

Payment Times Reporting Amendment Bill 2024: exposure draft

Submission to the Treasury

April 2024

Introduction

The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to comment on the exposure draft materials of the Payment Times Reporting Amendment Bill 2024.

ACCI is Australia's largest and most representative business network. Our members are state and territory chambers of commerce, national industry associations and a council of business leaders from individual enterprises. Together, we represent Australian businesses of all shapes and sizes, across all sectors of the economy, and from every corner of our country.

As a peak industry association representing businesses of all sizes, we are in a unique position to provide insights on the proposed reforms to the Payment Times Reporting Scheme (PTRS). We are able to acknowledge the impacts these changes will have on the businesses the PTRS is designed to protect and those it imposes obligations upon.

ACCI made a submission to the Statutory Review of the *Payment Times Reporting Act 2020* conducted by Hon Dr Craig Emerson (the Review) and welcomed its findings and recommendations, which we note were accepted by government.

We broadly support the reforms as proposed, noting they implement the Review's recommendations. However, we note that one of the reforms proposed, the slow small business payer direction, was not expressly recommended by the Review, nor was how the direction was to be provided.

Slow small business payers

ACCI is broadly supportive of the slow small business payer direction power (the direction) established in the amendments. As the Review recognised, there is a need to better incentivise bigger businesses to pay small businesses quicker, or on time. Pleasingly, the Review recommended against mandating maximum payment times,

in line with ACCI's recommendations, but did find that more public 'naming and shaming' of slow payers should occur.

The direction purports to fulfil this need, serving as both a label that businesses ought to avoid, and for small businesses to easily identify which businesses they should reconsider engaging with.

However, the Payment Times Reporting Regulator (the Regulator) should be the primary decision-maker and issuer as opposed to the Minister for Small Business (the Minister).

In other areas across government, the relevant regulator is responsible for giving similar directions to those proposed in these reforms.

The eSafety Commissioner, for example, can direct online service providers to remove certain content from their platforms.¹ The Australian Communications and Media Authority (ACMA) can direct telecommunications service providers to comply with the *Telecommunications Act 1997* or an industry code if there is a breach.² The Australian Securities and Investment Commission (ASIC) has the power to give directions to market licensees to suspend dealings in a financial product, among others.³

While the Regulator is not independent in the same manner as some other regulators,⁴ it is still subject to the same expectations and legislative requirements as other regulators, such as the *Public Governance, Performance, and Accountability Act 2013* and the principles of best practice for federal government regulators.⁵ It also has similar responsibilities to other regulators in terms of information-gathering and ability to compel materials. We also note that the government's response to the review supported "taking advantage of synergies with established regulators" in addressing constraints that inhibit the full effectiveness of the Regulator.⁶ As such, and noting the expanded powers to be provided under these reforms as currently drafted, we believe that this direction power would be a sensible responsibility for the Regulator to hold.

This is particularly relevant when considering the process before a direction is finalised. As currently drafted, the *Minister* writes to the reporting entity with notice that a direction will be given. The reporting entity is then invited to provide written submissions to the *Regulator*,⁷ who would then provide this to the *Minister* to make the final decision. While this may be because the Regulator is able to compile correspondence more easily and to brief the Minister ahead of an ultimate decision, this adds an additional and unnecessary step onto both the Minister and the

¹ *Online Safety Act 2021* (Cth).

² Australian Communications and Media Authority (n.d.), [Directions to comply with the Telecommunications Act](#).

³ s794D *Corporations Act 2001* (Cth).

⁴ Noting the Regulator sits within Treasury.

⁵ Collins MP, Hon J. (2023), [Statement of Expectations](#), July 2023.

⁶ Emerson, Hon Dr C. (2023), [Government response to the Statutory Review of the Payment Times Reporting Act 2020](#), December 2023, pg.8.

⁷ s22A(2)(b).

Regulator where it need not be the case. The time and resources required for the Regulator to brief the Minister ahead of making the decision would be better used by making the decision itself, and using the additional resources provided by these reforms to hasten payment times for small businesses.

The additional time required to compile the brief for the Minister – regardless of whether the brief recommends an action or outcome, and then to have the brief reviewed and a decision made by the Minister – could take weeks. In addition to the unnecessary use of resources, this time may be the difference between a small business engaging with what is to be a slow small business payer or choosing a more reliable option, and may undermine the intent of the direction.

We note that there are other circumstances where ministerial direction powers exist. However, this is typically the case where there is no regulator in place. Noting the existence of the Regulator for the PTRS, we believe it would be appropriate for the Regulator to have responsibility for the direction power.

As an additional safeguard measure, there could be a requirement for the Regulator to advise the Minister in writing ahead of any final direction. This could be supplemented by regular reports to the Minister on any proposed directions and any directions that are in place.

We note that the Bill as currently drafted includes an ability for the Minister to delegate this power to the Regulator.⁸ Noting our above concerns, if the Minister were to retain the direction powers, we would insist that the delegation ability remains.

Considerations to be taken into account

When considering whether to give a direction to a reporting entity, the decision-maker should also be required to consider any agreed payment terms between the small business and the reporting entity, and whether this was agreed to under duress.

Consideration should also be given to any standard payment times or practice of the reporting entity's industry, as this does differ. We note that this may be critical depending on the proposed 20 per cent circumstances which will be set out in the Rules.⁹

While these considerations could be pointed out if a reporting entity wishes to write to the Regulator regarding the proposed decision,¹⁰ they should be express considerations taken into account at the time of the initial decision.

