



27 February 2023

Hon Dr Craig Emerson  
Payment Times Reporting Act Review Secretariat  
Small and Family Business Division, The Treasury

By Email: [PaymentTimesReview@treasury.gov.au](mailto:PaymentTimesReview@treasury.gov.au)

Dear Dr Emerson,

**Re: Statutory Review of the *Payment Times Reporting Act 2020* (Cth) – NFIA Submission**

The National Fire Industry Association of Australia Ltd (**NFIA**) is the peak association operating in the Fire Protection sector. We represent employers, suppliers and industry stakeholders who work at the frontline of Fire Protection, with over 80 percent of the commercial Fire Protection work undertaken in Australia being completed by NFIA Members.

Pursuant to section 57A of the *Payment Times Reporting Act 2020* (Cth) (**Act**), on 6 December 2022 a statutory review of the Act was announced (**Review**). *Enclosed* with this letter is the NFIA's submission to this Review.

Thank you for considering this submission. The NFIA would welcome further engagement with the Review Secretariat throughout the evaluation of this framework. Should you have any questions or require any further information on any aspects of this correspondence, please contact us using the details provided.

Kind regards,

Adrian Shackleton  
**Chief Executive Officer**  
National Fire Industry Association Australia



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Statutory Review of the Payment Times Reporting Act 2020

Submission

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## The Australian Fire Protection Industry

Fire protection in Australia is typically achieved via three means:

1. active fire protection (fire sprinklers, fire hydrants and fire alarm systems);
2. passive fire protection (fire rated walls, floors and ceilings and fire sealing); and
3. education.

The Fire Protection Services industry contributes over \$2.5 billion to the Australian economy every year. Over 2000 businesses pay nearly \$700 million in wages each year and industry revenue is projected to increase at an annualised rate of 1.5% over the five years through 2025-26, to reach \$2.7 billion.

The IBISWorld Industry Report OD5424 Fire Protection Services in Australia (November 2020) claims that despite the presence of vertically integrated multinational giants, the industry has a low level of market share concentration. The two major companies have a combined market share of only 10% and are both part of large multinational companies operating globally across several related industries. Twenty years ago, the two major companies are estimated to have had 80% of the market.

There are numerous regional and local players that construct, install and service fire protection systems to small, medium, and major buildings across the full scope of class 2 to 9 buildings as well as higher risk facilities such as fuel depots, harbours, and similar developments. Over half the industry enterprises employ between one and 19 people. As the minor players have increased their share of the total market, the industry has become more diverse, while also growing substantially.

Where twenty years ago, the two major companies offered a form of institutionalised but limited 'industry' training to their people, it could be argued that the industry was less in need of regulation. However, as the industry has grown substantially and its make-up evolved it is now predominately made up of many more, smaller independent contracting companies. That market growth and diversification has provided customers with better contractor choices, better outcomes, and better pricing but, at the same time, raised the need for more over-arching regulation.

## The National Fire Industry Association (NFIA)

The National Fire Industry Association, Australia (**NFIA**) is an Australia-wide community of commercial fire protection contractors, their people, suppliers, and industry stakeholders representing a wide and varied membership from the smallest sub-contractor through to large Australia-wide construction and service businesses. Our Members work at the frontline of fire protection with an estimated 80 per cent of the fire protection work undertaken in Australia completed by Members of NFIA.



NFIA utilises the resources of other Australian and International industry organisations and associations.

NFIA is committed to the delivery of quality fire protection practitioners across all aspects of fire protection safety. To this end, NFIA has sponsored and supported the growth of the world leading fire industry Registered Training Organisation, Fire Industry Training (FiT), which now delivers fire industry required training for all of Australia at its campuses in Brisbane, Melbourne, and Sydney.

NFIA believes that an appropriate regulatory framework should be one that protects the safety of the community and property, provides adequate consumer protection, recognises, and accommodates industry practice and standards, requires registration of practitioners, and is linked to the national training package framework.

