Australian Government

Australian Government response

to the

PRODUCTIVITY COMMISSION INQUIRY INTO BUSINESS SET-UP, TRANSFER AND CLOSURE

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FOREWORD

I am pleased to release the Government's response to the Productivity Commission's Inquiry into Business Set-up, Transfer and Closure.

The report reflects positively on the Australian business landscape. It identifies that it is relatively easy to start a business in Australia, and that our rate of start-ups compares favourably by world standards.

The report also highlights challenges in the business environment and recommends the Government address regulatory impediments that can impose unnecessary costs on business to ensure the Australian economy continues to be agile. In this regard, the report identifies areas for reform to accommodate disruptive new business models, foster start-ups and an entrepreneurial culture, and improve insolvency processes for businesses experiencing trouble.

The Government has already initiated reforms in line with the Productivity Commission's recommendations. The Government's FinTech statement – *Backing Australian FinTech*, the National Innovation and Science Agenda, the response to the Competition Policy Review (the Harper Review) and the response to the Financial System Inquiry highlight some of the work that is already underway. The Government is also reforming Australia's tax system to support the Australian economy to become more adaptable and agile while enabling increased diversification, higher economic growth, better living standards and more jobs.

As our business landscape diversifies and creative disruption takes on new and varied forms, the opportunities for innovators, entrepreneurs and start-ups abound. Our prosperity, however, is not predestined. We must ensure that our economy is agile enough to help us reap the opportunities that arise from disruptive technology. We must also change our culture to recognise that failure can be a stepping stone to success and that we can all learn through our experiences.

The Government is determined to deliver stronger economic performance for Australia by promoting more dynamic, competitive and well-functioning markets for the benefit of all Australians. Reducing regulatory impediments that restrict business activity and distort incentives is central to our goal of achieving an agile and thriving economy.

We will continue to help small and large businesses, entrepreneurs and innovators, job creators and job seekers because our success as a nation will be driven by people who have a great idea or identify an opportunity, and are prepared to take risks and have a go.

The Hon Michael McCormack MP
Minister for Small Business

OVERVIEW

The Government tasked the Productivity Commission ('Commission') to undertake a broad ranging investigation into barriers to business entries and exits and identify options for reducing these barriers where appropriate, in order to drive efficiency and economic growth in the Australian economy. The Commission delivered its final report to the Government on 30 September 2015. The Government released the report publicly on 7 December 2015, coinciding with the release of the National Innovation and Science Agenda.

New firms entering the market have the capacity to drive growth, contributing to a diversified, globally connected economy. Competition from new firms, or even the potential threat of entry, encourages existing firms to be more efficient. Likewise, barriers to entry and exit can hinder the efficient operation of markets, with negative consequences for economic growth. Impediments to entry and exit can be a function of market structure, government regulation, industry specific sunk costs or geography.

Government policy frameworks should encourage entrepreneurial behaviour, innovation and collaboration. Cultural appetite for risk is also an important determinant; it impacts on whether people choose to start-up a business. This includes addressing the stigma of failure, which continues to be a barrier to experimentation and learning.

The Commission has identified a number of priority reform areas that will support economic growth and jobs by encouraging entrepreneurial activity and improving the efficient entry and exit of business. In responding to this Inquiry, the Government is committed to:

1. creating the framework for entrepreneurial activity to thrive, including through reducing the stigma of business failure; and

2. fostering agile, innovative businesses by eliminating unnecessary regulation and reducing regulatory complexity.

REGULATORY ARRANGEMENTS FOR BUSINESS SET-UP

Summary of the Commission's assessment

The Commission found that restrictions on new business entry come in many forms. Governments, at all levels, should identify and reform restrictions that are deliberately or inadvertently anti-competitive. The cumulative compliance burden is a major concern for business, particularly in the areas of taxation and employment, and can dissuade new business entrants, stymie business expansion or hasten closure.

Recommendation 3.1:

In principle, there should be a consistent approach to the taxation of business entities regardless of their ownership structure and size. The White Paper on the Reform of Australia's Tax System should consider in particular:

- the taxation of trusts used primarily for business purposes
- the tax treatment of profits and losses across business types
- the feasibility of a simpler entity for small business that would combine features of the existing structures

The Government notes this recommendation

Small businesses face disproportionate costs of complying with their regulatory obligations compared to large businesses, and tax obligations make up a significant part of those costs.

The Government's Enterprise Tax Plan, released in the 2016-17 Budget will ensure small businesses have every opportunity to invest, innovate, grow and employ more Australians. The first stage of the Enterprise Tax Plan was agreed by the Senate on 31 March 2017, under which the Government will increase the small business turnover threshold to $10 million from 2016-17 in order to allow more businesses to access a range of simplifying small business tax concessions, while cutting the tax rate for small businesses from 28.5 per cent to 27.5 per cent. This tax rate will then be progressively extended to companies with turnover less than $50 million by 2018-19 and then, phased down over time to 25 per cent by 2026-27. To coincide with this, the Government will progressively increase the tax discount for unincorporated small businesses to 16 per cent over time and make it available to unincorporated businesses with turnover less than $5 million.

The taxation of different business structures has been considered in the Government's tax reform process. The Government has no plans to amend tax treatment of different structures, beyond the measures in the 2016-17 Budget.

Recommendation 3.2:

Governments, particularly those at the state, territory and local level, should fully and promptly implement the leading practices and recommendations from the Commission's previous reports on business regulation, including:

- Performance Benchmarking of Australian Business Regulation: Cost of Business Registrations (2008)
- Performance Benchmarking of Australian and New Zealand Business Regulation: Food Safety (2009)
- Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety (2010)
- Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments (2011)
- Performance Benchmarking of Australian Business Regulation: Role of Local Government as Regulator (2012)
- Regulator Engagement with Small Business (2013)

The Government supports this recommendation

The Government recognises that inefficient and ineffective regulations waste valuable business resources and drive up business costs. Regulation must be fit-for-purpose and administratively efficient, both for Australian business and for global businesses operating in Australia. The Government is committed to improving the regulatory policy framework, with an emphasis on both reducing compliance costs and enhancing productivity and growth. The Government will continue to build on previous successes, announcing decisions to remove a net $5.8 billion in red tape, as at 31 December 2016 and will progress an active program of regulatory reform within the Commonwealth. The Government is also pursuing a National Business Simplification Initiative, which aims to reduce regulatory inconsistencies between the Commonwealth, state and territory and local governments and to create seamless mechanisms for business to interact with government, such as online single-entry points.

It is important for all jurisdictions to work together to identify and implement reforms of national significance. As part of the Government's response to the Harper Review, we announced our willingness to consider payments to states and territories for reforms that improve productivity and lead to economic growth, including for significant regulatory reviews that are followed by reforms. The Council of Australian Governments (COAG) subsequently agreed to develop a new competition and productivity-enhancing reform agreement, drawing on the Harper Review. This will provide an avenue for the Government to engage with states and territories on the outstanding recommendations of the reports highlighted above.

On 1 July 2015, the Government's Regulator Performance Framework commenced. The framework was informed by the Commission's 2013 report into Regulator Engagement with Small Business and establishes a common set of performance measures that will allow for the comprehensive assessment of regulator performance and their engagement with stakeholders. The Framework requires regulators to consider how they operate and the compliance burden they create when administering regulation. It will encourage regulators to adopt appropriate risk-based regulatory approaches.

Government engagement with small business

The Government agrees with the Commission's assessment of the challenges that can confront businesses when dealing with government. One way in which the Government is addressing this challenge is through the establishment of an independent Australian Small Business and Family Enterprise Ombudsman with real powers to act as a:

- Commonwealth advocate for small businesses and family enterprises;
- concierge for dispute resolution service to allow businesses to resolve disputes without resorting to costly litigation; and
- contributor to the development of small business Commonwealth laws and regulations.