⁸ s55B(1) and (2).

⁹ EM 1.172.

¹⁰ s22A(2)(b).

Disclosure requirements

In addition to being a discretionary ability to give a direction to a reporting entity, the direction also has a number of discretionary elements and decisions attached, such as specified statements or information to be published (disclosure requirements) and placements of these disclosure requirements.

While we welcome the ability for some elements to be tailored to an individual direction, we propose that some disclosure requirements should be mandatory.

For example, reporting entities subject to a direction should have this disclosed on the register. As currently drafted, the Regulator would have to be directed in writing to publish information regarding the direction.¹¹ Without direction to publish this information, there is no requirement for this to be publicly available, nor is there ability for the Regulator to publish it of their own accord.

If the intent of the direction is to bring attention to businesses that do not pay their small business suppliers promptly, a reporting entity subject to a direction should have this disclosed in a way that small businesses are likely to see it. Where a small business operator undertakes research via the register before engaging with a reporting entity, it should be easily available to them to see whether that entity is subject to a direction.

By listing it publicly on the register, reporting entities have an incentive to avoid being given the direction, which is an intent of the PTRS.

The disclosure should not remain on the register for longer than 12 months after the direction has ceased or has been revoked. As currently drafted, the disclosure may stay on the register for an unspecified period of time even after the direction ceases to be in effect.¹²

Conversely, some disclosure requirements should not be required at all.

For example, we do not believe that the requirement for disclosure on invoices should be required in any case.¹³ By the time a small business has seen an invoice, they have already engaged with the reporting entity. Receiving notice that the entity is a slow payer would not assist the small business in a meaningful way. Further, there are few circumstances where a small business would receive an invoice from a reporting entity; it is much more likely to be the other way around.

¹¹ s22F.

¹² s22F(3), EM 1.192.

¹³ s22C(3)(d).

Other comments

Revision of reports

We are also concerned with the ability of a reporting entity to revise their public reports on the register. It will be important to ensure that this ability is not misused.

As currently drafted, a reporting entity can self-publish the requisite information without any immediate checks or reviews by the Regulator. This is, reasonably, to allow the Regulator to undertake their additional responsibilities, as opposed to reviewing and publishing all reports before they are publicly available. However, we are concerned that a reporting entity may be able to intentionally self-publish a report which is not correct and revise it later.

An issue which may arise is where a reporting entity is in negotiations with a prospective small business supplier and may publish incorrect information to expediate this. The entity could then revise their payment times report to note the correct, unflattering payment times after entering the business arrangement.

While we are not suggesting that this would be a frequent occurrence, we believe safeguards should be in place to prevent this from happening and, if so, to provide recourse to any small business affected.

We note that the ability to self-publish was recommended by the Review, however that this was with the proviso that any revisions be publicly noted on the register.¹⁴ We recognise the importance of this ability for reporting entities, however any revisions should be publicly listed, along with what was revised and reasons given.

Reporting entities

A consequence of the new reporting entities arrangement will be that small business subsidiaries will now become reportable where they are part of a consolidated group where the entity that controls the consolidated group is a reporting entity.

Clarity on this will be necessary to avoid small businesses being required to report on payment times to other small businesses, creating an additional regulatory burden instead of assisting them.

Should this concern be realised, the current provision in the *Payment Times Reporting Act 2020*, which excludes the requirement of a subsidiary of a reporting entity to report if the recent annual income of the subsidiary was less than \$10 million, should not be repealed.¹⁵

¹⁴ Emerson, Hon Dr C. (2023), *Government response to the Statutory Review of the Payment Times Reporting Act 2020*, December 2023, pg.21.

¹⁵ s7(2)(b)(iii) *Payment Times Reporting Act 2020* (Cth).

Next steps

While we appreciate the urgent need to hasten payment times for small businesses and improve the PTRS, we note our disappointment with the public consultation process to date. Consultation on the exposure drafts of these reforms were open for only two weeks, inclusive of a national public holiday. We urge the government and Treasury, and indeed all government departments and agencies publicly consulting in the future, to reconsider this truncated approach to enable more considered responses from relevant stakeholders to improve and inform their policies.

We note that the Rules will be publicly released and consulted on in due course. While we have limited our above comments to the exposure draft materials of the legislation, our positions may change depending on the content of the proposed Rules. This will be the case for how the 'slowest 20 per cent of small business payers'¹⁶ is determined as well as the duration of the direction,¹⁷ both of which will be prescribed by the Rules. We look forward to engaging with those materials once they are publicly released.

Should you require any additional information or clarification of any points contained within, please contact David Alexander, Chief of Policy and Advocacy at David.Alexander@acci.com.au or Samantha McKenna, Senior Policy Adviser – Tourism and Small Business at Samantha.McKenna@acci.com.au.

About the Australian Chamber of Commerce and Industry

The Australian Chamber of Commerce and Industry (ACCI) is Australia's largest and most representative business network. We facilitate meaningful conversations between our members and federal government – combining the benefits of our expansive network with deep policy and advocacy knowledge. It's our aim to make Australia the best place in the world to do business. ACCI membership list can be viewed at www.australianchamber.com.au/membership/current-members/

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¹⁶ s22B(2).

¹⁷ s22D.