22 June 2020

Standing Committee on Education and Employment
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Email: eec.sen@aph.gov.au

Dear Madam/Sir

PAYMENT TIMES REPORTING BILL 2020
PAYMENT TIMES REPORTING (CONSEQUENTIAL AMENDMENTS) BILL 2020

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 Payment Times Reporting Bill 2020 ("the Bill") and Payment Times Reporting (Consequential Amendments) Bill 2020 and the associated explanatory memorandum ("EM").

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 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.

Our major suggested improvements to the Bill are:

- The Bill be amended to specify how to identify small business and who the regulator will be. These key concepts should be contained in the legislation.

  Our submission (attached) to the Department of Industry, Science, Energy and Resources on the proposed rules, discusses how the definition of small business could be simplified to reduce the cost of this measure to both business and government whilst also alleviating the need for the law to be amended to allow the Commissioner of Taxation to transmit sensitive tax information about small businesses to the payment times reporting regulator.

- The definition of a reporting entity be amended. Section 7 of the Bill defines a reporting entity by reference to its 'total income'. Section 5 of the Bill then defines total income by reference to section 3C of the Taxation Administration Act (TAA). However, that section does not define total income, and says that any undefined term is to be sourced from the Income Tax Assessment Act (ITAA). Paragraph 3.29 of the Explanatory Memorandum to section 3C TAA states "'Total income' is not defined in the tax law; it is based on accounting concepts, and refers to gross income." To provide clarity this definition should be amended to define total income by reference to accounting concepts. Such an amendment would require other amendments in the Bill, such as references to financial years rather than income years (which is a tax concept rather than a financial reporting concept).

Making this change has the following advantages:

- It provides greater consistency in how the bill is drafted. Currently, the Bill draws on both financial reporting concepts and tax law. For example, tax law is used to define 'total income' but the Corporations Act is used to define a 'member' of a group.
- Payment times reporting will be a sub part of financial reporting, thus the use of accounting definitions will be consistent for other financial reporting.
- There will be no need to link payment times reporting to the tax system and for businesses to obtain tax advice to implement this system which may reduce compliance costs.
- Using a definition that uses financial reporting concepts will make information available more quickly as financial statements are typically prepared well before tax returns.

- The Bill be amended to reduce the potential penalties for non-compliance.

The Bill 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 15)
- False or misleading report in a material particular – 350 units for an individual, 0.6% of total income for a corporation (section 16)
- Failure to keep records 200 units for an individual, 0.2% of total income for a corporation (section 29)
- Failure to comply with audit notice - 60 units for an individual, 300 units for a corporation (sub-section 30(7))
- Failure to assist auditor - 200 units for an individual, 0.2% of total income for a corporation (sub-section 30(8))

It is unusual for penalties to be calculated by reference to total income. Most legislation refers to 5 times the rate of an individual for a corporation. Paragraph 76 of the EM states that "The reason for this modification is to provide a sliding scale of penalty amounts to ensure that penalties retain a deterrent effect for the very large entities which are covered by this Act. The penalty should be large enough to have a deterrent effect on businesses and not simply be viewed as a "cost of doing business". There are a number of precedents in other Commonwealth legislation that apply multiple of gain penalties to certain contraventions of these Acts, including in relation to certain cartel and corporate and financial sector misconduct (see for example, subsection 1317G(4) of the Corporations Act 2001, and subsection 12GBCA(2) of the Australian Securities and Investments Commission Act 2001)."

Unlike the proposed Bill, both subsection 1317G(4) of the Corporations Act 2001 and subsection 12GBCA(2) of the Australian Securities and Investments Commission Act 2001 have a cap. We recommend that the Committee consider a similar approach.

The penalties imposed by the exposure draft are significantly higher than other regulatory 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 ($1,050) for each 28-day period (or part thereof) that the return or statement is late, up to a maximum of 25 penalty units ($5,250) 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 Bill, being 28 days late would incur a penalty of 1,680 penalty units or $352,800 (per entity).

A cap and the ability for the regulator to be given an express general penalty remission power is particularly important for the penalty for failure to report. 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 is 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 15 may lead to excessive, disproportionate and unnecessarily punitive penalties.