In addition, the Government is transforming the way it connects with and supports business through the single business service initiative which is being delivered by the Department of Industry, Innovation and Science. Similarly, the Business Grants Hub – part of a whole-of-government streamlining grants administration initiative – is making it faster, cheaper and easier for business to access government programs and services through a single entry point. This will reduce a business' effort and cost when accessing government information and advice, or when transacting with the government. Similarly, the use of a 'tell us once' approach will pre-fill and reuse information previously provided by a business, further reducing business transaction costs.

The Government is also addressing the Commission's finding that there are areas where improvements could be made to streamline and better coordinate the process of setting up a business. The Government is delivering a new online and streamlined process for business registrations. The development of a streamlined business registration capability means people starting a business will be able to visit **business.gov.au** to take care of multiple registration requirements in one single transaction. The Government will explore opportunities to work with other jurisdictions to further simplify business registrations through the National Business Simplification Initiative.

The Government will also consider whether enhanced digital services through **business.gov.au** could help business owners save time and capitalise on opportunities by simplifying a range of business transactions with government, including consideration of:

- opportunities, including eligibility for government programs and relevant government tenders;
- integrating selected digital transactions that business has with the government with delivery through **business.gov.au**;
- creating online single-entry points for business information and services;
- regulatory obligations; and
- what guidance a business owner may find useful.

Recommendation 3.3:

Industry-specific regulations that restrict business entry and the competitive operation of markets should be reviewed or removed, as recommended in the Harper Review. In reviewing their regulations, governments should assess whether they generate a net benefit to the community and whether they are the best way of achieving government objectives.

The Government supports this recommendation

The Government's response to the Harper Review outlined support for reinvigorating the review of regulation across all tiers of government to remove unnecessary impediments to competition.

The Government has strengthened the focus of its Regulatory Reform Agenda to embrace more complex reforms, building on the ongoing commitments to cut red tape, improve regulator performance, and strengthen regulatory impact analysis processes. Through the strengthened Agenda, the Government will continue to reduce the cost of complying with Australian Government regulations while also working to remove unnecessary regulatory barriers to productivity, innovation and growth. This includes working with the states and territories to undertake reform where priorities align including, for example, a new set of competition principles to guide competition policy implementation at all levels of government, for consideration by the Council of Australian Governments (COAG).

The Government encourages states and territories to identify their own priorities, focussing on areas where review and subsequent reforms have the potential to result in stronger productivity and economic growth. Where priorities align, this can be pursued in partnership with the Government under the National Business Simplification Initiative.

The Government has also recently established industry-led Growth Centres in six sectors of competitive strength and strategic priority to identify regulations that are unnecessary or over-burdensome and impede their sector's ability to grow, and suggest possible reforms.

Recommendation 4.1:

The extension of protections against unfair contract terms to small business should be reviewed within five years. The review should include examining if the provisions are being misused by businesses to avoid contractual obligations. To facilitate such a review, the Treasury should ensure that adequate data collection arrangements are in place.

The Government supports this recommendation

The Government agrees that reviewing the small business protections against unfair contract terms is important for ensuring their effectiveness and has committed to a review being commenced two years after the protections came into effect on 12 November 2016. Data will be collected from regulators and other key stakeholders for the review.

Under the new protections a small business will be able to have an unfair term declared void if, at the time of agreeing to a standard form contract, it had fewer than 20 employees and the contract does not exceed $300,000 or $1 million for contracts longer than 12 months.

Recommendation 4.2:

Governments should increase the pace of reform to their land tenure arrangements, particularly focusing on those that may inhibit the establishment of new businesses and where overlapping types of tenure exist. Consideration should be given to the scope and duration of leases on Crown land, flexibility of land titles, native title determination processes and the accessibility of land tenure information.

The Government supports in principle this recommendation

The Government recognises that complex land tenure arrangements can contribute to delayed economic development and discourage investment in parts of the economy. With respect to Indigenous land tenure arrangements the Government is committed to reforms to better support economic development, including the establishment and growth of new businesses.

As part of the White Paper on Developing Northern Australia, the Government, in partnership with various state and territory governments and Indigenous organisations, is implementing a number of land tenure-related measures. These measures support innovative changes that simplify land use arrangements and attract more investment across northern Australia. The Government has allocated $10.6 million for pilot projects that broaden economic activity and demonstrate the benefits of land reform. There are currently five pilots underway, located across the three northern jurisdictions. This funding also supports a new web-based, business friendly guide to tenure in northern Australia developed by Austrade. The guide includes a general introduction to systems of land tenure and information about working with Indigenous communities. The Government is investing $17.1 million for township lease negotiations and land administration measures aimed at increasing economic activity on Indigenous land in the Northern Territory and $20.4 million in capacity building for native title corporations.

On 11 December 2015, COAG considered the report of the investigation into Indigenous land administration and use (‘the Investigation’). The Investigation provided an opportunity to focus governments’ attention on getting the settings right to enable Indigenous land owners to leverage their land assets for economic development. The Investigation makes recommendations to support Indigenous peoples' use of their rights in land and waters for economic development. These include recommendations that go to reducing red tape arising from overlapping types of Indigenous land tenures, removing legislative barriers to bankable long-term leases, supporting native title determination processes and better engagement between governments and Indigenous land owners and also with particular sectors such as the banking industry. COAG agreed jurisdictions would implement the recommendations of the Investigation’s report, subject to their unique circumstances and resource constraints. The Commonwealth Minister for Indigenous Affairs will report back on implementation of the recommendations after 12 months.

REGULATION OF NEW AND INNOVATIVE BUSINESS MODELS

Summary of the Commission's assessment

Information technology is facilitating a wave of transformative business models that sometimes do not fit within the existing regulation – either because certain actions are in contravention of the intended purpose of regulation or were simply not considered at the time the regulation was drafted. Governments and regulators face ongoing challenges in applying existing regulatory frameworks to new business models with differentiated products and services in a rapidly changing environment.

Recommendation 8.1:

All jurisdictions should provide a legislative framework for fixed-term exemptions to specific regulatory requirements that deter entry by business models that do not fit within the existing regulatory framework. Such regulatory exemptions should be disallowable instruments and subject to public review prior to expiry.

Legislative safeguards should be put in place to ensure the regulatory exemption does not lead to a material increase in the risk of adverse outcomes to consumers, public health and safety, or the government.

More generally, governments should:

- continually review industry-specific regulatory approaches to assess whether they remain relevant and provide a net benefit to the community and are the most effective and efficient means by which objectives can be achieved.
- ensure that regulation and regulators are flexible and adaptive in the face of evolving technologies and business models and properly funded for this task.

The Government supports in principle this recommendation

The Government is committed to regularly reviewing regulatory frameworks to ensure that regulation and regulators are flexible, adaptive and support an agile economy. Regulator flexibility and discretion in the use of compliance and enforcement tools could, at times, provide greater welfare benefits (or at least no loss in welfare) whilst still achieving the broad regulatory objectives.

For example, Australia's financial regulatory framework makes it possible for the Australian Securities and Investments Commission (ASIC) to grant waivers (or relief) from the law to facilitate business. Among other matters, the waiver powers enable ASIC to grant relief from Australian Financial Service (AFS) licensing requirements, provide exemptions from disclosure or reporting obligations, and issue no-action letters where ASIC does not intend to take regulatory action over a particular instance of non-compliance.

