Hon Martin Hamilton-Smith  
Minister for Investment and Trade

Friday, June 17

New laws proposed to secure prompt payment for sub-contractors

Sub-contractors in the building industry will be supported in their push for prompt and fair payment by principal contractors under new laws proposed by the Small Business Commissioner.

The proposal follows a review of the Building and Construction Security of Payment Act, conducted by retired District Court Judge Alan Moss and a round of extensive consultation on his findings.

Small Business Commissioner John Chapman has sent his Consultation Report and recommendations to the State Government which has in turn called for submissions on the proposals which include a raft of changes to the resolution of payment disputes in the industry.

Background

Minister for Small Business Martin Hamilton-Smith has asked the Small Business Commissioner to coordinate public submissions on the review, its recommendations and the Commissioner’s proposals for change.

The Government remains open to suggestions for change, and the proposals put forward by the Commissioner and Mr Moss. Seeking feedback is an important step as we seek fairness in the way the industry operates. The Moss Review of the Act’s effectiveness was tabled in parliament in May 2015 and the Commissioner was given the task of consulting with industry to seek its view on Moss’s recommendations.

Quotes attributable to Minister Hamilton-Smith

As part of the review of the Building and Construction Security of Payment Act 2009, I have become increasingly concerned about feedback from businesses that they will not get further work if they were to use the Act to get payment.

The issue of intimidation by principal contractors was one of the most concerning issues raised. Prompt payment for these businesses often means the difference between staying afloat or going under and this is a top priority for government.

Quotes attributable to John Chapman

It is unacceptable that key participants in the industry are adopting heavy-handed tactics and as a result, I believe a firm legislative approach is required.
The Act provides for adjudication processes in cases where there is a dispute over payment for work done or goods supplied. It’s important we get these changes right in a way that supports small business, but without burdening it with any additional regulation or red tape.

The proposed changes are set out in a three stage approach. It is anticipated that the expeditious implementation of stage one will result in a significant improvement in the operation of the Act and principal contractor behaviour.

A heavier regulatory approach could be implemented by the Government under stage two, and possibly stage three, if the changes made under stage one fail to improve conduct in the industry and payment to subcontractors.

Proposed changes include:

- The insertion of a penalty provision for intimidation to address the apparent fear of retribution amongst subcontractors if they were to use the Act to recover payment;
- An amendment to the Act to withdraw the authority of existing Authorised Nominating Authorities (ANAs) and appoint the Small Business Commissioner (SBC) as the sole ANA. As the sole ANA, the SBC will be responsible for the appointment and selection of adjudicators;
- The establishment of a secretariat to support the SBC in the new role as the sole authorised nominating authority, and the responsibility of training adjudicators and administration of the Act;
- The insertion of a provision to enable the SBC to publish adjudications to provide transparency within the industry;
- An amendment to clarify the Christmas shutdown period in an attempt to avoid ambush claims;
- The implementation of procedures by Government to ensure subcontractors working on Government projects over $1 million are paid on a regular basis;
- The development of a Building and Construction Industry Code under the *Fair Trading Act 1987*, which would provide alternative dispute resolution services. The proposed Code would give the SBC the same powers as the existing Industry Codes, with mandatory requirements for parties to assist and participate in alternative dispute resolution;
- The establishment of an education program to promote the Act and educate the industry;
- The introduction of simple and complex claims;
- The development of a policy, in conjunction with the Industry Participation Advocate, which in effect will be a good behaviour test for principal contractors who bid for Government projects;
- The insertion of a provision in the Act requiring Directors of principal contracting firms to sign Statutory Declarations confirming that subcontractors have been paid. These declarations would be published on a principal contractor’s website and on the notice board at the worksite. Such a provision would provide a much greater degree of transparency in relation to subcontractor payments, as well as the behaviour of principal contractors;
- The insertion of a provision in the Act relating to the holding of payments in dispute in trust in cases where a claimant has lodged an adjudication application. In the SBC’s view it would assist in the resolution of any claim if there was a requirement that the amount in dispute be paid into trust;
- The establishment of trust arrangements for all retention payments for projects over $10 million. The involvement of a third party such as the SBC could potentially go some way to ensuring behavioural change in this important area;
The establishment of a Project Bank Account for Government projects, which is a form of trust account that allows subcontractors to be paid directly by the State Government on an agreed schedule.

The Consultation Paper is available online at www.sasbc.gov.au.

The closing date for submissions is 19 August 2016.