NATROAD

NATIONAL ROAD TRANSPORT ASSOCIATION

Submission to the Treasury

Payment times and Unfair Contract terms

21 December 2018

Introduction

1. NatRoad is pleased to provide input to the review of unfair contract terms legislation.

2. The National Road Transport Association Ltd (NatRoad) is Australia's largest national representative road freight transport operators' association and is also a foundation member of the Australian Trucking Association (ATA). NatRoad represents road freight operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, car carriers, as well as tankers and refrigerated operators. 75 percent of NatRoad's members are small businesses in that they own and operate 5 trucks or less as part of their business.

Payment Fairness – Deeming Sought

3. NatRoad notes the findings of Australian Small Business and Family Enterprise Ombudsman (ASBFEO) in its final report entitled *Inquiry into the effect of the Road Safety Remuneration Tribunal's Payments Order on Australian small businesses.*[1] Recommendation 11 in that final report is:

   Given the strong support of owner drivers, *the Australian Small Business and Family Enterprise Ombudsman should inquire into ways to reduce payment terms for owner drivers as part of its Inquiry into Payment Terms*.

   In that final report ASBFEO also records that:

   Payment terms and payment timeframes was a prominent issue in the small transport business industry. Owner drivers reported that they are, on the whole, reliable account payers and they were unanimous regarding an imbalance in payment structure in the industry.[2]

   And:

   Cash flow was a considerable issue for nearly all operators consulted. It was agreed the 30 day payment requirement was a positive aspect of the Tribunal's First Order (issued on 17 December 2013) and should have relieved considerable pressure and made small business more competitive[3]

4. In the context of the evidence then received by ASBFEO and noted in the prior paragraph, the 30 day payment requirement was the only redeeming feature of the Road Safety Remuneration Tribunal's (RSRT) regulatory framework. It was otherwise a disaster, as is evident from the ASBFEO final report.

5. **The purpose of this submission is to ask the Government to deem any payment term related to a small business standard form contract (as currently defined) that requires payment beyond a minimum of 30 days as unfair and proscribed.**

---

1 http://www.asbfeo.gov.au/sites/default/files/documents/RSRT%20Payments%20Order%20Inquiry%20Report%20-%20FINAL.pdf

2 Id at 48

3 Ibid

Problematic Issue

6. The road freight industry has a low market share concentration. The four largest companies accounted for over 15% of industry revenue in 2015-2016.[4] The low market concentration figure belies the market power of the major companies in the road freight industry. This market power is reinforced by the subcontract system within the industry. Larger companies often subcontract work to smaller owner-operators. Those owner operators have little power to influence prices. The characteristic which most distinguishes the owner operator area of the market is fragmentation and intense competition.[5] A significant number face business viability issues associated with their lack of power in the market. This includes vulnerability where extended payment terms form part of contractual arrangements.

7. In an industry which has a high proportion of small business operators who maintain their businesses on tight margins, cash flow is king. Our members inform us that late payment increases financial and administrative costs, reduces the potential for investment, damages business relationships and adds to business uncertainty and failure. The latter point was highlighted in a Commonwealth government Discussion Paper[6] where it was noted that, based on Dun & Bradstreet's failure score modelling, small businesses that experience late payments are three times more likely to close down compared to those that receive payments within 30 days.[7]

8. The same paper states that the problem can take on a very human dimension for small business owners, as often their personal and family finances are closely bound to the fate of their small business.

9. Counter-intuitively, the Discussion Paper notes that the three best performing industries in 2012 were agriculture at 50 days and **transportation at 50.3** and services at 50.9 days.[8] This comparatively favourable statistic is, according to member feedback, no longer the status quo. Further, even at 50-60 days members advise that, depending on the billing cycle, cash flow issues arise. Indeed, the ASBFEO encapsulated the trend that members discern where she stated that:

   (S)mall businesses were more frequently falling victim to the unscrupulous payment practices of some big businesses and governments: 'From stipulating unfair payment terms in contracts, to simply not honouring agreed payment times, a number of big businesses are effectively treating the little guys as banks by forcing them to provide interest free-loans in the form of late paid or unpaid invoices.[9]

   The average figure quoted by Dun and Bradstreet is, according to member feedback, invariably skewed by issues specific to the industry's operating environment. For example, under the

---

[4] IBISWORLD Report 14610 *Road Freight Transport in Australia* April 2016 at 18
[5] Ibid
[6] Cth Government, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education Australian Prompt Payment Protocol Discussion Paper July 2013 https://www.industry.gov.au/smallbusiness/Documents/PromptPaymentProtocolDiscussionPaper22July2013.pdf
[7] Id at 9
[8] Ibid
[9] http://www.skynews.com.au/business/business/national/2016/11/16/small-businesses-owed-over--26b.html

industry's principal awards, the *Road Transport (Long Distance Operations) Award 2010* and the *Road Transport and Distribution Award 2010*, weekly payment is mandated.

