small businesses.
4. Reduce small business disruption by Government infrastructure projects.
5. Improve the farm debt mediation system and ensure that it is nationally consistent.
6. Ensure delivery of services considered essential in the modern economy such as banking and insurance services.
7. Improve access to skills for small business.
8. Fund an extensive "Buy Small Business Australia" program.
9. Retain National Cabinet to deal with cross border regulatory and other barriers

Revenue Contingent Small Business Loans

Recommendation

1. Introduce a government provided revenue-contingent small business loan to allow for the phase out of JobKeeper.

Businesses in the early stages of recovery are unlikely to be in a position to immediately pick up full payments to their staff once JobKeeper payments cease. These businesses should be supported by access to a Government-provided HECS-style limited recourse facility. The facility would be capped at a certain amount depending on the size and capacity of the company. Repayments would be required once turnover reached a set level and would be calculated on a percentage of turnover.

The loan amount could be indexed each 12 months at the same rate as the Consumer Price Index. Similar to HECS, any loan amount should not be considered a debt to be taken into account by lenders.

Least cost routing for electronic payments

Recommendation

2. Ensure least cost routing for electronic payments.

During the COVID-19 crisis the ongoing trend from cash payments to electronic payments has continued, especially in retail where 'tap-and-go' has become dominant. However, financial institutions are able to dictate the route through which electronic payments are made, with Visa and Mastercard competing against the Australian run EFTPOS network, even though EFTPOS is typically offered at lower rates to the retailer. The higher fees of the international networks can add thousands of dollars a year to a small business. This matter was due to be considered by the Reserve Bank's Review of Retail Payments Regulation. Small businesses should be able to choose the path of electronic payments which suits them to provide least cost routing, and financial institutions should be forced to offer all payment paths to which they have access.

Legislated 30 day payment terms

Recommendation

3. Legislate 30 day payment terms for small businesses from receipt of a correct invoice with penalty interest applying where in default.

Cash flow is one of the biggest issues facing small businesses. The evidence of multiple large businesses extending payment times, particularly in times of economic downturn, have shown that legislation is required to manage payment times issues in this country, as has occurred overseas. While businesses should be encouraged to pay all suppliers within 30 days, no legislated outcome should be imposed for businesses falling outside of the small business definition.

Government Actions Affecting Small Business

As part of Government plans to stimulate the economy post COVID-19, significant infrastructure projects are planned. Governments should plan for and ameliorate the negative impacts of their actions on the many small businesses that often operate along the route of major infrastructure projects. In particular, small businesses with shop fronts have a high proportion of fixed costs, such as rent, power and leased equipment. Construction activities can take years to complete and commonly suffer significant delays. Constant noise and debris, traffic and pedestrian flow disruptions, drive customers away and hinder delivery of supplies. Small businesses in areas surrounding a site will suffer significant financial losses especially due to the current unpredictability of works.

Recommendation

4. Where Government infrastructure projects impact small businesses, the Government should:
 - a. Communicate as widely and as early as possible.
 - b. Deliver a viability/feasibility study, ascertaining the needs of affected small businesses along the planned infrastructure project route to consider what supports are required.
 - c. Each infrastructure project will have face-to-face project contact and/or a 24/7 telephone number for small businesses.
 - d. For each project, establish a small business infrastructure fund into which project extension penalties will be paid. The penalties will apply when the prime contractor cannot demonstrate that delays were outside of their control.
 - e. If the project breaks timeline markers – this small business infrastructure fund is drawn down to work with small businesses to offset costs arising from the delay.

The status quo

Small business disruption caused by infrastructure development is unavoidable. Commonwealth, State and Territory and local government currently seek to communicate and mitigate disruption through media campaigns and coordination between development teams' and Small Business Commissioners. A review of numerous state government's infrastructure projects post implementation¹¹ highlights that this 'status quo' causes Australian small businesses to close, harming economic development and employment opportunities for Australians.

Recommended approach

The objective must be to minimise disruption to the point that affected small businesses can pursue business continuity alternatives, especially where they lose physical access to shop fronts. While we recognise that many governments are hesitant to consult too widely for fear of negative media coverage, earlier and wider consultation with potentially affected businesses is essential to provide Government a better understanding of the needs of potentially affected businesses. Early project involvement with small businesses will allow those businesses to both assess and adjust their operations to the project timeline.

