1 March 2023

The Hon Dr Craig Emerson
Independent Reviewer, Payment Times Reporting Act Review
Small and Family Business Division
The Treasury
Langton Crescent
PARKES ACT 2600

via email: *PaymentTimesReview@treasury.gov.au*

Dear Dr Emerson,

Improving the transparency and timeliness of payments to small and family businesses

The statutory review of the operation of the *Payment Times Reporting Act 2020* and the effectiveness of regulatory settings is important and timely. Cash flow is a critical health indicator for small and family businesses and reasonable payment times are central to maintaining cash flow. As small businesses struggle with the compounding challenges of accelerating inflation, increasing costs of borrowing, rising energy prices, higher rents, and acute shortages of talent and skills, policy action to improve payment times is vital.

The problem of big businesses not paying small business suppliers in a timely way is longstanding and arises from the significant power imbalance between the two parties. Further, the capacity of large businesses radically to improve their small business payment performance was demonstrated during the COVID-19 pandemic, when some large mining companies reduced their payment times to 14 days or seven days.[1]

While the Payment Times Reporting Register has revealed a consistently underwhelming performance by large businesses, this has not shifted behaviour. Accordingly, we recommend that the Australian Government:

1. improve the transparency and accessibility of the Payment Times Reporting Scheme and Register to better promote exemplars, pressure poor performers and inform the decisions of small businesses, customers and investors
2. further develop the technology platform of the Register to support improved visibility and commercial utilisation with application programming interface (API) functionality so reported data can be used for comparison tools (e.g., Apps, credit reporting agencies) to complement invoicing tools (including eInvoicing) and for accounting software to enable payment performance to be considered by small businesses considering being a supplier and on what terms
3. develop, implement and enforce a mandatory code of conduct to be administered by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), allowing for both alternative dispute resolution and the capacity for ASBFEO to refer cases to the Australian Competition and Consumer Commission (ACCC) with explanations required for non-action

[1] See for example: AngloAmerican, *Anglo American provides extensive COVID-19 support to employees and host communities where it's most needed,* press release, 6 April 2020; BHP, *Seven-day payments for small local and indigenous businesses,* media release, 9 June 2021.

4. clearly define the starting point of the payment period as 'invoice successfully transmitted' by the small business to avoid hidden processing delays by the large business customer
5. The government should empower the ACCC to:
   a. Apply penalties to outlier entities that significantly delay payments, with the penalty threshold initially set at an accommodating level and then gradually reducing each year to motivate continual improvement
   b. Investigate (or consider via referral) serial or recurrent late payments under an 'unfair business practice' regime that would take account of any legitimate business justification for the conduct.
6. draw on an improved Payment Times Reporting Register when:
   a. assessing the suitability of large businesses for Commonwealth procurement opportunities
   b. enforcing the existing requirement on businesses with Commonwealth government contracts valued over $4 million to pay their small business suppliers within 20 days.

Evidence from the Payment Times Reporting Register

The Payment Times Reporting Regulator released new data on the payment performance of more than 7,000 big businesses (many with an annual turnover of more than $100 million) on 1 February 2023. Analysis by the ASBFEO revealed that there has been virtually no improvement by big businesses over the past six months and that their payment performance falls predominantly in the range of pedestrian to seriously deficient. Our analysis showed that:

- 24% of big business take more than 120 days to pay their small business suppliers
- 9% take between 61 and 90 days to pay
- 36% take between 31 and 60 days to pay
- 18% take between 21 and 30 days to pay
- 13% pay their bills in fewer than 20 days.

Large businesses operating in manufacturing, construction and retail trade sectors recorded the worst performance in paying their small business suppliers.

- Only 15% of manufacturing businesses paid their small business suppliers within 30 days.
- Only 18% of big construction businesses paid small business within 30 days.
- Only 24% of big businesses in retail trade paid small businesses within 30 days.

The best performers were big businesses operating in public administration and safety, but it was still only just over half (51%) of small business invoices paid within 30 days. Further, reporting to date by large businesses through the register indicates that the problem of poor payment performance persists over time and extends across industries (Appendix 1).

Insights from the ASBFEO assistance function

The ASBFEO, through our assistance function, receives approximately 7,000 requests for assistance each year. In the December quarter 2022, approximately 40% of requests for assistance related to payment times (including payments from one small business to another). Payment disputes can also manifest as contractual disagreements over the standard of the final product or service, as well as disputes between franchisors and franchisees (for example, a franchisee seeking to have a deposit refunded).