Using these powers, on 15 December 2016, ASIC launched a 'regulatory sandbox' which provides conditional, industry-wide licensing exemptions for Australian Financial Technology (FinTech) businesses. Under the licensing exemptions, all eligible businesses in Australia can now test a range of financial or credit products and services, for up to twelve months, without the need to meet all regulatory licensing requirements and costs. This will reduce the regulatory hurdles that may

otherwise prevent innovative offerings and the time for these businesses to get their services to market.

The 'regulatory sandbox' includes important consumer protections measures such as information disclosure obligations, adequate compensation arrangements for consumers, and dispute resolution systems.

With respect to the Commission's recommendation, fixed term exemptions to specific regulatory requirements are one possible means to enhance regulator flexibility; another is better designed, principle-based regulation, if regulation is required. A framework for fixed-term exemptions relates to a large range of diverse legislation and regulators and would therefore require considerable analysis of the possible risks associated with broad ranging discretionary powers and whether there are simpler or more effective alternatives.

The Government's broadened Regulatory Reform Agenda, announced in November 2015, will explore more complex reforms. The new approach will seek to drive regulatory reform that supports flexibility in the economy to improve competitiveness and encourage innovation and competition to the greatest extent possible. This includes undertaking targeted reviews across all levels of government. Ongoing regulatory framework reviews would address barriers to competition and innovation and also identify policy missteps, inefficiency and unnecessary red tape. Over time, better designed, principle-based regulation should give regulators greater flexibility to respond to new business models, reducing the need for the proposed legislative framework for fixed-term exemptions to specific regulatory requirements and reduce regulatory arrangements that unnecessarily slow the process of bringing innovations to the market.

Recommendation 9.1:

The Australian Securities and Investment Commission, the Australian Prudential Regulation Authority and the Reserve Bank of Australia should, with appropriate industry consultation, develop an enhanced graduated framework and determine appropriate thresholds and prudential requirements for stored value facilities. The framework should be published to provide clarity to new stored value systems.

There should be an ongoing review process or indexation of thresholds to ensure that prudential regulation continues to be limited to 'large and widely used' facilities that pose a substantial risk to the wider payment system and/or consumers.

The Government supports this recommendation

On 20 October 2015, the Government released its response to the Financial System Inquiry (FSI) chaired by David Murray AO. The recommendations of the FSI sought to position the financial system to best meet Australia's evolving needs and support economic growth.

Recommendation 16 of the FSI dealt with the issue of payment system regulation and recommended that there should be a clearer graduated payments regulation. In its deliberations, the FSI stated that:

- the regulators should publish a clear guide to the framework for industry, and in particular for new entrants, that outlines thresholds and regulatory requirements; and

- the Australian Prudential Regulation Authority (APRA), in consultation with other regulators, should develop a separate, two-tier prudential payments regime for purchased payment facilities to replace the current single-tier regime, which is a modified version of the authorised deposit-taking institution regime.

Recommendation 9.1 of this Inquiry is broadly consistent with Recommendation 16 of the FSI, while being more specific on the ongoing review process on how regulatory thresholds would be determined.

As publicly announced in its response to the FSI, the Government agreed that a graduated regulatory regime would support innovation and that APRA, ASIC and the Reserve Bank of Australia will review the framework for payments system regulation and develop clear guidance. Recommendation 9.1 will therefore be considered as part of this review.

Recommendation 9.2:

The *Payment Systems (Regulation) Act 1998* (Cth) should be amended to require a transparent processes for the assessment of applications to designate payment systems. The changes should include a formal application process; the publication of determinations and the reasons for each determination; and a review process through the Australian Competition Tribunal. The process should be similar to that for the National Access Regime set out in Part IIIA of the *Competition and Consumer Act 2010* (Cth).

The Government notes this recommendation

The Government notes the concerns that have been raised regarding the process under the *Payment Systems (Regulation) Act 1998* in relation to the designation of payment systems. The designation decisions are made by the Payments System Board (PSB) and then formally designated by the Reserve Bank of Australia (RBA).

During its root and branch review of Australia's financial system, the FSI examined the regulatory architecture and did not see fit to make any recommendation regarding the structure of the payments system. Rather, the FSI made recommendations regarding a clearer graduated payments regulation (FSI Recommendation 16) and interchange fee and surcharging regulation (FSI Recommendation 17).

As referred to in the response to Recommendation 9.1, the regulators will develop clear guidance, which should serve as guide to the framework for industry that outlines thresholds and regulatory requirements.

The Government will continue to monitor developments in the payments system regulation, particularly in relation to the PSB of the RBA, and assess whether further action is required in relation to the transparency of processes.

Recommendation 9.3:

The Australian Government should amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) to enable the Australian Transaction Reports and Analysis Centre to regulate digital currency businesses for anti-money laundering and counter-terrorism financing purposes.

The Government supports this recommendation

The Government is committed to facilitating innovation and growth in the digital currency sector and considers that appropriate anti-money laundering and counter-terrorism financing (AML/CTF) regulation will aid that development.

The Government notes that the regulation of digital currencies was considered as part of the statutory review of Australia's AML/CTF legislation. The Minister for Justice tabled the report of this review in Parliament on 29 April 2016.

The statutory review provided the Government with an opportunity to critically examine the operation and scope of Australia's AML/CTF regime, consider issues raised by regulated businesses, law enforcement, and other government agencies. The review considered a range of measures to support the development of the FinTech industry, including whether Australia's existing AML/CTF regime should be extended to include convertible digital currency exchanges and how to make the obligations under the AML/CTF regime technology neutral.

Internationally, it is considered that the extension of AML/CTF regulation to include convertible digital currency exchanges would encourage innovation and investment by ensuring service providers have greater certainty and security in their dealings with digital currency businesses, while reducing the money laundering and terrorism financing risks associated with this emerging technology. This approach has already been taken by a number of jurisdictions including the United States, United Kingdom and Canada, and is in line with the *Guidance for a Risk-Based Approach to Virtual Currencies* issued by the Financial Action Task Force, the international standard-setting body for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

The statutory review considered these approaches to addressing the money laundering and terrorism financing risks posed by digital currencies and made a number of recommendations in relation to the regulation of digital currencies. In particular, it recommended that Australia extend AML/CTF regulation to digital currency exchange businesses.

The Government will also consider guidance from the FinTech Advisory Group as part of broader considerations around the AML/CTF regulation of digital currencies.

Recommendation 9.4:

Digital currencies, such as Bitcoin, should be treated as a financial supply for GST purposes. This would require that the definition of money be updated to include digital currency in both Division 195 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and relevant GST Regulations.

The Government supports this recommendation

The Government agrees that consumers should not be subject to the GST twice when using digital currency to purchase goods or services.

For this reason, the Government has already committed, through its *Backing Australian FinTech* statement, released on 21 March 2016, to address the 'double taxation' of digital currencies. The Government is working with the FinTech Advisory Group on options to reform the current GST treatment of digital currencies and released a consultation paper for public consideration as part of the 2016-17 Budget. Any change to the GST treatment of digital currencies is subject to formal state and territory agreement.

GOVERNMENTS AND ENTREPRENEURIAL ECOSYSTEMS

Summary of the Commission's assessment

The Commission notes that Government assistance is provided for a range of reasons to support new and established businesses. The Inquiry recommends that any government support to facilitate entrepreneurial ecosystems should be underpinned by robust assessment of net benefits and be subject to ongoing monitoring to ensure stated objectives and desired outcomes are being achieved.

