



**Small
Business
Commissioner**

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Our Reference: TA20/3858

Mr Peter Cully
Head of Division Small and Family Business
Department of Industry, Science, Energy and Resources
10 Binara Street Canberra ACT 2600
via online submission

Dear Mr Cully

Submission - Payment Times Reporting Rules

The NSW Small Business Commission (NSWSBC) welcomes the opportunity to provide feedback on the Payment Times Reporting Rules.

The NSWSBC advocates on behalf of small businesses in NSW, provides mediation and dispute resolution services. Through evidence-based advocacy and professional mediation services, we help resolve issues impacting and limiting the potential of small business.

Small businesses are the engine room of the NSW economy and employ more than half of the NSW workforce. Cash flow and liquidity are some of the biggest challenges facing small business, and these challenges have been exacerbated by the COVID-19 pandemic.

The NSWSBC has been a strong advocate for Faster Payment terms for small businesses in NSW. Recognising that governments should lead by example the NSW Government has fast tracked the payment of suppliers and contractors in advance of contracted payment terms through the expansion of its Faster Payment Terms policy. This initiative has released \$7.4 billion into the economy since it was announced on 31 March 2020.

Prior to its expansion to all suppliers, the Faster Payment Terms policy had already improved our payment processing to registered small businesses. In the March 2020 quarter, the NSW Government paid over 98 per cent of invoices to registered small businesses within 20 calendar days, with 97 per cent of those being paid within five business days.

The NSW Government has committed under its Faster Payments Policy that registered small businesses that supply to in-scope government departments will be paid within five business days of central payment departments receiving a correctly rendered invoice for goods or services up the value of \$1 million.

We encourage large businesses, government agencies and indeed all levels of government to embrace faster payment times for small business. By reducing the cash flow burden on small business, larger businesses are improving the survival chances of small business which in turn means a wider pool to choose from when purchasing.

The NSWSBC Commission welcomes the Payment Times reporting legislation. This legislation will help address the information asymmetry which currently exists and highlight to large businesses how their payment practices compare to that of their peers. We hope that

publicising this information will encourage behaviour changes that ultimately benefit small business. We also support a platform that does not require small businesses to opt-in.

However, the effectiveness of the legislation will ultimately be determined by the accuracy and usability of the Payment Times Small Business Identification Tool (the Tool) and the ease with which large business can contribute information to the Payment Times Reporting Register (Register). We recommend that a detailed Regulatory Impact Analysis is undertaken prior to the legislation coming into effect to ensure that the costs of this additional regulation do not outweigh the benefits to small business. We also encourage the Department to continue to engage with stakeholders during the build of the Register, Tool and subsequent underpinning policy.

Please find attached our comments in relation to the *Rules*. For further information, please contact Ms Sylvia Georgiou, Principal Advisor on 0417 463 707 or email sylvia.georgiou@treasury.nsw.gov.au.

Yours sincerely



Chris Lamont
NSW Small Business Commissioner
16th June 2020

Attached: Payment Times Reporting Rules 2020 Exposure Draft – comments/questions



Appendix 1

Payment Times Reporting Rules 2020 Exposure Draft – comments/questions

| 1. | Topic | Question/Comment |
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| | <p>Section 5: Definition of small business</p> <p><i>Defined as any business with a turnover of less than \$10 million.</i></p> | <p>Although the definition proposed in the Rules currently aligns with the Australian Taxation Office’s definition of a small business, it differs to the statutory definitions applied in other Commonwealth legislation¹. Those definitions are often based on a maximum number of employees. Some examples include:</p> <ul style="list-style-type: none">• The Australian Bureau of Statistics defines a small business as one with less than 20 employees• The <i>Fair Work Australia Act 2009</i> (section 23) defines a small business as one with less than 15 employees• The <i>Corporations Act 2001</i> (section 761G) defines a small business as one employing less than 20 employees (or 100 if a manufacturing business) <p>The NSW Government’s Small and Medium Enterprise and Regional Procurement Policy defines a small business as having 1-19 Full Time Equivalent employees including sole traders and start-ups.</p> <p>While it is beyond the scope of the Rules to impose a standard definition across government, multiple definitions may cause confusion and add to the administrative burden on business.</p> <p>We understand that employment-based definitions of small business can create challenges. If a turnover-only test is used, we suggest that the definition of small business in the Rules is linked to the ATO definition (rather than specifically defined in the Rules). This would ensure the Rules remain consistent with the ATO definition if that definition changes.</p> |

¹ Financial services and Small and Medium-Sized Enterprises (SMEs) Background Paper 12, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2018, Figure 1, accessed <https://financialservices.royalcommission.gov.au/publications/Documents/financial-services-and-small-and-medium-sized-enterprises-paper-12.pdf>

