6 March 2020

Department of Industry, Science, Energy and Resources
Industry House
10 Binara St
CANBERRA ACT 2600

By email: paymenttimes@industry.gov.au

Dear Madam/Sir

Payment Times Reporting Framework Consultation Paper
Draft Payment Times Reporting Bill and associated Minister's rules

As the representatives of over 200,000 professional accountants in Australia, Chartered Accountants Australia and New Zealand (CA ANZ) and CPA Australia appreciate the opportunity to provide feedback on the above Consultation Paper, exposure draft legislation and Minister's rules.

Small businesses form a significant segment of the Australian economy and society, and as important stakeholders of CA ANZ and CPA Australia we believe in the fair and equitable treatment of this segment. Small businesses, like all other businesses should be paid on time and in a timely manner. While both accounting bodies are strongly supportive of a Payment Times Reporting Framework (the Framework), we believe the Framework as proposed is overly complicated and bureaucratic.

Opportunities to take simple practical steps have been ignored in favour of absolute certainty. Regulatory burdens could have been reduced through using consistent terminology and considering future interactions with the modernisation of business registers program, but this has not occurred. The proposed regime, as set out in the exposure draft, appears excessive with no clear additional benefits. A simpler regime could achieve the same results.

The legislation does not specify how to identify small business, how businesses will be reporting, what false and misleading means and who the regulator will be. **These key concepts should be contained in the legislation not the Minister's rules**.

Adding to this uncertainty is the lack of draft explanatory material. When tax legislation is designed the regulator, being the Australian Taxation Office (ATO), typically participates in a co-design process involving the simultaneous development of administrative guidelines to assist in the implementation of a proposed tax law. This has not occurred with this exposure draft. Given the proposed significant penalties and the importance of the regime, **we recommend that the proposed start date be delayed until sufficient guidance and education is provided and adequately communicated**.

Other key concerns we have with the exposure draft include:

- Tax information should not be used for non-tax purposes. We are concerned that the definitions of large business and the penalty calculations refer to assessable income. Most legislation that we are aware of that defines large business does so by annual turnover or consolidated revenue, which are accounting concepts, and/or the value of net assets and number of employees. The Government should look to adopt a different definition of a reporting entity.
- The proposed penalties in the exposure draft are excessive and should be reconsidered to bring them in line with other legislative frameworks such as the penalties regimes in the tax system. Further, the Regulator should have a specific power to remit penalties in whole or part, and penalties which accumulate by the day should be capped.

Our detailed comments are enclosed in the appendix below.

If you have any questions about this submission, please contact either Susan Franks (CA ANZ) susan.franks@ charteredaccountantsanz.com.au or Gavan Ord (CPA Australia) at gavan.ord@ cpaaustralia.com.au.

Yours sincerely

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Appendix

Below are our detailed comments on the Consultation Paper, exposure draft legislation and Minister's rules:

Key concepts and definitions should be in the legislation

CA ANZ and CPA Australia do not support key terms and concepts being in a legislative instrument such as Minister's rules. It is our firm view that they should be in legislation so that there is clarity.

Including such concepts in the legislation allows the proposed law to be better understood so that parliamentarians and the public can make an informed view on the law, and its potential scope and application.

The following key terms should be defined in the legislation.

The definition of small business supplier

The exposure draft legislation currently defines a small business supplier as an entity prescribed by the rules.

The proposed Ministerial Rule 1 states that "a small business supplier will be as identified through the Payment Times Reporting Small Business Identification Tool. A small business will be a business with turnover of less than $10 million that is not part of a larger entity or grouping of entities."

Details of the Payment Times Reporting Small Business Identification Tool have not been provided in either the legislation or the Minister's rules. All that is provided in the Consultation Paper is the comment "that the Framework should be supported by a look up tool to help automate the payment times reporting small business identification framework."

