

BUILDING AND CONSTRUCTION INDUSTRY

SECURITY OF PAYMENT BILL 2009

SECOND READING SPEECH

Mr Speaker, I move that the Bill now be read a second time.

This Bill seeks to achieve one of a number of significant reforms the Government intends to introduce to the Tasmanian Building and Construction Industry in order to align conditions in the Tasmanian industry with that elsewhere in Australia.

Mr Speaker, the main objective of this Bill is to reform payment behaviour in the building and construction industry. The Bill creates fair and balanced payment standards for all building and construction contracts. The standards include statutory rights to progress payments and quick adjudication of payment disputes. The Bill will speed up payments by

removing the ability to delay those payments. Reforms include the power for an unpaid contractor or subcontractor to suspend work. It also bans 'pay-when-paid' clauses.

In tabling this Bill, the Government seeks to improve cash flow throughout the entire building and construction industry. In particular, the Bill seeks to address the dramatic affect that non payment has on small subcontractors, such as bricklayers, carpenters, electricians, plumbers and earthmoving subcontractors. Many businesses and subcontractors at this level cannot survive financially when they do not receive regular payment for the work they have done. This can have severe consequences to themselves, their businesses and most importantly, Mr Speaker, their families.

Mr Speaker, the Government is determined to rid the building and construction industry of unacceptable payment practices. In doing so, there is a clear recognition by this Government that any action taken does not add unnecessary cost to

industry, its participants and its clients. A draft Bill, was issued for public comment in August this year. The draft Bill has received widespread support and recognition from all sectors of the industry, including bodies representing contractors, subcontractors, suppliers, interstate adjudicators, nominating authorities, specialist legal practitioners and private businesses (both large and small).

The representative bodies include the Building and Construction Industry Council, the Australian Institute of Architects, the Air Conditioning & Mechanical Contractors Association of Tasmania Limited and Master Plumbers Association of Tasmania.

Mr Speaker, this Bill is based on that Draft Bill and public comments received from stakeholders.

Mr Speaker, the Bill addresses what is commonly known in the building and construction industry as the 'security of payment

problem'. This problem occurs when the contractors, subcontractors and suppliers in the building and construction industry are unable to secure just payment in a timely fashion or sometimes to get paid at all, for the work performed or goods and services supplied, despite in most cases, having the contractual right to that payment.

Because much of the building and construction industry operates under a system of hierarchical contract chains, the industry is particularly vulnerable to security of payment problems. The failure of any one party in the contractual chain to honour its obligations can have a flow-on effect on other parties further down the chain by restricting cash flow and ultimately causing their bankruptcy.

There have been a number of inquiries into the security of payment problem in Australia. In general, these reviews have concluded that the security of payment problem was a matter that warranted government action. A consistent theme of all

the reviews was that traditional legal remedies do not provide adequate protection to subcontractors and suppliers. These reviews initiated government reforms in other states and New Zealand. All states and territories, except Tasmania, have legislated to address the security of payment problem in their building and construction industries. South Australia has tabled a Bill and the Australian Capital Territory is soon to debate their Bill.

The Tasmanian Security of Payment Bill implements many of the recommendations contained in the report '*Security of Payment in the Tasmanian Building and Construction Industry*' which was developed by consultants Stenning and Associates, released for public comment in October 2006. The report was commissioned in response to industry representations and supported by the Tasmanian Building and Construction Industry Council.

This report determined that many participants in the building and construction industry are under capitalised, resulting in a significant reliance on cash flow to sustain their business operations.

The report confirmed that the Tasmanian building and construction industry often experiences serious security of payment problems.

In developing the report a survey of small businesses found that 43% of those surveyed reported problems with receiving payment owed during the previous financial year.

In the sample of businesses surveyed, security of payment problems had affected over \$37 million dollars of revenue flow in the previous financial year.

The most common problem experienced by businesses was late payment (81%). Around 48% said they had experienced

partial payments and an alarmingly 43% said they had experienced non payment.

The Bill I put before the house today is based on the *Building and Construction Industry Security of Payment Act 1999* of New South Wales. A key departure from the policy outcomes contained in the New South Wales Act is the ability for contractors to make a payment claim against the contract Principal when that person is a residential home owner.

This departure is seen as necessary to ensure that all participants in the building and construction industry are treated equally.