The ASBFEO has also observed an increase in the number of disputes in which independent contractors are seeking payment for services provided to other businesses. Similarly, a key problem arising from disputes involving digital platforms includes non-payment of work done or bonuses.

Recommendations

1. **The Australian Government should make the Payment Times Reporting Scheme and Register more simple, transparent and consistent to ensure information is clear, accessible and highlights both exemplars and poor performers.**

There is scope to improve several aspects of the Payment Times Reporting Scheme and Register. For instance, the existing presentation of reported information includes businesses that report without having a small business customer, business names that are inconsistent with the Australian Business Register and entities reporting negative payment times. The fundamental data structure has also changed over the different reporting periods. As the register now includes original and revised data, it is becoming increasingly cluttered. These discrepancies result in challenges for users of the scheme to draw out the data critical to their business and masks the performance of reporting entities. Transparency of these data is key to driving better payment performance. For example, poor-performing entities may face reputational damage and forgo suppliers, investors, joint-venture partners or customers, while the best-performing entities can be acknowledged as industry leaders and exemplars of good environmental, social and governance practice.

Further, to support the extraction of critical data, we suggest the scheme consider improving the filter capabilities to effectively compare payment performance. For example, inclusion of an indicator on whether an invoice was paid on within the agreed payment terms.

2. **The government should support further development of the technology platform of the Register to support improved visibility and commercial utilisation with available application programming interface (API) functionality to enable broader use of payment performance data.**

The effectiveness of the Payment Time Reporting Register will be greatly enhanced by greater visibility and utilisation of data. The ready capacity to draw out data to populate payment reporting tools will see the Register function as a more effective performance improvement catalyst and as a valuable resource for the small businesses it is intended to assist in their commercial dealings with bigger business counterparties.

Just as occurs in the UK, an API would enable the development of a 'Good Business Pays' App or comparison portal that could be viewed by small business suppliers and consumers would assist decision-making in terms of where to direct commercial dealings and on what terms. A consumer could direct expenditure to better-performing payers in a market segment. Exemplar firms would be more readily identifiable and recognisable for the leadership they are displaying as an example to others.

A small business may adjust supplier pricing depending on the timeliness of payment performance. Just as credit reporting bureaus seek to inform businesses about the risk profile of potential counterparties and considerations about terms, an API would enable similar consideration of likely payment performance. This type of application could be enabled as an added feature to accounting software and complement invoicing tools (in particular eInvoicing) as potentially another use benefit *'powered by the Payment Times Reporting Register'.*

3. **The government should develop, implement and enforce a mandatory code of conduct for large businesses that allows for dispute resolution and 'super-complainant' referral by the ASBFEO.**

To drive improvements in payment performance amongst Australia's big businesses, we suggest the government, in collaboration with relevant stakeholders, develop and implement a mandatory code of conduct (the code) similar to the Business Council of Australia's (BCA) voluntary Australian supplier payment code. This could operate like the Food and Grocery Code and Dairy Code, whereby once signatories enter into the code they are bound by its terms and subject to a range of obligations and alternative dispute resolution that includes arbitration. The code should be designed to allow for an appropriate dispute resolution agency, such as the ASBFEO, to oversee the dispute resolution pathways and report on sector behaviours.

We also recommend that the government implement a 'super-complainant' mechanism that would allow the ASBFEO and other credible dispute-resolution agencies to refer cases to the ACCC for guaranteed investigation and enforcement action. Where the ACCC declines to investigate a case or enforce an outcome referred by a super-complainant, it could be required to provide an explanation for doing so. While some stakeholders have highlighted the potential for the ASBFEO to be empowered and resourced to operate as a regulator, the ACCC is better placed to ensure compliance with the law through its existing investigative powers and regulatory authority.

4. **The government should clearly define the starting point of the payment period as 'invoice successfully transmitted' by the small business to avoid hidden processing delays by the large business customer.**

We are concerned that big businesses can employ ostensibly reasonable practices to delay the 'acceptance' of invoices. These include:

- only processing invoices at the end of the month
- requiring that invoices be sent at a particular time of the month
- insisting that invoices be provided in specific formats or through outmoded technology (such as via facsimile)
- questioning the status of delivery of the product or service
- challenging the value of the labour required to perform the good or service.