It is unknown how the look up tool will operate. Will small businesses need to self-identify themselves? Which government agency will be responsible for developing the look up tool? The last Consultation Paper that was issued in November 2019 noted that "a third-party supplier would develop a look-up tool to help automate small business identification that all large businesses required to report could use."[1] How often will the look up tool be updated? What technology will it use? How will it integrate with existing business systems and keep up to date

[1] Page 10 of https://docs.employment.gov.au/system/files/doc/other/payment_times_reporting_framework_discussion_paper_stage_2_0.pdf

with technological developments? Could such a tool be delivered through existing registers such as the Australian Business Register rather than adding an extra register for business to use?

Given that the whole purpose of the Framework is to assist small business, a simpler clearer method of identifying small business should be incorporated in the legislation.

One of the four options canvassed in the November 2019 Consultation Paper was the use of an expenditure threshold as a proxy for small business. This offers a simple, effective way to assist business use existing accounting systems to identify and report and will cover most small businesses, and potentially some medium businesses (which given that medium business is also likely to have the same problems negotiating with large business would also be an appropriate policy outcome). Such an expenditure threshold would need to be set at a much higher level than that proposed in the Consultation Paper (which was $1 million) to ensure that small business (which is generally defined as less than $10 million turnover) that have substantial dealings with a particular large business are not excluded.

We recommend that the definition of "small business supplier" be incorporated into the Bill and that further co-design work on how reporting entities can identify 'small business suppliers' be undertaken before the Bill is tabled in Parliament.

Content of the report

The exposure draft states that the report must "include information prescribed by the rules relating to the entity's payment terms and practices during the reporting period in relation to its small business suppliers" and "include any other information and be accompanied by any documents prescribed by the rules."

We recommend that the Ministerial Rule 4 requirements for a payment times report be included in the Bill.

Who is the regulator

The exposure draft states in section 4 that the Regulator has the meaning given by subsection 21(3), which in turn states that the Regulator is the SES employee who occupies, or the acting SES employee who is acting in, that position.

It is not clear where this Regulator will sit in the bureaucracy. Section 21(1) state that The Secretary must, by writing, designate a position in the Department as the position of Payment Times Reporting Regulator. Section 4 defines Secretary as the Secretary of the Department – but it is unknown which Department (department is not a defined term).

Given that this legislation is meant to be operative from 1 January 2021, and there is a need for substantial guidance to be issued well before 1 January 2021, it is expected that it should be known who the Secretary and Department is intended to be.

We recommend that the Bill specifies which Department is responsible for the Payment Times Reporting Regulator

What is the role of the regulator

Section 22 of the exposure draft sets out the role of the regulator. It requires the Regulator to perform any other function prescribed by the rules. Currently there are no Rules that set out such a prescription to do this. Given the wide ambit of the functions of the Regulator outlined in section 22, it is unclear why subsection 22(d) is required or why the functions of the Regulator should be subject to Minister Rules rather than full Parliamentary scrutiny.

We recommend that subsection 22(d) be removed from the Exposure Draft legislation.

The definition of a reporting entity should change

Section 6(1) defines a reporting entity by reference to its ‘assessable income’. Assessable income is then defined by reference to the Income Tax Assessment Act, or if income tax is not payable by the entity under the Income Tax Assessment Act, the assessable income that would apply if income tax were payable by the entity under the Act. It is unprecedented to see confidential tax information being used to publicly define a type of entity.

ASIC, in defining large and small proprietary companies, does not use assessable income[2]. Rather, a proprietary company is defined as 'large' for a financial year under section 45A of the Corporations Act 2001 if it satisfies at least two of the below criteria:

- the consolidated revenue for the financial year of the company and any entities it controls is $50 million or more
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is $25 million or more, and
- the company and any entities it controls have 100 or more employees at the end of the financial year.

The recently enacted Modern Slavery Act 2018 [3] does not use assessable income either. It uses the accounting concept of consolidated revenue.

