



30 April 2024

Mr Peter Kelly
Government Response and Reform Unit
Small and Family Business Division
Treasury
Langton Crescent
PARKES ACT 2600

By email: paymenttimesreformSMB@treasury.gov.au

Dear Mr Kelly,

Payment Times Reporting Act 2020 Primary Legislation Amendments

As a representative of over 150 large corporates that operate across 22 industries, the Corporate Tax Association (CTA) welcomes the opportunity to make a submission to Treasury in relation to the *Payment Times Reporting Amendment Bill 2024* Exposure Draft (ED) and associated Explanatory Materials (EM).

We set out below some concerns we have with the ED and EM.

1. New definition of 'reporting entity'

Recommendation: Clarify the meaning of 'central management and control' in the new definition of 'reporting entity'.

New draft section 7 inserts a new definition for 'reporting entity'. Parts of the definition rely on existing concepts in other legislation and guidelines. For example, the term 'carries on business in Australia' in subparagraph 7(2)(a)(i) relies on how that concept is defined in the *Corporations Act 2001* (Cth) (**Corporations Act**). Likewise, we note the term 'control' is defined in the ED by reference to the accounting standards which, again, takes its meaning from the Corporations Act.

The terminology used in subparagraph 7(2)(a)(iii) "is a company that is not incorporated in Australia, but has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia" is the same wording used in section 6(1) of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**) to define when a company is a resident of Australia for tax purposes. Please advise whether the phrase used in the context of the ED is intended to take the same meaning. If so, an appropriate reference to the 1936 Act should be included in the ED. If not, please clarify what is meant by the concept of 'central

management and control', particularly as a definition for 'control' is already included in the ED. It is confusing if the concept of 'central management and control' does not take the same meaning as it has in the 1936 Act and only the word 'control' is defined and not the concepts of 'central management' or 'central management and control'.

2. Concept of 'Slow small business payer' and Ministerial Direction

Recommendation: More information is required to properly assess the suitability of the new concept of 'slow small business payer'. Examples should be included in the EM of the circumstances where the new Ministerial direction power is likely to be exercised.

Draft section 22A introduces a new 'Slow small business payer' direction the relevant Minister may issue if the Minister deems a particular reporting entity to be a 'slow small business payer'.

a) 'Slow small business payer'

The concept of 'slow small business payer' is defined in draft section 22B. We query whether the 20% threshold in draft subsection 22B(2) is an appropriate measure. Reporting entities could deal with any number of small business suppliers ranging from a few to numbers in the hundreds or even thousands.

The ED and EM note this concept depends on the concept of 'slowest 20% of small business payers' as prescribed by the rules. Please advise where this has been included. Is it a new concept contained in draft amendments to the rules that are not yet publicly available? In the absence of the meaning of the concept of 'slowest 20% of small business payers' being publicly available anywhere, it is difficult to meaningfully consider the concept of 'slow small business payer'.

In any event, we query whether using a 20% measure is suitable given different industries have different accepted payment terms and timeframes. What does Treasury consider to be 'slow'? 60 days? 90 days? 3 months? 6 months?

It may be more suitable to set a standard timeframe per industry to measure against or apply a percentage from a sliding scale depending on the number of small business suppliers a reporting entity pays rather than a blanket 20% threshold. We may be able to provide additional comments once the concept of 'slowest 20% of small business payers' is shared publicly and we can more completely consider the implications of the concept of a 'slow small business payer'.

b) Ministerial direction

Examples should be included in the EM of the circumstances when the Minister would issue a Ministerial direction and when the Minister would not issue a Ministerial direction. This will indicate to reporting entities when they may be issued with a Ministerial direction and will also guide the Minister when exercising the power.

We note that the Minister is being given the power to direct the Regulator to publish the Ministerial direction on the Register (draft section 22F). Where a Ministerial direction is published on the Register against the name of a reporting entity, there is a risk of reputational damage to the reporting entity in the event a Ministerial direction is issued on improper grounds.

We understand the desired impact this direction is intended to have on the behaviour of a reporting entity that may be intentionally paying small businesses slowly or not ‘on time’. However, as discussed above, an appropriate measure needs to be in place to ensure the correct ‘slow payers’ are captured. In this regard, the ‘slow small business payer’ concept must be appropriately defined to mitigate against circumstances where a reporting entity may be deemed to be a ‘slow small business payer’ for reasons beyond their control.

3. Penalties

Recommendation: Include a scale to determine the percentage of the applicable civil penalty taking into account the behavioural attributes of the entity being penalised. Treasury should also consider introducing a pathway for recourse for entities subject to civil penalties.

