HOUSING INDUSTRY ASSOCIATION

Submission to the
Department of Jobs and Small Business

Payment Times Reporting Framework Discussion Paper (Stage 2)

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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.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

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."*

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.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new residential construction 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 member committees before progressing to the Association's 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 23 centres around the nation providing a wide range of advocacy and business support.

1. INTRODUCTION

HIA takes this opportunity to respond to the Department of Jobs and Small Business discussion paper (Stage 2) on a proposed payment times reporting framework (Discussion Paper). The proposed Payment Time Reporting Framework (PTRF) is intended to implement the announcement made by the Commonwealth Government on 21 November 2018 that it would introduce a new national large business reporting framework with the overall goal of improving payment outcomes for Australian small businesses.

Moves that facilitate prompt cash flow and the timely payment of progress claims are worthwhile and greater transparency of payment arrangements between contractors is one way of achieving this outcome. However, HIA has a number of concerns with the proposed approach.

HIA notes that this Discussion Paper follows a paper released earlier this year. HIA understands that some matters arising from that consultation remained unresolved leading to the need for further consultation. While further consultation is encouraged, it is concerning that moves to implement a PTRF remain undeterred despite the clear complexities and challenges such a framework presents. For example, 'small business' remains undefined and it is unclear how the proposal can continue to move forward without the resolution of this matter.

The objectives of the PTRF are essentially to improve the collection of payment practice information, make this information visible and easily accessible to small businesses and stakeholders, and minimise the compliance and administrative burden (red tape) associated with the framework. HIA remains concerned that there are major inconsistencies between these objectives and it is not clear that the PTRF will achieve these, at times, competing policy goals.

There is an inherent implication that some payment terms will be 'good' and some will be 'bad' which has the potential to oversimplify commercial arrangements. Commercial parties should be free to contract and agree upon their own terms and conditions, including the terms and conditions of payment free of uninformed scrutiny.

The Discussion Paper looks to 'standardise' reportable metrics in relation to payment arrangements in order to ensure that the information collected and published is comparable. While understandable, this approach indicates a desire to use the PTRF as a way of imposing mandatory payment arrangements. Questions regarding the use of data collected to conduct comparative analysis on an industry by industry basis further supports this implication. Interference in commercial arrangements in this way is strongly opposed.

The Discussion Paper fails to consider industry specific factors that would not support the adoption of the PTRF. The residential building industry is unique and the sector should be excluded from the operation of the framework. Payment practices are already heavily influenced by existing consumer protection and security of payments laws in each jurisdiction.

In addition to these existing regulatory arrangements the unfair contracts provisions of the Australian Consumer Laws (ACL) also provide recourse for subcontractors. These laws have the potential to apply to unfair payment terms. The *Code for the Tendering and Performance of Building Work 2016* also requires that the Australian Building and Construction Commission (ABCC) monitor payment practices.

HIA sees the PTRF as unnecessary duplication for the residential building industry. It is also likely that the framework will increase regulatory burden for all parties involved in supply chains which is an undesirable outcome.

1.1 REGULATORY IMPACT ASSESSMENT (RIS)

It is of significant concern that no regulatory impact assessment has been carried out or is proposed to be carried out in relation to the PTRF. Not only is this part of *Australian Government Guide to Regulation*, specifically the requirement that a range of policy options be considered, including the costs and benefits associated with those policy options, but such an exercise may help address a range of the questions canvassed in the Discussion Paper. For example, issues relating to the most appropriate definition of 'small business', whether an expenditure threshold would be of utility in relation to excluded transactions and the type of IT systems that may or may not be of greatest use, would be better explored with the assistance of a RIS.

HIA is also concerned that without any assessment the regulatory impact of the proposed reform is significantly underestimated.

HIA estimates that the number of homes a builder would need to complete a year to reach the $100 million threshold proposed by the PTRF would be around 285 homes. This means that the PTRF would apply to at least the top 10 builders in each state and territory in the country if not more. This represents a significant regulatory impact that must be fully assessed prior to any further moves forward.

2. THE RESIDENTIAL BUILDING INDUSTRY

The residential building industry, including the home improvements and alterations market, is a key component of the Australian economy. The residential building industry is also the dominant sector in the building and construction industry.

While often overlooked, in reality the practice and paradigm in the residential building industry differs significantly from those businesses operating in commercial and civil construction and a range of other sectors of the economy to which the PTRF would apply.

