BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) BILL 2021

Committee

Resumed from 15 June. The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

Progress was reported after clause 73 had been agreed to.

Clause 74: Establishment of retention money trust accounts and payments into trust accounts —

Hon NICK GOIRAN: As we dive back into this 140-clause bill, I note that the minister had taken some matters on notice overnight and was potentially coming back to members today. Maybe this is a convenient time to provide an update.

Hon ALANNAH MacTIERNAN: Yes. I undertook to get back to Hon Nick Goiran with some figures on the number of complaints received by the Small Business Commissioner regarding subcontractor non-payment. The figures that I have been provided with show that the Small Business Development Corporation has received 161 complaints relating to non-payment within the building and construction industry since late 2018. Four matters received recently are currently being investigated and all other complaints have been examined and finalised.

I also undertook last night for Hon Dr Steve Thomas to look at issues in relation to adjudication applications in the other states. Our very diligent personnel have beavered away and gone onto the various websites of the other states and scoured some of that information. This document contains a synopsis of the relevant reports and extracts of relevant statistics that should give the member an indication of the number of adjudication applications made each year, the number of decisions made and the aggregated payment claim amounts versus the amounts determined in adjudication. I table that document.

[See paper 283.]

Hon NICK GOIRAN: Clause 74 is titled "Establishment of retention money trust accounts and payments into trust accounts". Clause 72(2) in particular has a time frame of 10 business days. What consultation occurred with stakeholders regarding the choice of 10 business days? I have had some people express concern about that. Can the minister communicate what kind of consultation occurred?

Hon ALANNAH MacTIERNAN: This was included in the exposure draft. The exposure draft provided that when a contract captured by this is entered into, the retention money trust account must be opened within 10 business days. If a contractor is subsequently captured by an increase in value in particular, they also have only 10 days to open the account. Some submissions asked that we look at extending that period to 20 days. We did not think that it would be too onerous for a contract requiring a retention trust account at the outset to come within the purview of the bill because most banks will open a new transaction account within a couple of days. But it was recognised that if a construction contract latterly comes within the purview of the bill, then perhaps there might not be the same awareness, so we provided for 20 days in which to open an account.

Hon NICK GOIRAN: Thank you for that explanation, minister. Is there any appetite on the part of the government to consider making it 20 days across the board? It would seem that that would have created some simplicity. The minister just acknowledged that it was originally 10 days but that the government was persuaded to extend it to 20 days in certain circumstances. I have received some stakeholder feedback that suggests that the simplest model would be to allow for 20 days across the board. If the government does not have an appetite for that and it wants to stick with what it is, what is the disadvantage of not having 20 days? There must obviously be some manifest benefit to the system and to the scheme to insist on maintaining the 10 days. It is not immediately apparent to me, but perhaps the government has an appetite to change it anyway.

Hon ALANNAH MacTIERNAN: We would not consider changing this. I do not think that an enormous amount turns on it either way. When a contract at the very outset is of a scale that comes within scope of the legislation, there is no reason an account could not be opened within 10 working days—that is two weeks. Our view is that that is part of the discipline of the system. We want people to attend to this in a speedy way. Although it would not have an enormous impact either way, we think that it is not unreasonable to require this after a whole range of matters have been done. People will have checklists when they enter into these contracts. One of those things will be to set up a retention trust account within 10 working days. I do not see this as being problematic, and we certainly do not see that as being a practical impediment to business.

Hon NICK GOIRAN: Was this issue of the 10 and 20-day period considered by the Fiocco review; and, if so, what was the recommendation?

Hon ALANNAH MacTIERNAN: It was not considered in the Fiocco report.

Hon NICK GOIRAN: I have one further question on this clause. If the retention money trust account is established on the eleventh day, what penalty will be imposed in those circumstances?

Hon ALANNAH MacTIERNAN: We do not see that that would necessarily be an offence under the act. However, a statutory trust is implied immediately after 10 days and a party could take action against the principal here if they had failed to set up that trust account because effectively they would be in breach of their trust obligations; that is, they could have arguably even stolen someone's money. That money should be in a trust fund because at that point they do not have beneficial ownership of that money.

