

Agreement in Principle

Mr PAUL LYNCH (Liverpool—Minister for Industrial Relations, Minister for Commerce, Minister for Energy, Minister for Public Sector Reform, and Minister for Aboriginal Affairs) [12.45 p.m.]: I move:

That this bill be now agreed to in principle.

The Government is moving to introduce amendments to the New South Wales Building and Construction Industry Security of Payment Act 1999. The aim of these amendments is to improve security of payment for subcontractor claimants—that is, those businesses at the bottom of the contractual chain that have the least cash flow and struggle to survive when they do not receive money owed to them for work undertaken. The Building and Construction Industry Security of Payment Act has been recognised as reforming the payment practices of the building industry by providing access to speedy, low-cost resolution of disputed payment claims and stimulating the much-needed cash flow along the supply chain.

It also brings parties in dispute together sooner, thus avoiding the need to resort to formal dispute resolution processes, such as expensive court litigation. Notwithstanding these strengths, stakeholders have advised the Government that some subcontractors are finding it difficult to enforce the outcomes of adjudications of payment disputes under the Act. Payment disputes at the subcontractor level involve three key players. The first is the subcontractor themselves, known as the claimant. The second is the contractor who owes the claimant money. This person is known as the respondent. The third is the legal entity next up the contractual chain that has a contractual agreement with the respondent, known as the principal contractor.

The current Building and Construction Industry Security of Payment Act has been widely utilised by subcontractors to gain adjudication determinations for disputed payment claims. But one of the problems facing subcontractors is ensuring that the respondent—the contractor owing money—makes the payments outlined in the adjudication determination. The Government is of the view that increasing awareness of payment problems in the contractual chain can help to protect subcontractors and further improve payment performance in the building industry. That is what this bill intends to do. I shall now describe in more detail the features of these amendments outlined in the Building and Construction Industry Security of Payment Bill 2010.

Currently, if a claimant knows that the respondent is owed money by a principal contractor they must go through the court system to have those funds frozen, utilising the Contractors Debts Act. This bill establishes that a principal contractor can be required to retain sufficient money to cover the claim being made by the claimant against the respondent without requiring the subcontractor claimant to go through the courts. The moneys withheld are to be taken from any money that is, or becomes, payable by the principal contractor to the respondent. The requirement for the principal contractor to retain moneys is not an automatic requirement and can only be instigated through service of a payment withholding request.

If the principal contractor does not owe any moneys to the respondent, they are required to notify the subcontractor claimant they are no longer a principal contractor for the claim. This will need to be done within 10 business days of receiving the payment withholding request. The obligation for the principal contractor to retain money is only in force for 20 business days after the claimant's adjudication application is determined and served. If the claim is withdrawn, or if the respondent makes a payment to the claimant before 20 business days have passed, the requirement to retain moneys will lapse. The requirement also lapses if the claimant commences proceedings for the recovery of the debt under the Contractors Debts Act 1997. If the principal contractor fails to retain moneys owed as per these requirements, the principal becomes jointly liable for the amount paid to the respondent in contravention of the payment withholding request.

Importantly, any money that the subcontractor claimant recovers from the principal under this part can be recovered as a debt by the principal contractor from the respondent. This is designed to protect the principal contractor from the risk of double payment. The bill also provides protections for principal contractors in relation to their contractual payment arrangements with the respondent. If a principal is required to retain moneys as a result of being issued a payment withholding request, the time these moneys are withheld cannot be taken into account for the purposes of invoicing and payment dates. This is designed to prevent payment claims being made against the principal contractor as a result of withholding moneys under this legislation.

In some cases, subcontractor claimants are unaware of who the principal contractor is. To address this, the bill will establish a requirement for a respondent to provide information regarding the identity and contact details of the principal contractor in relation to that particular claim. While these amendments will require the principal to freeze moneys owing to the contractor, equal to the amount being claimed by the subcontractor, the proposed amendments do not provide a mechanism to assign the debt to the claimant. Debt assignment would need to be pursued through the court system under the Contractors Debts Act.

I emphasise that while these amendments will alert the principal to payment issues and the lodging of an adjudication application by a subcontractor, there will not be any additional protection for subcontractors when

the principal has already paid the contractor all moneys owed. The measures outlined in this bill will go some way towards addressing the difficulties faced by unpaid subcontractors, whilst ensuring that principals will not be unduly affected. I thank the agency that has been involved in the preparation of this bill; it has done very good work in a short time frame. I commend the bill to the House.