Financial assistance packages and business mentoring can support the small business survival and can be funded with the retention payment for the prime contractor and managed by the relevant government agency. Additional payments into the fund can be delivered through penalties for missed timeline markers.

Each infrastructure project must have face-to-face project contact and/or a 24/7 telephone number for small businesses. Online portals are not sufficient as they assume a level of technological expertise, are often difficult to access and are cumbersome if a small business is seeking to resolve or escalate their issue in a timely way.

Each state and territory, as well as the Federal Government, should develop a central portal which includes information on all infrastructure projects proposed, in planning and underway. For those underway, the portal should include contact details of prime contractor and timelines and advice on what assistance packages are available.

Example

A small business operating a clothing store contacted the Ombudsman in relation to the impact that light rail construction was having on the business. Due to the lack of car access to the street, the business owner described how "the customers stopped coming", resulting in a large reduction in sales. In this case construction took 18 months, resulting in extensive and long-lasting noise, barriers and changes to traffic, pedestrian and therefore customer flows.

Farm Debt Mediation

Australia's agriculture, forestry and fishing sector overwhelmingly relies on small businesses and family run farms. They provided 75% of the total value add in the sector at more than \$24 billion in 2017/18 and employed almost 80% of total employees in the sector. That strength continues through the supply chain and in support of the local communities in which many of these farmers, foresters, fishers and their families live.

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<https://www.treasury.nsw.gov.au/sites/default/files/201912/Impacts%20of%20new%20government%20infrastructure%20on%20small%20business%20review%20report%20-%20Final.pdf>

Recommendation

5. Improve the farm debt mediation system and ensure that it is nationally consistent.
 - a. Existing schemes should be reviewed to develop a nationally consistent and compulsory scheme that:
 - produces enforceable outcomes that allows all parties to understand their roles and responsibilities within the agreement and work towards an equitable resolution.
 - sets precedents to manage a loan secured by properties across different jurisdictions.
 - ensures the cost of mediation is borne equally and costs of their representation are borne by each party.
 - b. A national network of farm debt mediators should be developed to provide consistency in process, costs, and timelines.
 - c. An education program to inform farmers of how the Farm debt Mediation works, and their rights under the process.

Although a national initiative, implementation of Farm Debt Mediation (FDM) lies with each State or Territory. At the time of writing, Tasmania, the Northern Territory and the Australian Capital Territory do not have FDM schemes.

FDM is most utilised by lenders with the intent to recognise the specific challenges and the cyclical nature of farming. When events occur outside the control of the farmer, such as drought or flood, there is a critical need to act quickly to explore options available to address financial distress. Farmers innovate and work harder to try and generate revenue to service debts. Ultimately, they are reliant on the lender, or other creditor, to offer FDM.

Anecdotally, lenders only offer FDM as a last resort. FDM is offered when debt has escalated, through penalty interest and fees, to a point the farmer can no longer service payments. If FDM is accepted, lenders may then further exploit the imbalance of power by sending an overwhelming number of legal experts to 'negotiate' a way forward with the farmer. The cost of that representation is then added to the loan facility.

The status quo

Leaving the implementation of a FDM scheme to each state and territory, with outcomes that are not enforceable, while restricting solutions within the legal constraints of an unfair contract will continue to shut down small business farming operations with significant losses in stock and equipment.

Forcing small business farmers to liquidate simply provides an opportunity for large farming conglomerates to buy up their competitors at fire sale prices. This reduces competition in the sector as well as variety in agricultural products.

As FDM is implemented by the States and Territories, the current FDM process delivers different approaches to justice based on your location; two farmers in different states facing similar levels of financial distress are likely to receive two very different outcomes.

Recommended approach

The COVID-19 pandemic has highlighted the critical role our farmers play in supporting the Australian population. FDM must be a legitimate option to assist farmers to work with creditors through times of stress. Lenders and creditors must offer FDM at the first signs of financial strain and enter mediation with a genuine intent to find an alternative way forward. Equally, farmers must be made aware of their rights under the FDM scheme.

That the scheme is implemented by different jurisdictions through different processes, or, in the cases of Tasmania and the two territories, not at all, is unacceptable for a system which is Federally funded. A nationally consistent approach must be taken, which will encourage a network of farm debt mediators to develop.

