1. Introduction

This submission is made on behalf of Business New Zealand, incorporating regional employers' and manufacturers' organisations. The regional organisations consist of the Employers' and Manufacturers' Association (Northern), the Employers' and Manufacturers' Association (Central), Canterbury Manufacturers' Association, Canterbury Employers Chambers of Commerce, and the Otago-Southland Employers' Association. Business New Zealand represents business and employer interests in all matters affecting the business and employment sectors.

2. Recommendation

That the Bill proceed subject to a re-consideration of recognised problems identified in submissions made on the Bill.

3. Discussion

3.1 This Bill is recognised as an attempt to deal with a difficulty associated in particular with the building industry. Business New Zealand has had the opportunity to read the draft submission prepared for the Construction Liaison Group and agrees with the Group that there is a need to develop payment protection methods for the industry.

3.2 Business New Zealand is pleased to support the general thrust of the Bill since it understands that the Group will endeavour to educate the industry about the legislation. Without education of this kind, problems can be foreseen arising, for example, from the Bill's default payment provisions, should there be contractors or subcontractors unfamiliar with what is provided for in the legislation.

3.3 A real difficulty is posed by the fact that there may be contractors and subcontractors who will lack the administrative capacity both to enter into clear contractual relationships initially and to enforce any adjudication decision obtained in their favour. So it is not likely that the Bill will provide a total answer to the industry's problems.

3.4 Nevertheless, the Bill can be seen as a real step in the right direction and should lead on to a better informed construction industry where there are real safeguards against the kind of business failure which has long been an unfortunate concomitant of the building industry.

3.5 Even so, there must be some concern that the adjudication process set out in the Bill will not achieve the speedy results anticipated should for example, the payer in question prove to be technically bankrupt.

3.6 There will also be a need to have properly skilled adjudicators familiar with the various forms of construction work if disputes are to be satisfactorily resolved and the dispute resolution not extended unnecessarily, and expensively, through the Court process.

4. Recommendation

That the Bill proceed subject to a re-consideration of recognised problems identified in submissions made on the Bill.

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5. Specific comments

The following comments refer to some difficulties with the Bill that Business New Zealand has identified. It is likely that there will be further matters, particularly those of a technical nature, which ought also to be addressed if the Bill's intention are to be realised.

Part 1 Preliminary provisions

Clause 5 Interpretation

"Contract price"

It is noted that the definition of contract price talks about the "total amount payable under the contract for carrying out construction work to which the contract relates". It is arguable that this definition ought to include a reference to any price variations agreed in terms of the contract, as, for example, by adding after "relates" the words "including any agreed variations to the contract price".

Clause 6 Meaning of construction work

(1)(c) The inclusion here of a reference to the cleaning (external or internal) of buildings for maintenance purposes would appear to extend the ambit of the Bill to activities which on the basis of ordinary usage, would not be thought of construction work, that is, general cleaning. This reference should either be deleted or the term "cleaning" defined to exclude routine cleaning activities.

Part 2 Payments

Clause 18 Payment demands

As in ordinary commercial practice an invoice is sent when payment of any amount owed becomes due, the use of the terminology “payment demands” would seem to be unnecessarily confrontational. There should be no inherent assumption that payment will not be made either at a contractually agreed time or, where none has been agreed, as specified in the legislation (as the word “demands” suggests there is). Given that those involved will probably still be required to work together “payment requests” would constitute a better description of what is being sought.

(4)(b) It is somewhat of a contradiction to provide that the matters earlier referred to in subsection (3)(a) and (b) must be in the prescribed form and then to add the words “(if any)”. Most residential occupiers are unlikely to be well acquainted with the legislation (if implemented) so they should at least be provided with a clear explanation of possible consequences should they fail to make periodic payments. In other words, it is important that a form of words *is* provided. A prescribed form for this purpose, as for that set out under clause 41(2), should be included as schedules to the Bill.

Clause 19 Payment schedules

The need to provide a readily available explanation of the possible consequences of a failure to make any periodic payment will be greater in the case of residential occupiers who may well not know of their right to provide a payment schedule setting out their view of what is payable. That being the case, the prescribed payment form could also refer to the payer’s right to respond to the payment request with a payment schedule. This is particularly necessary as, pursuant to clause 20(b), if a payment schedule is not provided liability accrues ten days after the request is served (or as stated in the relevant contract).

Part 3 Adjudication of disputes

Clause 23 Right to refer disputes to adjudication

(2) It is arguable that the inclusion of examples (here and elsewhere in the Bill) is not helpful and that the determination of what does or does not constitute a dispute should be a matter for the court or adjudicator concerned to determine.

Clause 24 Effect of Part on other dispute resolution procedures

(1) Here, too, there is no need to supply examples.

Clause 25 Effect of Part on civil proceedings

(1) If proceedings are taken in terms of Part 3 of the Bill it should not also be possible to take further proceedings on essentially the same grounds; it is not acceptable for any party to be able to pursue the same cause of action in two different forums. However there should be a right to appeal any decision made to a higher authority – an adjudicator's decision to a court, the decision of a lower court to a higher court - and not merely, as clause 40 indicates, a right of review.

Clause 27 Selection of adjudicator

The process here seems unnecessarily complicated – see comment under clause 43, "Nominating authorities".

Clause 41 Special provisions for residential construction contracts

(2) As under clause 18(4)(b), to ensure any notification provided is correct, it is important to set out in the legislation a prescribed form for the giving of notice of adjudication in respect to residential construction contracts.

Clause 43 Nominating authorities

It is unclear from this clause how the nominating authority process is to work. Is it proposed to establish a more or less permanent nominating authority, and if so where would it be based? Or are nominating authorities to be ad hoc creatures brought into being from time to time, as required? In any event there seems to be no reason to involve the Minister in what would appear to be an unsatisfactory bureaucratic process. Rather than try to provide for every eventuality it would make greater sense to amend clause 27

to provide that if the parties cannot agree on an adjudicator and have stated so in writing, then the claimant will have the right to decide who the adjudicator will be.

Clause 47 Adjudicator's fees

(1)(b) It makes little sense to provide that an adjudicator will be paid what is "reasonable" if the parties cannot agree on a fee since an adjudicator could then well claim that the fee ultimately paid was by no means reasonable. If an adjudication process is to be introduced, the parties should be required to decide on a fee, possibly related to the number of hours which the adjudication involves, before the adjudication begins.

(4) This provision fails to recognise that carrying out the adjudication is the adjudicator's job and at least part of the way in which he or she earns a living. It may simply not be possible to determine a dispute in the 20 days for which clause 36 allows. If fees and expenses are not to be payable if a dispute is not determined within the prescribed period one consequence could be over-hasty decision-making. More than that, however, there would be a disincentive effect discouraging people from doing so who would otherwise be prepared to take on the adjudicator role. Building disputes can be extremely complex matters on which to adjudicate.

Part 4 Other measures for securing payment under this Act

Clause 49 Suspension of construction work

(l)(a)(ii) As, presumably, the purpose of a payment schedule is to enable the party from whom an amount has been claimed to dispute that amount (in which case payment *in full* (emphasis added) by the due date could not be expected), suspension of work should be permissible only if payment of the amount specified by the payer in the payment schedule has not been made.

Clause 51 Special provisions for adjudication where charge brought by claimant

2(b) This provision should be omitted and the parties left free to agree their own adjudicator with the proviso that in the event of a failure to agree the right of choice would rest with the claimant.