

1 May 2020

Small Business Policy  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140

Email to: [FeedbackImprovingPaymentPractices@mbie.govt.nz](mailto:FeedbackImprovingPaymentPractices@mbie.govt.nz)

Dear Sir/Madam

**Re: Improving business-to-business payment practices in New Zealand**

I am writing to you regarding the Ministry of Business, Innovation & Employment (MBIE) Issues Paper, entitled *Improving Business-to-Business Payment Practices in New Zealand* (referred to as 'the Issues Paper').

The Issues Paper asks a number of questions in relation to the options supported by MBIE for future business-to-business payment practices. BusinessNZ would like to provide some overarching thoughts, as well as answer some of the questions raised.

**Background**

Overall, BusinessNZ agrees with initial comments made in the Issues Paper that technological progress will make the task of payments easier for businesses as a whole. We have long supported the introduction and use of e-invoicing and the New Zealand Business Number (NZBN). With the latter, while there is much upside from using it between Government and business, we also see greater value in it being used as part of business-to-business transactions that take place on a daily basis.

*Timing of Consultation*

Before discussing particular parts of the Issues Paper, BusinessNZ would like to provide comments on the consultation period. We note that the Issues Paper was released to the public on 26 February, with submissions originally due on 14 April.

Given the extraordinary and unprecedented events currently taking place in relation to COVID-19, it goes without saying that like almost all parts of the economy, the business community has been hit extremely hard, with almost all resources going into how best to assist with stopping the virus from spreading. This means for

many, time and resources that would be put into standard policy consultation that is not related to COVID-19 has been sacrificed for the greater need at present.

In response to this, we note that at after the deadline, MBIE decided to amend the deadline for submissions to 1 May. For some of our members they found out about the extension only after their submission had been sent in after the deadline because of resources being stretched.

While we believe this was the correct call in extending the deadline given the current situation, BusinessNZ is disappointed that MBIE took so long to make the decision to extend the deadline. Instead, there should have been a clear and early signal from MBIE (and indeed all Government departments) around an automatic extension of non-COVID-19 policy discussions. Not doing so risks not receiving sufficient information to make informed policy decisions going forward. For instance, a number of the questions asked in the Issues Paper seek real life examples that would answer questions around the severity of the problem.

We hope that in the future a better communications process will be in place across Government around what areas of policy work are in or out when the country goes through a crisis of this magnitude.

#### *Evidence to support change*

We note that much of the proposals in the Issues Paper are based on initial research commissioned in 2018 involving a survey of 1,254 businesses from across New Zealand about their experiences of sending and receiving invoices. Overall, BusinessNZ supports this type of research to ascertain whether there is a problem and the level of the problem at hand.

We tend to agree with the view expressed in the Issues Paper that extended payment terms is not something that is carried out across a large number of businesses. Moreover, the data would tend to suggest that on balance, the vast majority is carried out by larger businesses, who deal with multiple businesses at any one time.

However, there are two points we would like to raise with the analysis undertaken.

First, given the survey took place in August/September of 2018, we would be interested in knowing whether the same result would apply in the current climate, as some businesses may have changed their processes since 2018 in light of the focus on this issue. If a revised survey showed a significant drop in longer payment periods, this could indicate a market led response to the initial problem. Market led responses are usually the optimal way to deal with business issues, something we discuss more when addressing question 15 below.

Also, we wonder what the 'new norm' will look like for New Zealand businesses after the COVID-19 emergency. While many businesses across various industries will struggle once the country leaves the alert levels, there is also the possibility that we could see positive changes in the way larger businesses deal with smaller ones, given the increased leeway and assistance needed by many to get the country back on track.

Overall, we would urge caution around making significant changes in this area at this point in time, which we will discuss below when answering specific questions raised in the Issues Paper.

*Question 2: Would you support a legal maximum payment term? If you do support a legal maximum term, do you think it should be 20 days or some other term?*

In principle, BusinessNZ would not support a legal maximum term. We believe a one-size-fits-all approach would be the wrong way to address this issue.

At a practical level we are concerned that a 20-day term may not be sufficient to ensure differences in business practices are recognised.