Too frequently, farmers are required to represent themselves through the process, while lenders are afforded highly trained and expensive representation. The lender's representatives are experienced at the FDM process and understand the how they can maximise the return for their clients. The significant costs of the representatives are added to the amount of the loan facility, leaving the farmer further behind. Accordingly, costs associated with representation should be borne by each party, rather than being added to the farmer's debt.

Access to essential services such as insurance, telecommunications, and banking

There are a number of services that are essential to conduct business in the modern world, including insurance, telecommunications, and banking services. Removal of existing services or denial of new services presents a hard barrier to doing business, especially for already marginalised businesses.

Recommendation

6. Ensure access to services considered essential in the modern economy:
 - a. A legislative requirement that small business cannot reasonably be refused service by an entity that provides a service considered essential for conducting business in the modern economy.
 - b. The Australian Small Business and Family Enterprise Ombudsman should be given the power to require "show cause" for the reason behind any decision not to provide service and the power to then compel provision of the services.
 - c. The Australian Small Business and Family Enterprise Ombudsman to be empowered to provide services of a Federal Essential Business Services Commission within a similar framework to the Essential Service Commission (Victoria).

The greatest volume of denied service issues dealt with by the Ombudsman is in the banking sector, where there has been denial or withdrawal of service to small businesses in industries including adult service (brothels, individual sex workers and sex shops), tattoo parlours, cryptocurrency traders, precious metal traders and newsagencies providing Western Union remittance services. This 'de-banking' includes refusing access to a bank account, access to internet banking, and point of sales hardware.

In de-banking customers, banks commonly provide businesses with only a small amount of information, usually a letter outlining a change to the bank's 'risk profile'. This may suggest a concern within the bank regarding anti-money laundering/counter terrorism financing (AML/CTF) issues. However, some businesses have had their bank's decision reversed suggesting that banks may not be conducting due diligence before their decision.¹² The Ombudsman has also seen the practice of de-banking extended to personal accounts of family members not even involved in the operation of the business. In discussion with the banks, it appears that decisions are being made on arbitrary perceptions of morality.

The Ombudsman is also aware of increasingly frequent problems around the business insurance sector. Insurances such as business continuity and disaster, insurance products ceasing to exist and a lack of clarity and transparency on the part of insurance coverage. Trade credit insurance and industrial special risk insurance are two specific problem areas.

¹² <https://clmr.unsw.edu.au/article/market-conduct-regulation/austrac-throws-regulatory-lifeline-to-%22de-banked%22-bitcoin-operators>

The Ombudsman has also received numerous complaints regarding the provision of telecommunications services, some of which may be handled by the Telecommunications Industry Ombudsman (such as connectivity issues). Beyond telephonic and internet issues, the Ombudsman is also aware of matters where businesses are denied access to services provided by large digital platform, such as Facebook and Google. These platforms should now be considered essential to the facilitation of business as the marketplace increasingly moves online.

The status quo

With the COVID-19 pandemic hastening the trend towards a cashless economy, retail banking services are more important than ever. Businesses must not be denied banking services. To do so would marginalise classes of people who may already be marginalised, forcing them to deal wholly in cash, if trade at all. It would also serve to push individuals and their businesses outside the tax system as well as beyond the sight of AUSTRAC, contrary to the intent of AML/ CTF legislation.

Denial of insurance and communication services leave businesses unable to operate, applying further upwards pressure to the unemployment rate and denying the government taxes.

Recommended approach

Enabling legislation within the *Small Business and Family Enterprise Ombudsman Act 2015* will establish the standard that small business cannot reasonably be refused service by an entity that provides a service considered essential for conducting business in the modern economy. This specifically includes insurance, banking, and communications services with further extension to services required to facilitate trade, including digital platforms.

The Ombudsman should be empowered to require businesses to show cause for any decision not to provide service. The Ombudsman would then have the power to compel the provision of these services in appropriate circumstances.

A Federal Essential Business Services Commission should be implemented, with a similar framework to the Essential Service Commission (Victoria) and provide the same service as a tribunal. The Commission would also be able to conduct research into, and issue industry report papers.