The terms and conditions for commercial builders and those engaging in government contracts are significantly different from the terms and conditions for a builder working on a residential building project.

Commercial projects and government works are generally characterised by:

- a tendering process that often forces negative margins with the hope that future variations will cover the shortfall;
- the use of retentions;
- longer payments terms (up to between 45 and 60 days compared to 21 days in residential);
- limitations on a builders ability to select subcontractors;
- contract administration by a superintendent/ architect;
- significant amounts for liquidated damages; and
- long defects liability periods.

Such elements are not present in the residential building environment, which faces equally as challenging yet different factors such as:

- the homeowner, whose significant emotional and financial investment places additional pressures on the builder and trade contractors;
- prescriptive statutory contractual arrangements;
- quasi regulation of payment terms through the involvement of financial institutions;
- ineffective, time consuming and often litigious methods of recouping late payments;
- demanding terms of trade from suppliers; and

- significant exposure to uncontrollable events such as inclement weather and fluctuations in the supply of building materials.

The residential building industry is heavily regulated when compared to other building sectors and other sectors of the economy.

Home builders must manage a complex web of national, state and local laws, regulations and codes. These range from planning, design, environment, health and safety, to local authority inspection and certification and a multitude of building, electrical, mechanical and plumbing processes.

The businesses must also comply with a legislative framework that spans licencing, ATO contractor reporting requirements, dispute resolution, builders warranty obligations and contractual requirements.

2.1 RISK ALLOCATION

HIA supports the Abrahamson Principle, namely that *'a party to a contract should bear the risk where that risk is within that party's control'*.

However the statutory consumer protection frameworks established around the country distort the usual allocation of risk in favour of home owners, influencing the payment arrangements that home builders enter into with their subcontractors.

While residential home building laws differ around the country residential builders are generally required to incorporate a number of mandatory terms and conditions into their contracts for the benefit of home owners. For example a contract with a home owner must include:

- mandatory terms and conditions such as the name of the parties, a description of the building works, the contract price and any plans and specifications;
- variations must be in writing;
- implied warranties of materials and workmanship;
- limits on deposits and bans on up front progress payment;
- limits on the estimated amounts of prime costs and provisional sums;
- requirements that builders take out warranty insurance; and
- outlawing and/or voiding unconscionable contractual provisions.

It is generally accepted practice in the residential building industry for the builder to claim upon defined progress stages being completed. With the exception of the deposit, it is uncommon for builders to claim in advance of work being undertaken. In fact, draw downs on project finance is normally only available upon lenders being satisfied with completion of certain recognised building stages.

In addition, a residential builder is required to obtain all variations in writing and is required to have these signed by the parties. If these requirements are not strictly complied with a builder may not be paid for the variation.

There are significant cost implications associated with these regulations.

The cyclical nature of the residential building industry is relevant to the relationships between contracting parties.

The high cost and highly regulated nature of the industry together with the small business profile of firms also means that they are especially susceptible to economic cycles and changes in government policies and regulation.

There are also inherent uncertainties in contract prices which arise from the fact that works are required to be priced before construction commences and are based on technical, financial and workforce assumptions, together with material costs/availability, access to site, timeframes, weather and statutory approvals/ delays.

Finally, a consistent challenge for builders is maintaining cashflow under a negative cash flow model. Whilst a trade contractor is typically paid for work in arrears and must finance this cost, the same holds true for builders who must 'finance' an owner's costs.

Subcontractors and suppliers will naturally not wait for the substantial client to builder payment late in the duration of the job and often builders must source other financing arrangements to keep cash 'flowing'.

Builders in the residential building industry ordinarily fund their works by way of debt financing. Revenue on the other hand is derived from client payments which are highly regulated and paid after completion of work and after the building costs are incurred.

The builder's reliance on cashflow to manage operations and cyclical conditions exposes them to an even greater extent in the event of non-payment by a client.

The publication of information relating to payment arrangements ignores these regulatory requirements and administrative and financial complexities to the potential detriment of all participants in the residential building industry.

3. EXISTING REGULATORY ARRANGMENTS

3.1 UNFAIR CONTRACTS LAWS

On 16 November 2016, the unfair contract term protections in the ACL were extended to small business. Of note, these laws are currently under review.

These provisions are aimed at remedying an imbalance between parties, based on the perceived strength of the bargaining power between large and small businesses. Under the ACL an unfair term is defined as one that causes an imbalance in the parties' rights and obligations that goes beyond what is reasonably necessary to protect the legitimate interests of the party relying on the clause.

