



Australian Government
The Treasury

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Payment times and practices

Government response to the Australian
Small Business and Family Enterprise
Ombudsman Inquiry
November 2017

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Foreword



I am pleased to release the Government's response to the Australian Small Business and Family Enterprise Ombudsman's Inquiry into Payment Times and Practices in Australia.

Cash flow is crucial to the prosperity and health of small businesses. Adverse payment terms between businesses can have a negative impact on competitiveness, increase the cost of doing business and place significant stress on owners. Adequate payment terms, on the other hand, can help businesses unlock greater opportunities for investment to grow their business and to pursue their aspirations.

Having run my own small business and waited at times for many months to be paid for work already completed, I understand how frustrating and how burdensome late payments can be.

Government is backing small business — the local job creators — helping them grow and invest by creating a framework to enable success.

The Government understands small business should not be used as a bank. That's why the Government pays its bills on time. Our latest Pay On-Time Survey showed that Commonwealth agencies paid 97 per cent of their invoices within 30 days.

I am pleased to announce that the Government will take an even greater leadership role in payment times by paying in 20 days, compared to the current policy and industry norm of 30 days. Our actions run against the trend of increasing payment times between businesses in a time when we are seeing technology working to speed up payment times and an increase in businesses adopting accounting software solutions. In addition, the Government is taking steps to promote greater transparency by substantially increasing the number of agencies that are required to report on payment performance. Although Commonwealth agencies are performing well, there is no room for complacency.

It is clear that most issues relating to payment times and practices occur between businesses. The Government's preference is to not add more regulation to address a problem unless it is absolutely necessary. Therefore the Government welcomes the Business Council of Australia's (BCA) industry-led "Australian Supplier Payment Code" initiative, which is a good first step by industry to acknowledge the seriousness of the problem and the need to improve supplier payment culture in Australia. The Government is willing to give industry the first opportunity to address the problem. However, the Government's support is not unconditional and I will be carefully monitoring the effectiveness of the BCA's Code and reserve the right to take stronger action should we see a lack of progress over time.

The Hon Michael McCormack MP
Minister for Small Business

Overview

On 12 April 2017 the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) released its final report from its inquiry into payment times and practices for Australian small business ('Inquiry'). The Inquiry made 10 recommendations to the Australian Government. Six of the recommendations seek to maximise governments' role as payment leaders, three of the recommendations seeks the Commonwealth Government's agreement to mandate payment times and practices into industry codes and to legislate business-to-business payment times and practices. The final recommendation asks for governments to encourage the adoption of technology solutions to assist business to streamline administrative tasks and facilitate payment practices.

This report is the Government's formal response to the Ombudsman's inquiry. In developing this report, the Government has engaged in more than 50 targeted meetings across a wide range of stakeholders in the community to discuss the Inquiry findings and recommendations. This includes meetings with small businesses, industry bodies and business associations, business advisers such as accountants and bookkeepers, large corporates, internationally and with Commonwealth and state departments and agencies. Much care has been taken in ensuring that the response balances the need for change against adding red tape into the business environment, which stifles growth, innovation and investment.

Government procurement

Recommendation 1:

The Australian Government to adopt a 15 business day payment time by July 2018. All levels of government to consider adopting.

The Government supports this recommendation with amendment

- The Government will mandate that by July 2019 all non-corporate Commonwealth entities (NCCEs) are to pay all invoices for contracts up to \$1 million within 20 calendar days (equivalent to 15 business days) on receipt of a correctly rendered invoice. This will capture approximately 95% of procurement contracts entered into by the Commonwealth, requiring invoices for these contracts to be paid in 20 calendar days or less. In addition, the payment of interest on late payment policy which applies to payments over 30 days for contracts up to \$1 million will be adjusted to 20 calendar days starting from July 2019 to complement the new payment policy.
- Calendar days have been supported as opposed to business days as recommended in the inquiry due to stakeholders indicating a strong preference for the less complex calendar day.
- The Government has agreed to reduce its payment times to demonstrate leadership and set an example of best in class payment policy to industry and to other levels of government with the intention of influencing payment practices economy-wide.
- A sufficient transition time has been built in to provide agencies time to adjust their internal business processes, acknowledging the Government is undergoing transformation of backend functions, transitioning to a shared services model. In keeping with the existing policy, agencies can choose to pay in under 30 days and do not need to wait until July 2019.
- The Government is a proud leader in terms of payment times and practices. The Australian Government Pay-on-Time Survey Performance Reports for 2014-15 and 2015-16 shows that material NCCEs are paying on average 97 per cent of contracts valued under \$1 million within 30 calendar days. In consultations conducted by the Department of the Treasury, stakeholders did not raise concerns regarding the Commonwealth's payment performance. Regardless, reducing payment terms to 20 calendar days will improve cash flow for Government tenderers and influence industry to put downward pressure on payment times.
- In addition, the Government is ensuring businesses are paid faster through encouraging greater usage of payment cards. The Government's Facilitating Supplier Payment through Payment Card Policy states that for eligible payments to suppliers valued below \$10,000, debit or credit cards are the preferred payment mechanism.¹ A number of Commonwealth agencies noted they paid significantly faster than 30 days. For example, the Department of Infrastructure and Regional Development paid most of its suppliers within 4 days and the Department of Industry, Innovation

