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29 April 2024

Government Response and Reform Unit
Small and Family Business Division
Treasury
Langton Cres
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By email: paymenttimesreformSMB@treasury.gov.au

RE: *Payment Times Reporting Act 2020* primary legislation amendments

The Australian Industry Group (Ai Group) welcomes the opportunity to provide feedback on the proposed legislative amendments to the *Payment Times Reporting Act 2020*.

Ai Group is a peak national employer association representing and connecting thousands of businesses in a variety of industries and sectors across Australia. Our membership and affiliates include private sector employers large and small from more than 60,000 businesses employing over 1 million staff.

The Payment Times Reporting Scheme (PTRS) increases transparency around the payment performance of large businesses to small businesses. Its objectives are two-fold: to provide small businesses with information when deciding on potential customers, and to drive cultural change to improve payment times.

The Statutory Review of the *Payment Times Reporting Act 2020*, completed by The Hon Dr Craig Emerson in June last year, identified several areas where the PTRS was functioning poorly with respect to the objectives of the Act¹. These include onerous reporting requirements for reporting entities, unwieldy legislative requirements facing the Regulator, and a “confusing, clunky and cluttered dataset” that has seen very low engagement by small businesses. Due to these identified deficiencies, the PTRS was found to have had only a marginal impact on payment times across the first two years of its operation.

The Statutory Review of the Act made thirteen recommendations, of which the Government response indicated “Agreement” with twelve and “In Principle Agreement” with the thirteenth².

Ai Group commends the Government for incorporating several of these suggested reforms in its proposed amendments to the Act. These include amendments to simplify which entities must provide reports; shifting requirements for report content from the Act and into the Rules (with an intention of simplifying and focusing these requirements); removing unnecessary administrative obligations placed upon the Regulator; and the decision to not mandate maximum payment times in either the Act or its Rules. The latter, which was recommended by

¹ Treasury, Statutory Review of the Payment Times Reporting Act 2020, June 2023.

² Treasury, *Government response to the Statutory Review of the Payments Times Reporting Act 2020*, December 2023.



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Ai Group³, is particularly important to avoid introducing perverse outcomes for small businesses from the PTRS.

However, Ai Group has several concerns regarding some of the proposed changes to the Act. The proposed amendments introduce a new and unnecessary Ministerial power; fail to properly recognise industry differences in payments practices; provide insufficient detail regarding safeguards to protected reporting entity information; and introduce unwarranted application fees.

These features result in an unbalanced approach to regulation. The proposed changes to the Act overly focus on targeting the behaviour of reporting entities, without considering changes needed elsewhere across the ecosystem to improve payment times practices.

It is also premature to introduce new discretionary ministerial powers when broader reforms are underway. The Statutory Review identified additional changes to the PTRS' function which will improve its performance, which the Government agreed to implement. These reforms should be implemented, and given time to work, before any new ministerial powers are contemplated.

Ai Group strongly supports the intent of achieving quicker payment times, which requires improving payments practices across all players in our complex and interlinked supply chains. A more balanced approach to regulation – as outlined in the detailed responses below – will help ensure that reforms genuinely improve outcomes for small businesses.

1. Ministerial power to issue slow payer directives

Ai Group has particular concerns regarding the need for a discretionary Ministerial power to designate some reporting entities as “slow payers of small businesses”. PTRS register data is already published on the public record. The Minister and/or Regulator may already point to reporting entities at both the bottom and top of the register ranking without additional legislative powers.

Ai Group notes that other similar, reputation-based regulatory schemes – such as the gender pay gap dashboards produced by the Women’s Gender Equality Agency (WGEA) – are not accompanied by ministerial powers to name those reporting entities which fall at the bottom of the ranking. There is no reason why payment times warrants this directive power where other domains of similar regulation do not.

Second, Ai Group argues it is premature to introduce this additional Ministerial power while ongoing reforms to the PTRS are in train. The Statutory Review found, and the Government agreed, that the current format of the PTRS register is not fit for purpose. The Government has committed to improving the usability of the register, and supporting the Regulator to establish research and outreach functions⁴, to ensure that the best and worst payers are publicly reported upon in an effective manner.

The identified and committed improvements to register usability and Regulator capability

³ Australian Industry Group, *Correspondence to Treasury Regarding the statutory Review of the Payment Times Reporting Act 2020*, 1 March 2023, https://treasury.gov.au/sites/default/files/2023-08/c2023-360147_aig.pdf

⁴ Government response, recommendations 5.1 and 8.2



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should first be implemented, then given time to work, before any additional ministerial powers are considered.

Third, Ai Group has concerns regarding the excessive scope of this discretionary Ministerial power. The proposed power is defined extremely broadly, giving the Minister authority to apply the direction to any reporting entity that falls in the bottom fifth of the PTRS register for two sequential reporting periods.

Ai Group estimates that approximately 1500 reporting entities might satisfy this criterion during the most recent reporting period⁵. As the intent of such a direction is to bring reputational pressure to bear on only the poorest-performing entities, further criteria are provided to determine which subset of these entities warrant a Ministerial direction being made. Yet these proposed additional criteria – including the entity’s history of compliance with the Act, its payments practices, the costs of compliance and any extenuating circumstances – are drawn in an extremely broad manner and highly subjective in their interpretation.