Recommendation 10.1:

The creation of entrepreneurial ecosystems cannot be driven by governments. Where a self-generated nascent ecosystem exists and there are demonstrated additional net social benefits arising from proposed government involvement in excess of those that will naturally occur from the ecosystem, limited support addressing specific ecosystem deficiencies could be justified. In order to minimise the risk that government support distorts incentives within the ecosystem or fails to result in net social benefits, assistance should:

- be supported by an analysis of the ecosystem which identifies deficiencies and evidence that addressing these will improve outcomes
- avoid targeting particular business sizes, models, technologies or sectors and focus on strengthening ecosystems, including networks and connections between all parties
- be modest relative to the scale of the market and conditional on measurable private sector 'buy in' that exceeds government contributions
- have a clear exit strategy established at the outset
- be delivered by people with local knowledge and cross sectoral skills
- incorporate frequent monitoring against clear objectives, and be subject to independent and transparent evaluation.

All Australian governments, should, within three years, review existing assistance directed at the set-up of new businesses to ensure programs – including those for start-ups, business incubators, accelerators and hubs – are consistent with the above approach. These reviews should not be conducted by agencies responsible for implementing the programs and should be published. Those programs that are not consistent with the above principles should be wound up.

The Government notes this recommendation

Businesses are the source of growth and prosperity in the economy. The Government's role is to create the right conditions for businesses to thrive. This includes enabling trade and investment, fostering innovation and entrepreneurship, facilitating the development of skills and capabilities in our people and businesses, reducing red tape and other business burdens, enhancing access to overseas markets and developing physical infrastructure.

The Government's $1.1 billion National Innovation and Science Agenda — a key element of the Government's economic reform agenda — reinforced our commitment to establishing a culture of

innovation and collaboration that incentivises businesses to embrace innovation to help them be more competitive, more agile, and more prepared to take on risk. Good progress has been made on implementing the first suite of NISA initiatives announced in December 2015. Future investments to strengthen the innovation system will be informed by the work of Innovation and Science Australia and will link to broader whole of government initiatives, such as education, skills and competition policy. Over the coming year, the Government will pursue further activities to build on the momentum of the Agenda.

The Government agrees that business assistance should be regularly reviewed, to ensure that Government support continues to be an appropriate, efficient and targeted use of tax payer money. This includes ensuring support for sectors of competitive advantage, as necessary. In addition, the Government agrees that all programme reviews should meet standards of independence and transparency – ensuring wherever possible that programme administrators are at arms-length from those responsible for commissioning or undertaking programme reviews.

Recent reforms to reporting will achieve better monitoring and transparency of programme outcomes against stated objectives. An enhanced whole-of-government performance framework was established under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). An objective of the *PGPA Act* is to establish a performance framework across Commonwealth entities that provide meaningful information to the parliament and the public. This new framework promotes increased external scrutiny, and introduces new requirements for strategic planning, measuring and assessing performance, evaluation and reporting.

The Government's Public Data Policy Statement and the '2013 Declaration of Open Government' marked this Government's commitment to establishing an open government, a culture of engagement and greater access to, and use of, government held information by the public. The Government's direction to make non-sensitive Government data open by default aligns with open data agendas internationally, and is aimed at contributing to greater innovation and productivity across all sectors of the Australian economy. The initial platform for agencies to implement this policy is through **data.gov.au** as well as through their respective websites.

The Business Longitudinal Analytical Data Environment (BLADE) is a new statistical asset that integrates administrative data with collected survey data from the Australian Bureau of Statistics for all active businesses in the Australian economy. It presents new and unprecedented opportunities to assess the impact of programmes. Over time, relevant reviews will involve integrating programme data with BLADE to allow observance of the impact of the measure by responsible agencies and other researchers.

Recommendation 10.2:

To support an entrepreneurial culture, and build future skills and capacity:

- governments should use positive language to describe start-up success and failure that is associated with 'trying again' and 'learning by doing'
- state and territory governments should review the ways in which schools interact with the business and entrepreneurial community and any barriers to this happening.
- governments should not deny access to any assistance programs solely because an entrepreneur has had an unsuccessful business venture in the past
- universities should review the length and structure of their degrees to accommodate practical entrepreneurial experience of students
- universities should review their recruitment, performance assessment and promotion policies to ensure an increased focus on entrepreneurial capabilities and business experience.

The Government supports in principle this recommendation

The National Innovation and Science Agenda advances meaningful reforms which will assist businesses by encouraging entrepreneurship and innovation. An important principle underpinning the Government's agenda is the need to embrace and accept risk and the prospect of failure and learning from experience.

Moreover, the Government has revitalised its primary information portal for business information — **business.gov.au**. The website now reflects more positive and affirming language associated with starting and running a business. The website provides no-nonsense information on starting, planning and growing a business and reinforces the parallels between failure and learning by doing.

The Government will also examine its eligibility criteria for assistance programmes and consider whether it is appropriate to deny access solely because an entrepreneur has had an unsuccessful business venture in the past.

Recommendation 10.3:

The Australian Government should commission a comprehensive and independent inquiry into the Australian Innovation System, which is to include among other aspects:

- the business collaboration, intellectual property management and research commercialisation practices of the public sector, including universities and publicly-funded research institutions
- business incubators, accelerators and hubs in universities and publicly-funded research institutions

The public funding and provision of 'transformative research', including that by universities and publicly-funded research institutions.

The Government supports in principle this recommendation

The Government recognises that stable and coherent innovation policies and programs, based on a long-term strategic framework, will help catalyse business investment decisions.

In 2016, the Government directed Innovation and Science Australia (ISA) to undertake a comprehensive review of the Australian Innovation, Science and Research System. ISA published its Performance Review of the Australian Innovation Science and Research System in February 2017. This is the baseline from which ISA will develop a 2030 strategic plan that will set out a path for long term success in innovation, science and research in Australia.

The Government further recognises that the Australian Innovation System has been subject to multiple reviews in recent years, most recently by the Senate Economics References Committee which released their report into Australia's Innovation System in December 2015. The Government responded to this report in December 2016.

Recommendation 10.4:

To support access by start-ups and other businesses to publicly-funded data, governments should publicly release their data in formats that ensure privacy and confidentially requirements are met.

The Government supports this recommendation

The Government agrees that data produced and held by the Australian Government is a national resource with the potential to help grow the economy, stimulate innovation, improve service delivery and efficiencies across Government and transform policy outcomes for the nation.

Australia's capacity to remain competitive in the global digital economy depends on how well it can harness the value of public and privately held data. Data volumes are growing exponentially and so too is the potential value of data. Publishing, linking and sharing data creates opportunities that previously would have been unthinkable.

As part of the National Innovation and Science Agenda, the Government's 'Data Sharing for Innovation' plan will ensure non-sensitive data is made publicly available, in accordance with the Public Data Policy Statement released on 7 December 2015. Australian Government entities are required to make non-sensitive high-value data open by default, to ensure the extraordinary amount of unique data generated by governments is put to good use, including for private sector innovation. Data will be made available at **www.data.gov.au**, free of charge.

In addition, the Government is investing $75 million in the Commonwealth Scientific and Industrial Research Organisation (CSIRO) to capitalise on the data revolution through Data61, the result of a merger between National ICT Australia (NICTA) and CSIRO's digital research unit and one of the largest digital research teams in the world. Data61 will connect disparate government datasets and publicly release them on an open data platform, develop new cybersecurity architectures, build a digital innovation marketplace to link business with data researchers, and deliver data analytics training to improve the data literacy of Australian businesses.

For example, IP Australia publicly releases its non-sensitive administrative data as IP Government Open Data (**IPGOD**). It provides over 100 years of Australian IP data linked to broader business datasets. The data is of value to IP researchers and professionals and is easily accessible through an open platform that is updated regularly.

Additionally, the Government has commissioned the Productivity Commission to review options to improve accessibility to data, taking into account the Government's policy to improve the availability and use of public sector data (the Public Data Policy Statement) as part of its National Innovation and Science Agenda and to improve government performance through the Efficiency through Contestability Programme, as well as the findings of the Public Sector Data Management Project.

