Business Council of Australia

Payment Times Reporting Act 2020 primary legislation amendments

Submission

April 2024

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1. Overview

The Business Council of Australia (BCA) welcomes the opportunity to provide feedback on the *Payment Times Reporting Act 2020* primary legislation amendments. The proposed changes will improve the Payment Times Reporting Scheme (PTRS) by reducing the regulatory burden and removing many of its inefficiencies.

Simply put, maintaining the status quo for the PTRS is not an option. The issues with the current scheme are not in the interests of any stakeholder – be they small business, large business, government, or other users of the data.

BCA member companies support the payment times reporting framework to improve transparency of payment times to small business. The PTRS complements the voluntary commitments to fast payment through the BCA's Australian Supplier Payment Code (ASPC). The ASPC is an industry-led voluntary commitment to pay small business suppliers within 30 days and on time, with over 150 signatories.

Small businesses play a critical role in their communities and across supply chains. That success relies on invoices being paid quickly, in full and on time. The PTRS should be able to shine a positive light on large businesses that are paying small businesses promptly. It puts companies that are unfairly extending payment times to small business suppliers under the spotlight and puts pressure on those businesses to change their practices. Central to this is simple, accessible, and useful data, which in turn can reduce compliance costs.

The evidence is clear – payment terms and practices have improved across the two and a half years of available PTRS data. This has come at a time of enormous disruption, including natural disasters, the COVID-19 pandemic, lockdowns/restrictions, supply constraints, logistics challenges, delivery delays, record high job vacancies, and elevated staff turnover. Having payment practices and performance data in the public domain has encouraged many businesses to seek to improve through strong reputational incentives to improve payment times in response. The BCA is committed to further engagement to improve payment times, including working with the Payment Times Reporting Regulator and Australian Small Business and Family Enterprise Ombudsman.

The BCA welcomed the review of the PTRS driving these proposed changes. The initial changes made by the regulator to improve compliance around credit card transactions and correct the Small Business Identification Tool are welcome. The broader response to the review should be guided by the review's principles that the PTRS:

- Incentivises improved payment terms and practices and disincentivises poor behaviour.
- Imposes a proportionate regulatory burden.
- Is accessible and useful.

The BCA urges the government to use these reforms to the PTRS as an opportunity to further overhaul the scheme and unlock its full potential. This includes significant improvements to the Small Business Identification Tool (such as through use of Australian Taxation Office data and real-time identification of small businesses e.g. through an Application Programming Interface Tool), consolidating reporting fields to reduce compliance costs and improve data accessibility, driving the uptake of eInvoicing, and extending reporting to governments. These are discussed further in the BCA submission to the Statutory Review of the Payment Times Reporting Act 2020.[1]

The brief consultation period for these proposed changes however means many potential issues may not have been identified. It is critical that sufficient time and a genuine consultation process is conducted around the proposed rules that will determine the key reporting aspects of the revised scheme. Companies have undertaken significant investments to meet their reporting obligations under the existing regime. The proposed changes are due to commence imminently. Despite the proposed transition period, companies will need sufficient time to update systems and processes to ensure they are compliant with the revised scheme and that compliance costs are minimised.

[1] https://www.bca.com.au/submission_to_the_review_of_the_payment_times_reporting_act_2020

2. Key recommendations

- Recommendation 1: Clarify whether changes to the meaning of a 'reporting entity' intend to capture the payment times and practices of foreign entities that would only be captured by reference to being a related entity to an existing reporting entity. Alternatively, clarify whether the changes intend to capture large foreign entities that carry on business in Australia through an entity not incorporated in Australia.
- Recommendation 2: Clarify when entities that have been acquired should be included for reporting purposes. For example, this could be during a reporting period (noting potential challenges around collecting data with sufficient time), or at the start of the next reporting period.
- Recommendation 3: Publish a draft set of rules and guidance material as soon as possible for consultation and ensure they are finalised well before the end of this calendar year.
- Recommendation 4: Work with stakeholders to design the 'slow small business payer' designation in a way that delivers on the policy intent in a clear and meaningful way, while also ensuring procedural fairness. This should include greater clarity around when it may apply (including a 'last resort' condition), consequences and duration.
- Recommendation 5: Move to annual reporting rather than biannual reporting to reduce compliance costs.
- Recommendation 6: Introduce the concept of a 'fast small business payer' at the same time as the 'slow small business payer' designation, to shine a positive light on businesses that pay promptly.
- Recommendation 7: As an alternative to application fees, ensure the updated Act clearly outlines which entities are required to report under the scheme.
- Recommendation 8: Introduce a temporary exemption from penalties for any medium-sized companies that grow to reach the threshold of $100 million and are required to start reporting under the new scheme.
- Recommendation 9: Any proposed changes should be subject to a comprehensive assessment that follows best practice principles. This includes the problem to be solved must be well understood, adequate time for consultation, and regulation must achieve objectives at least cost.