The government should consider how enterprise resource planning systems, such as eInvoicing, can help standardise and expedite the receipt of invoices from small business to large businesses, and promote such systems on this basis.

5. The government should empower the ACCC to:

   a. Apply penalties to outlier entities that significantly delay payments, with the penalty threshold initially set at an accommodating level and then gradually reducing each year to motivate continual improvement

   b. Investigate (or consider via referral) serial or recurrent late payments under an 'unfair business practice' regime that would take account of any legitimate business justification for the conduct.

While generating more transparent, relevant and accessible data through a reformed payments register can be expected to encourage better performance by big businesses overall, some entities will still have a strong commercial incentive to maximise their own cash flow at the expense of their small business suppliers.

We suggest that the government empower the ACCC to require large businesses who are exceeding a late payment threshold to pay a daily penalty to the unpaid small business supplier, equal to the unpaid amount multiplied by the days overdue multiplied by the general interest charge daily rate.

The lateness threshold could be initially set at an accommodating level, both to give reporting entities time to adjust to the new compliance regime, as well as to allow the ACCC to account for and advise of any valid differences in acceptable payment times between industries. The threshold could be gradually reduced each year to motivate continual improvement and prevent persistent outliers from regarding the penalty as a stable cost of being a bad business partner.

In addition, enforcement action for serial or recurrent late payers might be investigated by the ACCC (or considered via referral) under an 'unfair business practices' regime that would take account of any legitimate business justification for the conduct. Unfair business practices lie within the gap in the law where the regulator has been unable to establish unconscionable conduct and the court finding unfair behaviour, as in the case of ACCC v Medibank.[2]

High Court Justice Gageler noted in ASIC v Kobelt (2019) that it is difficult to apply the concept of unconscionable conduct because it must be 'conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience.'[3]

6. The government should draw on an improved Payment Times Reporting Register when:

   a. assessing the suitability of large businesses for Commonwealth procurement opportunities

   b. enforcing the existing requirement on businesses with Commonwealth government contracts valued over $4 million to pay their small business suppliers within 20 days.

The Australian Government introduced the Payment Times Procurement Connected Policy in October 2021. Under the policy, large businesses (with annual income more than $100 million) that are awarded government contracts worth more than $4 million are required to pay their new

[2] Australian Competition & Consumer Commission, *Full Federal Court dismisses ACCC appeal against Medibank,* media release, 20 December 2018.

[3] High Court of Australia*, Australian Securities and Investment Commission v Kobelt [2019] HCA 18: Judgement,* p. 31.

subcontractors (up to $1 million) within 20 calendar days. Late payments of invoices in scope incur interest penalties.

A more efficient and effective Payment Times Reporting Register will help procuring officials incorporate payment performance into their value-for-money contracting decisions, as well as support their capability to track the performance of existing suppliers.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact Dr Matt Steen on 02 5114 6142 or *matt.steen@asbfeo.gov.au.*

Yours sincerely

The Hon Bruce Billson

Australian Small Business and Family Enterprise Ombudsman

Appendix 1: Percentage of entities paying 80% of their invoices to small businesses in 30 days or less, by industry

	Entities reporting for the 1st time	Entities reporting for the 2nd time	Entities reporting for the 3rd time
Manufacturing	14%	14%	15%
Construction	20%	23%	18%
Retail Trade	25%	24%	24%
Mining	21%	25%	29%
Transport, Postal and Warehousing	27%	30%	29%
Other Services	33%	36%	31%
Agriculture, Forestry and Fishing	24%	27%	31%
Arts And Recreation Services	34%	40%	31%
Wholesale Trade	29%	31%	32%
Education And Training	49%	47%	33%
Professional, Scientific and Technical Services	33%	33%	33%
Rental, Hiring and Real Estate Services	31%	39%	34%
Financial And Insurance Services	37%	38%	38%
Electricity, Gas, Water and Waste Services	44%	43%	41%
Health Care and Social Assistance	38%	38%	43%
Accommodation and Food Services	41%	42%	44%
Information Media and Telecommunications	35%	40%	44%
Administrative And Support Services	48%	48%	46%
Public Administration and Safety	57%	54%	51%
Total	**29%**	**31%**	**31%**

Source: ASBFEO analysis of Payment Times Reporting Register data, February 2023.