Speech By

Hon. Tim Mander

MEMBER FOR EVERTON

Record of Proceedings, 10 September 2014

BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS AMENDMENT BILL

Second Reading

Hon. TL MANDER (Everton—LNP) (Minister for Housing and Public Works) (7.58 pm): I move—

That the bill be now read a second time.

In opening, I thank the Transport, Housing and Local Government Committee for its consideration of the Building and Construction Industry Payments Amendment Bill 2014. In particular I thank the committee and the chairman, the member for Warrego, for their deliberation and report on the bill which was tabled on 1 September 2014. I am now pleased to table the government's response to the committee's report.

Tabled paper: Transport, Housing and Local Government Committee: Report No. 52—Building and Construction Industry Payments Amendment Bill 2014, government response [5915].

I would also like to thank those who made submissions regarding the bill to the committee. I appreciate the time that they have invested in conveying their feedback. I would also like to particularly thank Mr Andrew Wallace for the very hard work he has undertaken to review this act.

The construction industry is one of the main pillars of the Queensland economy. It is therefore vital that we have a system of payment which is fair for all. The Building and Construction Industry Payments Act, or BCIPA, was created to provide an alternative to the court system and is intended to be a quick and easy way to resolve payment disputes. Anything that allows payment disputes to be resolved quickly is worth supporting and, for the most part, BCIPA has operated reasonably well. The amendments being debated here tonight are intended to rectify a few issues which have been undermining confidence in the system.

One of the key areas of reform deals with the way adjudicators are appointed to decide cases. Under the new legislation an adjudication registry will be set up within the Queensland Building and Construction Commission from which adjudicators will be appointed by an impartial registrar. This will address the perception of bias that cannot help but exist in a situation such as we have at present, where adjudicators are appointed by private entities, known as authorised nominated authorities or ANAs, who could be seen to have a commercial interest in the outcome. Consultation conducted as part of Mr Wallace's review of the act delivered up example after example of this perceived bias. A sample of some of the submissions received by Mr Wallace include a statement from a lawyer that—

The current system effectively promotes 'ANA shopping' and 'adjudicator shopping' as the claimant has the right to elect which ANA to choose and therefore the claimant is likely to choose an ANA whose adjudicators are perceived to be more favourable to claimants.

A quantity surveyor submitted that—

The current system of profit motivated ANAs appointing adjudicators detracts from the operation of the act. It leads to claims, real or imagined, of bias, places undue pressure on adjudicators and does nothing to facilitate the proper operation of the Act.

An adjudicator stated that—

The present ANA system is open to and is presently being performed with undisclosed conflicts of interest. One of the main problems is with the ANAs maintaining an unhealthy relationship with what they refer to as preparers. These preparers are recommended to claimants by the ANA with the expectation that the preparer will direct the application to the ANA. There is an unhealthy chain of involvement which must inevitably one day end up with a Court action once someone is sufficiently aggrieved and has sufficient liquidity to run the case. The reputation of the BCIPA process will be shattered if this is allowed to continue.

A committee of the Queensland Law Society stated that—

Any process which allows one party to unilaterally appoint a decision maker (or in this case, an ANA) is open to abuse and may lead to the apprehension of bias and prejudice.

In my consultation I heard stories detailing what can only be described as a completely inappropriate cycle of inter-dependence between ANAs, adjudicators and claims preparers, many of whom are also adjudicators. Let us consider a situation where claim preparers, who are also adjudicators for a particular ANA, would allegedly recommend that the claimant use that ANA in exchange for the ANA providing said adjudicator with work on another claim. Other stories involved claimants approaching ANAs for advice and ANAs recommending claimants use a particular claims preparer, who just so happens to also be one of the adjudicators on the ANA's panel, on the proviso that the claims preparer uses them as an ANA. When it is open to this kind of mutual back scratching, the current system is totally untenable. Justice must not only be done, but also be seen to be done. Under these changes, adjudicators will now be appointed by the independent and impartial Queensland Building and Construction Commission based on their skills, knowledge, experience and area of expertise. Adjudicators would also be subject to a more comprehensive professional development regime, ensuring that they are better trained and more accountable.

The second area of reform is needed to make sure the time frames relating to responding to claims are fair. It stands to reason that complex claims—that is, those valued at more than $750,000—should be treated differently to smaller claims. However, at the moment, claims are subject to the same time frames whether the dispute is over $500 or $5 million. The changes would also help put an end to what are commonly known as ambush claims, which are cases where one party might take a whole year methodically putting together a claim to which the respondent has less than a fortnight to reply. Often those sorts of ambush claims would be served a few days out from Christmas or at other periods when businesses normally shut down, making the task of formulating a meaningful response even harder. That kind of creative use of the existing time frames in the act has resulted in all sorts of bizarre consequences. Believe it or not, some law firms have had to put on what they call a night crew, specifically to work on responses to those kinds of ambush claims.

Under the proposed amendments, the time frame in which a payment claim can be made has been reduced from 12 months to six months from the time work was last carried out or goods and services were supplied. Given that the intent of the act is to help people get paid quickly, this is a common-sense change. Time frames for respondents to provide a payment schedule for claims of less than $750,000, which represent 90 per cent of all claims, will remain unchanged at 10 days. For claims involving more than $750,000, respondents will have an extra five days to provide a payment schedule. In cases that proceed to adjudication, the time for a respondent to provide an adjudication response will increase from five business days to 10 business days and up to 15 business days for complex claims, with discretion for the adjudicator to grant extra time under certain circumstances.

I now turn to the committee's recommendations in relation to the bill. The first recommendation is that the bill be passed, and I thank the committee for its endorsement of the bill.