Hon NICK GOIRAN: There is obviously the civil remedy to which the minister refers. However, just to be clear, no criminal penalty would apply in this instance?

Hon ALANNAH MacTIERNAN: As I understand it, the statutory penalties apply only if it has never been established. If we see one that has not been established, we take action. I am advised that if that is then established, the action would no longer exist; it would simply be a civil requirement. Bear in mind that what we are trying to do is get people to put money into the retention fund. As I think we discussed earlier, there is a statutory right for the party whose interests have not been properly protected to suspend works until that is remedied.

Hon NICK GOIRAN: That is a good explanation. If there were any desire on the part of the government to incentivise people to comply with this provision, I suspect that if they read *Hansard* and saw that the minister indicated that there could be some allegation of stealing money, they might be suitably incentivised to take the action. It was probably that phrase that sparked my interest to clarify for people whether any criminal liability will flow from a provision that states that we want people to do it within 10 days and, in different circumstances, we want it done within 20 days. There are some stakeholders out there saying that it would be easier for them if we would let them all do it within 20 days. The government is saying that probably not much turns on it one way or the other. I agree with the minister on that point. However, if we are now talking about criminal sanctions that might apply because someone does something on the eleventh business day for whatever reason—sickness or any other reasonable delay—then that would probably be a concern to some of these stakeholders. I hear from the minister that in the end when push comes to shove, only a civil remedy applies and no criminal sanctions are applicable.

Hon Alannah MacTiernan: That is correct.

Hon Dr STEVE THOMAS: Clause 74(4) refers to the establishment of retention money trust accounts. Paragraph (a) appears to refer to effectively one trust per contract: if people build something and they have six contracts, they can have six trust accounts under the act; or, under paragraph (b), people can have a single trust account for all the contracts and all the subcontractors. Am I right in thinking that in my example of six subcontractors, there cannot be two trust accounts with three contracts each? They cannot be grouped as such; they are either individual accounts or all in. Is that how I am supposed to read that clause?

Hon ALANNAH MacTIERNAN: From the advice that I am being given, the member's analysis is correct. There are only two options; that is, one account per beneficiary to keep all moneys separate and easily identifiable or people may choose to have a single account. The member's question is whether there can be mob groupings of accounts. The advice I have is that that is not the case. The member's analysis is correct: there is a choice of one account per beneficiary or per contract, so there might be multiple beneficiaries on one contract. That is, there can be one per contract or multiple contracts; one cannot have multiples of multiples.

Hon Dr STEVE THOMAS: Is there a reason why? It might be convenient to group like contracts potentially. Is there a reason it is either/or and no other choice?

Hon ALANNAH MacTIERNAN: It is just really for administrative efficiency and I suppose it is to stop new complexities arising when trying to track down how many accounts one has.

Clause put and passed.

Clauses 75 to 77 put and passed.

Clause 78: Trust account interest and fees —

Hon Dr STEVE THOMAS: I thank the minister for providing additional information while I was out of the chamber on urgent parliamentary business. It looks most interesting but I will not be reading it until I have finished the bill. I will go through it though. Clause 78(4) refers to the fees and charges payable to the recognised financial institution. It is fair enough that the institution will charge a fee for a trust. Certain institutions tend to crank up their prices under certain circumstances when money is available. Is there any indication of what those charges are like and whether the government might need to keep a watching brief on how high those charges might climb? I ask that as someone who remembers 22 per cent interest rates.

Hon ALANNAH MacTIERNAN: Because this is simply a transaction account, payments will be made into the account. It is not an overdraft account. It is anticipated that the fees will be minimal. Research that has been done indicates that monthly account fees will range from zero to $10 a month.

Clause put and passed.

Clauses 79 to 87 put and passed.

