1 May 2020

Small Business Policy
Ministry of Business, Innovation & Employment
PO Box 1473
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Email: FeedbackImprovingPaymentPractices@mbie.govt.nz

Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the ***Improving business-to-business payment practices in New Zealand: Discussion Paper****.* This replaces the earlier submitted draft.

We request the draft submission provided on 14 April 2020 be destroyed as no longer valid.

The final submission can be published with the submitting signature redacted.

Yours sincerely

Katherine Rich
Chief Executive

Improving business-to-business payment practices in New Zealand: Discussion Paper

Final Submission by the New Zealand Food & Grocery Council

1 May 2020

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council ("NZFGC") welcomes the opportunity to comment on the *Improving business-to-business payment practices in New Zealand: Discussion Paper* (the Discussion Paper).

2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over $40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over $34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

BACKGROUND

3. The objective of the work undertaken by the Ministry of Business, Innovation and Employment (MBIE) is to improve the business operating environment by improving business-to-business payment practices to remove wasted effort (chasing debtors) and improve operations (cash flow). The Discussion Paper aims to gather information to facilitate changes to deliver on the aims by reflecting technological realities into payment terms through setting maximum payment terms and introducing a right to interest and debt recovery fees for late payments without recourse to the courts.

OVERARCHING COMMENTS

Process

4. In terms of process, and in the current environment, we were concerned that this consultation was not extended in a timely manner. We found it particularly challenging to gather information over the initial consultation period to 14 April 2020, the original closing date. We appreciate all Government departments have been variously affected by the Covid 19 events but almost all other departments extended consultation deadlines well in advance of the original due dates that otherwise came due after mid-March. This suggests procedures should be in place for any future crisis event to provide consultation extensions.

Overarching position

5. NZFGC does not support a legislated maximum payment term. While we note that technology means there is no rationale to delay payments, voluntary arrangements should be pursued before turning to legislation. This could include guidance around best practice, codes of practice and other non-regulatory arrangements that could assist. This should involve enlisting the assistance of accounting firms and professional associations such as the Chartered Accountants ANZ, the NZ Institute of Chartered Accountants and other trade, industry and business associations.

6. We note that an estimated 4% of businesses (that is large businesses) send half of all invoices (p8 Discussion Paper). NZFGC suggests this group might be the focus of a first phase of non-regulatory actions to address the issues identified in the Discussion Paper.

Current environment impacts

7. The current environment characterised by the Covid 19 events that remain at the forefront for all businesses may provide an opportunity to promote voluntary arrangements to companies that may not have been sympathetic to changing their approach in the past. A campaign to seek support for 'looking after your suppliers of goods and services in a difficult supply chain environment. With all businesses under pressure, securing scarce goods and services might be assisted by more attractive payment arrangements.

8. As well, it would be useful to re-survey business late in the near to medium term to assess changes in payment terms that may have occurred since 2018, the date of the survey data underpinning the proposals. If change was identified, this might suggest an expanded non-regulatory approach is best.

RESPONSES TO QUESTIONS

Payment terms

Ques 1 Have you experienced problems with extended payment terms? Do you require your suppliers to offer them? Please tell us about your experiences

9. NZFGC represents food and grocery manufacturers supplying to others domestically and internationally. NZFGC is aware that some extended payment term arrangements have existed in the past but they have generally been coupled with a range of different payment terms depending on the goods and services provided.

Introducing a Maximum payment term to address extended payment terms

10. The Discussion Paper proposes introducing a maximum payment term of 20 days. This would apply to goods and services with some exceptions such as property/land, intellectual property rights such as patents security for payments.

Ques 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?

11. NZFGC does not support a legislated maximum payment term. We consider a one-size-fits-all approach is not appropriate for businesses in New Zealand where a range of payment arrangements already prevail from same day to 90 days or longer. We believe a legislated maximum payment term could discourage current more efficient and shorter payment terms in the belief that this was ‘standard’ practice.

12. While we note that technology means there is limited rationale to delay payments, as noted in response to Q1, some manufacturers have a range of payment arrangements depending on the goods and services provided for a range of reasons relevant to their business model and industry sector. While lengthy (months) payment arrangements are not in principle supported, there may be reasons that for these that could inform any future approach.