Additional mechanisms are introduced by the Bill to ensure residential contract Principals with no experience of building and construction contracts (for example, home owners) are afforded special consideration for their lack of experience. These mechanisms include mandatory warnings on claims and

an increase to 20 business days to consider the content of a progress payment claim, rather than the 10 days afforded building practitioners. This additional time is provided to allow these non practitioners to consider their options and if necessary to seek assistance or advice concerning the claim process.

The additional mechanisms are not extended to 'owner builders' registered under the *Building Act 2000* because they are considered to be a building practitioner.

The parties who will be most affected by the legislation will be those who, for their improper financial benefit, delay making legitimate progress payments. This Bill gives claimants a quicker and cheaper means of enforcing payment. It enforces interim payments to 'keep money flowing' during the contract. Final financial adjustments are made at the end of the contract under the terms of the contract.

Mr Speaker, I shall now describe in more detail the major features of this Bill. Some building or construction contracts do not explicitly provide for progress payments. A building or construction contract will now have to include provision for making progress payments and for determining the amount of each progress payment, otherwise these matters will be covered by the default provisions in the Bill.

If the contract does not cover these matters, Part 3 of the Bill provides that payment claims can be made for work carried out or goods and services supplied up to the last day of each month. For building practitioners, payment becomes due 10 business days after the claim is made. In the case of an owner of a residential building who is not a building practitioner, this claim period is extended to 20 business days.

If the construction contract is silent on how a payment is to be valued, the Bill provides that the amount is calculated on the

basis of the value of the work carried out and related goods and services provided.

Mr Speaker, some existing subcontracts provide that a subcontractor is not entitled to be paid until the principal pays the contractor, even though the principal is late in paying or withholds payment on account of something unrelated to the subcontractor's performance. The Bill bans these 'pay-when-paid' contractual clauses.

When a payment claim is made, and the other party, called the respondent, does not intend to pay the full amount of the payment claim, it must issue a payment schedule stating the amount, if any, of the payment claim which will be paid and the reasons for not paying the amount claimed.

The payment schedule alerts the claimant to the existence of a dispute over payment and allows the claimant to immediately commence an adjudication process available under the

legislation. This is a critical component of the Bill as it provides a statutory early warning to claimants that the respondent does not propose to pay their claim in full.

Mr Speaker, to provide the incentive for early warning to be given, the respondent must pay the full amount of the payment claim when it becomes due for payment under the contract if a payment schedule is not given within time. The claimant can also seek payment of that debt by way of proceedings in a court.

The respondent cannot raise defences of defective work or cross-claims in order to delay judgment in these proceedings, therefore ensuring a prompt decision by the court.

Mr Speaker, the Bill provides a much faster adjudication process by giving an interim decision on disputes over progress payments, and fixing the amount of the debt. In addition, if a payment schedule is not given within time, the

party entitled to payment is given a right to suspend construction work. The right to suspend work also exists if a payment made is less than the amount which a payment schedule states will be paid.

The payment schedule is akin to the architect's progress certificate which is typically provided for in construction contracts. In adjudication under the Bill, the respondent is unable to raise defences, set-offs or cross-claims which have not been identified in the payment schedule. This means that the respondent must treat payment schedules with the utmost care. The Bill prevents parties from contracting out of the effects of either providing or not providing a payment schedule or the adjudication which can follow a dispute over a payment claim.

To ensure a claimant does not delay in initiating the adjudication process, the claimant has only 10 business days after receiving a payment schedule, and 20 days if the

respondent lodges a payment schedule and does not pay, in which to give notice requiring adjudication under the legislation. If the claimant fails to make the adjudication application within time, the claimant forfeits the right to the adjudication available under the Bill. The claimant also forfeits the right given by the Bill to suspend work. However, other dispute resolution processes in the contract or provided by law are not affected.

The adjudication application is simply a notice in writing identifying the relevant payment claim and payment schedule and stating that the claimant requires adjudication under the Act. The claimant can include reasons why the full amount of the payment claim should be paid and why the respondent's reasons in the payment schedule for not paying are not justified. The claimant sends the adjudication application to an authorised nominating authority. At the same time, a copy of the application must be served on the respondent.