Clause 88: Application for authorisation —

Hon NICK GOIRAN: I am pausing for a moment. We sped past clause 87. Obviously, I will ask a question about clause 88, which is what we are up to. Before I do, I ask the minister and her colleagues to turn their minds to clause 87, which we have just passed over, in light of the remarks relating to criminal liability that we were making earlier when considering clause 74. We have passed over clause 87, but if any correction to the record needs to be made, I am sure that that will be done at some time.

With regard to clause 88, will the prescribed appointors that currently exist under the Construction Contracts Regulations 2004, specifically rule 11, automatically qualify as an authorised nominating authority under part 5 of this bill, or will the prescribed appointors need to go through the application process set out in clause 88 of the bill?

Hon ALANNAH MacTIERNAN: I thank the member for the question. Very quickly on the first question relating to clause 87, I am advised that one could take legal action. It could be an offence not to set up an action but if an action was taken against someone and, in the interim, they set up the retention fund, they could not be prosecuted. For example, if it was found at the end of the contract that they had not set up the retention fund, they could be prosecuted because they would not be in a position to remedy that situation. That is the advice I received, but I will not continue any longer on the clause that we have already passed.

The prescribed appointees under the existing legislation will not automatically be authorised as nominating authorities. It is considered that this is a bigger, more robust, role under this legislation than under the previous legislation. Everyone will start afresh and will have to make an application to the Building Commissioner, who will make a determination.

Hon NICK GOIRAN: During that period of time, will people who qualify have a period of 12 months from assent to continue their role as a prescribed appointor before then becoming a nominating authority 12 months later?

Hon ALANNAH MacTIERNAN: The prescribed appointees can obviously continue in their role and the other legislative regime will continue for those contracts that are not covered by this legislation. Those who want to apply once all the regulations are in place can make their application and they could become nominating authorities. It is not a question of having to discontinue being a prescribed appointor but, rather, having the option to take on a different role under this legislation.

Hon NICK GOIRAN: If the minister looks at clause 110, she will see a transitional registration process set out there. Was any consideration given to providing for a transitional registration provision along those lines for these nominating authorities who are currently serving as prescribed appointors under the current act?

Hon ALANNAH MacTIERNAN: Consideration was given but, as I said before, a determination was made that the role of the nominating authority is a bigger role than under the existing role of the prescribed appointees. We felt it was appropriate that they need to satisfy a new process. Clause 110 is needed to provide administrative flexibility, which allows for the registration of an adjudicator under the Construction Contracts (Former Provisions) Act 2004 to carry over for a provisional period of 12 months, within which time such individuals will need to apply for full registration. We will get the nominees in place. They can continue their role. While we are assessing the nominating authorities, the existing adjudicators can continue in their role.

Clause put and passed.

Clause 89: Maximum number of persons who may be authorised —

Hon Dr STEVE THOMAS: I am interested in why there was a need to suggest the regulations may need to prescribe the maximum number of persons who may be authorised as nominating persons at any time. Surely so many authorised nominating authorities would be set up. Is there a reason we need a specific limit?

Hon ALANNAH MacTIERNAN: We will make a determination on how that limit will be set. It is important. We do not want every man and his dog, Uncle Tom Cobley and all, to be there because we will need to have oversight and regulatory control over supply and demand with respect to the services of the persons who are authorised as nominating authorities. We do not want a situation in which the market is saturated, as we may undermine the capacity and professionalism of the authorised nominating authorities. We anticipate that we will probably be looking at five or six of these nominating authorities.

Hon Dr STEVE THOMAS: I thank the minister and I get what she is saying. I am not sure why we would not just simply have in mind that we need five or six and approve five or six. Is there a risk that someone might inadvertently somehow approve 15?

Hon ALANNAH MacTIERNAN: No, at this point we have a particular expectation of what the number of cases might be. As the member said, when we look at cases from other states, our supposition of 250 cases per year is probably quite reasonable, and that could be satisfied at this point. But maybe in five years' time, if the fabulous boom that is going on under the McGowan government continues, we might need to double that amount, and it would be better to be able to do that in regulations than to prescribe the number at the outset.