A balance is needed when seeking rules that are as straightforward as possible with minimal exemptions, while recognising the practical differences that exist across different sectors. We believe a 20-day term across all businesses would be too harsh in many sectors. We also understand that others in the business community will be submitting on specific reasons why a 20-day term would be impractical. Therefore, we would welcome moves by the Government to extend the proposed time period out to ensure these concerns are adequately addressed.

Notwithstanding our concerns with a rigid application of a legal maximum term, if the weight of other submitters points towards a legal maximum payment term, we would like to take the opportunity to respond to the following questions asked in the Issues Paper.

*Question 3: Should they only apply to large businesses, or to large contracts, or to standard term contracts?*

Notwithstanding our primary recommendation above, if a legal maximum payment term were to proceed, we would not want to see different legal maximum payment terms for different sized businesses. Power imbalance does not automatically depend on size; it can also include, among other things, the number of players in the market, scarcity of the product and intellectual property issues. We believe any attempt to differentiate between different sized businesses would create confusion and arbitrary rules that would prove to be counterproductive.

On balance, BusinessNZ agrees with the views expressed in the Issues Paper that applying the legislative approach to standard form contracts may reduce unnecessary complexity (such as definitions and thresholds) when dealing with large contractual arrangements.

*Question 4: Should any industries or classes of goods have longer or shorter maximum terms?*

As noted above, BusinessNZ understands there will be clear examples across various industries or classes of goods where the maximum terms should differ. However, having such varying maximum terms would be difficult for a number of reasons, not the least of which would be the complex nature of what could end up as an exhaustive list of mismatching, and in some cases contradictory, maximum terms.

Overall, we believe a single rule applied across all business transactions would be the preferable way forward. However, as pointed out above, we believe it should be for a longer time period, to mitigate wider problems.

*Question 5: What sorts of contractual relationships might it be inappropriate to apply a maximum term to?*

Overall, BusinessNZ agrees with the Issues Paper that certain arrangements may need to be excluded. The Issues Paper outlines some of these, such as property deals, intellectual property (such as patents) and employment contracts. We certainly agree that any introduction of this provision needs to be very clear about the types of contractual relationships that should be excluded.

*Question 6: Should businesses be able to contract out, and if so, in what circumstances?*

As discussed in the Issues Paper, BusinessNZ supports a provision for contracting out of the maximum term, subject to the term not being "grossly unfair" to the supplier.

*Question 7: If you agree with contracting out where a term is not "grossly unfair", do you agree with the circumstances to be considered in determining "gross unfairness"? Are there other circumstances that we should consider?*

Overall, BusinessNZ agrees with the circumstances set out in the Issues Paper as determining "gross unfairness", as it covers the standard points required.

*Question 8: Do you agree with the proposed definition for determining the 20-day period, and a process of acceptance or verification of goods or services?*

The Issues Paper outlines a working definition of "20-days", which would be a 20-day payment period from the later of:

- The day on which the goods or services to which the payment relates are provided, or
- The day on which the purchaser is notified of the amount of the payment (i.e. receives an invoice).

In addition, given there may be instances where there are disputes around whether the goods or services provided are actually what was contracted for, the Issues Paper proposes there be a procedure for confirming and verifying acceptance. Specifically, the Issues Paper outlines the situation that the purchaser could receive an invoice during, or at the end of, this verification procedure. The 20-day payment period could run from the end of the verification procedure, with the verification period capped at a specified number of days in the legislation.

In principle, BusinessNZ agrees that the working definition for the starting point of any maximum term is the best option available. However, some members have expressed concerns about how this could be used in conjunction with a 20-day period. Greater clarity is required about how a maximum term is defined. It would be most simply defined as the difference between invoice date and payment date, however, if defined differently this would widen the scope for both interpretation and disagreement.

At a practical level, members have told us that due to the widespread adoption of IT accounting systems, it is no longer common for suppliers (no matter what size) to gather all records and invoice these out at the end of the week or month. For various industries, there is typically close alignment (i.e. within a day or two) of the day on which goods are received and the date of invoice.

Therefore, BusinessNZ would be concerned if the proposed changes placed constraints on the ability of any business to pay efficiently and accurately. Looking at the other side of the coin, there would no doubt be many suppliers who would also not favour daily payments as it is far more efficient to receive consolidated remittance files for clearing open items within their systems. Therefore, potential changes in this space can cause serious unintended consequences to current business practices that have nothing to do with the issue of late payment.