Recommendation 10.5:

Universities should review their management of alumni networks with a view to maintaining links with alumni and enhancing the contribution of successful entrepreneurs among their alumni back into their universities and local entrepreneurial ecosystems.

The Government supports in principle this recommendation

The Government notes that this recommendation is a matter for Australia's universities, but supports the proposition that maintaining connections through alumni networks can enhance entrepreneurship.

ACCESS TO FINANCE

Summary of the Commission's assessment

New businesses have access to a range of potential finance sources including personal finances, venture capital, bank loans, government grants, peer-to-peer lending, private and publicly–raised equity and crowd-sourced equity finance. The Commission found that access to finance does not represent a barrier for most new businesses and the ability to access different types of finance depends on the nature of the business and the stage it is at.

Recommendation 6.1:

The Australian Government should introduce arrangements to facilitate crowd-sourced equity funding based on:

- a single corporate form (the 'exempt public company') — as proposed by the Corporations and Markets Advisory Committee (CAMAC) in its Crowd sourced equity funding report — with the ability to revert to a proprietary company where the entity meets the legislative requirements following the exemption;
- the regulation of intermediaries as proposed by CAMAC, without the proposed restrictions on intermediaries having a financial interest in an issuer or on their fee structures, but with full disclosure of intermediary interests;
- a regulatory framework to protect investors, including cooling off periods, acknowledgment of risk and a cap on those investors that are not 'sophisticated' or 'professional' investors as defined under the Corporations Act 2001 (Cth)
- an issuer cap of $5 million per year (that excludes funds raised from sophisticated and professional investors) and an investor cap of $25,000 per year and $10,000 per issuer as proposed in the Treasury consultation paper, but recognising that such caps are arbitrary and should be adjusted in light of experience with the operation of crowd-sourced equity funding.

The Government supports in principle this recommendation

On 22 March 2017 the Government's Crowd-Sourced Equity Funding (CSEF) framework for public companies passed the Parliament. This framework encouraging Australians to innovate and invest will commence 28 September 2017. The legislation was informed by extensive stakeholder consultation and was foreshadowed in the Government's response to the Financial System Inquiry.

Unlisted public companies with less than $25 million in assets and annual turnover will be able to raise up to $5 million in any 12 month period through crowdfunding platforms. In addition, small companies that become public companies to use crowdfunding will be given a transition period of up to five years during which they will be eligible for exemptions from certain corporate governance and reporting requirements. To balance the fundraising needs of businesses and investor protection, companies will need to meet minimum disclosure requirements. Retail investors will have an investment cap of $10,000 per company per 12 month period and a cooling off period allowing withdrawal from their investment for up to 5 business days after making a commitment.

The Government is working on extending CSEF proprietary companies as a priority. The Government has consulted on a possible framework for proprietary companies and is now developing legislation for further consultation and introduction to Parliament in the near future.

Recommendation 6.2:

The effectiveness of employees share schemes and the costs and benefits to the broader community of their concessional taxation treatment should be reviewed by 30 June 2020. The review should consider:

- the use of additional tax concessions for small start-up companies and the eligibility requirements to access these tax concessions
- the removal of the cessation of employment as a deferred taxing point for equity or rights granted by an employer.

The Government supports this recommendation

The Government agrees that the tax and administrative arrangements for employee share schemes (ESS) should be reviewed again by 30 June 2020, to evaluate the success of the 2015 changes and determine whether any further changes are appropriate.

The Government's changes to the tax and administrative arrangements for ESS came into effect on 1 July 2015. The changes centred on changing the taxing points of rights, reducing administrative costs associated with establishing an ESS, and providing additional tax concessions for ESS to assist eligible start-ups, with turnover of not more than $50 million, unlisted and incorporated less than 10 years. The cessation of employment taxing point does not apply to ESS that are eligible for the start-up concession.

As part of the National Innovation and Science Agenda, the Government has introduced legislation which will further reduce the barriers to implementing an ESS by limiting the requirement for disclosure documents given to employees under an ESS to be made available to the public. This legislation was passed by the Parliament on 27 March 2017. In October and November 2016, the Government consulted on further potential changes to make ESS more user-friendly. This will inform the Government's future approach to the treatment of ESS.

Recommendation 6.3:

The Australian Government should not require superannuation fund trustees to allocate funds to particular asset classes or investments, including venture capital or small businesses.

The Government supports this recommendation

It is critical that Australia's superannuation system be competitive, efficient and transparent and has the highest standards of governance. If legislative rules were established to direct fund trustees to invest in particular asset classes, there is a risk that superannuation members' retirement savings would be directed into suboptimal investments for reasons other than securing retirement income.

The recent Financial System Inquiry (FSI) found that to maximise the efficiency of the financial system, policy makers should not set out to favour one particular funding destination over another. The Government's response to the FSI clarified its support for this approach.

Recommendation 6.4:

The Australian Government's tax incentive scheme – the Venture Capital Limited Partnerships – to increase the supply of venture capital, should be closed to new registrations while the Early Stage Venture Capital Limited Partnership should continue.

Both the Early Stage Venture Capital Limited Partnership arrangements and the ongoing Venture Capital Limited Partnership should be subject to an independent evaluation in 2017 as to the cost and benefits of these arrangements for the overall community. The evaluation should also consider extending the provision of capital gains tax exemptions for individual investors.

If the Government intends to continue to provide tax incentives for venture capital following this evaluation, future arrangements should be:

- back-ended to reward success and avoid tax minimisation
- limited to seed stage or early stage venture capital, where there are likely to be greater difficulties in accessing capital
- subject to an independent evaluation as to the overall costs and benefits after the scheme has been in place for an adequate period.

The Government does not support this recommendation

Early Stage Venture Capital Limited Partnerships (ESVCLPs) and Venture Capital Limited Partnerships (VCLPs) are investment vehicles that provide tax exemptions for those investing in innovative companies at the early and growth stages of the start-up life-cycle. At these stages of development, companies will typically have received one or more rounds of initial funding (for instance, from early stage/ angel investors) but do not yet have the scale and track record needed to go public or attract buy-in from institutional investors.

The National Innovation and Science Agenda announced changes to the tax treatment of ESVCLPs and VCLPs to attract more investment into high potential early-stage start-ups, where the financing difficulties are greatest for the potential investee entities. These reforms to ESVCLPs and VCLPs will make them more internationally competitive and attract greater levels of venture capital investment. These changes have been designed to create a cultural shift towards an investment ecosystem where innovative companies can succeed by connecting investors with both the requisite funds and business experience to commercialise concepts which benefit the economy. Further, the Government announced it would extend tax incentives to investors in early stage innovation companies to encourage more businesses to develop innovative ideas. These reforms take into consideration recent reviews, including by the Board of Taxation (2011), the Treasury and the then Department of Industry, Innovation, Science, Research and Tertiary Education (2012).

Recommendation 7.1:

As identified in the 2014 Financial System Inquiry, the Australian Government should undertake a review of the participation of the lending industry in the comprehensive credit reporting in 2017 with a view to determining whether participation should be mandated. The review should also consider extension of reporting to include the comprehensive credit history of business.

The Government supports in principle this recommendation

The Government announced in its response to the Financial System Inquiry that it supports industry efforts to implement the comprehensive credit reporting (CCR) regime, but will not legislate for mandatory participation at this stage.

Credit reporting entities have developed the Principles of Reciprocity and Data Exchange (PRDE) that will create a level of consistent data supply between credit providers and credit reporting bodies. The Australian Retail Credit Association, the industry association for organisations involved in the provision, sharing and application of credit reporting data, considers the PRDE to be the most effective means to incentivise participation in the credit reporting system and facilitate data sharing.