1 Facilitating Supplier Payment through Payment Card Policy, Resource Management Guide No.416, November 2016, Australian Government, Department of Finance.

and Science paid most of their invoices within 14 days. Agencies also noted that in most instances they would agree to supplier requests for faster payment terms. This information showing better performance against the Government's payment benchmark is not captured by the current Australian Government Pay-on-Time Survey Performance Report which is addressed in the Government's response to recommendation 4 of the Inquiry.

Recommendation 2:

The Australian Government to require its head contractors to adopt the payment times and practices of the procurement through its supply chain. All levels of government to consider adopting.

The Government notes this recommendation

- Currently the Commonwealth Procurement Rules (CPRs) set out the basic rules that apply to entity procurement activities. The rules do not extend to the procurement or contracting practices of suppliers, and instead enable suppliers to organise their commercial arrangements as they see fit.
- In June 2017, the Joint Select Committee on Government Procurement released its report "Buying into our Future" (Committee Report). The report presents the findings of the Committee inquiry into the Commonwealth Procurement Framework, particularly the amended CPRs which came into effect on 1 March 2017. Recommendation 5 of the Committee Report relates to mandating contractual provisions throughout the supply chain.
- The Government response to the Committee Report was tabled in Parliament on 14 November 2017 and is available on the Department of Finance website.

Recommendation 3:

The Australian Government to extend its payment policies to all its agencies and entities. All levels of government to consider adopting.

The Government notes this recommendation

- The accountable authorities of NCCEs must govern their entities in a way that is not inconsistent with the policies of the Commonwealth while carrying out non-commercial, "core" government functions. The Australian Government payment policies, set out in RMG 416 (establishing processes promoting the use of payment cards for supplier payments below \$10,000) and 417 (the Supplier Pay On-Time or Pay Interest Policy), automatically apply to the 95 NCCEs which are legally part of the Commonwealth and subject to the *Public Governance, Performance and Accountability Act 2013 (PGPA Act)*. These entities account for the vast majority (around 98 per cent) of government spending.
- Other types of entities subject to the *PGPA Act* are Corporate Commonwealth entities (CCEs) and Commonwealth companies (companies). For operational reasons CCEs are legally separate from the Commonwealth. The separate legal identity reflects the more commercial focus of CCEs and companies that operate at "arm's length" from core government functions. As a result, although CCEs and companies are subject to the *PGPA Act*, fewer PGPA requirements are placed on CCEs and companies than on NCCEs.

- Whilst extensive consultation with a wide range of stakeholders did not suggest concerns with the Commonwealth's existing payment performance, the Government will write to heads of CCEs encouraging them to follow the leadership of the Government in supporting small businesses by promoting the prompt payment of invoices consistent with RMG 417 that automatically applies to NCCEs.

Recommendation 4:

The Australian Government to publish its payment times and policies, and for all its agencies and entities, with performance against best practice benchmarks. All levels of government to consider adopting.

The Government supports this recommendation with amendments

- Since 2002, the Commonwealth has measured the success of its payment policies by surveying its agencies. The current policy, the Supplier Pay On-Time or Pay Interest Policy, applies to NCCEs under the *PGPA Act*.
- Since the survey commenced in 2002, there has been significant improvement in the proportion of small business invoices paid within 30 days. In 2002, 82 per cent of invoices were paid on time. By 2013-14, Government agencies paid more than 97 per cent of small business invoices on time. The current Supplier Pay On-Time or Pay Interest Policy, amended in July 2014, includes all business contracts valued up to \$1 million. While it is not possible to make a like-for-like comparison with previous surveys conducted, the most recent survey conducted for the 2014-15 and 2015-16 financial years found that on average, more than 97 per cent of the invoices received were paid within 30 days.
- However, the Government recognises that the current survey is voluntary, with 32 out of 35 agencies responding to the most recent survey. To continue the Government's payment times leadership it will increase the transparency and accountability of agencies in complying with the Supplier Pay On-Time or Pay Interest Policy by mandating that all NCCEs report payment performance against the stated policy, which will include a breakdown on the proportion of invoices paid within 20 and 30 days. While all agencies will be invited and encouraged to participate in the next survey, mandatory reporting will begin for the 2018-19 financial year. As agencies transition to the start of the new payment time of 20 days (on July 2019), it is anticipated that payment performance will improve year-on-year against this benchmark.
- The increase in information will also allow and assist organisations such as the Australian Small Business and Family Enterprise Ombudsman, as a Commonwealth-wide advocate for small business, to monitor the performance of NCCEs.