[2] https://asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/are-you-a-large-or-small-proprietary-company/

[3] Section 5(1)(a) of the Modern Slavery Act 2018 (Cth) defines reporting entity with reference to “consolidated revenue”.
Section 4 defines “consolidated revenue” with reference to “accounting standards”.
Section 4 defines “accounting standards” with reference to the Corporations Act 2001.

The ATO does not define large business by assessable income. The ATO uses combined turnover[4]. The ATO defines large businesses as those entities that are part of an economic group with combined turnover greater than $250 million.

Furthermore the tax transparency measures that apply to large businesses do not use assessable income in defining large business.

- The Corporate Tax Transparency measure in the Tax Administration Act 1953 uses 'total income' which is based on accounting concepts not tax concepts[5]**.** The measure results in public disclosure of ABN, total income, taxable income (assessable income) and tax payable for groups whose total income exceeds $100 million per annum.[6]

- The measure regarding significant global entities in the Income Tax Assessment Act 1997 that result in, amongst other matters, country by country reporting of tax, apply where the annual global income is A$1 billion or more. The legislation defines "the annual global income is the total of income that goes to the determination of profit or loss in accordance with accounting standard AASB 101, as shown on the global financial statements.

The use of assessable income to define a large business is therefore unprecedented and raises the following issues:

- The law will need to be amended to override of the taxpayer secrecy provisions to allow the Commissioner of Taxation to share this information with the Regulator. [7]This is not appropriate given alternative acceptable definitions are available and already in use.

- It unnecessarily increases regulatory burden by adding to the number of definitions that need to be adhered to by business.

We recommend that 'assessable income' in the definition of a reporting entity in section 6 of the exposure draft legislation be removed and replaced with another definition that is more in line with terminology used for thresholds in other relevant existing legislation.

Section 334 of the Corporations Act 2001 (Cth) covers accounting standards.

[4] https://www.ato.gov.au/business/large-business/

[5] Refer paragraph 3.29 of the explanatory memorandum to this measure which states "'Total income' is not defined in the tax law; it is based on accounting concepts, and refers to gross income. 'Total income' is currently reported at item 6(S) in the company tax return."

[6] "Assessable income" is not part of the tax reconciliation (between tax expense/income and the product of accounting profit multiplied by the applicable tax rate) required by AASB 112 Income Taxes.

[7] The publicly disclosed assessable income relates to prior years not the current year. For example, as at 3 March 2020 the latest tax transparency report is for 2017/18 yet the exposure draft requires the use of the current year assessable for the calculations of penalties and the most recent income year when defining a reporting entity.

Civil penalty regime is excessive

The exposure draft contains a wide range of offences with varying degrees of penalties.

- Failure to report - 60 units for an individual, 300 units for a corporation (section 14)
- False or misleading report in a material particular – 350 units for an individual, 0.6% of assessable income for a corporation (section 15)
- Failure to keep records 200 units for an individual, 0.2% of assessable income for a corporation (section 28)
- Failure to update - 60 units for an individual, 300 units for a corporation (section 29)
- Failure to comply with audit notice - 60 units for an individual, 300 units for a corporation (sub-section 30(4))
- Failure to assist auditor - 200 units for an individual, 0.2% of assessable income for a corporation (sub-section 30(6))

It is unusual for penalties to be calculated by reference to assessable income. It is unclear how such penalties would be calculated when an offence occurs during the year as tax returns are not lodged until after year end (usually 6 months after year end for large entities**).**

Assessable income should not be used in a penalty calculation.

The proposed penalties are excessive and should be reconsidered to bring them in line with other legislative frameworks such as the penalties regime in the tax system. For example, the penalty for failure to report (section 14) is 60 penalty units per day (as per the Consultation Paper) for an individual (currently $12,600 per day) or for a corporation 300 units (currently$63,000). If a group of entities (which can be as large as 100 different entities) cannot lodge, say due to an IT failure or the unavailability of the responsible person to sign the report, then the group could be facing a penalty of $6.3 million per a day. This seems excessive and, inappropriate, and fails to recognise an exceptional circumstance.