In March 2016, the Government tasked the Productivity Commission, as part of its inquiry into data availability and use, with examining participation in credit reporting under the voluntary framework and considering recommendations for improving participation in CCR. The Commission released its draft report on 3 November 2016 and made a draft recommendation that if 40 per cent of accounts were not being reported in the CCR regime by 30 June 2017, then the Government should mandate participation in the CCR. The Government will consider its response after receiving the Commission's final report.

Recommendation 7.2:

Australian governments should not pursue credit guarantee schemes as a means of enhancing the ability of new businesses to access credit debt finance.

The Government supports in principle this recommendation

The Government agrees that credit guarantee schemes can be distortionary and inefficient and transfer risk from private lending institutions to taxpayers. In addition, they may adversely affect the vetting and monitoring behaviour of lenders.

The Productivity Commission acknowledges that banks, particularly larger banks, dominate lending to businesses in Australia. The PC acknowledged a number of reasons for this, including: the size and scale of smaller banks, non-bank institutions and superannuation funds; the prudential regulation and lending model of ADIs; and the relatively slow emergence of new lending platforms. For this reason, the Government considers there may be some limited circumstances where Government intervention may be appropriate.

Recommendation 7.3:

Governments should cease programs that offer concessional loans to new businesses on the basis of their location or industry.

For concessional loan programs provided to new businesses as a means of addressing social disadvantage, clear and persistent economy-wide net social and economic benefits should be able to be demonstrated. In the absence of these benefits, these programs should also cease.

The Government supports in principle this recommendation

The Government recognises the importance of allowing markets to work with minimal government interference.

In some limited circumstances, the Government considers it appropriate to offer concessional loans, for example, to assist drought-affected farm businesses manage and recover from drought, noting that these loans are restricted to established businesses. The Government may also provide concessional loans where it has public benefit objectives. This is the case for the Government's Northern Australia Infrastructure Facility which aims to support economic and population growth across northern Australia and address the particular challenges in the region posed by low population density, dispersed industry, remoteness and the north's unique climate. Policies to address such issues should be carefully designed to ensure that lending decisions take into account public benefit objectives and are made on a commercial basis.

Outside of the circumstances where concessional loans are appropriate, the Government agrees with the Commission's assessment that concessional loans transfer long-term costs and risks onto the Government's balance sheet, and that it is important to carefully consider the economy-wide net social and economic benefits and related risks when offering concessional loans.

VOLUNTARY BUSINESS EXITS

Summary of the Commission's assessment

Unnecessary regulatory burdens and barriers to voluntary exit may hinder the efficient operation of markets by delaying the use of business assets (or income derived from them) for alternative activities such as retirement or a new business venture.

Recommendation 11.1:

In line with recommendations from the Harper Review, the Australian Competition and Consumer Commission should combine the formal merger clearance process and the merger authorisation process, and remove unnecessary restrictions and requirements to improve the efficiency and effectiveness of business transfer processes.

The Government supports this recommendation

Consistent with the Government's response to the Harper Review, the Government has released exposure draft legislation for public consultation on changes to the formal merger review process, in consultation with business, competition law practitioners, the ACCC and states and territories.

Recommendation 11.2:

The current small business capital gains tax concessions should be rationalised. The White Paper on the Reform of Australia's Tax System should consider;

- the recommendations of the Henry Tax Review relating to small business capital gains tax relief with a view to the effectiveness of implementation, avoidance of unintended consequences and ensuring consistency with broader tax policy.
- the relationship between small business capital gains tax relief and retirement incomes policy for small business owners.

The Government does not support this recommendation

The Government has considered issues related to the taxation of small business as part of its tax reform process. The small business capital gains tax concessions are designed to assist small business owners to transition to retirement. They enable businesses to re-invest earnings in their business, instead of having to save separately for retirement.

Recommendation 11.3:

Governments should confine their involvement in business succession planning to raising the importance of this issue publicly, ensuring the provision of high quality, accessible information on relevant regulatory issues, and ensuring government processes are as timely and inexpensive as possible with appropriate cost recovery.

The Government supports in principle this recommendation

The Government agrees that succession planning is largely a commercial matter. In general, governments can best support business by providing clear, succinct information on regulatory requirements and ensuring processes are timely. For example, the Government currently provides information on succession planning through its **business.gov.au** website, and as part of the process to revitalise the website, the Government will continue to ensure that businesses can easily and quickly navigate succession planning information.

Where succession planning issues arise incidentally through the delivery of broader business advisory programmes, it is appropriate for government funded business advisors to cover these issues. Government funded business advisors play an important role as an independent third party to address the concerns of small business regarding the value of private sector advisory services and to facilitate links between small business and private sector advisory services, including succession planning specialists.

BUSINESS RESTRUCTURING

The Government's current focus is on promoting and improving business rescue, including by implementing measures responding to Recommendations 14.2 and 14.5. The Government is committed to deregulation and as part of our ongoing review of the insolvency system will consider further ways in which the system may be modified to ensure that it operates efficiently and proportionately after that time if necessary.

Summary of the Commission's assessment

A well-functioning external administration regime should facilitate the restructuring of economically viable companies and also provide a fair and orderly process for dealing with the financial affairs of insolvent companies. In this way, an effective external administration system facilitates the efficient recycling of capital and contributes to the efficient allocation of funds in the economy. The regime must also protect stakeholders' interests and particularly creditors' rights in order to promote broader credit provision.

Recommendation 14.1:

The *Corporations Act 2001* (Cth) should be amended such that, for an administration to continue, within one month of appointment the administrator must certify they have reasonable grounds to believe that the company (or a large component entity of it that may emerge following a restructure) is capable of being a viable business.

If the administrator is unable to certify this, they should be under a duty (enforceable by the Australian Securities and Investments Commission) to convert the administration into a liquidation.

The Government does not support this recommendation

The role of the voluntary administrator is to investigate the company's affairs, to report to creditors and to recommend to creditors whether the company should enter into a deed of company arrangement, go into liquidation or be returned to the directors.

The recommendation would fundamentally change the purpose of a voluntary administration to focus only on restructuring, which disregards the current focus of also providing an alternative mechanism to liquidation to maximise returns to creditors where appropriate.

Currently creditors are provided with the opportunity to bring a voluntary administration to an end after 5 – 6 weeks (depending upon the time of year). The proposal would therefore only bring an administration to an end only one or two weeks earlier than would be otherwise the case.

Additionally, there are concerns whether the period of one month is likely to be sufficient for an administrator to be able to certify that a company is "viable" in some cases. There is a further related concern whether the process recommended by the Commission would encourage litigation where creditors disagreed with the administrator's decision and give rise to potential liability of the administrator.

It should be noted that the existing voluntary administration structure is likely to operate much more effectively (and be sought to be less utilised in matters where other processes would be more appropriate) if the Commission's recommendations in relation to ipso facto clauses (recommendation 14.5) and the introduction of a safe harbour for directors in relation to insolvent trading (recommendation 14.2) are implemented.

- The implementation of safe harbour will provide a viable alternative to formal administration in many circumstances where, under the current regime, administration is the only option.
- Banning ipso facto clauses will remove one of the stresses which exist on administrations under the current arrangements.
- The Government has committed to introducing the ipso facto and safe harbour reforms as part of the National Innovation and Science Agenda.