Example

Sarah is a sole trader operating in the sex work industry. The sex industry in Australia is heavily regulated and while Sarah is regularly paid in cash, she deposits that cash into a business bank account, from which she pays taxes. Sarah's business account is with one of the big four banks, with whom she also has a credit and personal account. Sarah receives a letter from her bank saying that after conducting "due diligence checks" her bank "must cease" the banking services it provides to her. This includes not just her business account but also her credit card and personal account. The letter gives her 30 days to open accounts with a new bank, pay any outstanding debts and transfer any credits to a new account. Under the Code of Banking Practice, Sarah's bank does not have to provide a reason. The bank also offers no recourse for addressing any concerns that the bank may have and avoid termination of services. If the other banks also deny her service, Sarah will be forced to either discontinue her current line or be forced to work solely in the cash economy. The former option means Sarah will be left unemployed with work scarce in the post COVID-19 economy. The latter option means Sarah will be forced to keep large amounts of cash on her person or in her home, and be left without electronic records that can be drawn upon for tax purposes.

Accessing a skilled workforce

Most small businesses start with the aim to expand and employ more staff. It is this entrepreneurial spirit that makes the sector so vibrant and healthy. However, access to skilled staff, or staff who can be trained and provided with apprenticeships, traineeships, or microcredentials, requires some Government involvement and encouragement to overcome impediments in the market.

Government has a number of existing levers in this regard, such as the National Skills Needs List, administrative control and requirements for visas, and the Vocational Education and Training (VET) system. Government needs to maximise the opportunity of these levers to support small businesses employment and growth.

Recommendation

7. Improve access to skills for small business.
 - a. Expedite the *Delivering Skills for Today and Tomorrow* package, announced in 2019, particularly focusing on expanding the Skills Organisations programs to make the VET sector more responsive to the ever changing requirements of industry.
 - b. Link the National Skills Needs list to projections of VET system graduation numbers, ensuring roles with low future graduation numbers are given greater importance on the list. Equally, following a review of the list showing which sectors require more skilled workers, places in relevant VET courses should be more heavily subsidised by Government with a related recruitment drive.
 - c. Lengthen the time that working holiday maker visa holders may remain with a small business.
 - d. Continue visa extensions for any worker who has remained in Australia but has been unable to find work due to COVID-19 restrictions.
 - e. Reissue and extend visa applications for employees who have returned overseas due to COVID-19 with processing within two weeks of application.
 - f. Generally, Government processing of visa applications should take no more than one calendar month to pass between application and decision.

Small businesses consistently report that availability of suitable labour is one of their major challenges¹³. This challenge is often particularly acute in regional and remote areas.

In the first instance, small businesses seek to hire local workers, including apprentices. However, limitations and recent issues with the VET system mean that the number of apprentices in training has almost halved since 2012.

Where local workers are not available, employers should be able to access the skilled migration system. However, the difficulty in navigating the system, long processing times and the cost of visas means that this system also does not adequately meet small businesses' needs.

The status quo

There is a disconnect between the National Skills Needs list and vocational training. Rather than one informing the other, they operate in isolation to each other. Those industries which are short of skilled workers are pushed into finding employees from overseas, while there is no increase in VET placements to develop those skills locally.

Employers are unsure what will happen with the visas of staff who have returned to their countries of origin, or who have remained in Australia, but have been unable to work. Given current timeframes, workers who re-apply for a visa or a visa extension may be waiting months for approval.

¹³ For example, in the NAB Quarterly SME Surveys.

Recommended approach

There needs to be a focus on expediting planned reforms to the VET system as well as improving the capacity of the visa system to meet skills shortages, including where exacerbated by the crisis.

In 2019, the Government announced the \$585.3 million Skills Package 'Delivering Skills for Today and Tomorrow' which includes measures to strengthen VET, support apprentices, increase engagement with VET, and improve foundation skills. Implementation of these measures should be expedited to help the labour market operate efficiently to support the economy.

The review¹⁴ of the National Skills Needs List (NSNL) should be prioritised and an expanded replacement list issued as soon as possible. There must be a greater feed of priorities from the VET system into the NSNL and *vice versa*. Where future graduations in the VET system will fulfil a skill currently listed on the NSNL, the number and length of visas approved for that skill should reflect the future graduation numbers. Similarly, where a skill is listed on the NSNL there should be a process where courses and opportunities for Australian workers to receive training is improved.