The adjudicator must be a person acting independently. Clauses 35 and 36 provide for the disqualification of adjudicators if they have a material personal interest in a building or construction contract, dispute, or a party to the contract to which an application relates.

An authorised nominating authority is an individual or organisation approved by the Security of Payments Official. The Security of Payments Official is established under the Act to be the Director of Building Control or a person appointed by the Minister. There are presently a significant number of nominating authorities established under interstate laws. It is expected that these organisations will apply to be approved as authorised nominating authorities in Tasmania. It is also expected that in future Tasmanian based nominating authorities and adjudicators will be established. The Security of Payments Official may decide to withdraw approval of any authorised nominating authority or impose conditions if it is

unable or unwilling to properly perform the role of a nominating authority.

An appeal is available to the Magistrates Court (Administrative Appeals Division) against the refusal of the Security of Payments Official to authorise a person as a nominating authority or to set a condition or withdraw authorisation.

The claimant is free to use any authorised nominating authority. If a claimant does not receive notice of acceptance of an adjudication application within four business days, the claimant can present their adjudication application to any other authorised nominating authority.

The respondent can make the response up to a maximum of 10 business days after receiving a copy of the claimant's submission to the adjudicator or 5 business days after receiving a copy of the notice of the adjudicator's acceptance of appointment, whichever is the later. The response must

contain any submissions which the respondent wishes the adjudicator to consider when the adjudicator decides the claimant's adjudication application. If the respondent does not lodge the response in time, it cannot be considered by the adjudicator. The adjudicator will then proceed to make a determination only on the information provided by the claimant.

Mr Speaker, this date will be the date for payment prescribed by the building or construction contract or, if no date is prescribed, either 10 days after the payment claim was made by a building practitioner or 20 days in the case of a residential building owner.

As the respondent's submission must be confined to reasons, amounts and grounds for withholding payment which were stated in the payment schedule and any related issues raised in the claimant's submission, the ambit of the dispute to be

decided is fixed by two documents, namely, the payment claim and the payment schedule.

Mr Speaker, normally payment of the adjudicator's fees is shared equally by the disputing parties. However, a party could ask the adjudicator to make a different apportionment. The adjudicator would have to give the other party an opportunity to make a submission on this point.

Neither party is entitled to recover from the other the costs of preparing or making its submissions to the adjudicator.

Usually, if payment is not provided within 5 business days after the adjudicator's decision, the claimant can suspend work but must give 2 business days notice of an intention to do so. The claimant can also register the adjudicator's decision in a court and obtain a court judgement.

In summary, the time frames set out by the Bill for responding to a payment claim and for the making of adjudication are tight

and aimed at ensuring that the disputes under this proposed legislation are resolved rapidly and at minimal expense to the parties.

The adjudication process for building practitioners should be completed within 6 weeks of the claimant receiving notice that a progress claim will not be paid in full. The process is slightly longer (8 weeks) if the claim is against an owner of a residential building.

If, without the consent of both parties, the adjudicator fails to make a decision within 10 business days, the adjudicator forfeits any right to payment and the claimant can proceed to have another adjudicator nominated.

Adjudication provides the claimant with important benefits: a prompt interim decision on a disputed payment, impartial assessment of a disputed payment, and the opportunity to

progress the matter as a judgement for a debt in court. Failure to pay will also allow the claimant to suspend work.

The Bill does not specifically provide for an appeal from an adjudicator's decision. The adjudicator's decision is only an interim decision until the final amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process.

The right to suspend work given by this Bill is in addition to any other right to suspend work. Sometimes a building or construction contract contains an express right to suspend. Such a right will not be affected by this Bill. Generally speaking, the common law does not allow a contractor to suspend work simply because the other party has failed to make a payment on time. This Bill changes the common law by providing such a right.

There are limitations on the exercise of this right. Firstly, work can only be suspended on account of non-payment of an undisputed payment claim or adjudicator's decision. Secondly, time for payment must have passed and a notice of intention to suspend must have been given. Suspension cannot commence until 2 business days after such a notice is given. The suspension must be lifted if the respondent pays the debt.

This Government committed itself to the introduction of this important legislation during this sitting of the Parliament. In fulfilling this commitment on behalf of the Government, I am pleased to note that the building and construction industry, and particularly subcontractors, will benefit substantially from the implementation of this legislation.

Mr Speaker, I commend this Bill to the House.