10. Member feedback is that extended payment terms provisions in contracts is not just an issue confined to smaller trucking operations. As reflected in the statistics from Dun and Bradstreet, the feedback that NatRoad has received from members is that in prior years, the industry generally worked on the basis of a 30 day payment from end of month. For example, for all work carried out in (say) January, payment would be made in the first week of March. This averaged about 45-50 days in payment terms. This was generally acceptable and seemed to be the norm for most industries (not just the road freight industry).

11. As the industry became more reliant on computer based accounting packages, it became common for payment terms to be 30 days from the date of invoice, payable weekly. So for invoices issued for (say) the week ended 15 January, payment would be received on about 20 February. Given the invoicing was undertaken weekly, payment would be received each week (as the 30 day period rolled around). Again, this appears to be an acceptable basis for payment.

12. However, member feedback shows that it is now becoming more common for larger businesses which seek to have freight contracts filled (often companies with overseas based parents) to require payment terms of up to 90 days from the end of the month plus 7 days, i.e. averaging up to 110-120 days from when the work was carried out. With these extended payment terms, road freight businesses are expected to carry a greater amount of debt and risk, with the consequences of a greater likelihood of business failure should the large customer default on the contract or further delay payment beyond the contracted date. This development also favours larger road freight operators which are generally more likely to have the capacity to fund the debt created or to fund the weekly wage and fuel costs which comprise the majority of operators' costs in the industry.

13. Member feedback has also highlighted that some principal contractors appear to be deliberately putting in place systems that thwart on-time payment. One member has indicated the following:

    There is a growing trend towards automated payment systems where by a 'machine' matches your invoice with the customer's purchase order. These systems are generally manipulated by the customer to extend payment terms. Payment is made x days after receipt of a valid tax invoice. The trick is getting a 'valid' invoice into the system. Many customers insist on an order number being quoted, but the order number provided (if you can actually get one issued) is often for the goods, not transport of the goods. Your invoice is rejected. Most systems either don't advise rejection or the advice is a bland automated email designed to trigger your spam filter so you are not aware the invoice has been rejected. Invariably, such emails are from an automated 'no-reply' address and simply advise that the invoice has been rejected with no explanation as to why it has been rejected. Reasons can include:

    - *No Order number*
    - *Invalid order number*

- *incorrect division or entity charged*
- *missing/invalid vendor code*
- *supplier compliance certificate or some other ancillary document is expired or missing.*
- *unmatched price (even if the customer has failed to enter a price into their system)*
- *no proof of delivery document available (even if the customer has not processed correctly)*
- *Invalid invoice format (customer machine cannot read your invoice)*

Increasingly the payment processing centre is overseas and cannot be readily contacted. No one in Australia knows why the invoice has been rejected and the incentive for the customer to figure it out is minimal. The final catch-all is that if a supplier invoice is not submitted within a defined period the customer reserves the right to not pay at all.

The Solution

14. The Discussion Paper referred to in paragraph 6 of this submission proposed the establishment of a voluntary payment protocol. NatRoad, however, submits that the deeming of payment terms that require payment beyond a minimum of 30 days should be deemed to be unfair and proscribed via changes to the unfair contract terms legislation. A voluntary protocol is unlikely to solve the problem given the intense levels of competition that the industry faces and the lack of incentives for companies to take up the protocol. It is already evident that the industry is especially vulnerable to extended payment time exploitation. This stance reflects Recommendation 12 from the ASBFEO inquiry which is as follows:

    The Australian Small Business and Family Enterprise Ombudsman recommends that the Department of the Treasury and the Australian Competition and Consumer Commission work with the industry to investigate developing a Code of Conduct for the road freight industry under the Competition and Consumer Act 2010 (Cth).[10]

15. We reiterate that the industry is characterised by tight margins and therefore issues such as extended payment terms present a significant challenge. Research by the ANZ shows that the median EBIT margin for trucking businesses was 4.2 per cent in 2015.[11] The bottom quartile of trucking businesses recorded negative, unsustainable EBIT margins. As we have emphasised throughout this submission, for businesses operating on a tight or negative margin not receiving payment for services for an extended period, including for periods up to 120 days, adversely affects their ability to offer lower prices as well as their ultimate viability. As has been noted by industry analysts, fierce competition in the industry means that productivity gains over recent years, particularly from the use of larger vehicles, together with savings from lower fuel prices, have been largely passed on to downstream industries through cheaper freight rates. [12] For a sector that is directly involved in the supply chain and the delivery of goods throughout the economy, fair payment terms is an issue which must be addressed.

16. A term in the manner sought would address the payment terms issues especially those facing small trucking businesses.

---

[10] Above note 1 at 6
[11] Suffield T. "Road transport performance from a bank's perspective." Presentation at Trucking Australia 2016, 24 June 2016.
[12] Above note 4 at 6