Q&A – PAYMENT TIMES FAILSAFE MECHANISM

What is the Government's Payment Times Reporting Scheme?

The legislation introduces a new Payment Times Reporting Scheme which requires approximately 3,000 large businesses and government enterprises with annual turnover of $100 million and above to publicly report bi-annually on their payment terms and practices for their small business suppliers.

The Bill creates a Payment Times Regulator to administer the scheme.

Why does the Government argue the transparency regime is enough?

The objective of the Scheme is to improve payment outcomes for small businesses by creating transparency around the payment practices of large business entities. The Government argues that by providing access to information on large business payment performance, small businesses will be able to make a more informed decision about their potential customers.

The Government argues that greater transparency on payment practices and performance will also create pressure for cultural change to improve payment times.

Does the Government's Bill require firms to improve their payment practices to small businesses?

No. The Bill does not mandate maximum payment times to small businesses, nor does it provide for genuine incentives, penalties or remedies on invoices that are paid late or with payment times greater than 30 days.

Why doesn't the bill go far enough?

The Payment Times Reporting Scheme is a transparency initiative to support self-regulation.

The efficacy of self-regulatory regimes is usually poor to questionable unless backed by a genuine threat of heavier-handed regulation. Currently there is no genuine incentive in the Bill for large firms to improve payment times.

The Government's position is not grounded in the reality that markets in Australia are concentrated, often with less than a handful of large firms dominating many markets. Nor does it reflect the power imbalance large firms have over small suppliers.

As the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) told the Senate Economics Committee, some large firms simply ignore bad publicity about their practices. In concentrated markets, small business suppliers can't 'shop around' when there are very limited buyers.

In any case, small businesses are rightly fearful of reprisals—even if this simply means no further contracted work—from large businesses due to the power imbalance between them.

In-principle the transparency regime should be given a limited time to demonstrate its efficacy; however, Labor believes that complementary ‘backup’ measures are necessary to ensure the Payment Times Reporting Scheme improves general payment times to small businesses.

The Government announced it would only give contracts to large businesses that pay their suppliers in 20 days – isn't that an incentive?

Many of the worst offenders are large businesses that do not get government contracts. Retail and food manufacturers, for example, will never compete for government procurement, and as such there is no incentive.

Further, the Government has a propensity for promising big and not delivering. The procurement-link payment policy is not in place and we have no guarantee it ever will be. Let’s get this right first time.

Why the focus on 30-day payment times in commentary/amendments?

Most witnesses at the Senate Committee hearing argued for mandated 30-day maximum payment times or clarification that the object of the Bill was to achieve payment times of 30 days or less.

30-days as a ‘maximum’ payment times is broadly agreed upon as the general upper bound of what acceptable payment times to small businesses are. The Business Council of Australia’s payment code also uses 30-days, however only a handful of large businesses have signed the BCA’s voluntary and unenforceable code.

These stakeholders referring to 30-day maximum payment times included (for mandated times) the Australian Small Business and Family Enterprise Ombudsman, Australian Trucking Association, the Institute of Public Accountants, Self-Employed Australia, and (for clarification of Bill’s intent) Chartered Practicing Accountants Australia and Chartered Accountants Australian & New Zealand.

What are Labor’s amendments? What is a failsafe mechanism?

Labor’s amendment would introduce a ‘failsafe mechanism’. The failsafe mechanism means that over the next few years if the Government’s scheme as designed does not broadly improve payment times to small businesses to 30 days or less, the failsafe mechanism is triggered.

The failsafe mechanism can be triggered after three years of the scheme operating and will allow the Regulator (created by the Government’s Bill) to force large businesses not paying small businesses on time to pay them within 30 days of face hefty fines.

The Payment Times Failsafe Mechanism is intended to provide an incentive for reporting entities to collectively improve their payment practices or run the risk of more stringent regulation.

What is the design of the failsafe mechanism? Can you give more detail?

