Speech by

Hon. JUDY SPENCE

MEMBER FOR MOUNT GRAVATT

Hansard 21 July 1999

QUEENSLAND BUILDING SERVICES AUTHORITY AMENDMENT BILL

Hon. J. C. SPENCE (Mount Gravatt— ALP) (Minister for Aboriginal and Torres Strait Islander Policy and Minister for Women's Policy and Minister for Fair Trading) (12.08 p.m.): I move—

"That the Bill be now read a second time."

I am proud to deliver this Queensland Building Services Amendment Bill today as it fulfils a commitment I gave to the building and construction industry of Queensland one year ago. Honourable members interested in Queensland's great building and construction industry will recall the history of procrastination under the stewardship of those opposite. They gave us inquiries, task forces, discussion papers, reports—anything but action. When they lost office, they left behind building industry regulations that were in dire need of an overhaul. This major overhaul is something that the coalition could not achieve. It goes well beyond the scope of reforms proposed in the Scurr report, the green paper and the implementation steering committee report. This legislation does what the coalition Government could not or would not do after three attempts.

The Government is indebted to the major industry groups, particularly the Building Industry Specialist Contractors Organisation of Queensland, the Housing Industry Association and the Queensland Master Builders Association, for their participation in the framing of this legislation. Their contribution, as well as the contribution of the Queensland Law Society, the building trades group of unions and a number of others has resulted in a package of reforms that will benefit both industry and consumers in the years ahead.

The package will be implemented in three stages, beginning with this Queensland Building Services Authority Amendment Bill. The package consists of this Bill, the Queensland Building Tribunal Bill 1999 and the Queensland Domestic Building Contracts Bill 1999. The reforms dovetail together to benefit subcontractors and suppliers, builders and consumers.

The legislation we have designed will clean up the industry. Much of the problem lies with a power imbalance. While the law of contract recognises contracting parties as equals, we must acknowledge the reality that the information, advice and economic power behind a large building company far outweigh the resources available to an individual subcontractor. This puts the subcontractor at a considerable disadvantage.

This Bill introduces a range of reforms to building contracts to help redress the imbalance. It increases protection for the weaker players, while keeping limits on market freedom to a minimum. The philosophical underpinning of the new Part 4A in the Bill is that parties to a contract deserve the right information. In the absence of express provisions for some basic matters, fair and reasonable minimum standards will apply. Provisions are structured so that, where inconsistencies arise between the legislation and contractual provisions, contractual provisions are void only to the extent of the inconsistency. All other existing contractual rights are preserved.

Injustices occur where contracts are not committed to writing. The legislation therefore makes it mandatory to put contracts in writing and set out basic contractual terms. Failure to do so constitutes an offence for all parties to the contract who are building contractors. However, the unwritten contract is not rendered void by the legislation.

Variations, which are often the source of disputation and injustice in building contracts, are also required to be put into writing. Most commercial subcontracts provide that the contracting party may direct the subcontractor to perform a variation. In these cases, the legislation relieves the subcontractor of any obligation to perform the variation unless it is put into writing. If, despite this, the subcontractor performs a variation on the basis of an oral direction—such as where the need for the variation becomes apparent during a concrete pour—the contracting party is required to put the direction into writing as soon as practicable. The contracting party commits an offence if this is not done.

The legislation provides for situations where moneys due and payable under a contract are not paid. It gives the contracted party—usually the subcontractor—a right to suspend work without being put in jeopardy of termination of the contract. This is crucial. It addresses a major injustice where subcontractors feel they have no option but to continue work, despite not receiving payment. If the worst happens and the developer collapses, their losses are compounded.

Under the Bill, subcontractors are entitled to substitute alternative financial instruments, such as bank guarantees, for cash, where securities or retentions are held under the contract by the contracting party. This will relieve subcontractors of the substantial costs associated with having cash tied up for extended periods, and will prevent liquidators distributing subcontractors' money to other creditors of a failed builder. It will not affect the right of parties to recover moneys under the contract, such as for partial performance.

The total amounts held as securities or retentions under subcontracts will be capped at 5% of the total amount payable under the contract. This will reduce to 2.5% in respect of retentions held for the warranty period following completion. Set-offs occur where the contracting party reduces an amount payable, such as the warranty period retention amount at the end of the warranty period, by an amount owing—such as for site clean-up. These will only be available where timely notice is given to the contracted party. Without notice, the contracting party is still entitled to recover such sums. But they must do so by other means, such as litigation. This addresses the injustices arising from set-offs being exercised when the trail has gone cold—sometimes years after the event—effectively stopping the contracted party from exercising rights to challenge the issue.