The civil penalties that the Regulator may impose on reporting entities are being substantially expanded under the ED. Similar penalties are also being introduced to apply to the new concept of ‘reporting nominees’. We have included a table in the Appendix summarising all new and existing civil penalties.

Per the four Regulator’s Updates issued by the Regulator to date (dated July 2022, January 2023, July 2023 and January 2024), our understanding is the Regulator has not yet imposed any of the existing civil penalties in the *Payment Times Reporting Act 2020 (Cth)* (**PTR Act**).

With the impending expansion of civil penalty provisions in the PTR Act, the Regulator may likely start to apply these provisions. In this regard, we recommend that a scale be introduced to take into account certain behaviours of reporting entities when applying the penalties. We strongly recommend that the Regulator consider adopting a scale similar to the scale the Australian Taxation Office uses to adjust for the imposition of penalties, for example:

Behaviour	Percentage applied to adjust the penalty amount
Failure to take reasonable care	25% of the prescribed penalty unit amount applies
Recklessness	50% of the prescribed penalty unit amount applies
Intentional disregard	75% / 100% of the prescribed penalty unit amount applies

Also, it is unclear what recourse there is for a reporting entity to request that a penalty be remitted or reduced in the event they made an honest mistake in reasonable circumstances (again similar to the considerations the ATO takes into account), such as:

- there were circumstances beyond the reporting entity's control which prevented them from meeting their obligation;
- the imposition of the penalty produces an unfair or unjust result;
- it would be fair and reasonable to remit the penalty, considering a range of factors, depending on the type of penalty.

Treasury should consider introducing a pathway for recourse for reporting entities subject to civil penalties under the PTR Act.

4. Application fees

Recommendation: Treasury should provide reasons why it is necessary to provide the Regulator with a discretionary power to impose application fees to make certain determinations.

Draft section 57C introduces a discretionary power allowing the Regulator to impose fees to assess certain applications for a determination regarding whether an entity is a subsidiary reporting entity (Part 1A, Division 3), exempt reporting entity (Part 1A, Division 5) or reporting nominee (Part 2A). No quantum has been indicated for the proposed fees.

It would be useful to understand why the Regulator needs to charge fees to make these determinations, particularly as the fee is being charged for reporting entities to simply comply with the law. Is the Regulator anticipating receiving numerous requests for these kinds of determinations and considers it isn't appropriately resourced to handle them and therefore needs to charge a fee? Is it considered that the provisions are too difficult to understand in the ordinary course and the Regulator will be relied on to make these determinations for many reporting entities?

The imposition of the fees may also act as a deterrent to reporting entities from interacting with the Regulator unnecessarily. Is that part of the reason for the imposition of the fees?

It is unclear why the Regulator may need to make these kinds of determinations. If the desired outcome is to move to a fee-based model, Treasury should ensure the concepts are clearly defined in the ED such that the majority of reporting entities are able to make these determinations on their own and an application is made to the Regulator in only the most uncertain of circumstances. On the contrary, if reliance remains on the Regulator to make these determinations, reasons should be given as to why the Regulator needs to charge a fee for making these determinations.

Should you have any questions, please do not hesitate to contact me on 0408 028 196 in the first instance.

Yours faithfully,

A handwritten signature in black ink that reads "Stephanie Caredes". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

Stephanie Caredes
Senior Tax and Policy Adviser

Appendix – Summary of Civil penalties

Penalty provision	Penalty amount	New / existing
Section 10J - Civil penalty provision for giving false or misleading notice	350 penalty units	New
Section 10N Revocation of exempt reporting entity determination	Liable under section 15 – 60 penalty units	New
Section 15 Civil penalty provision for failure to report (reporting entity)	60 penalty units	Existing
Section 16 Reporting entities must not give false or misleading reports	350 penalty units	Existing
Section 22E Civil penalty provision for failure to comply with slow small business payer direction	200 penalty units	New
Section 22K Civil penalty provision for failure to report by reporting nominee	60 penalty units	New
Section 22L Reporting nominees must not give false or misleading reports	350 penalty units	New
Section 29 Record-keeping requirements	200 penalty units	Existing
Section 29A Record-keeping requirements—reporting nominees	200 penalty units	New
Section 30 compliance audits i) failure to comply with a notice ii) failure to provide all reasonable facilities and assistance so auditor can effectively exercise their duties	i) 60 penalty units ii) 200 penalty units	Existing
Section 30B Civil penalty provision for failure to comply with notice (issued under new information-gathering power in section 30A)	60 penalty units	New