This failure to specifically define poor performance provides too much discretion to the Minister, and gives business very poor guidance as to which specific payments practices are required to avoid the designation.

2. Definition of and thresholds for “slow payment” rankings across industries

Ai Group contends it is highly difficult to determine any set of ranking rules which provide a fair yardstick for comparing payment times performance across industries.

As noted in Ai Group’s submission to the Statutory Review, payment times vary widely between industries due to differences in commercial structure. Generally speaking, standard payment times are longer in industries with greater project interdependencies such as construction, manufacturing and mining; and shorter in more ‘transactional’ industries such as retail and consumer services. What qualifies as a “fast” payment time in one industry may be average for another, and slow in other industries still.

This has implications for any attempt to construct a ranking rule that defines “slow payments”. The proposed ranking of the bottom fifth of reporting entities is likely to primarily identify those in project-interdependent industries with longer-than-average payment times, rather than identify poor performers overall. Similarly, poorer performers in transactional industries are unlikely to fall into the bottom fifth of the overall ranking. It is highly likely that any aggregated ranking approach will result in selection bias towards certain industries, rather than genuinely identifying entities with poor payment times performance.

Attempts to construct industry-specific ranking rules – which Ai Group understands is being contemplated – may suffer the same problem. Even within an industry there can be significant

⁵ The number of reporting entities, identified by unique ACNs filing original reports, which fell into the bottom fifth of the all-industry ranking for “share of invoices paid in 30 days or less” in both the H2 2022 and H1 2023 reporting periods. Ai Group understands that alternate definitions of the ranking rule, including industry-specific rankings, are being contemplated. In the absence of further detail being provided during the consultation period, we consider the ~1500 entities that currently meet the criteria on an all-industry basis to be a reasonable estimate of the population of reporting entities likely to be subject to the new Ministerial power.

variations in payments practices at the subindustry level. An example is construction, where payments practices in major infrastructure projects differ markedly from those in residential house building. Similar problems would afflict other 'composite' industry divisions, such as Wholesale Trade and Professional, Scientific and Technical Services, amongst others. Thus, industry-specific rankings are likely to suffer the same selection bias problems.

3. Sharing of protected information by the Regulator

Ai Group has concerns regarding the use and sharing of protected information between government agencies. The EM indicates an intention amend s.42 of the Act to provide for additional instances where the Regulator may disclose protected information to other Government agencies for the unrelated regulatory purposes of those agencies without the need for an enforcement action⁶. This is distinct from proposed amendments which allow sharing of information specifically associated with the Regulator's research and publication functions.

This proposed s.42 power is similar in nature to that in s.155AAA of the *Competition and Consumer Act 2010*, which governs how officials of the Australian Competition and Consumer Commission can disclose protected information to other agencies. However, s.155AAA also contains a range of provisions that proscribe the form of such disclosures to a limited set of circumstances and purposes and specifies a process for the approval of such disclosures⁷.

Ai Group has been advised that draft text for the proposed changes to s42 of the Act will not be available in time for review during this consultation period. In absence of draft legislation to review, we argue that proper controls on the sharing of protected information should be implemented. Information collected for the purposes of and under provisions contained in the Act should be reasonably expected to be used for and only for objectives related to the Act. In the absence of an enforcement action, sharing of protected information to other regulatory agencies should be made with reference to the provisions of the Acts which govern those specific regulatory domains.

Ai Group therefore argues that any protected information sharing provisions in the Act should, at a minimum, implement the same level of safeguards and limitations on inter-agency disclosure as seen in relevant comparable forms of legislation.

More broadly, the general sharing of protected information proposed risks the information security of reporting entities while offering no benefit for payment times reform. This amendment was not contemplated by either the Statutory Review nor the Government Response. Nor does it have any identifiable connection with the objectives of the Act, or the objectives of the PTRS writ large. Its scope should be reduced to introduce proper and proportionate controls on the disclosure of protected information as seen in other similar legislation.

4. Application fees for regulator determinations

⁶ At s1.229 and s1.230.

⁷ Australian Competition and Consumer Commission, *ACCC guidelines—Use of section 155 powers July 2022*, <https://www.accc.gov.au/system/files/Guidelines-Use%20of%20section%20155%20powers.pdf>



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Ai Group expresses concern regarding an intent to charge application fees for Regulator determinations of whether an entity is required to report under the PTRS. Proposed changes regarding the handling of consolidated entities are likely to require a large number of businesses to obtain such determinations when the Act takes effect.

While regulator fees are sometimes charged in other areas, these are typically those where the regulator provides some form of service beyond core regulator functions to businesses (such as biosecurity assessment fees). As no such service is provided here, the costs of administering the PTRS should be supported from budgeted administrative costs.

A business acting in good faith should not be required to pay to receive a regulatory determination that they are not required to comply with a regulation.

Should you wish to discuss the matters raised in this submission, please feel free to contact Dr Jeffrey Wilson at jeffrey.wilson@aigroup.com.au

Sincerely yours,

A handwritten signature in blue ink that reads 'Innes Willox', with a horizontal line underneath.

Innes Willox
Chief Executive, Australian Industry Group