



Speech by

Paul Hoolihan

MEMBER FOR KEPPEL

Hansard 11 May 2004

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS BILL

Mr HOOLIHAN (Keppel—ALP) (6.09 p.m.): It is with pleasure that I speak in favour of the Building and Construction Industry Payments Bill 2004. Part of my background involved trying to enforce charges under the Subcontractors' Charges Act, which was somewhat akin to a nightmare. For many years the building and construction industry has experienced difficulties with payments between different levels of contracting parties, as has already been set out. It is pleasing that we have a minister who has a background in the construction and building industry, and I congratulate him on the thrust of this bill.

Any member of this House who has practised law in the area of building contracts will be aware of the difficulties experienced by subcontractors in obtaining payments from certain unscrupulous builders and even some decent operators who have difficulties with cash flow or where a dispute exists over a contract. The member for Darling Downs has pointed out that, in some ways, this bill does not go far enough, but the shortcomings relate more to the ultimate recovery of moneys owed if a claim for the unpaid amount is filed as a judgment for a debt in a court of competent jurisdiction. Company liquidation or bankruptcy could still frustrate the payment. If the respondent is going bust or is a company close to liquidation, the money may never be paid in full, but this situation does not affect the real improvement that will be implemented under this bill and that will protect the majority of industry operators.

The bill substantially expands the definition of 'work' which can attract the payment provisions and give certainty to a claimant. The original Subcontractors' Charges Act was very prescriptive in respect of the areas that attracted the operation of that act and the time frames were very tight, and I will mention that later in my speech. The chain of payments was also attacked further up the chain thereby causing cash flow problems for the whole contractual chain.

If the non-paying entity or person had only some temporary difficulties in their cash flow and had not wished to become part of any resolution because of a perceived backlash by the industry, the requirement in this act for a payment schedule should give both parties the opportunity to be open with each other and perhaps enter into meaningful discussions for resolution. Even if only some payment is to be made now, that will protect the claimant's position in the interim and give them a continuing right to receive the balance of their money.

The present requirements under the Subcontractors' Charges Act caused long and involved proceedings. Anecdotally, it appeared that the main argument usually raised against any claimant was that the work was substandard or had not been completed. The onus of proving all aspects of the claim rested on the claimant's subcontractor and virtually became a trial on a breach of contract.

I note that the research brief produced by the Parliamentary Library sets out the limitations under the existing act, one of which is 'that courts have strictly interpreted the act because of the special position it confers on subcontractors'. To any lawyer acting in that field, that comment is a substantial understatement. Because of the nature of most subcontractors' operations, they work on a small profit margin and a substantial cost in enforcing any claim—together with the strict interpretations and sometimes coupled with the loss of the payment—caused them to face ruin. In addition, they were not able to cease work under the contract as the mere cessation would thereby constitute a breach of the contract.

Various amendments were made to the original Subcontractors' Charges Act over the years, but the difficulties for any claimant in securing payment has never been completely resolved. To have a defined process with specific time frames does give some certainty to claimants while endeavouring not to disrupt the payment chain. A procedure allowing a claim, then requiring submission of a payment schedule, adjudication of any disputed claim and payments of progress payments should streamline the resolution of any disputes.

The act makes provision for the registration of an authorised nominating authority and also for separate registration as an adjudicator. It is the nominating authority that must register the adjudicators in accordance with the act, but I would have preferred to see the QBSA itself register the adjudicators, thereby removing one tier of bureaucracy. The criteria for registration is, however, set out in the act and should ensure a high quality of adjudicator. In addition, the failure of an adjudicator to meet the time limits set out in the act for his or her adjudication would result in the loss of right of payment of the adjudicator, and that should set a high quality of persons entering the field.

The Commercial and Consumer Tribunal Act is amended and given review powers in relation to the registration of the nominating authority or the adjudicator, and this power may ultimately resolve any of my perceived problems. The authority is required to report to the minister as to the operation of the adjudication registry in each year and it may be necessary to review that aspect of the appointment of adjudicators after consideration of that report.

Although causing difficulties in its enforcement, the Subcontractors' Charges Act has not been discarded altogether and it still may have some relevance under certain circumstances. The claimant has the option to choose which procedure they wish to follow. That was mentioned by the member for Darling Downs. However, in fact they may switch from one procedure to the other if circumstances change.

The Queensland Building Services Authority Act is also amended to change the application of that act to certain contracts, and that is under section 67. In fact, it amends part 4A of the act to allow the provisions of the new bill to operate in the manner envisioned.

As with much legislation, the proposed operations can only be assessed against comparable provisions in other states or assessed against its own operation over time. The minister and his department have addressed the difficulties for payment to contractors by the procedures proposed. I believe the majority of operators in the building industry will accept the legislation and try to operate within its framework. Those who do not accept the procedures are the ones who caused the problem in the first place and, hopefully, the application of the bill will banish them from the industry. I commend the bill to the House.