Recommendation 14.2:

The Corporations Act 2001 (Cth) should be amended to allow for a safe harbour defence to insolvent trading. The defence would only be available when:

- directors of a company have made, and documented, a conscious decision to appoint a safe harbour adviser with a view to constructing a plan to turnaround the company.
- the advisor was presented with proper books and records upon appointment, and can certify that the company was solvent at the time of appointment.
- the adviser is registered and has at least five years' experience as an insolvency and turnaround practitioner.
- directors are able to demonstrate that they took all reasonable steps to pursue restructuring
- the advice must be proximate to a specific circumstance of financial difficulty, and subject to general anti-avoidance provisions to prevent repeated use of safe harbour within a short period.

The defence would not attach to any particular decision and instead would cover the running of the business and any restructuring actions from the time of appointment until the conclusion (or reasonable) implementation of the advice.

- if the adviser forms the opinion that restructure into any form of viable business of businesses is not possible, they are under a duty to terminate the safe harbour period and advise the directors that a formal insolvency process should commence.

The safe harbour adviser may only be appointed in a subsequent insolvency process with leave of the court.

The Government supports this recommendation in part

The Government released on 28 March 2017 draft legislation which would amend the Corporations Act 2001 to create a 'safe harbour' for company directors from personal liability for insolvent trading if the company is undertaking a restructure in certain circumstances.

Under the new safe harbour, directors will only be liable for the offence of trading while insolvent where it can be shown that they were not taking a course of action reasonably likely to lead to a

better outcome for the company and its creditors as a whole than proceeding to immediate administration or liquidation.

The current exposure draft legislation does not mandate the appointment of a 'safe harbour' or specialist restructuring adviser, however, whether a director was obtaining appropriate advice may be a factor that the Courts would have regard to in determining whether the director has met the requirements for the safe harbour.

Recommendation 14.3:

Provision should be made in the *Corporations Act 2001* (Cth) for 'pre-positioned' sales.

Where no related parties are involved, there should be a presumption of sale such that administrators can overturn sales only if they can prove that the sale was not for reasonable market value (in accordance with s420A of the Act), or if it would unduly impinge on the performance of the administrators' duties. Administrators or liquidators should be able to rely on the pre-appointment sale process as evidence.

If sales are to related parties, there is no presumption favouring sale and the administrator's or liquidator's examination of the sale process continues as normal. The administrator's review should include checks that the sale has met existing regulatory requirements for related party transactions.

In both cases, s439A of the Act should be amended to include requirements to disclose information of the sale to creditors.

Where the sale (whether given effect before or after the insolvency appointment) is the result of advice received under the safe harbour defence, that defence should also apply against voidable transactions actions from administrators or liquidators.

The Government does not support this recommendation

Currently, a liquidator or administrator will assess any contract for sale entered into prior to the administration but not yet completed, to determine whether it is in the interests of creditors to honour it. A liquidator may elect to honour a contract for sale, or to allow the counterparty to lodge a claim in the administration. Any presumption in favour of a sale would fetter the liquidator's ability to carry out this function.

The Government does not believe that this would be a desirable policy outcome.

The Government notes also that the UK's non-legislative 'pre-pack' administration has attracted considerable criticism because of perceptions that it may facilitate fraudulent phoenix activity.

Recommendation 14.4:

The small liquidation process detailed in recommendation 15.1 should include provision for small pre-positioned sales, consistent with recommendation 14.3.

In the context of small businesses, the requirements of s420A of the *Corporations Act 2001* (Cth), and investigations of related parties, should be applied proportionately in relation to determining the relevant market for the sale, advertising effort and reasonable price

The Government does not support this recommendation

The Government does not support this recommendation for small businesses for the same reasons set out in the responses to recommendations 14.3 and 15.1.

Recommendation 14.5:

The *Corporations Act 2001* (Cth) should be amended such that ipso facto clauses that have the purpose of allowing termination of contracts solely due to an insolvency event are unenforceable if the company is in voluntary administration or the process of forming a scheme of arrangement. Amending legislation should make clear that the party experiencing the insolvency is in no way absolved of any other contractual obligations.

External administrators should be given the ability to apply to the Court to require continued performance of a contract where the Court is satisfied that the supplier is attempting to avoid this moratorium, and that the continuation of the contract is in the best interests of the creditors as a whole.

In circumstances where this moratorium could lead to undue hardship, suppliers should be able to apply to the Court for an order to terminate the contract.

The Government supports this recommendation

The Government released on 28 March 2017 draft legislation which would amend the Corporations Act 2001 to prevent certain contracts from being terminated or amended, in reliance on an ipso facto clause, solely due to an insolvency event (such as the appointment of a voluntary administrator), where the company is undertaking a restructure.

Recommendation 14.6:

The *Corporations Act 2001* (Cth) should be amended to create a moratorium on creditor enforcement actions during the formation of schemes of arrangement. This should be aligned with the approach used in voluntary administration.

Courts should also be given the power to lift all, or part of, the moratorium in circumstances where its application would lead to unjust outcomes.

The Government supports this recommendation in principle

The Government agrees that there are circumstances where a moratorium on creditor enforcement action may be appropriate when affecting a business rescue. However, schemes of arrangement are also routinely used for other restructures such as mergers and acquisitions where a moratorium would not be appropriate. The Government will consider further the circumstances in which a moratorium may be appropriate.

CORPORATE INSOLVENCY

The Government's current focus is on promoting and improving business rescue, including by implementing measures responding to Recommendations 14.2 and 14.5. The Government is committed to deregulation and as part of our ongoing review of the insolvency system will consider further ways in which the system may be modified to ensure that it operates efficiently and proportionately after that time if necessary.

Summary of the Commission's assessment

Australia's corporate insolvency framework is generally sound and reforms should focus on specific, not fundamental change. Where liquidation is required, for those businesses that fail and cannot suitably be restructured, the focus of an efficient system should move towards a balance between expedient winding up and an orderly, robust process that also functions as an enforcement tool to discourage breaches of directors' duties and other illegalities.

Recommendation 15.1:

The *Corporations Act 2001* (Cth) should be amended to provide for a simplified 'small liquidation' process.

- this would only be available for those companies with liabilities to unrelated parties of less than $250,000.
- to access small liquidations, directors should be required to lodge a petition to the Australian Securities and Investments Commission (ASIC) and verify that their books and records are accurate.
- the primary role of the liquidator would be to ascertain the funds available to a reasonable extent, given a reduced timeframe. Requirements for meetings, reporting and investigations should be reduced accordingly.
- the pursuit of unfair preference claims should be limited to those within three months of insolvency and material amounts. The duty to pursue unfair preference should be explicitly removed unless there is a clear net benefit and it will not impede conclusion of the liquidation.
- creditors would be able to opt out of the process and into a standard creditors' voluntary liquidation, and ASIC would be able to initiate further investigation if it has concerns of illegality.

Liquidators for these processes would be drawn from a panel of providers selected by tender to ASIC. Panel membership would be for a period of up to five years, with ASIC able to conduct tenders at regular intervals to ensure that demand can be met.

ASIC should be empowered to hear complaints of practitioner misconduct and if the complaint is upheld, replace the liquidator. ASIC should be enabled to take disciplinary action, if warranted, against the discharged liquidator, including the suspension from participation in the panel or revocation of their registration.

The Government supports in principle this recommendation

The Government has already taken significant steps to improve Australia's corporate insolvency regime, including by improving the standards of compliance and professionalism in the industry with the passage of the *Insolvency Law Reform Act 2016* in February 2016.

As announced in the National Innovation and Science Agenda, the Government is currently focussing on promoting and improving business rescue, including by implementing measures to make ipso facto clauses in certain contracts unenforceable during a restructure (Recommendation 14.5) and introducing a safe harbour for directors from liability for insolvent trading in certain circumstances (Recommendation 14.2).

Recommendation 15.2:

In instances of small liquidations where a liquidator is unable to recover funds to cover their own fee, and where the Australian Securities and Investments Commission (ASIC), is satisfied that the activities are not excessive, the liquidator should be able to apply for the balance of their fees to be paid through ASIC.

