



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:CB1b280223

28 February 2023

Payment Times Reporting Act Review Secretariat
Small and Family Business Division
The Treasury
Langton Cres
Parkes ACT 2600

By email: PaymentTimesReview@treasury.gov.au

Dear Sir/Madam,

Statutory review of the *Payment Times Reporting Act 2020*

The Law Society of NSW appreciates the opportunity to comment on the issues raised in the review, to assist in assessing whether the regulatory settings are fit for purpose. The Law Society's Business Law Committee contributed to this submission.

Our comments are general in nature, rather than specific responses to the questions set out in the consultation paper '*Statutory Review of the Payment Times Reporting Act 2020*' (Consultation Paper).

General Comments

The issue of payment times for small business has been of concern to policy makers in Australia and elsewhere (notably in the United Kingdom and in the European Union (EU) including Ireland) for a number of years.

Collect more data and information before introducing changes

There appears to be limited, and likely insufficient, data available on:

- (i) the relative importance of payment times to small business when deciding to enter a supply contract with large business or a government enterprise, and
- (ii) the factors driving current and emerging trends in payment terms and practices.

It is important to collect detailed data to use as a basis for decision making to avoid unintended consequences, before introducing new measures on payment times. We suggest that it would also be helpful, before proceeding to mandate payment periods, to obtain more information and data on different markets and business sectors so that the impact of any new payment time rules can be properly assessed. For example, while business risk is inherent in all economic activity, agricultural production is particularly fraught with uncertainty due to its biological processes and exposure to weather conditions with a perishable product. Late payment may impact more negatively on the viability of the supplier without providing offsetting benefits.

The requirement to obtain sufficiently detailed information and data on the impact and reasons for late payment in different sectors is highlighted by the experience of the EU. The EU recognises a clear difference (and introduced different rules) between late payment times applicable generally,¹ and those applicable to the food and agriculture sectors,² and goes even further by distinguishing the grape and wine sector as having characteristics that warrant different payment time rules to those applicable to contracts concerning other food and agricultural products.³ Sufficient relevant information should be collected on, and consideration given to, the characteristics of different sectors and sub-sectors of the economy before introducing rules to ensure that they are appropriate in a particular sector.

Non-mandatory rules should be carefully considered

Before considering whether mandated maximum payment periods for the payment of small business invoices is useful, the experience in the EU (including Ireland) and the UK should be investigated and carefully considered. The EU Directive on late payment has been in force since 2013 and the experience, in particular of the UK (pre Brexit), Ireland and other common law jurisdictions in the EU should be investigated to compare their experiences with late payment rules.⁴ The European Commission has reported a number of issues on payment times rules that would likely be of parallel concern also in Australia, including:

Approximately half of all creditors do not exercise their rights to claim late payment interest, compensation and recovery costs as provided for by the Directive for fear of damaging their commercial relationships. The external evaluation also revealed that many SMEs continue to accept long payment terms imposed by larger companies for the same reason. This is an inherent aspect of business culture brought about by the different position of companies in the supply chain, their size and degree of dependency on each other, as well as other factors such as the market sector specificities.⁵

Non-mandatory mechanisms to address payment time issues should also be considered

Alternative non-mandatory mechanisms should also be considered to improve payment times and practices. We note that the Government has implemented several measures to sit alongside the current framework to support it, such as the Commonwealth procurement rules to help improve payment times for small businesses in the supply chain of Government contracts, and support for the uptake of eInvoicing.⁶ We suggest that consideration of the provision of further guidance, recommendations and/or codes of conduct together with information and education for small and large businesses, on the mechanisms available to them to resolve late payment issues would also assist. There may not be sufficient information or understanding, in particular by small businesses, of all the avenues available to address late payment times.

¹ [EU Directive 2011/7/EU on Combating Late Payment in Commercial Transactions.](#)

² [Directive \(EU\) 2019/633 of 17 April 2019](#) on unfair trading practices in business-to-business relationships in the agricultural and food supply chain; however, we note that some member states may not have the legislative unfair contract terms protections that exist in Australia, and which will be strengthened with the new provisions commencing on 10 November 2023 (Consultation Paper, 17).

³ Preamble paragraph (19) of Directive (EU) 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

⁴ For example, the [Late Payment in the Construction Sector Analytical Report of April](#) 2020 by the European Construction Sector Observatory.

⁵ See [COM\(2016\) 534 final, EU Commission Report on Implementation of Directive 2011/7/EU](#) on late payment in commercial transactions.

⁶ Consultation Paper, 16.

If you have any questions about this submission, please contact Liza Booth, Head of Commercial and Advisory Law Reform, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'CBanks', written in a cursive style.

Cassandra Banks
President