While we understand that it may be useful for the regulator to have the ability to apply punitive penalties to entities intentionally disregarding the law, not giving the regulator the express power to remit penalties in full or part for entities using their best endeavours to comply with the law seems inappropriate and not conducive to proportionate and sensible administration of the law.

Further, not imposing a cap on the penalty under section 14 may lead to excessive, disproportionate and unnecessarily punitive penalties.

We recommend that the regulator be given an express general penalty remission power.

Further, we recommend that the civil penalty provision for failure to report (section 14) be capped to a maximum amount in the legislation.

The penalties imposed by the exposure draft are significantly higher than other legislation. By comparison, the failure to lodge (FTL) on time penalty for late lodgement of tax returns or statements to the ATO is five penalty units ($1050) for each 28-day period (or part thereof) that the return or statement is late, up to a maximum of 25 penalty units ($5250) for entities with a turnover of $20 million or more.

For significant global entities, the penalty for each 28-day period (or part thereof) that a tax return or statement is late is 500 penalty units ($105,000), up to a maximum of 2500 penalty units ($525,000). Under the proposed penalty regime in this Exposure Draft, being 28 days late would incur a penalty of 1680 penalty units or $352,800 (per entity).

We recommend that the penalties proposed in the Exposure Draft be substantially cut and the regulator be given an express general penalty remission power.

Audit requirements

Section 30(3)(a) of the exposure draft states that the Regulator must specify the qualifications and independence of the auditor to be appointed but does not indicate what those might be.

In Australia, there are four typical choices when considering who can perform the assurance engagement (i.e. the “qualifications” of the auditor).

1. A Registered Company Auditor (RCA). RCAs are the only professionals that can undertake audits of public and other companies under the Corporations Act 2001, although other pieces of legislation may also require an audit be undertaken by a RCA. We note however that many assurance engagements can be undertaken by other qualified professionals and that the RCA may not be the only professionals with the requisite skills and expertise who could undertake an ‘audit’ under this legislation.

2. The Auditor-General of the relevant jurisdiction. Usually appropriate for public sector entities.

3. A member of Chartered Accountants Australia and New Zealand (CA ANZ), CPA Australia or the Institute of Public Accountants who holds a Certificate of Public Practice (CPP). These members are subject to initial qualification requirements to attain membership, comply with professional development requirements, ongoing monitoring and compliance with professional and ethical requirements to maintain membership. This includes a professional and ethical requirement preventing them from accepting engagements that they do not believe they are competent to perform. Further, such members are subject to maintaining professional indemnity (PI) insurance. Therefore, a member of one of these professional bodies are likely to have the appropriate skills and expertise to undertake an ‘audit’ under this regime..

4. Anyone else. Where the qualification is not specified in detail, for example; “a person” or “a qualified person” then the user is not protected by the standards and education to which a member of a professional accounting body is held. It also removes the protection of PI insurance. We do not recommend that such broad clauses be used.

Independence is one of the key attributes of an assurance engagement. The independence of the practitioner adds credibility to their assurance report and is fundamental to the practitioner demonstrating their integrity and objectivity. In Australia, members of the professional accounting bodies must comply with APES 110 *Code of Ethics for Professional Accountants* *(including Independence Standards)* as well as other professional and ethical standards issued by the Australian Professional and Ethical Standards Board (APESB).

Section 30(3)(a) indicates the form and content of the auditor's report will be prescribed. The auditing and assurance standards issued by the Australian Auditing and Assurance Standards Board (AUASB) contain mandatory requirements for the contents of assurance reports. Therefore, specifying that the engagement is to be performed in accordance with these standards will ensure that consistent reporting is obtained. If a prescribed report is desired then consultation with the AUASB should be undertaken to avoid prescribing a report that does not comply with the requirements of the Australian auditing and assurance standards.

Additionally, we draw your attention to the Federal Government's Department of Finance circular; RMG 210: Clarification of the terms 'Audit' and 'Assurance' which may also be a helpful point of reference.