In the Government's response to the Australian Small Business and Family Enterprise Ombudsman Inquiry into Small Business Payment Times and Practices it was noted that:

> *'…the ACCC is monitoring complaints about payment terms and unfair commercial practices that delay payment times for suppliers. This includes terms allowing large businesses to unilaterally alter their payment terms and unfairly delay payment times for their suppliers.'*[1]

HIA sees actions by the ACCC through existing unfair contracts laws as serving more utility than the proposed PRTF. Further, the ACCC may be collecting information relevant to the PTRF. HIA submits that this is worthy of investigation prior to the implementation of any further reforms.

[1] See pg.9

3.2 SECURITY OF PAYMENT LAWS

Since 1999, security of payment (SOP) legislation for the construction industry has been progressively introduced into all Australian jurisdictions.

The common objective of this legislation has been to improve cashflow down the contractual chain. It effectively establishes a default entitlement to payment.

Under these laws:

- the subcontractor has a statutory right to a progress payment;
- the builder/principal is liable for claimed amounts irrespective of what the contract provides;
- the subcontractor may suspend work or supply without liability, and, if the principal removes any part of the work or supply from the contract as a result of the suspension, the principal is liable for any loss or expense the contractor suffers;
- the subcontractor can exercise a lien in relation to the unpaid amount over any unfixed plant or materials supplied;
- there is an expedited dispute resolution procedure (adjudication) by which disputes concerning payment are resolved, usually by way of written submission, within a very short period of time;
- if a principal becomes liable for an amount under SOP laws, then, in addition to recovering the amount as a debt due to the contractor, the adjudication determination may be enforced as if it were a court judgment; and
- there are very limited appeal rights or rights of judicial review in respect of an adjudication decision materials supplied by the contractor for use in connection with carrying out construction work.

Clauses in building contracts that offend the SOP legislation are void – contracting out is prohibited.

The remedy of rapid adjudication is also not available for a residential builder in dispute with a client.[2] This has potentially undesirable implications for payment arrangements throughout a residential builders contacting chain.

SOP legislation makes certain 'unfair' provisions void. There are time limits for payments to subcontractors and a principal contractor/builder cannot require that payment to a subcontractor be withheld or delayed due to payment from the client not yet being received. This has codified the common law position that 'pay when paid' and 'pay if paid' clauses are void in respect of contracts for construction works performed or related goods and services supplied in Australia.[3]

In HIA's experience SOP legislation has provided an effective mechanism for payment for those subcontractors who have availed themselves of the laws. However and notwithstanding the existence of SOP laws some subcontractors continue to work for builders and principals when they have not been paid for a number of outstanding progress claims. This choice to continue to work even when substantial sums are already outstanding and when there is therefore an increased exposure to greater losses in the event of insolvency, is often based on a balanced assessment of risk and essentially is a commercial decision of these firms.

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[2] Except in Tasmania

[3] See eg *Ward v Eltherington [1982] QdR 561*; *Sabemo (WA) Pty Limited v O'Donnell Griffin Pty Limited (1983)* (unreported, Court of Western Australia); *Crestlite Glass & Aluminium Pty Ltd. v. White Industries (QLD) Pty Ltd* (Unreported, Federal Court of Australia).

There also are a number of building firms who continue to undertake work for a consumer or home owner notwithstanding a failure to pay current or previous progress claims by that owner. As noted above, unlike subcontractors they do not have access to SOP or rapid adjudication to remedy cashflow issues in this regard.

Below is a table setting out the security of payment protections:

State	Legislation	Maximum time period for payment of progress claims	Paid when paid clauses
ACT	*Building and Construction Industry (Security of Payment) Act 2009 (ACT)*	*10 days after a payment claim*	Void
NSW	*Building and Construction Industry Security of Payment Act 1999 (NSW)* (NSW SOPA)	*20 days to a subcontractor, 15 days by a principal to a head contractor.*	Void
SA	*Building and Construction Industry Security of Payment Act 2009 (SA)*	*15 days after a payment claim*	Void
NT	*Construction Contracts (Security of Payments) Act 2004 (NT)*	*28 days*	Void
Qld	*Building Industry Fairness (Security of Payment) Act 2017* *Queensland Building and Construction Commission Act 1991 (QLD)*	*25 business days after submission of a payment claim for construction management trade contract or subcontracts.* *For commercial building contracts, 15 business days after submission of a payment claim.*	Void
Tas	*Building and Construction Industry Security of Payment Act 2009 (Tas)*	*10 days*	Void
Vic	*Building and Construction Industry Security of Payment Act 2002 (Vic)*	*20 days*	Void
WA	*Constructions Contracts Act 2004*	*42 days*	Void

