HOUSING INDUSTRY ASSOCIATION

Submission to the
Department of Industry, Science, Energy and Resources

Payment Times Reporting Framework
Consultation Paper
Exposure Draft – Payment Time Reporting Bill 2020

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HOUSING INDUSTRY ASSOCIATION

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.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. HIA members are involved in land development, detached home building, home renovations, low & medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diverse mix of companies including residential volume builders, small to medium builders and renovators, residential developers, trade contractors, building product manufacturers and suppliers and allied building professionals that support the industry.

HIA members construct over 85 per cent of the nation's new building stock.

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.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

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."*

HIA develops and advocates policy on behalf of members to further advance new home building 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 committees before progressing to the 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 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

HIA takes this opportunity to respond to the Payment Times Reporting Framework (PTRF) Consultation Paper and associated Ministers Rules (Consultation Paper) and exposure draft *Payment Time Reporting Bill 2020* (Bill) which seeks to establish a PTRF.

The 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.

According to the Consultation Paper, the purpose of the PTRF is four-fold:

1. To introduce a new national large business reporting framework for businesses with an annual turnover of over $100 million to publish payment information.
2. Improve the collection of information about the payment practices of large businesses and government agencies towards small business.
3. Make information about payment practices visible and easily accessible to small businesses and other interested stakeholders.
4. Minimise the compliance and administrative burden associated with the reporting framework for government agencies, large and 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 Bill and the PTRF.

The Consultation Paper and the Bill go well beyond the original 2018 announcement and the purpose of the PTRF set out above.

The content of a payment time report, the requirement to report every 6 months and the proposed compliance framework that includes penalties for, for example, a failure to report, are just a few ways in which the Bill sits at odds with the original scope of a PTRF. HIA sees that the remit of the PTRF should be a narrow one to deal with discrete and clear matters.

There is also an inherent implication that through the PTRF some payment terms will be deemed ‘good’ and some will be considered ‘bad’. This characterisation is already evident through the approach of the Australian Small Business and Family Enterprise Ombudsman who tends to be very critical of any payment terms longer than 30 days. This drastically oversimplifies 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 Consultation Paper and Bill fail 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 PTRF. 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.

Given the concerns with the matters set out in the Consultation Paper and the Bill, HIA submit that should the Bill progress it include a requirement that the residential building industry be excluded from the requirements and that the PTRF be reviewed after 2 years to ensure it is meeting its objectives.

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 implementation of PTRF. Not only is this part of *Australian Government Guide to Regulation*, it is also specifically a requirement that a range of policy options be considered, including the costs and benefits associated with those policy options.

Without any assessment the regulatory impact of the proposed reform is significantly underestimated at this time.

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 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.

No attempt has been made to discern the impacts of the Bill or the PTRF on specific industries. HIA considers that an investigation of that nature is necessary and critical.

The practice and paradigm in the residential building industry differs significantly not only from businesses operating in different sectors but also when compared to those businesses operating in commercial and civil construction. These differences have implications for the operation of the Bill.

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 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. If these requirements are not strictly complied with a builder may not be paid for the variation;
- 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 payment from the client 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 on lenders being satisfied with completion of certain recognised building stages.

There are significant cost implications associated with these regulations.

The cyclical nature of the residential building industry is also 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 residential 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 which occurs in accordance with legislated and contracted payment terms hence 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 business to business payment arrangements ignores these regulatory requirements and administrative and financial complexities to the potential detriment of all participants in the residential building industry.

Given these unique circumstances that apply to the residential building industry, HIA does not support the inclusion of this sector in the scope of the legislation.

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 PTRF. 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.

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 cash flow 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.

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.

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

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]

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[1] See pg.9

[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).

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.

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 with the client 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 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.

[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

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.

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. Duplication through this proposed legislation should be avoided.

4. RESPONSE TO THE CONSULTATION PAPER & BILL

4.1 REPORTING ENTITIES

The Bill requires that individual entities report at an entity level rather than at a group level. This is incongruent with the approach to determining whether a business is required to submit a payment times report in order to comply with the Bill.

Under the Bill an individual entity may have an assessable income of less than $100 million but may be a member of a *controlling corporation's group* that does have an assessable income that is captured by the Bill. As a consequence of this approach the individual entity will be captured (by way of the controlling groups assessable income) and required to report individually despite the fact that that individual entity does not meet the assessable income threshold.

If individual entities are required to report individually, then it should be those individual entities that are required to meet the threshold notwithstanding that they may be part of a larger corporate group. As such section 6(1)(ii) of the Bill should be deleted.

Also relevant is the need for consistency with the *Modern Slavery Act 2018* (MS Act) which also imposes reporting requirements. While the MS Act also base the satisfaction of the consolidated revenue threshold requirements on the total revenue of the entity and all of the controlled entities, corporate groups can choose to report individually or through a joint statement. HIA sees value in allowing the reporting entity the flexibility to choose how they report under the PTRF.

Ceasing to be a reporting entity

Rule 2 and section 6 of the Bill provide a process through which an entity ceases to be a reporting entity. This process involves making a written application and the provision of evidence that the entity now falls below the annual turnover threshold for each of the 2 most recent income years.

It is unclear why such a process is required. Once a reporting entity ceases to meet the threshold requirements set out in the Bill, HIA sees no reason why that entity should remain captured and also sees no reason why the entity should have to seek permission to no longer report payment times.