A matter that is notably absent in this section is the level of assurance required for this engagement. An assurance engagement can be either a reasonable assurance engagement or a limited assurance engagement. The AUASB Glossary sets out what these terms mean.

We recommend that the Regulator nominate members of the Chartered Accountants Australia and New Zealand (CA ANZ), CPA Australia or the Institute of Public Accountants who holds a Certificate of Public Practice (CPP) as being suitably qualified to perform audits under the regime.

We recommend that the Regulator state that APES 110 Code of Ethics for Professional Accountants (including Independence Standards) be the standard independence requirement under which all audits under this law are to be conducted.

We recommend that the Regulator adopt the standards issued by the AUASB as meeting the form and content of the specified audit report.

Supply chain financing

We agree with the proposal for reporting entities to include information in their payment times report on whether they offer any form of supply chain finance, reverse factoring and discounting, and details of those arrangements.

Having such information publicly available would be valuable for smaller businesses and would assist small businesses to compare how their large business customers perform against their peers and use such information in their negotiations.

We note that it may take some time for reporting entities to gather all the details required, especially on discounting, which is significantly more widespread than supply chain financing and reverse factoring.   We also noted that many reporting entities may have varying discount policies for small businesses depending on a range of circumstances.

It is important that the Regulator monitor developments in financing to ensure that where appropriate, new arrangements are disclosed under this regime.

As it may take some time for reporting entities to gather all the details required, we recommend that the Regulator refrain from imposing penalties for honest mistakes in the disclosure of supply chain financing, reverse factoring and discounting practices by reporting entities for a reasonable transition period.

Other red tape reduction ideas

The exposure draft seems to be drafted for the convenience of the regulator rather than striking a balance between it and the regulated entities. For example, section 29 requires the regulator to be notified of a change in the entity's business name, the entity's accounting period, in the case of insolvency, the entity becoming a Chapter 5 body or a creditors petition or debtors petition being presented against the entity. It is not clear why all of these events need to be notified to the regulator from a policy perspective. The regulator is meant to regulating payment terms and times not the credit position of the business.

In any case, the Australian Securities and Investment Commission (ASIC) is already notified of all of this information. The modernisation of business register program should allow for such data to be provided by business to government once, and for that data to flow through automatically to relevant government agencies. Setting up separate additional reporting requirements is not consistent with the government's aim of reducing red tape. These requirements should be reconsidered.

We recommend that the Government reconsider the necessity of section 29 of the exposure draft law and consider sharing of data between regulators to reduce duplication.

A reporting entity must provide a payment times reports every six months and within three months of the end of that six-month reporting period. The income tax year has been used as the reporting period, which is unusual given that the Framework does not relate to tax. It would make more sense to link the reporting period to the entity's financial year.

We recommend that 'financial year' replace 'income year' in section 7 of the exposure draft legislation.

The Consultation Paper indicates that entities will be required to report at an entity, rather than a group, level. This has the potential to add to compliance costs. Therefore, consideration should be given to allowing sub-group/group reporting (with a listing of relevant ABNs) if payment terms are similar for a sub-group/group.

To alleviate concerns that a particular entity is acting outside the norms there could be a specific anti-avoidance rule. For example, if there is more than a, say 10 per cent deviation in actual payment times from the group's median, then the reporting entity is required to make a separate disclosure for that entity. This could enable a reduction in compliance costs whilst still achieving the policy objective of allowing small business to search ABNs to determine payment terms and times.

We recommend the government allow reporting by a group/sub-group

Whilst we acknowledge the policy intent behind requiring a board of directors of a company to approve every report before lodgement, this appears unnecessary. As per income tax returns, it should be sufficient that the public officer of the entity signs the report. Such public officers are responsible to, and are overseen by, the Board of Directors. Boards of Directors already have legal responsibilities for entity they govern.

We recommend that subsection 13(2) of the exposure draft legislation be removed.