Members of the NFIA include both entities which may be classed as 'small businesses', for the purposes of the *Payment Times Reporting Act 2020* (Cth) (**the Act**), and entities with reporting obligations under the Act.

## Introduction

The pyramidal structure within the Building and Construction Industry (**BCI**) has the effect of bargaining power between parties becoming increasingly imbalanced along the contractual chain. Principal contractors are often able to transfer risk on key issues to subcontractors, with subcontractors being heavily burdened by a disproportionate level of risk.

It's often the case that sub-subcontractors at the base of the pyramid both have the least capacity to bear the financial risks associated with the project, but also the least capacity to negotiate more reasonable and balanced terms. In most instances, contractual documentation is presented on a 'take it or leave it' basis and subcontractors are reluctant to cause tension in commercial relationships, instead choosing to simply accept the terms presented.

This imbalance of bargaining power within the BCI has had a devastating impact on the most vulnerable parties. Contract terms containing unfair risk allocation between principal contractors and subcontractors has undoubtedly contributed to the high levels of insolvency within the Australian BCI. Payment terms and conditions are one area in which a principal contractor can hold a significant degree of control and pressure over the subcontractor.

The potential impact of delayed and incomplete payment of invoices on the cashflow and viability of all businesses is well-known. Poor payment practices can lead to significant lost opportunity costs through a lack of working capital and are a known cause of business insolvency in Australia.

The NFIA strongly supports efforts to:



- improve security of payment in full, and on time, for subcontractors in the Building and Construction Industry (**Industry**);
- facilitate prompt cashflow; and
- eliminate the use of unfair contract terms in Industry, particularly between principal contractors and subcontractors.

The NFIA recognises that legislative, regulatory and policy frameworks which provide greater transparency of payment arrangements between commercial contracting parties are potential building blocks towards such outcomes.

Whilst this piece is focused on small business suppliers in-line with the scope of the Payment Times Reporting Scheme (**Scheme**), these concerns exist for all subcontractors irrespective of business size.

## Review Questions

### Questions 1, 4 & 5

***How important are payment terms and practices to small businesses when considering a supply contract with a large business or government enterprise? Has their relative importance changed over time?***

***Having regard to the goal of the Review and the three principles, how effectively is the operation of the Act meeting the objects set out in Box 2 [Consultation Paper]?***

***What, if any, changes should be made to the existing Scheme to improve its efficiency and effectiveness in meeting the objects set out in Box 2 [Consultation Paper]?***

The availability of information reported under the Scheme established under the Act, gives small businesses greater capacity to make informed decisions regarding who they do business with.

However, there are limitations to its real-world impact. In reality, the potential benefit of an opportunity to do business with a large entity in the first place may outweigh the risk of a lengthy payment term, and the information may therefore not guide their decision. It is therefore critical that the Scheme does not operate alone as it does not go so far as to incentivise or enforce fair business practices, nor improve the capacity for small businesses to negotiate better payment terms with large businesses.

Fortunately, the ability to make more informed decisions also extends to potentially being able to plan for a lengthy period until payment is made.



It could be useful to survey small businesses across jurisdictions to identify whether, if at all, information reported under the Scheme has formed the basis of a decision they've made on who they engage with.

### **Question 2**

**What factors are driving current and emerging trends in payment terms and practices? How do they affect large businesses, small businesses, and the economy?**

In recent years, there have been significant changes across jurisdictions in the 'security of payment' space for Industry. We are also starting to see greater interest in protecting against unfair contract terms. There is no single solution to unfair payment practices, and practices which are detrimental to small businesses.

### **Question 3**

**What is a 'reasonable' timeframe in which small businesses should be paid? Should 'reasonable' vary between different industries or sectors?**

Various factors influence what a 'reasonable' timeframe may look like across industries and sectors, and therefore 'reasonable' should vary between different industries and sectors. Ultimately, any mandated timeframe must fairly balance the needs and interests of both contracting parties. Further, it's critical that entities then comply with their stated payment periods.