Recent changes in Queensland also mean that a failure to respond to a claim for payment can result in the imposition of penalties and/or disciplinary action and may have consequences for a contractor's builders license. Further, compliance with minimum financial requirements in Queensland are a license condition and require that:

> *'a Licensee must at all times pay all undisputed debts as and when the debts fall due and within industry trading terms'.*

In NSW under the *Contractors Debts Act 1997* subcontractors (or supplier of building materials) who have not been paid by a contractor can sometimes obtain payment directly from the principal. The rights under this legislation are expansive. For instance, the subcontractor is able to freeze monies in the hands of the principal (client) so that the principal does not pay the money to the contractor (builder) until the subcontractor has had the opportunity to obtain judgment of the amount owed by the contractor to the subcontractor.

The laws in NSW also enable subcontractors to earmark money which may become payable by the principal contractor to the subcontractor through rapid adjudication under the security of payment

legislation [4] and require a head contractor to submit a supporting statement with a payment claim to a principal. A supporting statement requires that a head contractor declare that all payments due and owing to subcontractors have been paid and identifies any disputed amounts that have not been paid.[5] Penalties apply for failing to provide a supporting statement and making a false declaration.[6] The Queensland Government has recently announced that it is considering adopting similar measures.[7]

3.3 THE BUILDING CODE

In 2015 the *Code for the Tendering and Performance of Building Work 2016* (Code) was amended and expanded the role of the Australian Building and Construction Commission (ABCC) in monitoring security of payment requirements.

Under section 11C contractors and subcontractors that are covered by the Code must:

- comply with state and territory security of payment laws;
- not coerce or unduly pressure or influence a contractor, subcontractor or consultant not to exercise rights under state or territory security of payment laws or to exercise such rights in a particular way;
- report disputed or delayed progress payments to the ABC Commissioner .An obligation to report a disputed or delayed payment may arise where:
    - An amount is certified by a Principal (or Superintendent) under a contract and not paid within the contractual timeframe.
    - An amount is specified in a payment schedule/notice of dispute issued under the security of payment laws and not paid by the date prescribed by those laws.
    - Other than in Western Australia and the Northern Territory, no payment schedule/notice of dispute is issued in response to a valid payment claim and the full amount of the payment claim is not paid by the date prescribed by the security of payment laws.
    - An adjudicator makes a determination under the relevant state and territory security of payment legislation and the adjudicated amount is not paid by the date prescribed by the security of payment laws.
    - A third party such as a court, arbitrator, or expert issues a binding determination and the amount determined is not paid in accordance with the determination.
- ensure payments that are due and payable are made in a timely way and not unreasonably withheld;
- have documented dispute settlement processes detailing how disputes about payments to subcontractors will be resolved;
- comply with the dispute settlement process and any determination made under such a process;
- ensure disputes about payments are resolved in a reasonable, timely and co-operative way; and
- comply with any project bank account or trust arrangement that may apply on a Commonwealth funded project.

While the powers of the ABCC in relation to security of payments laws is limited to Code covered entities (being those contractors and subcontractors who have expressed interest in or tendered for Commonwealth funded building work) the ABCC is collecting useful and powerful information about payment practices.

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[4] See Division 2A NSW SOPA
[5] See section 13(7) NSW SOPA and Schedule 1 *Building and Construction Industry Security of Payment Regulation 2008*
[6] See sections 13(7) and (8) NSW SOPA
[7] Government response to the Building Industry Fairness Reforms Implementation and Evaluation Panel Report

HIA submits that prior to the implementation of any further reforms it would be useful to investigate the work of the ABCC in this space.

Further a number of entities potentially captured by the PTRF have existing obligations under the Code. Such duplication should be avoided.

4. RESPONSE TO THE DISCUSSION PAPER

4.1 WHICH REPORTING AREAS SHOULD BE IN THE PTRF

Are these the correct reporting areas for the PTRF to provide transparency of practices while minimising reporting burden?
Should large businesses report on their small business invoices as a total dollar value or as a proportion of their total requirement?
What information should be included on payment terms in the PTFR? For example, could we consider an approach similar to the UK model?