Clause put and passed.

Clauses 90 to 96 put and passed.

Clause 97: Code of practice for nominating authorities —

Hon Dr STEVE THOMAS: I am interested to see what the code of practice might be for nominating authorities. I do not imagine we have seen it yet, but when does the government expect to have that ready to go in terms of regulations, and is it likely to be based on a particular model—either an eastern states model or an existing building and construction process?

Hon ALANNAH MacTIERNAN: It will go out with the draft regulations for consultation. I think I outlined in my reply to the second reading debate that it would be things like professional conduct; managing of conflicts of interest; setting of fees; appointment of adjudicators; conduct of review adjudicators; reports to the Building Commissioner; and complaints handling. The code will be part of the regulatory package, so it will be enshrined in regulations and will go out with all the other materials for consultation.

Clause put and passed.

Clause 98: Making and determining applications for authorisation before commencement of Division —

Hon Dr STEVE THOMAS: This is an interesting clause. It states —

> (1) An application for authorisation as a nominating authority may be made and determined under this Division before all the provisions of this Division come into operation.

But surely that is not before the provisions that relate to the applications and authorisations come into operation. We are not going to go through that process before we declare the parts of the legislation that will actually enable it.

Hon ALANNAH MacTIERNAN: The advice is that this provision will allow the receival of these applications prior to the requirements coming into effect and the particular parts being proclaimed. We can see the purpose of it, because we want to make sure there is a suite of nominating bodies that have been given authorisation by the time the division comes into effect. Although division 1 of part 5 may have come into effect, no-one will be able to use the new adjudicating process because there will not yet be any persons authorised to appoint an adjudication. This authorises the agency to receive applications in advance of the proclamation of those clauses.

Hon Dr STEVE THOMAS: I do not know how common that is. I just thought it was interesting that we would receive applications to authorise something before it is authorised, but I take the minister's word for it. I have not seen too many of those, so I am not too certain how common it is.

Hon ALANNAH MacTIERNAN: Just to explain, because I share the member's puzzlement: apparently this provision has an earlier commencement date, so this provision will commence first. I understand where the member is coming from.

Clause put and passed.

Clauses 99 to 119 put and passed.

Clause 120: Review of Act —

Hon NICK GOIRAN: With regard to the review of the act, in the 2020 bill it was determined that part 7, "Consequential amendments to other Acts", would not be reviewed. This is now to be reviewed under the current bill. What is the genesis of that change?

Hon ALANNAH MacTIERNAN: The advice of Parliamentary Counsel was that part 7 of the bill contains consequential amendments to the Building Services (Registration) Act 2011, the Building Services (Complaint Resolution and Administration) Act 2011 and the Construction Contracts Act 2004. The Building Services (Registration) Act and the Building Services (Complaint Resolution and Administration) Act already have review clauses, so it was considered that it would be a doubling-up of review because those bits that are consequential amendments are already part of the review process that was enshrined in those other pieces of legislation.

Hon NICK GOIRAN: That is fair, but the query then arises: why have we changed from that? In the 2020 bill we excluded part 7; we were not going to review it for, no doubt, exactly the reasons the minister has just mentioned, but under this new provision on page 110 of the bill it is now the effectiveness of the whole bill, and what is being deleted from the previous bill is the phrase "(other than Part 7)".

Hon ALANNAH MacTIERNAN: Sorry, I have a different explanation now. Parliamentary counsel's view was that because they were consequential amendments, those provisions become spent upon the proclamation of the legislation. Therefore, given that they were spent provisions, there was no point in reviewing them, but there was no need to exclude them from review because they were spent. Obviously, between the two bills, parliamentary counsel reviewed this and came up with a number of these stylistic felicities.