13. We consider guidance around payment term best practice could be a non-regulatory alternative to pursue. However, if a legislated solution is pursued, we would like the opportunity to comment on proposed elements in order to provide further input and to road test impacts before decisions on legislation were taken.

Definitional issues

14. The Discussion Paper suggests that the size of businesses impacts the decisions on payment terms especially where a power imbalance exists between parties. This, however, raises definitional issues of business size. An alternative is proposed that would define a limit for the application of the term to an annual value of less than $250,000. This amount is drawn from draft provisions in the *Fair Trading Amendment Bill*.

Ques 3. Should they [maximum payment terms] only apply to large businesses, or to large contracts, or to standard term contracts?

15. NZFGC does not support a regulatory maximum payment term defined by an annual value. However, if the proposals were pursued, NZFGC would prefer there not be different maximum payment terms for different sized businesses. There are always complexities in determining company values and this complexity would raise unnecessary system confusion. If a voluntary/mandatory approach was possible for inclusion in 'standard form contracts' – that is mandatorily included (perhaps in square brackets) but optional to retain by the parties – this could be a useful mechanism for a discussion between the parties to a contract.

Application of a maximum payment term

16. The Discussion Paper explores the prospect of categories of industries or classes of goods having longer or shorter terms of payment.

Ques 4. Should any industries or classes of goods have longer or shorter maximum terms?

Ques 5. What sorts of contractual relationships might it be inappropriate to apply a maximum term to?

17. NZFGC does not support a regulatory arrangement for maximum payment terms but some such arrangement in guidance could be useful.

18. In any event, we agree with the Discussion Paper that some arrangements such as property deals, security arrangements and intellectual property (such as patents) would need to be excluded in guidance.

Contracting out a maximum term

19. In relation to contracting out of a maximum payment term, and the risk of longer terms being considered business-as-usual as identified in the Discussion Paper, NZFGC does not support a regulatory approach and therefore contracting out of a legislated maximum payment term is not a feature. However, guidance on this issue should explore terms that might be considered "grossly unfair" to the supplier.

Ques 6. Should businesses be able to contract out, and if so, in what circumstances?

Ques 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?

20. In reaching a view on "gross unfairness" in guidance, all circumstances should be considered including gross deviations from good commercial practice, the nature of the goods and services and the reason for deviation.

Determining the 20-day period

21. Determining when the 20-days payment term commences is proposed as the later of the following: the day on which goods and services are provided or the day on which the purchaser is notified of the payment amount. The Discussion Paper also suggests that a process for confirming and verifying the payment amount needs to be developed.

Ques 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?

22. Defining a payment term start date is necessary for voluntary or mandatory payment arrangements. The most common approach is on receipt of the invoice for goods and services or on the delivery of the goods and services. With electronic invoicing commonly available, delivery and invoicing is often closely aligned in any case. We are concerned that coupling a defined, across-the-board payment term start date with a legislated maximum payment term, may invoke unintended consequences. This might, for example, introduce expectations of payment at the maximum date and impact efficiencies in payments already in place. As well, trying to define verification or acceptance could open up a further legal complexity beyond the provisions already available in contracts.

Ques 9. Have you experienced problems with late payments or paid invoices late yourself? Please tell us about your experiences?

23. Not applicable.

Costs incurred as a result of late payments

24. The Discussion Paper states that late payments are very common with around two thirds of businesses MBIE surveyed saying that in the previous year they had been late paying at least one invoice. This was due to forgetting, insufficient funds or not having been paid by customers. Nonetheless, late payments are recognised as having a severe effect on businesses.

Ques 10. What costs do you incur as a result of late, or deferred, payments?

25. Not applicable.

Recourse for late payment

26. Several recourses are available in relation to late payments, the simplest being a reminder. The businesses that explained in the MBIE survey that they ‘forgot’ suggests improvement in business processes could have a positive impact and this should be investigated further before taking up legislative approaches. Other recourses include debt collectors, the Disputes Tribunal or other the court-related actions. These other recourses are generally costly or could be expected to damage business relationships.

27. The Discussion Paper proposes legislating a right to charge interest. Even though an entitlement to charge interest already exists, only 5% of businesses surveyed by MBIE actually do so (p18 Discussion Paper). The legislative proposal would be an *automatic entitlement* to interest for late payments, that is, interest claimed as of right. The Discussion Paper then discusses the appropriate interest rate.