Recommendation 5:

The Australian Government to mandate the use of Project Bank Accounts (PBAs) in public works and construction projects. All levels of government to consider adopting.

The Government notes this recommendation

- PBAs are currently used on Commonwealth projects where appropriate.
- On 21 December 2016 the Government appointed Mr John Murray AM to conduct a national review of security of payment laws in the building and construction industry. There exist significant differences between jurisdictions in approaches to security of payment laws. Mr Murray will seek to identify best practices across jurisdictions and make recommendations on how applicable laws can be strengthened. The Government notes that Mr Murray's review is considering the use of PBAs in the construction industry. The review is expected to conclude by 31 December 2017.

Recommendation 6:

The Australian Government to procure from businesses which have supply chain payment times and practices equal to or better than its practices. All levels of government to consider adopting.

The Government does not support this recommendation

- The Commonwealth Procurement Rules (CPRs) note that when specifying conditions for participation, these must be limited to those that will ensure that a potential supplier has the legal, commercial, technical and financial abilities to fulfil the requirements of a procurement (paragraph 10.14 of the CPRs). This requirement reflects Australia's international trade obligations.
- The Government does not support the introduction of additional regulatory burden of verification requirements to bid for Government tenders.
- The Government is conscious that small businesses are disproportionately affected by the burden of regulation. Any step to increase regulation is a barrier and disincentive for small businesses to participate in government procurement. Consultations with stakeholders also suggest that a number of small and indigenous businesses would find it difficult to equal or better the Government's commitment to pay its suppliers in 20 days due to a range of factors such as: capacity or capability, operations and location. During consultation some small businesses indicated they only reconcile accounts once a month and other businesses operate on manual paper-based systems.
- In addition, limiting the number of businesses from which the Commonwealth can procure, risks undermining the Commonwealth's capacity to achieve value for money. The Government supports businesses structuring and managing commercial relationships as appropriate.

Business to Business

Business surveys and Government consultations confirm the inquiry's finding that there is a problem with supplier payment culture in Australia. The Dun and Bradstreet (D&B) *'Late Payments in Australia'* report shows the average late payment was around 14.6 days in the June quarter 2017. While there has been a downward trend since 2011, late payment times remain unacceptably high. Xero's Small Business Insights finds that for invoices with 30-day payments terms, suppliers had to wait on average 34 days to be paid in August.

The inquiry found that late payments are occurring across the economy, but largely between business to business transactions. The D&B report finds the slowest payers are the largest companies (more than 500 employees) which pay on average 18.2 days late, followed by large companies (200-499 employees) and micro-sized businesses (1-5-employees) who pay on average 14 days late. The D&B report also found that only 12 per cent of ASX companies paid on time. This data shows there is significant scope for improvement by large businesses across the economy.

Recommendation 7:

Industry codes which regulate business to business transactions to include best payment practices including set payment times.

The Government notes this recommendation

- The Government welcomes the BCA "Australian Supplier Payment Code" (Code), launched in late May 2017 and endorsed by the Council of Small Business Organisations of Australia (COSBOA). It is the Government's preference that business and industry self-regulate in the first instance, providing more flexibility than a mandatory code. The BCA Code enshrines the importance of prompt and on-time payment for small business suppliers through a set of agreed standards. The Code commits signatory organisations to pay eligible Australian small business suppliers on-time and within 30 days of receiving a correct invoice. As at 24 October 2017 the Code had 61 signatories.
- The Government's consultation indicates a low level of awareness of the BCA's Code amongst small businesses. However, upon small business stakeholders and business advisers being informed of the BCA initiative there was general support for the initiative. Internationally, the United Kingdom has already developed such a voluntary code, the Prompt Payment Code (PPC). The PPC started in 2008 and today has more than 2000 signatories — comprising of almost three-quarters of the FTSE100.
- The Government recognises the BCA's Code will need to be given time to work. The Government is carefully monitoring the effectiveness of the BCA's Code and will consider the need for further action should the BCA's Code be insufficient in addressing the trend of payment times and practices. The Government welcomes the BCA's review of the Code within 12 months of the date of commencement. The Government encourages the BCA to commit to an ongoing performance review of the Code and take into consideration the Australian Competition and Consumer Commission's (ACCC) guidance on voluntary codes of conduct, including sanctions for non-compliance.

