

OPTUS

Submission to the Senate
Standing Committee on
Education and Employment

**Inquiry into the Payment
Times Reporting Bill 2020
[Provisions] and Payment
Times Reporting
(Consequential
Amendments) Bill 2020
[Provisions]**

Public Version

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INTRODUCTION

1. Optus is pleased to provide a submission in response to the inquiry by the Senate's Education and Employment Standing Committee into the provisions of the *Payment Times Reporting Bill 2020* ("**the Bill**") and *Payment Times Reporting (Consequential Amendments) Bill 2020* ("**the Consequential Amendments Bill**").
2. We have engaged extensively with the Department of Industry, Science, Energy and Resources ("**the Department**"), as well as the former Department of Employment, Skills, Small and Family Business, throughout the previous iterations of their respective consultation.
3. As outlined in our previous submissions, Optus appreciates the opportunity to provide feedback on this important matter to ensure that the legislation underpinning the Payment Times Reporting Framework ("**the Framework**") is fit for purpose and achieves the desired outcomes of improving the cashflows for Australia's small businesses.
4. Optus supports the intent of the Framework, and the desire to improve the cashflow situation for Australia's small business operators.
5. We reiterate our feedback offered in previous consultations that it is very important that the framework delivers consistency and clearly defined terms, as well as minimising the red tape burden on Australian enterprise.
6. Optus also notes that there is the intention to publish payment times on the website of the regulator. Optus believes that this will motivate larger businesses to pay their small business vendors within fair and reasonable timeframes.
7. This will not only provide transparent information to small businesses looking to enter commercial arrangements, but larger businesses who have an obligation to report will be likely to improve their timeframes when required to publish such information.

REPORTING PROCESS

Entity level reporting concerns

8. From the outset of consultation with the Department, Optus outlined our preference that the Framework should allow companies to report at either their group or individual entity level. This provides them with the flexibility to report in the manner which best reflects their existing reporting frameworks, and their internal structures.
9. The Bill, as drafted, will require Optus to submit multiple reports for our various component entities, rather than one single report on behalf of Optus as a whole. Section 7 (2) (b) (iii) of the Bill will require smaller entities with income of just \$10 million to report their payment times, if they are a member of a larger company structure.
10. Optus is disappointed that a conscious decision has been made to require individual entities to report separately, even if they are part of the one group of companies. The Government has chosen the option which inflicts a far greater red tape burden.
11. From Optus' perspective – with a number of legal entities of varying size – the preference is for Optus to accept overall responsibility for reporting as a single entity and submit one report in each reporting cycle. This makes logical sense, given that almost all of these entities use the same centralised payment system within Optus.

12. Optus appreciates that the Government may have made this decision to mitigate the risk of larger businesses who may use a group-level report to disguise longer payment terms by some of their component entities.
13. Optus is not one of those companies; our payment terms were published online by the Australian Small Business and Family Enterprise Ombudsman in 2019 and demonstrated our times were among the lowest in the industry. We have been very transparent about our processes.
14. Optus was progressing implementation of the Business Council of Australia's supplier payment code in 2018 when the Prime Minister announced the Government's intention to introduce a new framework for paying small businesses on time. Optus has therefore been engaging with the Government in good faith to assist in the success of the Framework.
15. It is regrettable that the Government has excluded the possibility of group level reporting, regardless of how reasonable a company's existing payment terms might be for small business vendors.
16. Optus suggests that there should be an amendment to the Bill which would allow for a group level report where a single payment system is used by multiple entities.
17. Additionally, the rules accompanying the legislation could instead be amended to allow the regulator or the Minister to ban a larger business from reporting at the group level. If larger businesses are found by the regulator to have been unscrupulously reporting at a group level to hide certain practices, they would then have to publish their reports broken down by individual entities for the future reporting periods.