- the existing Assetless Administrative Fund should be renamed the Public Interest Administration Fund and its objectives and funding modified to reflect this new function.
- to the extent that this requires additional funding, it should be raised by increasing the annual review fee for company renewals.

Funding should also be available from the Public Interest Administration Fund in instances where ASIC initiates further investigations beyond those required by the small liquidation process.

The Government notes this recommendation

This proposal extends the existing purpose of the Assetless Administrative Fund, which is to finance preliminary investigations or recovery actions, with a particular focus on curbing illegal phoenixing activity. The fund was not designed to support small scale liquidation more generally.

Recommendation 15.3:

The Australian Government should instigate an independent review, to report by 30 June 2017, of the relevant parts of the *Corporations Act 2001* (Cth), and the practices of receivers in the market, with a view to ensuring that:

- the primary role of the receiver should be to protect the value of the property that is the subject of the secured credit.
- the focus should be on the performance of individual loans. The appointment of receivers should not be used a mechanism to manage lenders' portfolios.
- if there is a substantial group of unsecured creditors affected by the receivership, the receiver should have consideration of the impact of their actions upon the overall wellbeing or insolvency of the company.

The Government supports in principle this recommendation

The Parliamentary Joint Committee on Corporations and Financial Services ('the Committee') report into the impairment of customer loans was provided to Government on 4 May 2016. The Government is considering its response to the inquiry and will further consider its response to this recommendation in that context. In addition, on 31 August 2016, the Government directed the Australian Small Business and Family Enterprise Ombudsman to undertake an inquiry into the adequacy of the law to address concerns raised by the Committee in its report. The Australian Small Business and Family Enterprise Ombudsman, in examining selected cases identified by the Committee, provided its final report to Government in December 2016. The Government will consider the report as part of its ongoing work to improve the business operating environment.

Recommendation 15.4:

The *Corporations Act 2001 (Cth)* (the Act) should be amended such that where the stakeholders in a receivership (that is, unsecured creditors, including employees and government authorities such as the Australian tax Office) form a committee of inspection and notify the receiver, that committee should have the right to basic information regarding the receivership process. This should include, but not be limited to:

- a description of the proposed process
- the results of the sale process
- details of proposed and actual costs and disbursements

Receivers should be compelled to have regard to the views of the committee in a similar manner to liquidators under s479 of the Act. Considerations directly relating to protecting the value of the security should override any views of the committee.

- the Committee should have standing under s425 of the Act to apply to the Court to seek relief in relation to the fees (but not actions) of the receiver.

The Government supports in principle this recommendation

The Government supports in principle this recommendation for the same reasons set out in the response to recommendation 15.3.

Recommendation 15.5:

The operation of the Fair Entitlements Guarantee, in its entirety, should be reviewed in 2021 in order to monitor any moral hazard issues, potential abuse of the scheme and continued effectiveness of recovery arrangements. As part of this, consideration should be given to amendments to the *Corporations Act 2001* (Cth) to allow the Commonwealth to play a more active role as a creditor.

The Government supports this recommendation

The Fair Entitlements Guarantee (FEG) is designed as a safety net of last resort to protect certain unpaid employment entitlements that would otherwise be lost due to liquidation or bankruptcy of the employer.

Following a review of the scheme in December 2015 by the Australian National Audit Office, the Department of Employment has enhanced the administration of the scheme and is undertaking work to ensure that compliance risks and fraud control arrangements continue to maintain integrity of the scheme.

On 19 December 2016, the Commonwealth Government announced that the pilot Fair Entitlements Guarantee Recovery Program has been made permanent with expanded funding from 1 January 2017. The ongoing program will continue to strengthen recovery of amounts advanced under the FEG scheme.

The Government remains committed to monitoring the operation of the scheme and safeguarding it against potential abuse.

Recommendation 15.6:

In addition to existing requirements for directors, section 117 of the *Corporations Act 2001* (Cth) should be amended to require that, at the time of company registration, directors must also provide a Director Identity Number (DIN).

A DIN should be obtained from the Australian Securities and Investments Commission (ASIC) via an online form at the time of an individual's first directorship. In order to obtain a DIN, individuals should be required to provide identity proof (based on the personal identification requirements for opening a bank account), and verify that they have read brief materials on directors' legal responsibilities provided as part of the online registration.

For existing companies, directors should be required to obtain a DIN. The DINs should be provided to ASIC at the annual review date for the company, as a change to company details. To enforce these requirements, ASIC should be empowered under section 205E of the Corporations Act 2001 (Cth) to ask a person who is a director to provide their DIN.

There should be no lessening of the existing recording of, and means of accessing, director information.

The Government notes this recommendation

The Government notes the Commission's recommendation to introduce the Director Identification Number as a transparency measure that could provide greater regulatory oversight of directors' duties and assist ASIC in early intervention in compliance and enforcement of these duties.

The Government will give this proposal further consideration as part of its ongoing work on insolvency reforms.

Recommendation 15.7:

Following the implementation of the Commission's proposed reforms to the insolvency system, the Australian Securities and Investments Commission (ASIC) should produce a regulatory guide targeted at small businesses facing financial difficulty.

The guide should cover legitimate restructure and liquidation options and responsibilities, with a focus on the new processes designed to assist small businesses.

ASIC should consult with the Australian Small Business Commissioner (or its successor), representatives of small business and the insolvency and legal professions in producing the guide.

The Government notes this recommendation

The Government notes this recommendation, but acknowledges that it is directed towards the Australian Securities and Investments Commission (ASIC) rather than the Government. The Government notes that the ASIC is committed to updating its regulatory guidance when significant changes to the law are progressed.

PERSONAL INSOLVENCY

Summary of the Commission's assessment

An efficient personal insolvency process should protect creditors and society, from disreputable or unscrupulous business people while not unduly penalising genuine entrepreneurs whose ventures have been unsuccessful on entirely honest and legitimate grounds.

Recommendation 12.1:

The *Bankruptcy Act 1966* (Cth) should be amended so that, where no offence has occurred, a bankrupt is automatically discharged after one year. Specifically, this should apply to restrictions relating to overseas travel, holding an office under the *Corporations Act 2001* (Cth), employment within certain professions and access to personal finance.

The trustee, and the courts, should retain the power to extend the time until the bankrupt is discharged for a period of up to eight years if there are concerns regarding the bankrupt's conduct. Any extensions should be recorded on the National Personal Insolvency Index.

The Australian Government should work with other governments and professional bodies to ensure that any regulations or other arrangements restricting the employment of bankrupts beyond the period of bankruptcy are justified to specific and efficient policy objectives.

The Government supports this recommendation

The Government's National Innovation and Science Agenda announced a reduction in the current default bankruptcy period from three years to one year. Automatically discharging bankrupts after one year instead of three years will help remove the stigma of bankruptcy, encourage failed entrepreneurs to attempt new business ventures, and allow bankrupt individuals to attain quick financial rehabilitation.

Recommendation 12.2:

The obligation of the bankrupts to make excess income contributions to the trustee should remain for three years. The period of excess income contributions can be extended at the discretion of the trustee to up to eight years. If the period of bankruptcy is extended beyond three years, then excess income contributions should be required until discharge.

The Government supports this recommendation

The Government agrees that the implementation of this recommendation along with recommendation 12.1 would promote the 'fresh start' goal of bankruptcy, whilst ensuring that creditors are not unfairly disadvantaged through the continuation of excess income contributions. The Government agrees that maintaining a trustee's discretion to extend bankruptcy and the period for excess income contributions is appropriate as a consequence of misconduct by a bankrupt.