The legislation contains deemed minimum prompt progress payment provisions—35 days after a lodgment of a claim for subcontracts. Parties may agree to longer payment terms. But a longer term will only be legal if the contract explicitly provides for it, and the provision is initialled by the parties. In the absence of any such express initialled provision, the deemed 35-day payment will apply. For all contracts, a special penalty interest rate will apply for late payments. This rate is 10%, in addition to the Reserve Bank's 90-day bill rate, calculated daily. Because no short-term investment could possibly yield such a rate, there will be a strong incentive for the contracting party to pay on time, and to settle disputes fairly and promptly.

The industry has a problematic growth area of construction management trade contracts. Under these arrangements, the developer contracts directly with trade contractors, often through the intermediary of a construction manager. The legislation addresses these cases. It treats such contracts as though they are subcontracts, even though the relationship is directly with the principal. This provides subcontractors with the same protection however the project is structured. The legislation provides for contracted parties to be warned that they are dealing direct with a principal, who may not enjoy the same level of financial security as a licensed building contractor.

Over the years, some of the worst injustices have occurred through use of so-called "pay if paid" or "pay when paid" clauses in contracts. These clauses absolve the contracting party of any liability to pay for building work performed, unless some other unrelated payment under some other contract is first made. Such provisions are unconscionable and are voided by this Bill.

The Bill also remedies the potential for unfairness which emerged last year following a Court of Appeal decision in Zullo Enterprises and Others versus Sutton. The intention of the regulatory scheme has always been that building contractors be licensed. It is not the intention, therefore, that builders and developers have incentives to engage unlicensed contractors. The court found that, contrary to previous belief, the Act prevents an unlicensed building contractor from recovering any money at all under a contract. This opens the door for unjust enrichment of unscrupulous developers and builders, potentially encouraging them to engage unlicensed contractors.

The Bill rectifies this situation by allowing unlicensed contractors to recover any moneys that they have reasonably spent while performing building work. But unlicensed contractors cannot recover any profit or receive any more than the contract price specified in the purported contract. They will also be penalised for the offence of operating without a licence. In addition, building contracts are required to include the licence number of the contracted party.

The Bill introduces a range of enhancements to the existing licensing system for the benefit of consumers and industry participants. Ultimately, they will improve public confidence in the integrity of the system. First, the Bill contains provisions to prevent bankrupts and persons associated with bankruptcy from holding or being associated with a building contractor's licence for a period of five

years. This will prevent the re-emergence of shonks through the device of "phoenix" companies. The scheme introduced by the Bill provides for "excluded individuals", who may not hold a licence. These are bankrupts or individuals who take advantage of the laws of bankruptcy, such as through entering into a "part 10 arrangement" with creditors, or who are associated with a failed company. They will be "excluded individuals" for five years from the relevant event.

So as to prevent injustice, a person who becomes an excluded individual may apply to the Building Services Authority to have that status expunged. To do so, they will have to prove that they could not have avoided the relevant financial catastrophe. This is intended to mean that the cause of the relevant event was entirely outside the responsibility of the individual concerned. Examples might be that a spouse absconded with an individual's assets, or that a financial calamity was due to a natural disaster, against which it was not possible to insure. Further safeguards against injustice are provided through access to review of the authority's decisions by the Queensland Building Tribunal.

Second, the Bill requires that licensees continue at all times to satisfy the financial requirements relevant to the licence and set out by gazetted policies of the Queensland Building Services Board. This scheme will be administered through a system of random audits conducted under a program approved by the Minister, through audits based on information received by the authority—for example, that a licensee's cheques are not being honoured—and by provision of financial statements accompanying the annual licence renewal. The reform legislation creates an offence for provision of false or misleading information, in line with similar false reporting provisions in the Corporations Law.

Third, the Bill creates a number of new offences relating to the problem of licence lending. These remedy provisions in the existing Act have proved ineffective. They also exercise sanctions against the licensee doing the licence lending, as well as against the unlicensed borrower.

Fourth, the Bill empowers the authority to suspend a licence with immediate effect if there are risks to consumers, suppliers or other licensees. This replaces the current provision, which allows for immediate cancellation. The new provision is fairer to affected licensees, without placing any added risk on other parties. The Bill goes further to enhance the integrity of the regulatory structure. It removes the capacity of defaulters to avoid the consequences of their actions by hiding behind company structures.

Finally, the Bill improves the structure of the industry regulator, the Queensland Building Services Authority. The building services board is restructured with a reduction in voting members from nine to seven. A new member will represent building industry employees as significant stakeholders. A new non-voting public service member is also added to provide an additional channel of communication between Government and the industry regulator. New provisions allowing independent advice about the insurance fund through a statutory insurance manager will enhance the corporate governance role of the board.

This legislation does not just build a better industry. It provides peace of mind and confidence for consumers and investors. It supplies the tools for employment growth, and for expansion of existing viable businesses. Ultimately, it gives Queensland the foundations for a more robust building and construction sector, and that must build a healthier State economy.

I commend the Bill to the House.

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