3. Additional information

3.1 Reporting entities

The proposed changes to the meaning of a reporting entity, including the ability to report on a group basis, are welcome. They will significantly reduce compliance costs, reduce complexity and uncertainty, reduce the number of reports lodged under the PTRS, and improve the accessibility of published data.

BCA member companies have noted that consolidated reporting will capture more transactions and entities within some groups. On balance, this will streamline reporting and reduce overall compliance costs. However, the inclusion of entities that were previously not reporting will mean an adequate transition period is critical to ensure companies can update systems and processes in time for reporting. It will also raise issues around the treatment of related foreign entities and acquired entities for reporting purposes.

The proposed changes include the ability for a reporting entity to apply to the Regulator to change default reporting arrangements. This may be through having another entity report on its behalf or allowing certain entities within a group to report individually. This can be important where different entities have their own reporting mechanisms and practices. The BCA welcomes these proposed changes which improve flexibility and allow the PTRS accommodate a wider range of circumstances among reporting entities.

Recommendation 1

Clarify whether changes to the meaning of a 'reporting entity' intend to capture the payment times and practices of foreign entities that would only be captured by reference to being a related entity to an existing reporting entity. Alternatively, clarify whether changes intend to capture large foreign entities that carry on business in Australia through an entity not incorporated in Australia.

Recommendation 2

Clarify when entities that have been acquired should be included for reporting purposes. For example, this could be during a reporting period (noting potential challenges around collecting data with sufficient time), or at the start of the next reporting period.

3.2 Payment Times Reports and changes to the register

The proposal to move details around reporting requirements from the Act to rules is welcome. It will improve flexibility in the operation of the scheme, support the timely and efficient management of any issues, and ensures the rules can remain fit-for-purpose. The ability for the Regulator to automatically publish reports will also remove existing inconsistencies around reporting, while reducing administration costs for the Regulator.

The design and content of the rules are therefore a critical aspect of how the future PTRS will work. The first proposed reports under the new rules are due in a little over a year. Companies are unable to prepare for the new reporting requirements until they have been finalised, which means there is currently a high degree of uncertainty around the practical effect of the new rules. The proposed rules should be released for adequate consultation as soon as possible and finalised well before the end of this calendar year. This will ensure adequate time for the Regulator to consult on and update its guidance, and for companies to update internal systems and processes in line with new reporting requirements.

Recommendation 3

Publish a draft set of rules and guidance material as soon as possible for consultation and ensure they are finalised well before the end of this calendar year.

3.3 Slow small business payers

The proposed introduction of a 'slow small business payer' directive is highly detailed within the legislation in one sense, but there is considerable uncertainty as to how this will operate in practice. This is because the Minister (and potentially the Regulator) is ultimately provided significant discretion in its application. An accurate Small Business Identification Tool is paramount if this concept is to be introduced. BCA member companies have raised several potential issues for consideration.

- The definition of slowest 20 per cent of small business payers is not defined in the Act. The impact and implications will be unclear until an approach is outlined in the rules.
- In practice, an entity that is identified as a slow small business payer in one period will be unaware until at least halfway through the next reporting period. By that point, it may be difficult and/or require a significant level of resources (such as working capital, updates to systems/processes etc) to substantially change payment practices for the second period. A company may demonstrate an improvement in the second period, but remain in the slowest 20 per cent, and still be identified a slow small business payer under the wide discretion in the powers given to the Minister (and potentially the Regulator).
  - This process will compare entities with millions of invoices with some that may have hundreds of invoices. This raises issues around meaningful comparisons between entities.
- Schedule 1, subsection 22D(1)(a) of the draft legislation references "95 per cent payment time of 30 calendar days or less". It is unclear what this represents or how it is defined. Given it is proposed to be set out in the rules, this in turn may inhibit the flexibility of the rules.

- The consequences around being designated a slow small business payer are broad and unclear, with a wide range of discretion given to the Minister (e.g. would it apply on a group or entity basis, where would a designation be placed on a website, and would it vary by a domestic website, global website or app?). The technical and resourcing requirements may be significant for a mid-sized company to, for example, update their invoices to reflect a directive that may only be in place for between one day and one year. Further consultation is needed to design a proportionate response that delivers on the policy intent.

Recommendation 4

Work with stakeholders to design the 'slow small business payer' designation in a way that delivers on the policy intent in a clear and meaningful way, while also ensuring procedural fairness. This should include greater clarity around when it may apply (including a 'last resort' condition), consequences and duration.