By way of contrast, the MS Act contains no such requirements, a business who falls below the threshold is simply no longer captured by the legislation and therefore is no longer required to submit a modern slavery statement. It is unclear why the same approach has not been taken in relation to the PTRF given that the compliance burden imposed by this proposed process seems unjustifiable.

4.2 Definition of Small Business

Rule 1 outlined in the Consultation Paper sets out that a small business will be:

- identified through the Payment Times Reporting Small Business Identification Tool; and
- a business with turnover of less than $10 million that is not part of a larger entity or grouping of entities.

HIA has a number of concerns with these proposals.

Small Business Identification Tool

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, the Small Business Identification 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.

The Consultation Paper indicates that a small business may be able to 'opt-out' of the identification tool. In those cases, it remains unclear how a large business is to, firstly, know that the small business has opted out of inclusion in the tool and secondly, identify them as a 'small business' for the purposes of the PTRF. This issue must be resolved prior to the reforms moving forward.

Definition of Small Business

The consideration of one factor (such as the proposed turnover threshold) for such an important classification does not allow any flexibility to account for:

- Changes in economic conditions that will impact the expansion or contraction of a business.
- The way a business may structure themselves in order to either be (or not be) considered a 'small business'.
- Incentives (or disincentives) for business growth.

HIA prefers a multi-factor test be applied in order to determine a small business. Similar to the current 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.

There are legitimate, reasonable and sensible reasons why a multi-factor test may be the most appropriate way of identifying a small business. This approach seeks to balance the needs of all businesses in the interests of the broader economy.

It may also be appropriate, and indeed preferred, to allow larger businesses the flexibility to determine who is a small business in their particular industry or for a particular purpose.

4.3 REPORT CONTENT

Rule 4 set out in the Consultation Paper specifies the information that a reporting entity must include in their payment times report. The level of detail that must be provided is overly burdensome and does not balance possible anti-competitive outcomes or the need to prevent the disclosure of commercially sensitive information.

Payment term information

Rule 4 proposes that a payment times report include *'the shortest and longest payment terms the entity offers and any changes made to these terms during the reporting period'.*

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

Rule 4 proposes that a payment times report include:

- *The total proportion (number and value) of invoices paid in the calendar day periods of 1-20 days, 21-30 days, 31-60 days and 60+ days.*
- *The total proportion (number and value) of invoices paid within the contract terms.*

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.
- 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.
- Invoices paid based on business days not calendar days. 'Calendar days' are generally not used in the residential building industry and most commercial arrangements exclude certain days from a count towards payment times. The term 'working days' or 'business days' is generally used. Also, for the residential building industry SOP laws influence such matters, 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.

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.

Supply chain finance, reverse factoring or discounting

HIA opposes the requirement to disclose information regarding supply chain finance, reverse factoring or other discounting arrangements.

The arrangement between a buyer of supply chain finance (or similar) and the finance company and the take up of those arrangements is a matter for those parties. Any arrangements should be treated as confidential.

Further, there is no evidence to support the need for the number and value of invoices where these arrangements are utilised to be a part of the PTRF. There is no legitimate basis on which these confidential business negotiations should be disclosed and may in fact jeopardise any beneficial terms secured.

4.4 Time Frames for Reporting

Reporting timeframes should be aligned with the reporting periods set out under the MS Act. For example, 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 Bill. 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 Government's November 2018 announcement and the objective of ensuring that the compliance and administrative burden associated with the PTFR be minimised.

4.5 Penalties

It is disappointing that the Bill proposes the introduction of an extensive compliance framework that includes penalties for a reporting entity that fails to:

- Report within the three month lodgment period;
- Provide a compliant report;
- Notify the regulator of changes such as a new business name or insolvency; or
- Comply with a notice to appoint an auditor, arrange for an auditor to give a written report and give this report to the regulator.

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.[8] 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[9] not imposing pecuniary penalties. HIA sees the PTRF as having a similar goal. However, provisions that, for example, propose that the Regulator can require an entity to appoint an auditor on a 'suspicion' of non-compliance with the legislation, at the entity's cost seems heavy handed and at odds with the desire to inspire cultural change.

HIA opposes the adoption of the powers from the *Regulatory Powers Act 2014*, including those relating to monitoring and investigation. As outlined in this submission there are a range of measures through which poor payment practices and non-payment can be addressed. To add a further regulatory layer is unnecessary, unjustified and will simply create duplication and overlap.

If such a framework is to remain in the Bill HIA supports the delayed commencement of any compliance and enforcement arrangements.

4.6 COMMENCEMENT

Given the current regulatory arrangements in the residential building industry, should this sector be included in the scope of the legislation, 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 understands that should the Bill pass through Parliament this year a commencement of 1 January 2021 would be considered meaning that:

- A reporting entity with a reporting period based on a calendar year would be required to report by October 2021.
- A reporting entity with a reporting period based on a financial year would be required to report by April 2022.

In HIA's view this does not provide enough time for businesses to review their current arrangements and put in place mechanisms to comply with the detailed requirements outlined in the Bill. Further, there are no timeframes

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

regarding the development of the Payment Times Reporting Small Business Identification Tool, which must be in place prior to the commencement of the proposed requirements.

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.