Overall, from discussions with members, we acknowledge that this is a complex issue. Given the range of potential unintended consequences, BusinessNZ believes any attempt to legislate a process for acceptance or verification of goods or services should be treated with extreme caution.

*Question 11: Would you support an automatic right to claim interest for late payments? Why or why not?*

BusinessNZ empathises with those businesses that experience persistent or significant late payments, given these can have direct and indirect costs on businesses. However, given there are already existing mechanisms available through the Disputes Tribunal to target late payment due to poor behaviour, we believe that any steps taken to address this problem first need to be examined through potential changes within the Disputes Tribunal mechanisms.

At a practical level, we also note the example on page 18 of the Issues Paper whereby the introduction of an automatic right to claim interest for late payments has had little take-up by businesses in the European Union (EU). The fact that the Issues Paper states that "if we had a legislated right to interest and/or debt recovery fees there would need to be supporting work to encourage a culture of exercising those rights" means that what is proposed in the Issues Paper does not appear to be an optimal solution.

We know other submitters have called for an update to the rates applicable through the Money Claims Act 2016 as a sufficient way in which the current framework could be strengthened. BusinessNZ believes this alternative approach has merit and would favour further work in this space if other submitters also believe this is a more justifiable step forward.

*Question 13: Should a right to claim interest apply equally to all kinds and sizes of businesses?*

Notwithstanding our concerns around the right to claim interest discussed above, if it was introduced, BusinessNZ would not want to see any differentiation between sizes of business given that would only create further complexity and no doubt inconsistencies.

*Question 14: Should there be some ability to vary or replace the interest rate for late payment in some cases? If so, in what cases?*

Please see above.

*Question 15: If there were to be new legislative requirements designed to prevent unfair payment terms and invoicing practices, what do you think would be the best way to encourage businesses to comply?*

As touched upon in our opening remarks above, BusinessNZ has long held the view that any policy development should occur through the lens of a regulatory pyramid approach, whereby stronger regulatory steps are only taken where there is clear failure from less intrusive regulatory options. For many cases, the base of the pyramid starts at education, typically in partnership between the public and private sectors to ensure reach and consistency of message out to as many relevant businesses as possible. Looking at the wider BusinessNZ network, this involves

ensuring our regional associations, industry associations and major companies' group are all aware of the need to deal properly with what some to consider to be unfair payment terms and invoicing practices.

We note that chapter 5 of the Issues Paper examines other potential ways to address poor payment practices. While on one hand the chapter outlines other initiatives that have been used overseas with varying degrees of success, for now they are not considered part of the policy response. It is BusinessNZ's view that these other options, namely disclosure, voluntary codes of conduct and alternative dispute resolutions should actively be considered now given they follow the logical step of moving up the regulatory pyramid. The Issues Paper states that *"we might consider these in the future. We are noting some of the main candidates now so you know what other avenues we could pursue in the future, whether or not we legislate maximum payment terms and/or interest and debt recovery fees"*. From our perspective, the process here seems upside down. We would strongly argue that voluntary options should be examined and ideally trialled first, rather than more stringent regulatory measures currently proposed.

Ideally, the real focus should be on those small number of businesses that are exhibiting poor behaviour, rather than a wide regulatory approach where the proposed changes have a high likelihood of negative unintended consequences.

For instance, we are concerned that a sole focus on what is often one aspect of the general business relationship may create problems elsewhere. In question 11 above, the example from the EU was highlighted, namely that there is little take-up by businesses around automatic right to claim interest for late payments. While we agree that there may be cases where potential retaliatory actions are considered, in many other cases such decisions are often not so black and white and do not automatically lead to automatic claims on interest being applied. Instead, businesses will usually weigh up the overall relationship with the other party. They will take into account more positive aspects such as consistency of purchase, length of overall relationship or favourable terms in other parts of the relationship.

Last, we believe existing mechanisms that have recently been introduced – such as e-invoicing – will continue to drive towards better accuracy levels and help mitigate any underlying issues that may delay payment. Also, it creates a better idea of what standard business behaviour should be.

Thank you for the opportunity to comment, and we look forward to further discussions.

Kind regards,

A handwritten signature in black ink, appearing to be 'Kirk Hope', written in a cursive style.

Kirk Hope  
**Chief Executive**  
BusinessNZ