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| 2. | Small business buy-in | <p>We anticipate some small businesses will not want to be included in the Payment Times Small Business Identification Tool (the Tool) as they may not want to be identified as a small business. The Rules suggest that small business will automatically be included with opt-out as an option.</p> <ul style="list-style-type: none"> • Will each small business be advised they are being included in the Tool? • How will the Tool be presented to small business and will the option be extended to allow the option to opt-out? • If a business elects to opt-out will they subsequently be afforded the opportunity to opt-in again at a later date? • Will the Tool update each year to include/exclude small businesses which now/no longer meet the turnover definition? • What provisions are in place to ensure that small businesses do not opt-out due to pressure from large businesses? • Will the reason(s) small businesses opt-out be captured? • If access to the Tool is restricted only to reporting entities, how will small businesses ensure their details in the Tool are correct or that their direction to opt-out has been actioned? |
| 3. | Register and Tool | <p>It will be critical for the Register and Tool to be accurate and user-friendly. It will also be important for small businesses to be able to easily view and update information held about them in the Tool. We encourage the Commonwealth to continue to engage with stakeholders during the build of the Register and Tool.</p> |
| 4. | Sub-contracting | <p>The Rules do not appear to capture sub-contracting arrangements. Given subcontracting forms part of the majority of contracting arrangements, particularly in the building and construction industry, are there plans to address payment times for subcontractors (noting it would likely be burdensome to make a large firm responsible for a whole subcontracting chain)? It is generally the contracting relationships further down the contracting chain where the biggest issues exist. Also, will there be any monitoring to ensure large businesses, and their related entities, do not modify their contracts to avoid reporting by using sub-contracting arrangements?</p> <p>Typically, in the construction industry, small business are tier 3 and below (i.e. a sub-sub-contractor). Late or non-payment of invoices remains common in the construction industry, particularly on non-government projects. This is despite work by the NSW Government to educate small businesses of their rights relating to receipt of timely payment. It may be useful for the Register to identify payment times by industry so that industry-specific responses to improving payment times can be developed where needed.</p> |

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| | | We are supportive of the Rules requiring reporting of practices such as supply chain financing and reverse factoring, which have received negative media attention in recent times. |
| 5. | Standard payment periods, section 6 | <p>Will further guidance be provided to large businesses as to what a “standard payment period” should be? We understand that the Rules will not mandate any particular time however, is there a role to play in setting best practice?</p> <p>The NSW Government has committed under its Faster Payments Policy that registered small businesses that supply to in-scope government departments will be paid within five business days of central payment departments receiving a correctly rendered invoice for goods or services up the value of \$1 million. We consider this best practice and can provide further information about the NSW policy if this would be useful.</p> |
| 6. | <p>Payment terms</p> <p><i>9(a) a small business invoice is issued when it is received by the entity in accordance with all requirements of the relevant written or oral contract, regardless of any date entered into a software system for the entity;</i></p> | <p>What monitoring or auditing mechanisms are proposed to ensure the correct application of this section (for example, ensuring the date when the invoice is received rather than the date the invoice is entered in a software system)? When the Register and Tool are ready, we suggest including some case studies on this section to inform how this measure should operate.</p> <p>We also suggest providing guidance on how disputes about incorrect invoices should be handled. Section 9(c)(ii) notes for the purposes of calculating the payment time, it is irrelevant whether the invoice is in dispute. This is potentially inconsistent with section 9(a) which requires the invoice to be in accordance with the requirements of the relevant contract before the calculation of the payment time commences. What types of disputes are envisaged to be captured by s9(c)(ii)?</p> |
| 7. | <p>Rule Provision 4: additional information for a report</p> <p><i>the total proportion (by value) of the businesses procurement during the reporting period</i></p> | <p>We recommend the number of small businesses is included in addition to the value. By understanding how many small businesses an entity procures from, it will provide a better overall picture of their procurement payment times. We note this has already been contemplated for supply chain financing:</p> <p><i>whether the business offers any form of supply chain finance and if so, details of that arrangement including the total proportion (by number and value) of small business invoices paid under these arrangements in the reporting period;</i></p> |

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| | <i>that was from small business suppliers;</i> | |
| 8. | Risks | <p>We note there are likely to be some risks in implementing the Scheme. In particular:</p> <ul style="list-style-type: none">• Compliance costs may outweigh the benefit to small business. If behavioural changes do not occur as a result of this legislation, then small business will not realise the benefits and it will simply be another cost to large business which are then passed onto small business. If a regulatory impact analysis has yet to be performed, we recommend this is completed to mitigate the impact of any unintended consequences or unexpected imposts.• Compliance costs incurred by large businesses may be passed onto small businesses. It is essential that the compliance burden both in terms of time and cost be minimised as there is a risk of these costs being transferred onto small business.• Large businesses may cease to contract directly with small business if it means it is administratively easier to complete their reporting obligations. Will therefore recommend that consideration be given to the establishment of a monitoring regime to assess the extent to which large businesses are engaging small businesses more/less often over time?• There should be mechanisms in place to measure the impact of the legislation over time to ensure the benefits are realised and unintended consequences do not arise. |