



Building And Construction Industry Security Of Payment Amendment Bill

Second Reading

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BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT BILL

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Bill introduced and read a first time.

Second Reading

Mr IEMMA (Lakemba—Minister for Public Works and Services, Minister for Sport and Recreation, and Minister Assisting the Premier on Citizenship) [11.14 p.m.]: I move:

That this bill be now read a second time.

Just over three years ago this Parliament enacted the Building and Construction Industry Security of Payment Act 1999. The Act was the first of its kind in Australia. It has set a benchmark for dealing with payment problems in the building and construction industry and similar legislation has already been adopted in Victoria. I understand other States are also considering adopting a similar approach. The main purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. The Government wanted to stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers by ignoring progress claims, raising spurious reasons for not paying or simply delaying payment.

Reports received by my department indicate that the Act is proving very successful in reforming these practices. But changes can be made to make the Act even more effective. The purpose of this bill is to enact those changes. The changes were foreshadowed in a detailed discussion paper I released on 5 September 2002 to coincide with the formal review of the Act required at this time. The responses to that discussion paper were overwhelmingly supportive of the proposed changes. Proposed changes encompass new features to the Act, modifications to existing provisions, and drafting changes to clarify the intent of the Act.

The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid. However, some claimants have had difficulty enforcing payment of the debt due under the Act. To enforce payment, the claimant has had to obtain a judgment of a court. At present this involves taking out a summons in the appropriate court. The respondent has 28 days to lodge a defence or cross-claim. Then there is a hearing before a magistrate or judge, who has to decide whether to enter summary judgment for the statutory debt or set the matter down for a full hearing.

By raising in court defences such as that the work does not have the value claimed or that the claimant has breached the contract by doing defective work, some respondents have been able to delay making a progress payment for a long time. Those respondents have forced claimants to incur considerable legal costs. They have effectively defeated the intention of the Act. To overcome the problem, the bill clarifies that in court proceedings by a claimant to enforce payment of the debt due under the Act, a respondent will not be able to bring any cross-claim against the claimant and

will not be able to raise any defence in relation to matters arising under the construction contract. A respondent who wants to raise these matters must do so in a payment schedule in response to a payment claim under the Act, or in separate proceedings.

Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act. To reinforce this determination, the bill provides that after an adjudication the respondent must pay the claimant the adjudicated amount. The existing legislation gives the respondent the options of paying the adjudicated amount or providing security for payment of the amount. Experience has shown that where respondents have taken the security option, they have then not taken steps to expedite the final resolution of the dispute.

The result is that cash flow to the claimant does not occur, and the claimant has achieved little through the adjudication process. Removing the security option will overcome this situation and ensure that a reasonable interim payment, assessed by an independent party, is made within a short time frame. In addition, the bill includes another important measure for ensuring a claimant can more easily enforce prompt payment of the adjudicated amount. The bill provides that after an adjudication a claimant can ask the Authorized Nominating Authority, who nominated the adjudicator, for a certificate as to the adjudicated amount. The claimant can file that certificate in an appropriate court and automatically obtain judgment for the adjudicated amount.

Under the new procedure there will no longer be need for a summons and a hearing before a magistrate or judge. Claimants will be able to obtain judgment for the adjudicated amount without the need to engage a solicitor. A claimant will be able to obtain judgment on the day that the claimant files the adjudication certificate with the court. These measures not only will expedite recovery of progress payments but will considerably reduce the cost of doing so. If a respondent applies to the court to have the judgment set aside after an adjudication, the respondent will have to pay into court as security the unpaid portion of the adjudicated amount. This will defeat the practice of using legal proceedings to simply delay payment.

There will be some instances where a court may set aside the judgment. The respondent may be able to demonstrate to the court that the requirements of the Act have not been complied with; for example, that there has not been a valid adjudication. But in proceedings to set aside the judgment the respondent will not be entitled to bring a cross-claim or to raise any defence in relation to matters arising under the construction contract or to challenge the determination by the adjudicator. Adjudication is an expedited procedure. The adjudicator has only 10 business days in which to make a decision. There will be instances when the progress payment determined by the adjudicator will be more or less than the entitlement finally determined to be due under the contract. However, it is better that progress payments be made promptly on an interim basis, assessed by an independent party, rather than they be delayed indefinitely until all issues are finally determined.

Presently, when a respondent fails to pay the claimant by the due date for payment under the contract, the claimant's only recourse to enforce payment is to commence proceedings in a court. The bill will give the claimant another option. The claimant will be able to opt to have an adjudicator determine the amount of the progress payment that is due. This is an "optional adjudication". The claimant will still be able to proceed to adjudication earlier if the respondent provides a payment schedule and the scheduled amount is less than the amount claimed. The benefit to the claimant of proceeding with an optional adjudication rather than commencing proceedings in a court is that the claimant will then be able to use the adjudication certificate to obtain judgment expeditiously and without a court hearing. The claimant will be able to initiate an optional adjudication when the respondent fails to provide a payment schedule within time and fails to pay the amount claimed, or the respondent provides a payment schedule but fails to pay the whole of the scheduled amount.