### **Question 8**

**Excluding the Payment Times Reporting Scheme, to what extent have, or will, related Government policies improve payment terms and practices for small businesses? Would a substantial increase in invoicing materially help reduce payment times?**

Over the coming months and years, we will continue to experience the positive effects of changed Government policies regarding security of payment protections in the BCI. However, there are significant differences in these protections between jurisdictions, and the timing of their implementation, meaning it will take time to see their benefit in entirety. These protections are not limited to improving payment practices for small businesses, rather they apply to all.

### **Question 9**

**What are the disincentives for large business to offer improved payment terms and practices to small business suppliers? Are there other ways to more effectively incentivise improved payment terms and practices?**

Barriers to improved payment terms may depend on the scale of the business's operations and are likely to look more like incentives to lengthy payment terms, rather than barriers to shorter payment terms.



For example, a principal contractor potentially benefits from holding onto funds later owing to a subcontractor, as this boosts their immediate cashflow. Further, principal contractors may attempt to use held funds as leverage or to coerce the subcontractor into accepting payment of a smaller fee, within a shorter timeframe. The imbalance of power between contracting and subcontracting parties largely facilitates these behaviours.

### **Question 10**

**Would mandating one or more maximum payment periods for the payment of small business invoices by reporting entities be more effective in improving payment terms and practices? How should a mandatory maximum payment period(s) best be designed and implemented?**

Mandating one or more maximum payment period for the payment of small business invoices by reporting entities could have the effect of improving payment terms and practices across entities who previously did not meet an equal or shorter self-imposed period. It is inherent in mandating behaviour that widespread compliance is likely.

However, any mandatory maximum payment period(s) must be designed and implemented in such a way that allows for a reasonable transition for entities to meet their compliance obligations for new contracts, and contain a transitioning-out period for existing contracts with non-compliant periods.

### **Question 11**

**What other measures could be considered to improve payment terms and practices of reporting entities in relation to their small business suppliers?**

Further protections against unfair contract terms, particularly regarding payment terms and conditions, could have the effect of improving payment terms and practices of reporting entities in relation to their small business suppliers.

From 26 July 2022 onwards, section 11D of the *Code for the Tendering and Performance of Building Work 2016 (Code)* has been removed.

Under this former section, Code-covered entities were required to, among other things:

(1) ...

(a) *comply with all applicable laws and other requirements relating to the security of payments that are due to persons; and*



- (b) ensure that payments which are due and payable by the code covered entity are made in a timely manner and are not unreasonably withheld; and*
  - (c) have a documented dispute settlement process that details how disputes about payments to subcontractors will be resolved, and must comply with that process; and*
  - (d) as far as practicable, ensure that disputes about payments are resolved in a reasonable, timely and cooperative way; and*
  - (e) comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code covered entity in relation to Commonwealth funded building work; and*
  - (f) report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due.*
- (2) A code covered entity must not engage in illegal or fraudulent phoenix activities for the purpose of avoiding any payment due to another building contractor or building industry participant or other creditor.*
- (3) A code covered entity must not:*
  - (a) organise or take or threaten to organise or take action with intent to coerce a contractor, subcontractor or consultant to:*
    - (i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or*
    - (ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.*
  - (b) apply or attempt to apply undue influence or undue pressure on a contractor, subcontractor or consultant to:*
    - (i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or*
    - (ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.*





Recognising the limitations of this former section to only Code-covered entities, the reintroduction of such protections more broadly could complement the existing terms of the Payment Times Reporting Framework.

## Closing Remarks

The pyramidal structure of the BCI means that it is particularly susceptible to issues such as unfair contract terms, inappropriate contractual risk allocation, and delayed and incomplete payment of invoices. This can significantly affect the cashflow and viability of subcontractors in particular.

The NFIA recognises that legislative, regulatory and policy frameworks which provide greater transparency of payment arrangements between commercial contracting parties are potential building blocks towards such outcomes. To that end, we support the strengthening of these frameworks, and further efforts to improve security of payment, facilitate prompt cashflow, and eliminate the use of unfair contract terms.

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