Ques 11. Would you support an automatic right to claim interest for late payments? Why or why not?

28. A precursor to responding to this question should be to explore, and look for, non-regulatory options to address the very low uptake of the existing entitlement to charge interest.

29. NZFGC recognises that some businesses experience repeated or significant late payments and that these impact businesses directly (through costs) and indirectly (through concerns about appropriate action where long-standing relationships are involved). While there is an existing recourse through the Disputes Tribunal to target the worst of late payment behaviour, we suggest that the Disputes Tribunal should be looked at first for any means of improving the process it involves, uptake of the Tribunal recourse and

alternatives before taking the step of legislating an automatic right to claim interest for late payments.

30. It is instructional that the Discussion Paper (p18) reports on the lack of take-up by businesses in the European Union of an automatic right to claim interest for late payments in that region. We would therefore also propose that the current entitlement to charge interest that is already in place in New Zealand be researched further to determine factors in the lack of take-up or effectiveness before taking legislative steps.

Ques 12. Do you have late payment fees or interest clauses in your contracts or on your invoices? Do your suppliers charge you interest or fees for late payment?

31. Not applicable.

Implementing a scheme to charge for late payment

32. To avoid costly court involvement, MBIE proposes that an implied dispute resolution clause could be introduced. That is, if contracts did not include their own provisions around dispute resolution, they would be required to include a clause specified in legislation.

Ques 13. Should a right to claim interest apply equally to all kinds and sizes of businesses?

33. Should an automatic right to claim interest proceed, NZFGC would support the same approach for businesses irrespective of size. supports the existing rights to claim interest. A standard for contracts in a guidance document would be helpful in any case. In any event, the proposal that the cost to small business is greater raises the issue identified at the outset in the Discussion Paper of defining ‘small business’.

Setting the rate of interest

34. The Discussion Paper refers to the *Interest on Money Claims Act 2016* which provides the setting of interest rates for court related debt, damages etc claims. This is the Reserve Bank 6 month term deposit rate plus a base rate of 0.15 percentage points. As at November 2019, this was approximately 2.8% per annum. The issue was whether that was fair for small business.

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

35. NZFGC suggests that Guidance might propose the rate set for the courts as well as a late payment alternative. In any case, in the current environment with term deposit rates so low, the approach for setting of interest rates for court related debt, damages etc claims in the *Interest on Money Claims Act 2016* should be reviewed as to future applicability, future proofing and reasonableness.

Compliance with Proposed Legislative Changes

36. The Discussion Paper discusses some dispute resolution mechanisms.

Ques 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?

37. As noted above, NZFGC believes the best way of encouraging a behavioural change voluntarily is education – involving as many agencies as possible and both Government

and industry including trade, industry and professional associations such as the Chartered Accountants ANZ, the NZ Institute of Chartered Accountants. We suggest that since an estimated 4% of businesses (that is large businesses) send half of all invoices (p8 Discussion Paper), this might be a target group in a first phase of non-regulatory actions to address the issues identified in the Discussion Paper.

38. We note that the Discussion Paper identifies a range of initiatives that have been applied overseas to address the foregoing issues. Best regulatory practice would suggest that non-regulatory alternatives should be pursued before undertaking a legislative pathway. Such options as disclosure, voluntary codes of conduct and alternative dispute resolutions stand out as candidates for exploration and potential implementation. A research paper on the detail of these and any evaluation in the countries where they are applied would be a useful starting point. NZFGC would be very pleased to see such work progress rather than remain ‘off the table’ as was suggested in the Discussion Paper (p21) .

39. As noted above, a rerun of the 2018 survey could elucidate changes in the environment that might result in a greater focus or targeting of the businesses that continue to display poor behaviour. As also noted, the current Covid 19 environment may provide an opportunity to promote voluntary arrangements to companies that may not have been sympathetic to changing their approach in the past. A campaign to seek support for ‘looking after your suppliers of goods and services in a difficult supply chain environment’ could be part of a programme. As well, with all businesses under pressure, securing scarce goods and services might be assisted by more attractive payment arrangements.

Ques 16. Do you have any other views you would like to share on how to improve payment practices in New Zealand?

40. NZFGC looks forward to further developments in this area and has no further comments at this time.