Leasing arrangements should be excluded

18. Optus would appreciate assurance that invoices payable under leasing arrangements are not captured by the Framework.
19. Optus has approximately 8,000 sites in its mobile network, with different leasing arrangements across the network. It is critical for Optus to have guidance about whether lease payments are included in the framework, given that many of Optus' landlords are small businesses.
20. Lease payments are made on a regular timeframe and are organised immediately. Further, they are facilitated under a contract, which provides parties with an avenue of restitution in the case of late payment. Accordingly, including lease payments under the framework would be likely to distort the overall results.

Reporting periods

21. The Bill and the accompanying Explanatory Memorandum refer to the bi-annual reporting requirements. It is, however, unclear what the due dates of the reports will be, and whether it is possible for reporting entities to self-nominate the two times each year they submit a report for the previous half-year.
22. Optus would prefer a self-selection of the financial year of the reporting period. This allows for reporting to mirror existing internal processes and systems. Given the other areas of red tape brought about by the Framework, we consider this a fair and reasonable request.

Timeframe calculations

23. Optus holds concerns about the proposed timeframes outlined in Section 14 of the Bill, which state that reportable timeframes must be calculated from when an invoice is “issued”.
24. Optus believes that it is more appropriate for the timeframes to be calculated from the satisfactory delivery of the goods or services and a correctly rendered invoice has been received. Such a date is clear, indisputable and it ensures that invoice payments are more appropriately aligned to the delivery of what has been pledged. Additionally, this mirrors the terms recommended to by the Department of Finance to Commonwealth entities.¹
25. Optus was also surprised to note that the exposure draft of the rules as circulated by the Department indicated that a conscious decision has been made to include disputed invoices in the timeframes. Given the harsh penalty framework which the Government has introduced to oversee compliance with the Framework, that particular rule offers two particularly unsatisfactory options in the case of a disputed invoice:
 - (a) Pay an invoice in dispute, even if it is not through fault of the payer, to avoid future action taken by the regulator; or
 - (b) Withhold payment until the dispute is resolved and risk future action by the regulator.
26. Optus would appreciate clarification that if a disputed invoice is found to be incorrect on the part of a small business vendor, whether the Framework allow for a supplementary (correct) invoice to be reported upon in place of the original, disputed one.

Penalties, auditing and compliance

27. Optus remains concerned that the proposed financial penalties are at a maximum of 200 units and listed at \$210 per unit. Thus, some \$42,000 could be charged in fines for failing to keep records for seven years. Optus considers this to be an unreasonable penalty for issues with record keeping.
28. Additionally, penalties can be charged at 0.2 percent of income for various contraventions. It seems that “income” should be read as “revenue,” and thus it would be possible that a body corporate could be charged 0.2 percent of its annual revenue in fines, even in a year when it had not made any profit.
29. Optus also holds concerns about the powers available to the regulator to be able to commence a compliance audit. The Bill indicates that the regulator need only to “reasonably suspect” the entity to have contravened a provision of the legislation. It is unclear what the accompanying reasonable grounds for such a suspicion might be.
30. We submit that an audit should only be triggered where all other avenues and communications made in good faith have been exhausted. Given the onerous nature of such an audit, we submit that audits should not be requested on demand without appropriate precursor attempts at resolution.

Sign-off and submission

31. Optus also notes that Section 14 of the Bill requires the report to be signed by, “a responsible member of the entity” which we have taken to mean our Chief Financial

¹ <https://www.finance.gov.au/publications/resource-management-guides/supplier-pay-time-or-pay-interest-policy-rmg-417>

Officer. It will be helpful for the Government to clarify who would be deemed “a responsible” representative if this is an incorrect assumption.

32. It was suggested during previous consultation that each payment report may need the approval of a board of directors. Optus would consider that to be an unnecessary administrative burden and not one which would drive an improvement to the payment times for small businesses.

