HOUSING INDUSTRY ASSOCIATION

Submission to the
Department of Industry, Science, Energy and Resources

Payment Times Reporting Rules 2020

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contents

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diverse mix of companies including residential volume builders, small to medium builders and renovators, residential developers, trade contractors, building product manufacturers and suppliers and allied building professionals that support the industry.

HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

HIA takes this opportunity to respond to the Consultation Paper and exposure draft Payment Times Reporting Rules (Draft Rules) which underpin the operation of a Payment Times Reporting Framework (PTRF). If passed the proposed PTRF will be established by the *Payment Times Reporting Bill 2020* (Bill) that was introduced into Parliament on 13 May.

HIA has made a number of submissions expressing concern with the proposed PTRF, the Bill and the Draft Rules. HIA takes this opportunity to reiterate those concerns.

2. RESPONSE TO THE DRAFT RULES

2.1 DEFINITION OF SMALL BUSINESS

Section 5 of the Draft Rules sets out that a small business will be:

- identified through the Payment Times Reporting Small Business Identification Tool; and
- a business with turnover of less than $10 million.

HIA has a number of concerns with these proposals.

Small Business Identification Tool

HIA submit that small businesses be required to disclose that they are small businesses and therefore covered by the PTRF. This would appropriately share the administrative burden associated with compliance under the proposed PTRF.

Notwithstanding this, if it is incumbent on reporting entities to determine their small business suppliers, the Small Business Identification Tool is preferred. It is also preferred that a 'positive screen' approach be taken with information limited to ABN's or company names. This makes it very clear to the reporting entity which businesses they must report on.

The Consultation Paper indicates that a small business may be able to 'opt-out' of the identification tool. In those cases, it remains unclear how a large business is to, firstly, know that the small business has opted out of inclusion in the tool and secondly, identify them as a 'small business' for the purposes of the PTRF. This issue must be resolved prior to the reforms moving forward.

Definition of Small Business

The consideration of one factor (such as the proposed turnover threshold) for such an important classification does not allow any flexibility to account for:

- Changes in economic conditions that will impact the expansion or contraction of a business.
- The way a business may structure themselves in order to either be (or not be) considered a 'small business'.
- Incentives (or disincentives) for business growth.

HIA prefers a multi-factor test be applied in order to determine a small business. Similar to the current approach adopted under the unfair contracts provisions of the Australian Consumer Law a small business would be defined by:

- The upfront price payable under the contract; and
- The turnover of the small business.

There are legitimate, reasonable and sensible reasons why a multi-factor test may be the most appropriate way of identifying a small business. This approach seeks to balance the needs of all businesses in the interests of the broader economy.

It may also be appropriate, and indeed preferred, to allow larger businesses the flexibility to determine who is a small business in their particular industry or for a particular purpose.

2.2 Ceasing to be a Reporting Entities

Section 7 of the Draft Rules sets out additional information that a reporting entity must provide should they wish to cease to be a reporting entity. This process involves making a written application and the provision of evidence to support the application and the grounds on which the application is made.

It is unclear why such a process is required. Once a reporting entity ceases to meet the threshold requirements set out in the Bill, HIA sees no reason why that entity should remain captured and also sees no reason why the entity should have to seek permission to no longer report payment times.

By way of contrast, the *Modern Slavery Act 2018* contains no such requirements, a business who falls below the threshold is simply no longer captured by the legislation and therefore is no longer required to submit a modern slavery statement. It is unclear why the same approach has not been taken in relation to the PTRF given that the compliance burden imposed by this proposed process seems unjustifiable.

2.3 Additional Information for a Report

Section 8 of the Draft Rules proposes that a payment times report include a range of information in addition to that already required to be provided under the Bill.

HIA has a number of concerns with the proposed approach.

The level of detail that must be provided by a reporting entity in their payment times report is overly burdensome and does not balance possible anti-competitive outcomes or the need to prevent the disclosure of commercially sensitive information.

There is some overlap between section 8 of the Draft Rules and section 14 of the Bill which creates unnecessary complexity and additional administrative burden. The table below sets out some examples of where potential duplication exists:

Draft Rules requirements	Requirement set out in the Bill
(e) a statement on the standard payment periods for the entity at the start of the reporting period, and an explanation of any changes to the standard payment periods for the entity during the reporting period	(c) include details of any changes to the shortest or longest standard payment periods for the entity during the reporting period;
(a) the entity's name and ABN	(e) include details of the principal governing body of the entity
(f) the proportion, determined by total value, of all procurement by the entity during the reporting period that was procurement from small business suppliers	(d) state the proportion, determined by total number and total value, of small business invoices paid by the entity during the reporting period in accordance with each of the following: (i) less than 21 days after the invoice was issued; (ii) between 21 and 30 days after the invoice was issued;

	(iii) between 31 and 60 days after the invoice was issued; (iv) more than 60 days after the invoice was issued

Removing any overlap would also assist in ensuring compliance.