Hon NICK GOIRAN: I thank the minister; that does explain it. Yesterday, the minister tabled an eight-page document that set out the summary of the changes. I am looking at the version that was updated at 6.37 pm yesterday. In that document, the explanation that is given about clause 120 states that the government would like the statutory review provision to be triggered once clause 72 commences. I note that on page 110 of the bill at line 15, reference is made to clause 71. Can the minister clarify whether the government intends this to be clause 71 or clause 72, and whether an amendment needs to be made as a result? Irrespective of that, why has that clause, whether it is clause 71 or 72, been selected?

Hon ALANNAH MacTIERNAN: The view of parliamentary counsel was that this should be triggered by the proclamation. The five-year review should occur on the anniversary of the coming into play of a significant portion of the bill. We wanted to make sure that all of the essential elements of the bill had been operational and that five years had passed from the time all the significant provisions of the legislation had been proclaimed. As we outlined in earlier discussions, the retention trust is the second substantive and, I guess, most important, component of the bill, and it is anticipated that the retention trust will commence 18 months after royal assent. We think it is appropriate that the proclamation of that clause, headed "Retention money to be held on trust", triggers the beginning of the five-year period, because we want five years to see how the system as a whole, with its various components, is operating. That will be the second tranche of the bill to be proclaimed, and we believe that is then the appropriate date to start the five-year clock running for the review.

Hon NICK GOIRAN: I am happy to take this by interjection if it is of assistance. Is it intended to be clause 71 or clause 72?

Hon ALANNAH MacTIERNAN: Clause 71 is the most appropriate one because it has the deeming provisions that say that regardless of the action of the principal, the trust exists.

Hon NICK GOIRAN: That is fine. I do not want to get the minister worked up, because we are nearly finished. I just make the observation that yesterday when the amended document was tabled, this row at page 7 was amended, and yet the document says "section 72" and now we are being told it is clause 71. It does not help the ease of passage of these bills when we continue to be provided with inaccurate documents. That said, it sounds to me that given the period of time the minister referred to, the act will not be reviewed until six and a half years from now. Is it the intention that clause 71 will be proclaimed in 18 months' time? I think the answer to that is yes. The question then is: when is it intended to proclaim clause 120?

Hon ALANNAH MacTIERNAN: It is intended that clause 120 will be proclaimed as part of the first tranche, but I think five years is appropriate. These schemes are complex and we need a period of time to see how they operate. I think it would be appropriate for us to have a review five years from the commencement of the full operation of the legislation. I am advised that clause 120 will be proclaimed in the first tranche. I think we are now saying that clause 71 will commence 18 months after royal assent. The security of payments provision will commence 12 months after royal assent and the retention trust provision will begin to step in 18 months after royal assent.

Hon NICK GOIRAN: This is more of a comment to conclude. I make the observation that, in effect, a report will not be tabled in this place for probably seven and a half years by my count. Let us assume that assent happens this week or next week. Eighteen months later, the second tranche will be proclaimed. That will include clause 71. Then there will be five years until the review starts, so that is six and a half years, and then, of course, there is a 12-month period. It will be seven and a half years before we get a review document of the Fiocco–Swinbourn quality. I think seven and a half years is really stretching things; nevertheless, the minister has provided an explanation, and I just make that observation.

Clause put and passed.

Clauses 121 to 132 put and passed.

Clause 133: Part 5A inserted —

Hon Dr STEVE THOMAS: This will be my last question. This is potentially the most important clause in the bill, to some degree; it is the anti-phoenixing component. I think it is well overdue and probably a very good part of the legislation. I refer to the functioning of it to make sure that it is not too lenient, because it provides a fair bit of leeway to the board, or that, at the other extreme, it is not too harsh. What review process will the government have in place to make sure that the anti-phoenixing process works, and how quickly will we see that review happen?

Hon ALANNAH MacTIERNAN: Very quickly, this is a consequential amendment of the building services legislation. That review is set down by statute for 2024, so we will have a review of this in 2024.

Hon NICK GOIRAN: When will clause 13 be proclaimed?

Hon ALANNAH MacTIERNAN: We anticipate that to be done in 12 months' time as part of the first tranche.

Clause put and passed.

Progress reported and leave granted to sit again, pursuant to standing orders.