The biannual reporting requirement increases compliance costs but the benefits for small businesses from this additional reporting are unclear. It is also unclear how biannual reporting better delivers on the objective of the PTRS compared with annual reporting.

A less costly, simpler, and more effective approach would be to require entities to submit an annual report. Indeed, the government's Pay On-Time Survey moved from biannual to annual reporting over a decade ago. This would also be consistent with most other public reporting.

Recommendation 5

Move to annual reporting rather than biannual reporting to reduce compliance costs.

3.4 Regulator functions

The proposed changes enhance the functions and the power of the Regulator, including the potential for sensitive information to be provided to the Regulator. Additional functions have also been proposed for the Regulator to further research and analyse payment times.

The Regulator should introduce the concept of a 'fast small business payer' to promote companies that pay small business suppliers promptly. This should be introduced at the same time as the 'slow small business payer' designation to help promote companies that pay promptly and provide reporting entities with a goal to work towards.

Recommendation 6

Introduce the concept of a 'fast small business payer' at the same time as the 'slow small business payer' designation, to shine a positive light on businesses that pay promptly.

3.5 Application fees

The proposed changes include a discretionary power for the Regulator to introduce application fees around determining reporting eligibility. Reporting entities should not be charged a fee for determining their requirement to report (or not report) under the scheme. The Act should clearly outline which entities are required to report. This consultation process is the appropriate time to identify and address any of these issues and has the advantage of starting with a scheme already in operation. It also illustrates the importance of adequate time for consultation on any proposed changes.

Where situations arise that may be challenging to account for in the legislation, these are likely to be limited. As an alternative they could be determined by the reporting entity, who would subsequently notify the Regulator (to then respond, if needed). The imposition of fees may also discourage interactions with the Regulator, which would not support the policy intent of the scheme. The overall rationale for application fees is unclear but it is no substitute for clarity in the legislation.

Recommendation 7

As an alternative to application fees, ensure the updated Act clearly outlines which entities are required to report under the scheme.

3.6 Other issues

The BCA welcomes the proposed legislative requirement for another independent review within five years of the commencement of the proposed changes. This will offer another opportunity to assess the scheme's effectiveness, the costs and benefits and any needed improvements or deregulation opportunities. However, this should not prevent the ability to deliver improvements to the scheme today that can achieve these outcomes.

The significant changes to the scheme, and potentially limited time to adopt them by 1 July 2025, mean companies may face many issues with transitioning to a new scheme. Just as when the PTRS was introduced, there should be a temporary exemption from penalties for any medium-sized companies that grow to reach the threshold of $100 million and are required to start reporting.

The revised penalty provisions, to go alongside other changes such as consolidated reporting, give potential rise to new issues for consideration. For example, where an entity separately reports as a subsidiary of a group, would a potential penalty apply against the turnover of the group or the separate reporting entity?

Recommendation 8

Introduce a temporary exemption from penalties for any medium-sized companies that grow to reach the threshold of $100 million and are required to start reporting under the new scheme.

3.7 Best practice consultation

The proposed changes should be put through a comprehensive policy development or assessment process that follows best practice principles. The Office of Impact Analysis (OIA) outlines this process in detail for new policies.[2] While the proposed changes to the PTRS do not require a new Impact Analysis, best practice principles should still be followed to ensure the proposed changes meet the policy intent at least cost.

The consultation period for the proposed measure is unreasonably short given the scope and significance of the changes. The draft legislation is out for just two weeks of consultation, across a period that includes a public holiday. This makes it difficult to adequately consult with affected companies to ensure the proposed changes deliver on the policy intent, minimise compliance costs, and ensure no unintended consequences. The BCA notes that the Best Practice Consultation guidance note issued by the OIA recommends a minimum consultation period of 30 days.[3] The note also maintains that longer consultation periods may be necessary when they fall around holiday periods.

Inadequate consultation periods and impact analyses have been seen across a number of recent consultations, particularly those dealing with sensitive and complex proposals with high political salience. This is likely to produce sub-optimal policymaking, with increased risk of unintended consequences. The BCA continues to monitor Treasury's overall adherence to principles of best practice consultation.

Recommendation 9

Any proposed changes should be subject to a comprehensive assessment that follows best practice principles. This includes the problem to be solved must be well understood, adequate time for consultation, and regulation must achieve objectives at least cost.

[2] https://oia.pmc.gov.au/resources/guidance-impact-analysis/7-impact-analysis-questions
[3] Best Practice Consultation, The Office of Impact Analysis, July 2023. https://oia.pmc.gov.au/sites/default/files/2023-08/best-practice-consultation.pdf

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