Secondly, section 8 proposes that a payment times report include a range of payment term information including, for example, the standard payment time periods for each small business supplier and details of the arrangements under which small business invoices are paid.

HIA opposes the mandatory reporting of key contractual terms. Such matters are determined by commercial negotiations between the parties, may be a result of competitive market forces and be commercially sensitive. For example, if discounts for on time payments have been negotiated, those offering such arrangements may not want competitors to be aware of them.

The payment term arrangements in place for a business can vary significantly. While it may be possible for a large business to broadly specify its payment terms it is likely that when the terms for all suppliers are considered there will be significant variations. For example, normal trade suppliers may be subject to very different payment terms than consultants, one-off suppliers, professionals and government agencies. It is therefore unlikely that a single standard payment term would apply for a reporting entity and it may be difficult to clearly apply differing payment terms.

A relevant consideration is the use of standard form contracts.

There is little utility in the publication of payment terms set by standard form contracts which are a long standing feature of the residential building industry. Many are developed through a process of negotiation and discussion. They are usually well understood by the parties and are often amended to reflect competing interests of the parties involved in the project type and the contractual value.

HIA drafts and publishes a number of standard form building contracts and trade contract (sub contract) documents. The terms of these contracts reflects the unique needs of the residential building industry and in HIA's view represent fair, reasonable and balanced conditions.

Finally, HIA opposes the requirement to disclose information regarding supply chain finance, reverse factoring or other discounting arrangements.

The arrangement between a buyer of supply chain finance (or similar) and the finance company and the take up of those arrangements is a matter for those parties. Any arrangements should be treated as confidential.

Further, there is no evidence to support the need for the number and value of invoices where these arrangements are utilised to be a part of the PTRF. There is no legitimate basis on which these confidential business negotiations should be disclosed and may in fact jeopardise any beneficial terms secured.

2.4 Calculating Information for a Report

Section 9 of the Draft Rules sets out a method for calculating payment times for the purposes of a payment times report.

HIA has two concerns with the proposed approach.

Firstly, HIA opposes the inclusion of weekends and public holidays.

Invoices are paid based on business days not calendar days. Therefore the proposal to include weekends and public holidays is at odds with all business practices and the operation of other laws that apply to the residential building industry across the country, such as Security of Payments (SOP) laws.

The objective of SOP laws is to improve cash flow down the contractual chain by establishing a default entitlement to payment and offering a rapid adjudication process for the resolution of payment disputes.

These laws generally impose strict time frames for the taking of certain actions that are linked to, for example, the receiving of an invoice (known across the east coast as a payment claim). The calculation of timeframes is therefore part and parcel of administrating a claim under the laws.

Under SOP laws certain days are specifically excluded in order to reflect not only the operation of the residential building industry, but also to ensure business custom and practice is reflected. For example under the NSW *Building and Construction Industry Security of Payment Act 1999* 'business day' means any day other than:

- a Saturday, Sunday or public holiday, or
- 27, 28, 29, 30 or 31 December.

While this definition differs around the country this is the preferred and recommended approach. HIA strongly recommends that weekends and public holidays be **excluded** from the calculation of a payment time.

Secondly, HIA opposes the inclusion of disputed payments for the purpose of the calculation of a payment time.

One of the reasons often cited for the establishment of a PTRF is to improve the collection of information about the payment practices of large businesses and government agencies towards small business. Also noted in the Explanatory Memorandum is that the PTRF will provide greater transparency on payment practices and performance to create pressure for cultural change to improve payment times.

Neither of those objectives are satisfied through the inclusion of disputed invoices in the calculation of payment times. Not only does the inclusion of disputed invoices have the potential to 'muddy the waters' in terms of a large businesses approach to payments to smaller businesses but in the residential building industry there are often disputes over the quality of work and the liability to pay, delaying payment. In general, these disputes do not reflect any unreasonable or unjustified behaviour by the payer but simply reflect a desire to have the contracted services performed in accordance with what was agreed.

If there is no appetite to remove disputed invoices from the calculation of payment times the business should be able to choose how payment times relating to disputed invoices are reflected in their payment times report.