Recommendation 8:

The Australian Government to introduce legislation for larger businesses to publicly disclose all of their payment times and practices and performance against those terms. Larger businesses being the top 100 listed on the ASX and multinationals.

The Government notes this recommendation

- As noted in recommendation 7, the Government's preference is for industry to self-regulate in the first instance. The BCA's Code requires signatories to fulfil compliance and reporting commitments. This includes putting in place clear, fair and efficient processes for dealing with complaints and disputes about payment times and practices and reporting on company policies and practices to comply with the BCA Code.
- Over time, the Government encourages the BCA to consider performance reporting that helps shine a light on whether signatories are meeting their obligations. For small business suppliers better information means they can make informed decisions on which businesses to trade with, negotiate fairer terms, and challenge late payments.
- The Government notes that the United Kingdom has recently legislated for larger businesses to report on payment times and practices. The new reporting obligations came into force on 6 April 2017 for financial years starting after this date. The Government will closely follow the outcomes from these changes.

Recommendation 9:

Australian Government to introduce legislation which sets a maximum payment time for business to business transactions. Certain industries may need terms greater than the maximum which can be agreed providing they are not grossly unfair to one party. Where a longer term is called into dispute it will be considered an unfair contract term.

The Government notes this recommendation

- It is the Government's view that it should not intervene in markets unless it is absolutely necessary, particularly where intervention would mandate restrictions on private interactions. The Government's consultations indicate that support is mixed for legislating maximum payment times. Small business stakeholders were more supportive of the idea of setting maximum payment times but noted the challenges of enforcing contract breaches by clients. A number of stakeholders also noted that negotiation of commercial terms were broader than just payment times and reflected a range of factors in the relationship.
- A number of stakeholders noted that rather than imposing more legislation and red tape, a more effective step to improving supplier payment culture is by educating and making businesses more aware of the impacts from late payments and poor practices on suppliers. Increasing transparency would also ensure that companies with poor practices find it in their best interest to improve their practices. In that regard, the industry-led BCA Code can play an important role in changing supplier payment culture in Australia. The BCA Code establishes that 30 days is the acceptable standard in paying small suppliers, but allows for mutually agreed terms or terms that are consistent with industry practice.

- On 16 November 2016, the unfair contract term protections in the Australian Consumer Law were extended to small business. Under the law, a small business can apply to the court to have an unfair term in a standard form contract declared void if, at the time of agreeing to the contract, it has fewer than 20 employees and the contract does not exceed \$300,000 or \$1 million for contracts longer than 12 months. The unfair contract term provisions are broad in scope allowing businesses to pursue Court action to challenge payment times that they believe to be unfair.
- In addition, the ACCC is monitoring complaints about payment terms and unfair commercial practices that delay payment times for suppliers. This includes terms allowing large businesses to unilaterally alter their payment terms and unfairly delay payment times for their suppliers. The effectiveness of the extension of the unfair contract term protection to small business will be reviewed in late 2018.

Technology

Recommendation 10:

Governments should encourage the adoption of technology solutions, such as e-invoicing, to assist business to streamline administrative tasks and facilitate payment practices.

The Government supports this recommendation

- The Government agrees that technology can play a vital role to streamline administrative tasks and facilitate payment practices. Current and emerging digital solutions can facilitate simpler cash flows and financial health management, reduce administration costs, automate manual tasks and manage invoices and payment practices. These solutions provide businesses more time and cash flow to invest, grow and employ. The adoption of technology solutions should be driven by the market, with business owners basing these investment decisions on individual requirements. The FinTech industry and accounting software providers are playing an important role in driving stronger adoption of technological solutions through ever-improving product offerings. Increased digital business to business (B2B) and business to government (B2G) interactions are also increasing competitive pressure between businesses and encouraging more businesses to adopt digital solutions.
- In addition to these interactions, increased digital capability among small business owners as outlined in Google's "Connected Small Business 2017" prepared by Deloitte Access Economics has small businesses well placed to take advantage of technology solutions as opportunities arise.
- Another positive development in reducing late payments and improving payment practices in Australia is the industry-led Digital Business Council's (DBC) work on e-invoicing. The DBC estimates e-invoicing to be 60 to 80 per cent more efficient than traditional paper invoice processing. For buyers, it will decrease costs, eliminate processing errors and reduce processing time. For suppliers, by eliminating process errors, it will provide efficiencies in receiving payments, reducing costs and improving account reconciliation. The Government announced in the 2016-17 Budget that it would undertake a detailed study into the costs and implementation of Government adoption of e-invoicing. This study will help the Government identify how the Government can play a leadership role in embracing emerging technology solutions to improve efficiency.