Processing times remain a major barrier for small businesses utilising workers on visas. Processing times can be up to two years for the Regional Sponsored Migration Scheme, 15 months for the Skilled Work Regional (Provisional) visas, six months for a Designated Area Migration Agreement, and up to two months for the standard Temporary Skill Shortage Visa. These delays are prohibitive and not compatible with a rapidly evolving modern economy. Processing times should be one month or less for all new applications. For renewals, this should be reduced to two weeks or less.

The Government should enable Working Holiday Makers permission to work for the same employer for longer than six months where that employer is a small business.¹⁵ The current six-month limit strongly discourages small businesses from employing Working Holiday Makers because it is hard for them to recoup the investment in training over such a short period.

The Skilled Occupation List, particularly the Regional Occupation List (ROL) and the Regional Sponsored Migration Scheme (RSMS), are too narrow and updated too infrequently. These lists should be updated and expanded to include in-demand occupations, particularly in regional areas.

In response to COVID-19, the Government has made several changes to help support businesses with workers on temporary visas, as well as those workers themselves. This pragmatic and flexible approach should be applauded and then maintained after the crisis so that the visa system better serves Australian businesses by responding to their changing needs in an agile and timely way.

Example

Andrew owns a small bakery in Bathurst. He regularly starts work at 2am and wants to employ more staff to help him grow the business. He has been unable to find an apprentice or local workers willing to commit to the times that bakers need to work. He would consider hiring workers on visas, but after investigation, he has discovered that the process is burdensome for him, and it may be up to 2 years before a visa is approved. Further, even if Andrew manages to engage workers on visas, this is only a temporary fix and will require him to almost constantly seeking to hire through the scheme. Andrew decides that growing his business is not an option for now.

¹⁴According to the Department of Education, Skills and Employment [website](#), the review is currently up to stage six of nine.

¹⁵ The government already grants permission for Working Holiday makers to work for the same employer for longer than six months in some circumstances, such as in plant and animal cultivation.

Buy ‘Small Business Australia’ campaign

Small businesses have been severely impacted by COVID-19, and many still suffer ongoing impacts of the recent drought and bushfires. While some large retailers have seen improved conditions during the period, thousands of small retail shops have had to close their doors and continue to suffer.

Recommendation

8. Fund an extensive “Buy Small Business Australia” program promoting domestic products, retailers, and regional tourism.

The status quo

There can be little doubt that the tourism sector has been one of the hardest hit sectors of the economy through COVID-19. The largest single tourism segment is people travelling within their own state, valued at \$68 billion for 2019. The combined value of the interstate and international travel segments is valued at an additional \$70 billion. All of these sectors have been effectively removed from the Australian economy during the pandemic.

It is likely that international travel will still be restricted, both into Australia for inbound tourism, and to international destinations for an extended period. For example, the United Kingdom is considering, in mid-May, the recommendation of a quarantine period for inbound travellers. Australia continues to impose a two week mandatory quarantine for travellers arriving from overseas destinations.

It takes no more than a walk through any of Australia’s shopping centres or strip malls to see the effect of the pandemic on small retail shops. While supermarkets and bottle shops have been the beneficiary of stay at home requests from Government, the retail, dining and accommodation sectors have taken a significant hit, especially in regional and rural areas reliant on tourism.

Recommended approach

A “Buy Small Business Australia” campaign will encourage people to shop locally and to do so in their own area. For people traveling, it will encourage the sampling and purchase of Australia’s great local products. This means that local tourism would be the beneficiary of Australian tourism dollars which would otherwise have been spent overseas and on foreign products. The immediate success of Australian small business retailers, restaurants and cafes is reliant on all Australians being encouraged to “spend local, spend small”.

Deloitte Access Economics has estimated that retained spending available to intrastate tourism sectors could be worth \$28 billion in NSW, \$21 billion in Victoria and \$13 billion in Queensland.¹⁶

Reduce Red Tape

As Australia returns from its necessary hibernation, there should be a push to further support Australia’s small businesses, while also ensuring cross border regulatory barriers are reduced.