Rules

33. Optus notes that Section 14 of the Bill states that reports submitted under the framework must, “include any other information or documents prescribed by the rules.” We acknowledge that many of the elements governing the Framework are to be contained in the rules, which are legislated instruments.
34. The rules are disallowable by the Parliament and Optus appreciates that this is an efficient way of ensuring the finer points of the Framework are responsive to needs of businesses both small and large, and that minor amendments to the administrative process will not require legislative change.
35. In its submission to the Department on the Exposure Draft of the rules, Optus noted that the Government should be mindful of scope creep, in that certain elements of the circulated draft rules went beyond the aim of reducing the payment times of small businesses.
36. For example, the rules governing the structure of reports stated that reporting entities would have to include the percentage of their vendors were small businesses, which Optus considers to be sensitive information.
37. Optus draws this to the Committee’s attention, given that a significant proportion of the Framework’s operations will be underpinned by the rules, and not this legislation.

OTHER MATTERS

Use of the small business lookup tool

38. Optus is pleased that the Department has continued progress on the Payment Times Reporting Small Business Identification Tool, to ensure easier identification of small businesses under the Framework.
39. We appreciate the Department seeking our feedback on the tool through recent consultation meetings, noting that other, more burdensome measures had previously been flagged as potential methods of identifying the small business vendors of reporting entities.
40. Optus reiterates that the effectiveness and accessibility of the small business lookup tool is a critical component for ensuring ease of compliance with the framework.
41. Larger businesses captured by the Framework must be able to rely on the accuracy of the information contained within the lookup tool. Any issues or mistakes on the part of the tool should be factored in by any follow-up by the regulator.

Commencement date

42. Optus believes that the timeframe for commencement of the Act, that is 1 January 2021, is unreasonably short.

43. Given that the Government will be bringing the Framework into place approximately two years after it originally flagged its intention, we do not feel it is unreasonable the commencement to take effect from 1 July 2021.
44. There is a significant level of administrative preparation which will need to be carried out and this will need to be carried out by industry in a period of less than five months, and this is on the assumption that the Government can guarantee passage of the legislation in the August 2020 sittings.
45. As yet, industry does not have a finalised copy of the legislation as passed by both Houses, nor does it have a copy of the finalised rules as signed by the Minister.
46. As we noted previously, we have been pleased with the progress of the Payment Times Reporting Small Business Identification Tool, but we also feel that it would be premature to expect the Act to take effect in less than five months' time, without a finalised product to help underpin the success of the Framework.
47. We feel it would be highly beneficial for the both the Department and the new regulator to have this additional time to aid in their preparation, to ensure that they are adequately resourced and prepared for the Framework's commencement.

Impact on Commonwealth procurement bidding

48. Optus notes that this legislation is the culmination of a policy announcement made by the Prime Minister in November 2018 when he was addressing the Business Council of Australia.
49. We also note that during this same speech, the Prime Minister indicated that that companies who fail to meet satisfactory payment times in line with the Framework may be prevented from bidding for Commonwealth contracts.
50. Optus submits that the Framework must be given an appropriate amount of time to be implemented and analysed. This can allow for any teething problems in the Framework to be fine-tuned – and for companies to adapt internal processes – prior to restrictions on the ability to bid for procurement contracts are utilised.
51. Optus recommends that Government does not take an overly proscriptive approach towards organisations who wish to bid for Commonwealth contracts. For example, we suggest that a company which has acted in good faith and paid the overwhelming majority of its small business vendors within the 20-day timeframe should not be prohibited from Commonwealth procurement opportunities, if a very small number of vendors are not paid on time. Such a proposal fails to appreciate that even the most effective administrative processes are occasionally prone to error.

Transparency

52. Optus would also like to draw the Committee to a potential double standard, contained in section 56 of the Bill. Whilst the Bill outlines countless reporting requirements of businesses captured by the Framework, the new regulator will only need to submit an annual report which includes information “on the operation of this Act during the period.”
53. Optus trusts that the report submitted by the regulator will contain similar performance measures as required by the Bill the Framework's rules; furthermore, that the regulator will seek to be as transparent as it will require reporting entities to be.

CONCLUSION

54. Optus is pleased to work with our small business partners around the country. We offer our support for the principles and intent of the Framework, to ensure small businesses have greater access to cashflow and can play their vital role in the Australian economy.
55. However, there are some notable opportunities to improve the legislation, as we have outlined above. We would welcome any amendment or clarification during the second reading stage which would address these matters.

(ENDS)