- The start date for the law be delayed. With the uncertainty about what is a small business and the technology required to determine it, the proposed start date of 1 January 2021 should be delayed. The 18-month grace period for enforcement is appreciated but a later start date is also needed.
- The Bill be amended to withdraw the requirement for the board of directors of a company to approve every report before lodgement. We believe this is unnecessary, costly and time consuming. 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 the entity they govern.
- The objects of the law be clarified. We note that the Australian Small Business and Family Enterprise Ombudsman has recommended the legislating of 30-day payment terms for small business. While we understand the intention of this recommendation, we currently do not support this approach. Rather, we recommend enacting this Bill to improve payment times. One consideration could be amending ‘Objects of the Act’ (section 3) to specifically state that the objective of law is create incentives for reporting entities to improve their payment times to 30 days or less.

If you have any questions about this submission, please contact either Susan Franks (CA ANZ) [redacted] or Gavan Ord (CPA Australia) at [redacted].

Yours sincerely

Simon Grant FCA
Group Executive - Advocacy, Professional Standing and International Development
Chartered Accountants Australia and New Zealand

Dr Gary Pflugrath CPA
Executive General Manager - Policy and Advocacy
CPA Australia

Appendix

28 May 2020

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

Dear Madam/Sir

Payment Times Reporting Rules – exposure draft and consultation paper

As the representatives of over 200,000 professional accountants in Australia, Chartered Accountants Australia and New Zealand (CA ANZ) and CPA Australia (the "major accounting bodies") appreciate the opportunity to provide feedback on the payment times reporting rules exposure draft and associated consultation paper. Our comments focus on the definition of small business.

The definition of small business in the draft Rule is any business with an annual turnover of less than $10 million (annual turnover being defined by reference to the Income Tax Assessment Act (ITAA)) AND is described as a small business in the Payment Times Small Business Identification Tool.

Section 328-120 of the ITAA defines annual turnover as total ordinary income derived in the course of carrying on business but excludes non-assessable non-exempt income and ordinary income the entity derives from sales of retail fuel. It also includes potential adjustments for transactions between associates and part year adjustments. The Payment Time Small Business Identification Tool, which large businesses will be required to use, is still being developed by the Department and has not been exposed to public consultation and information about its potential operation is scant in the consultation paper.

The major accounting bodies remain firmly of the view that key legislative concepts, such as the definition of small business, should be contained in legislation not rules.

The major accounting bodies recommend that the definition of small business be changed, from one that depends on tax concepts and a payment times small business identification tool, to an expenditure threshold. An expenditure threshold would require a large business to report all invoices for a supplier from which they procure less than $X million of goods and services annually. In this way the expenditure threshold acts as a proxy for whether a supplier is a small business, without having to go through a verification process.

CHARTERED ACCOUNTANTS™
AUSTRALIA + NEW ZEALAND

Chartered Accountants Australia and New Zealand
33 Erskine Street, Sydney, NSW 2000

W: charteredaccountantsanz.com
ABN 50 084 642 571

CPA AUSTRALIA

CPA Australia
Level 20, 28 Freshwater Place, Southbank Victoria 3006

W: cpaaustralia.com.au
ABN 64 008 392 452

The use of an expenditure threshold as a proxy for small business offers a simple, effective way to assist business use existing accounting systems to identify and report, and will cover most small businesses (provided that an appropriately high threshold is set), and potentially some medium sized 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).

This will:

- Reduce the compliance costs for business, which the regulatory impact statement in the explanatory memorandum Payment Times Reporting Bill 2020 and Payment Times Reporting (Consequential Amendments) Bill 2020 notes "will increase compliance costs for reporting entities by an average of **$22.5 million per year,** on an annualised basis". Our members have advised us that it is common practice for them to analyse payment times by expenditure thresholds and that this is done using existing accounting software packages.
- Substantially reduce the need to provide **$10 million** of government funding over four years from 2019-20 (including $3.4 million in capital funding) for the Payment Times Reporting Framework, by eliminating the need to establish and maintain a Small Business Identification Tool.
- alleviate the need to change the law to allow the Australian Taxation Office to exchange data about small business with the Payment Times Reporting Regulator.
- remove the need to have mechanisms in place for businesses to remove themselves if they do not want to be identified as small.

Additionally, greater clarity around what is intended by rule 9(d) would be beneficial. Rule 9(d) states that "any small business invoice that is not paid under a trade credit arrangement is to be disregarded". This could be done in the explanatory statement to the rules through examples of the types of invoices or arrangements the Minister intends should be disregarded from payment times reporting.

If you have any questions about this submission, please contact either Susan Franks (CA ANZ) [redacted], or Gavan Ord (CPA Australia) at [redacted].

Yours sincerely

Simon Grant FCA	**Dr Gary Pflugrath CPA**
Group Executive - Advocacy, Professional Standing and International Development	Executive General Manager - Policy and Advocacy
Chartered Accountants Australia and New Zealand	**CPA Australia**