The changes are not only designed to prevent abuses of the intent of the legislation by respondents. We recognise the potential for claimants to abuse also the intent of the legislation. Consequently, the bill restricts claimants to one payment claim under the Act in respect of each

reference date. Reference dates will be either dates specified in the construction contract for making progress claims or, if not stated, the last day of each month of the year. There will also be a limit upon how long after construction work is completed that a claimant can continue to make payment claims under the Act. The period will be 12 months after the last work was carried out or the goods or services were last provided, or a later date if provided for under the contract.

If the scheduled amount is less than the claimed amount, the Act presently allows the claimant five business days in which to initiate an adjudication. This period will be extended to 10 business days. This reflects the fact that a claimant frequently is unaware there is a payment dispute until the payment schedule is received and the proper preparation of an adjudication application can take more than five business days. Another time which will be extended is the time for the respondent to make payment after an adjudication. Presently, it is two business days. This will be extended to five business days to provide a more reasonable time to organise payment and to ensure work is not suspended prematurely.

A significant new feature is the provision in the bill that interest must be paid on the unpaid portion of a progress payment. Interest will be at the higher of the rates of interest provided for in the construction contract or the rate applicable to Supreme Court judgments. This will stamp out the practice of including a very low rate of interest in a construction contract. A low rate of interest is an incentive to delay payment. We want to remove any such incentive. To further enhance security for payment, the bill provides that, if a progress payment becomes due and payable, the claimant is entitled to a lien. The lien is for the unpaid amount and is over any unfixed plant or materials supplied by the claimant to the respondent for use in connection with the carrying out of the construction work. The lien will not override a pre-existing entitlement of a third party.

Under the bill, authorised nominating authorities are given an enhanced role. Henceforth, all adjudication applications must be made to an authorised nominating authority chosen by the claimant. A respondent will no longer be able to dictate in the construction contract that a particular authorised nominating authority must be used. Authorities will be entitled to charge fees for dealing with adjudication applications and related matters. The Minister will be able to limit the number of authorised nominating authorities and to set the upper limit of fees which may be charged by an authorised nominating authority. The bill provides that the adjudicator's determination must include the reasons for the determination unless both the claimant and respondent request otherwise.

The bill also puts a stop to "adjudicator shopping". This is the practice of a dissatisfied claimant making repeated adjudication applications until the claimant gets the adjudication decision that the claimant wants. Henceforth, if one adjudicator has decided that work, or related goods or services, have a certain value, in a subsequent adjudication the adjudicator or any other adjudicator will have to give the work, goods or services that same value. An exception is where the claimant or respondent satisfies the adjudicator that the value of the work, goods or services has changed since the previous adjudication. If the adjudicator's determination includes a clerical mistake or minor error or miscalculation, the adjudicator may correct the determination.

The Act has provision to enable an unpaid claimant to suspend work but there is no reference to when the claimant must recommence work. It is proposed to allow the claimant up to three business days to resume work after the claimant has been paid all moneys due under the Act. The bill further provides that if, as a consequence of the suspension, the respondent removes from the construction contract any part of the work or the supply of goods or services, the respondent is liable to pay the claimant's loss or expense arising from such removal. That loss or expense can be included in a progress claim.

Under the present Act the costs of the adjudicator are shared equally unless the adjudicator finds the adjudication application or the adjudication response was wholly unfounded. Experience has shown that there are many instances where the adjudication application or response was not wholly unfounded but was, nevertheless, so unmeritorious or ill-prepared that the responsible party should be made to pay more than half the costs. Under the bill the adjudicator will be empowered to determine how costs should be apportioned. This includes fees paid to an authorised nominating authority, for example, on lodgment of an adjudication application or for an adjudication certificate,

that are provided for in the bill.

As previously mentioned, authorised nominating authorities will be empowered to issue adjudication certificates which can be used to obtain judgment. Such certificates can also include the amount of interest and adjudication costs payable by the respondent to the claimant. In the light of the enhanced role of authorised nominating authorities, the bill provides an authority with protection for anything done, in good faith, in the reasonable belief that it was done in exercising the authority's functions under the Act. Notices served under the Act will also be able to be served in a manner provided for under the construction contract.

To further enhance the remedies available to a claimant, the bill incorporates an amendment to the Contractors Debts Act 1997 to provide that the Contractors Debts Act covers all debts arising under the Building and Construction Industry Security of Payment Act. The Contractors Debts Act establishes a debt recovery procedure that allows a claimant to whom money is owed to seek payment of that money from a principal who engaged the defaulting respondent. This amendment will ensure all claimants under the Building and Construction Industry Security of Payment Act will be able to avail themselves of this procedure.

Minor changes have been made to remove possible ambiguities, for example, to ensure that progress payments include milestone payments, that progress claims under the Act can be made under construction contracts that have no provision for progress payments, and that progress claims can include the final amount claimed and retention moneys. The voiding of contract provisions that seek to contract out of the Act is extended to include any contract provision that can be construed as an attempt to deter a claimant from taking action under the Act. The proposed amendments will not affect payment claims made before the commencement of the amending Act. Such claims will be dealt with as if the amending Act had not commenced.

Debate adjourned on motion by Mr Maguire.

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