If the reported information is to be of any use it needs to be easy to understand and interpret but also be comprehensive and not subject to manipulation. Information outlined in Figure 1 may be of some assistance to small business in deciding whether to do business with a reporting entity. However the utility of such information must be balanced against anti-competitive outcomes and preventing the disclosure of commercially sensitive information.

While the 'basic descriptor' information outlined in Figure 1 of the Discussion Paper seem appropriate, i.e. entity name, ABN, HIA has some concerns with the approach to information relating to 'payment terms', 'payment performance' and 'other'.

Payment term information

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.

Payment performance

HIA opposes the mandatory reporting of 'payment performance'.

The payment of invoices can be influenced by many factors, for example administration errors often make up a significant proportion of late payments. Further in the residential building industry, there are often disputes over the quality of work and the liability to pay, delaying payment.

As such requiring reporting entities to determine and disclose the proportion of contracts for which invoices have or have not been paid within agreed-upon terms says little about a company's payment practices.

If such information is to be collected then it should be limited to the:

- Disclosure of the median or average number of days a reporting entity takes to pay suppliers; and
- Percentage of invoices paid on time. In this way, the percentage of invoices paid late is also able to be determined, without requiring further calculation.

The provision of this information satisfies the objectives of the regime and provides small businesses with insights into the payment practices of reporting entities, while also limiting the regulatory and commercial impact on those entities.

Other

The mandatory disclosure of information about the characteristics of the business's supply chain, such as the number of suppliers or contracts they have or the total contract value or proportion of suppliers considered small business is opposed. This information is not publically available and is likely to be commercially sensitive.

HIA also queries some aspects of the UK approach. Principally, it is unclear why it is required that a reporting entity disclose whether there have been changes to their standard payment times. Such information could be voluntarily reported if deemed relevant and appropriate by the reporting entity. HIA also prefers an approach which clearly sets out the information required to be reported, questions regarding reportable information could be included in guidance material.

4.2 IDENTIFYING SMALL BUSINESS SUPPLIERS

HIA sees there are 2 aspects to this issue.

The first relates to determining which businesses are 'small businesses' and therefore must be reported on. This matter does not seem to be squarely addressed in the Discussion Paper, other than to confirm that the *'PTRF would provide a standard definition of a small business so there is consistency in how small businesses were defined'*[8]. The second matter relates to how a reporting entity finds out if their supplier is a small business.

Definition of small business

The definition of a 'small business' for the purposes of the operation of the PTRF is critical.

[8] See Page 9

HIA suggests that a multi-factor test be applied in order to determine a small business. Similar to the approach adopted under the unfair contracts provisions of the ACL a small business would be defined by:

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

This ensures that those entities captured most accurately reflect the intended beneficiaries of the PTRF.

How to identify a small business supplier

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, a small business look-up 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.

If a small business look-up tool is established, careful consideration must be given to the information that would be available through such a tool to determine whether a business is a 'small business'.

HIA would have concerns with an approach that draws the definition of 'small business' for the purposes of the PTRF from, for example, the available data that could be provided by the ATO, over an objective assessment of the best and most appropriate method of determining the criteria for categorising a business as a 'small business'.

As the Discussion Paper does not seem to put forward a definition or set out the criteria for determining a small business further investigation and consultation is required.

4.3 Who Will Report?

What are the advantages and disadvantages of reporting at a group or entity level?

What are the advantaged and disadvantages of providing large businesses with a choice?

Differing corporate and legal structures used by business make this a complex issues. For example, a business may choose to operate as one company or choose to operate as a group of companies. It is easy to imagine a scenario where one business is compelled to report under the PTRF but another business of a similar size and nature is not if it was limited to single entities.

The same issue applies with respect to incorporated and unincorporated entities. It is logical to require that similar businesses – regardless of their legal structure - are subject to the same requirements. If the reform is to have any value it would seem necessary to ensure that the choice of legal structure does not exclude reporting.

Consistency with the *Modern Slavery Act 2018* (MS Act) which also imposes reporting requirements is desirable however, HIA does not oppose allowing the reporting entity to choose how they report.

5. IMPLEMENTATION

Are there other issues the Department will need to consider in the implementation phase of the PTRF?

Given the current regulatory arrangements in the residential building industry, HIA would stress the need to allow a significant period to allow business the opportunity to review their current payment systems and make decisions regarding the need for any changes.