The second recommendation seeks to develop and include high-level guiding principles regarding the appointment process of adjudicators in the bill, with which agency staff must comply. While the government agrees that criteria and principles need to be established to rank and appoint adjudicators, this could be best accomplished via a policy that is approved by the QBCC Board and published on the commission's website. It is also important to note that the appointment of adjudicators by the registrar will be under the jurisdiction of the Crime and Corruption Commission and the Ombudsman. Therefore, while the proposed amendment to the bill is not supported, the spirit of the recommendation will be achieved by other means.

The third recommendation is to implement an alternative model for the appointment of adjudicators to matters where the Queensland government is a party. The government is of the view that the appointment of adjudicators is best undertaken by the registrar in all instances. Furthermore, the registrar will be selecting adjudicators based on a QBCC Board approved policy and all activities undertaken by the registrar will be under the jurisdiction of the CCC and the Ombudsman. Contrast

those heightened levels of accountability with the current arrangements where adjudicators are appointed by private companies that are not accountable to anyone.

In addition to these measures, the QBCC will publish the appointment of adjudicators and adjudication decisions on its website on a daily basis. These measures will ensure there is probity in the appointment process and for this reason the government considers the proposed amendment unnecessary at this time.

Recommendation 4 suggests that the bill should be amended to implement recommendation 19 of the Wallace report which proposes adjudicators should fall within the jurisdiction of the CCC. Crown law advice on this recommendation was that because adjudicators are not considered to be public officials they cannot be made subject to the CCC.

Recommendation 5 suggests I outline the advice received from the Queensland Competition Authority addressing the perception that the amendments are anticompetitive. In response, I note the QCA's consideration of the preliminary impact assessment found that the proposed amendments were not likely to result in adverse impacts and therefore a regulatory impact statement was not required. I am confident that these amendments will lead to more competition in the market for adjudication services and create an environment which could lead to a reduction in adjudication costs for all parties involved.

In recommendation 6 the committee recommends that the minister include a list of who is responsible for the training and accreditation of adjudicators in the bill. This is a function currently undertaken by the authorised nominating authorities, ANAs. The government agrees in principle with this recommendation, but believes an amendment to the regulation will address the requirements for training and accreditation of adjudicators.

In recommendation 7 the committee recommends that the bill be amended to include indemnity protection for ANAs to cover them for any functions undertaken prior to the amendment of the legislation. This recommendation is unnecessary as ANAs will already have indemnity protection for functions performed prior to the amendments under the Acts Interpretation Act 1954.

Recommendation 8 recommends that the bill be amended to ensure adjudicators engage independent agents. The government agrees in principle with this recommendation, but believes this objective can be achieved by making the engagement of an independent agent a condition of registration.

Recommendations 9 and 10 look at the definition of 'complex claims'. Through the committee process concerns were raised that the definition was too complex and could lead to some claims being classed as complex when they were for a relatively minor amount. The government accepts that the definition of 'complex claims' be amended and will do so.

In recommendation 11 the committee recommends that recommendations 10 to 15 of the Wallace report be implemented. These recommendations relate to the inclusion of retention moneys and securities in payment claims, the establishment of a construction retention bond scheme, the introduction of penalties for contractors and the empowerment of adjudicators to direct the release of securities. The government remains committed to boosting the security of payment for subcontractors and has begun investigating additional options to supplement BCIPA. Over the coming months we will be engaging with industry to develop a suite of initiatives that strike the right balance between the needs of all parties in the contracting chain.

In relation to recommendations 10, 12, 13, 14 and 15, the department will undertake further investigation and will consider adopting these recommendations in future amendments. With regard to recommendation 11 of the Wallace report, the department is actively monitoring the implementation of a statutory retention trust fund scheme in New South Wales. I will consider the best approach for Queensland following a review of that scheme.

Recommendation 12 relates to investigating ways to protect claimants against the nonpayment of outstanding amounts, once the contract has been terminated. The government notes this recommendation with interest and will explore options in more detail.

In recommendation 13 the committee recommends that the bill be amended to provide for the regulation of all adjudication fees, application fees and certification fees. The government agrees that the application and certification fees should be regulated and will support the regulation of adjudication fees for small claims up to $25,000. Adjudication fees for claims of greater than $25,000 will be at an hourly rate which will be agreed with the adjudicator. Last year approximately 50 per cent of all claims were under $25,000.

In recommendation 14 the committee recommends that the bill be amended to replace ‘must’ with ‘may’ in proposed section 100(4). This amendment provides the Supreme Court with the ability to enforce part of a payment. The government agrees with this recommendation and the bill will be amended accordingly.

In recommendation 15 the committee recommends the bill state clearly how claims, schedules and adjudication applications, relating to claims which have already commenced, will be treated under the amended act. The government agrees with this recommendation and the bill will be amended to include a transitional arrangement to address this.

Recommendations 16, 17 and 18 from the committee’s report all seek amendments to the bill to address a range of needs. Among other things, these recommendations clarify section 20A and resolve some inconsistencies which were identified in submissions to the bill inquiry. The government agrees with all of these recommended suggestions and proposes that the bill be amended in that regard. These amendments will assist in reducing costs to the industry through introducing a more competitive market. This could see a reduction in adjudication costs as well as a reduction in red tape by establishing a one-stop shop for claimants.

For BCIPA to work to its fullest potential, people at all levels of the contract chain need to have faith in the system. The amendments put forward today will create a payment dispute resolution model that is simpler and easier to use, ensures disputes can be solved in time frames that are fair for all parties and, importantly, is free from the perceived conflicts of interest that have beset the current system. I commend this bill to the House.