The failsafe mechanism has the following features:

- The Regulator will be required to report to the Minister after each reporting period, with the reports tabled to both Houses of Parliament. This starts after the first 3 reporting periods (18 months) of the Scheme. The report includes data on the median and average times taken by all reporting entities to pay small business invoices.
- The payment times failsafe mechanism is triggered if, after the first 6 reporting periods of the Scheme (3 years), the representative time reported by all reporting entities to pay small business invoices for a reporting period is more than 30 days. The Regulator must report this fact to the Minister.
- Once the payment times failsafe mechanism has been triggered, the Regulator must declare any reporting entity that had a median payment time for small business invoices of more than 30 days for that reporting period to be a recalcitrant reporting entity.
- A recalcitrant reporting entity is required to pay all small business invoices within 30 days (for 2 years) and is liable to a civil penalty if it fails to do so. The rules may provide for exemptions from this requirement.

If effect, the "self-regulatory" incentive is that if within three years of the transparency scheme operating, large businesses are not generally paying small businesses in 30 days or less, then the firms not doing so will be mandated to do so. Firms with better payment practices are unlikely to increase their payment times.

What additional elements of the amendments are there?

Additional elements of the amendment to supplement the failsafe mechanism are:

- Amending the Objects Clause of the Bill to explicitly state payment times of less than 30 days are an expected outcome of the legislation;
- Remove the ability of firms to disguise long payment times (of 120+ days) as being around 60 days by replacing the '61 days and above' top threshold for reporting to '61-90 days', '91-120 days', and '121 days and above';
- Clarify that the audit powers of the Regulator in the legislation do not limit the existing powers of the Australian Small Business and Family Enterprise Ombudsman to command documents, and requires a formal response from the Regulator to payment time framework enforcement matters referred to is by the Ombudsman; and
- Define 'small business' and 'supply chain financing arrangements' in legislation, rather than leaving this to the Minister and delegated legislation.

Why don't you mandate 30-day payment terms across the board as a policy priority?

Some witnesses to the Senate Committee noted rare instances where particular industries or business relationships may have longer or staggered payment times that are reasonable and fair.

Some witnesses also noted that a blunt maximum 30-day payment term may incentivise large firms that currently pay well below 30 days to increase their payment times.

The failsafe mechanism addresses both concerns. To avoid the failsafe being triggered, all businesses have an incentive to lower their payment times in general or maintain existing rapid payment times.

If the failsafe is triggered, rare exemptions can be made for industries or businesses relationships where payment times above 30 days are reasonable.

Does the amendment address concerns about 'supply chain finance' or 'reverse factoring'?

Yes. The amendment creates a strong disincentive for using "reverse factoring" when coupled with long contracted payment times. It does not prevent 'legitimate' uses, such as when a large firm offers 30 day contracted payment times with supply chain financing offered for quicker payments.

Even leading proponents of supply chain financing such as Greensill have committed to phasing out their clients using payment times of greater than 30 days coupled with reverse factoring. They should welcome the failsafe mechanism as it would ensure other proponents match them.

Should the failsafe mechanism be triggered, the egregious use of reverse factoring would be penalised.

Why is 'median of the media times reported' in the amendment?

The reason "median of the median times reported" is the language used in the legislative text (as opposed to simply the median) is as a result of the data reported by reporting entities, as required under the Government's scheme design. These entities report payment times in brackets (e.g. under 20 days, 21-30 days, 31-60 days etc.)

Why not wait for a few years? Can these changes wait until after a review?

A statutory review – as recommended by the Government's Senate Committee members – is another excuse for the Government to delay real action on payment times and for big businesses to stymie reforms.

Small businesses need the certainty that the scheme will improve payment times, and if it doesn't, that the worst offenders are brought into line.

Is now the best time to be doing this? Will it put undue pressure on large companies struggling with the recession?

Cash flow and payment times have always been a key issue for small businesses, and integral to their survival. COVID-19 has made this issue even more important.

Unlike large businesses that can access bond markets or issue stock to equity markets, small businesses rely on on-time cash payments and expensive bank finance.

Getting large businesses to pay small businesses on time will help small businesses survival and growth, and also help money flow faster through the economy – helping growth for all Australians.