HIA notes that under the MS Act, the legislation passed Parliament in December 2018, with a commencement date of 1 January 2019. The requirement to provide a modern slavery statement within six month of the end of a reporting period has meant that the first reports will be due at the end of 2020 at the earliest or the middle of 2021 at the latest. This offers reporting entities at least 2 years to investigate and implement the modern slavery reporting requirements. A similar approach regarding the implementation of the PTRF would be sensible.

Should the PTRF central publication portal include information on trends over time or provide information to allow comparisons by industry and location?

No. HIA sees this as beyond the scope of the Governments November 2018 announcement regarding the development of an annual reporting framework for payment information.

5.1 HOW SHOULD REPORTING PERIODS BE DEFINED?

Should the PTRF allow companies to use their financial year as a basis for reporting or should it be based on a calendar year?

Reporting periods should be aligned with the reporting periods set out under the MS Act. Under the MS Act, a reporting period is defined as *'a financial year, or another annual accounting period applicable to the entity'*. This allows entities that financially report on a calendar year to have consistency across their financial reporting obligations.

For further consistency, HIA recommends that a business be required to report within six months of the end of the reporting period, not three months as outlined in the Discussion Paper. This approach aligns with the requirements under the MS Act.

HIA opposes the proposal that reporting entities submit two reports each year for six month reporting periods. This is clearly at odds with the Governments November 2018 announcement that specified the development of an annual reporting framework.

5.2 WHAT TYPES OF EXPENDITURE SHOULD BE COVERED BY THE FRAMEWORK?

What are your views on the above categories of expenditure?

Adopting a multi-factor test in relation to the identification of small businesses goes some way to addressing this. Expenditure, below a certain threshold should be excluded from reporting, notwithstanding that the entity may be considered a small business.

5.3 HOW SHOULD THE NUMBER OF DAYS FOR PAYMENT BE CALCULATED?

What are your views on the two options to determine the start of a payment period? Are there others?

The determination of when the 'clock starts ticking' is critical to the operation of the PTRF and goes to the heart of the accuracy of the data provided. HIA sees the best, and the least administratively cumbersome option, as one that allows the company to determine how the number of days for payment is to be calculated, as long as the approach is disclosed and transparent. This allows businesses that

have established frameworks that comply with, for example, security of payments law to continue to operate under those arrangements.

In the alternative, this approach could be seen as transitional in order to allow reporting entities an opportunity to investigate how they receive invoices, how their suppliers submit invoices and the dates used.

It is also important, particularly for the residential building industry that certain days be excluded from a count towards payment times under the PTRF. For example under NSW SOPA '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.

For absolute clarity the day of receipt for the purposes of calculating payment times should not be the date of the invoice. This provides opportunities for manipulation, may lead the need to reissue invoices (which may have implications for claims under security of payments laws) and may not provide an accurate picture of payment timeframes. The better approach is to set the day after an invoice is received by the payer as the day on which the 'clock starts ticking'. This aligns with the approach adopted in the UK.

5.4 WHAT APPROACH TO COMPLIANCE SHOULD BE ADOPTED?

It is disappointing that the Discussion Paper indicates that compliance measures will be included in the draft legislation. HIA opposes the adoption of penalties and other compliance mechanisms.

The value of imposing the PTRF is unproven. As such, it would make sense to minimise the regulatory burden and avoid introducing onerous legal requirements, enforcement powers and sanctions. Instead, the approach of enabling legislation with guidance material is a better way to introduce this reform so that its operation, integrity and value can be tested.

In HIA's view the approach adopted under the MS Act is relevant and appropriate.[9] It would be premature to introduce enforcement powers or sanctions.

The MS Act does not currently contain enforcement and compliance powers; but provides authority to request an explanation where the requirements imposed by the MS Act have not been complied with and if a company fails to comply with this request, information about that entity can be made publically available.

The focus of the MS Act is on changing attitudes and culture[10]not imposing pecuniary penalties. HIA sees the PTRF as having a similar goal.

HIA opposes giving the administrator power to accept complaints or instigate investigations. As outlined in this submission there are a range of measures through which poor payment practices and non-

[9] See section 16A NSW SOPA
[10] See generally Explanatory Memorandum *Modern Slavery Act 2018*

payment can be addressed, this, of course also includes legal actions. To add a further regulatory layer is unnecessary, unjustified and will simply create duplication and overlap.