Recommendation

9. Retain National Cabinet to deal with cross border regulatory and other barriers, with early critical projects being:
 - a. to apply consistent, streamlined and timely regulatory processes for interstate road transport;
 - b. Recognition of trades certification across borders; and
 - c. Product requirements that are modernised and nationally consistent.

¹⁶ A.L. Romain, “Slowly restarting tourism”, posted 20 April 2020 <www2.deloitte.com>.

The status quo

Businesses that operate close to, or in towns that straddle state and territory borders suffer by attempting to operate under two regulatory regimes. This causes additional administrative burdens, and leaves business owners confused and struggling to ensure they are operating in accordance with local regulations.

Recommended approach

National Cabinet has shown that jurisdictional differences can be set aside in the national interest. The National Cabinet structure should be retained and settle longstanding matters of jurisdictional imbalance that hamper cross-border trade. As the economy begins to prosper, it should not be hamstrung by illogical and unnecessary jurisdictional differences.

A plumber based on the border of NSW and Queensland should have their qualifications recognised in both states. The family owned farm should not be burdened with different food standards dependent on which state the retail outlet is in. A small business truck driver delivering fresh produce from a family enterprise owned farm to a small business outlet should be able to rely on consistent road rules across her trip.

Implementation

The vast majority of Australia's businesses are small – almost 98% have fewer than 20 employees – but combined they are the single largest source of employment across the workforce. Yet they are expected to follow the same complex system of legislation, regulation, taxation, and industrial relations which apply to businesses that employ tens of thousands.

In order to adequately support the small business sector and implement the range of measures outlined in this paper, consideration should be given to the introduction of a Small and Family Business Act.

The Small and Family Business Act would govern small business engagement with a range of legislative and regulatory aspects of doing business in Australia. It would also provide 'safe harbours' in various other pieces of legislation, allowing small businesses peace of mind that if they follow a simplified set of rules, they will be safe from prosecution for honest errors.

Small and Family Business Act

The following recommendations would be dealt with under the Small and Family Business Act to apply to those small business that opt into coverage by the Act. For the purposes of the Act, small business will be defined as those businesses with a turnover of less than \$10m.

Taxation

- Expand the Instant Asset Write Off to make permanent and increase to \$150,000.
- Single ATO payment to cover PAYG(W), superannuation guarantee and GST.
- Reduce period of review for tax returns to one year following lodgement.
- Abolish from Fringe Benefits Tax.

Insolvency and exit

- Introduce a "fit for business" service for small businesses.
- Increased statutory demand thresholds and time to respond.
- Administrators in voluntary administrations to work with small business owner.
- ASIC assurance of proportionate insolvency practitioner costs.

Industrial Relations

- New Small Business Award.

- Reg-tech solution with safe harbour for existing awards.
- Employees to easily move between awards and classifications.
- Ability to rely on Fair Work Ombudsman and Safe Work Australia advice.

Small business friendly environment

- Government provided revenue-contingent loan.
- 30 day payment terms.
- Ensure delivery of services considered essential in the modern economy.

Federal Civil and Administrative Tribunal Act

- To cover matters not within the state and territory tribunal framework (up to \$10m)
- No costs jurisdiction

Australian Small Business and Family Enterprise Ombudsman Act 2015

- Power to refer to independent, binding arbitration
- Enhanced concierge services for insolvency and Federal Civil and Administrative Tribunal Act matters

Other regulatory measures and amendments

Government procurement

- Small business procurement panel
- Requirement for agencies to monitor contracts down supply chain
- Full digitisation
- 33% minimum procurement from small business
- Smart specialisation and focus on NCCC priority industries

Unfair Contract Terms (Australian Consumer Law)

- Unfair Contract Terms automatically void with penalties and compensation.
- Lift cap to \$10 million, regardless of contract term.
- ACCC and ASIC to make findings, levy penalties and ensure action.
- Extend coverage to Government contracts.

Small business friendly environment

- Least cost routing for electronic payments.
- Reduce small business disruption by Government infrastructure projects.
- Improve the farm debt mediation system and ensure that it is nationally consistent.
- Improve access to skills for small business.
- Fund an extensive “Buy Small Business Australia” program.
- Retain National Cabinet to deal with cross border regulatory and other barriers

Various consequential amendments including for taxation, insolvency, industrial relations



Australian
Small Business and
Family Enterprise
Ombudsman