Speech By

# Yvette D'Ath

## MEMBER FOR REDCLIFFE

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## BUILDING AND CONSTRUCTION INDUSTRY PAYMENTS AMENDMENT BILL

**Mrs D'ATH** (Redcliffe—ALP) (8.16 pm): I rise to address the Building and Construction Industry Payments Amendment Bill 2014. Let me state from the outset that there are elements of this bill which the opposition does not philosophically oppose and we would be willing to consider them if they were presented to the House in coherent, credible legislation. Unfortunately, this bill has not been presented to this House in such a fashion. Unfortunately, this is a dog's breakfast of a bill that should not have been introduced in its current state.

The Labor Party cannot and will not support such slip shod legislative processes and policy development. The fact that this bill was introduced raises serious questions about the minister's competence and about the quality of cabinet consideration under the Newman government. Because of the many severe deficiencies contained within this bill, the opposition will be voting against it.

The Building and Construction Industry Payments Act 2004 is designed to provide security of payment for contractors in the construction industry. The issue was identified as serious by a number of stakeholders and at the Cole royal commission in 2002. As the original explanatory notes explain—

Security of payment has been an issue in the building and construction industry over many decades. Recently the Royal Commission into the Building and Construction Industry flagged security of payment as a significant industry matter requiring Federal legislation where specific State legislation appears to be deficient. It also found that traditional remedies under Commonwealth Corporations Law, common law and contract law were not sufficient to address the issue.

The building and construction industry is particularly vulnerable to security of payment issues because it typically operates under a hierarchical chain of contracts with inherent imbalances in bargaining power. The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow, and in some cases, insolvency.

The act currently allows for the progress payments to be made to a contractor even where they are not explicitly guaranteed in the contract. It also sets up a system for the timely adjudication of claims through the appointment of independent adjudicators through private authorised nominating authorities, ANAs, which operate on a fee-for-service basis.

After 10 years of operation, it makes sense to review the operation of the act and to consider whether any amendments are necessary. Unfortunately, the review and amendments proposed by the minister fall significantly short of best practice. We do have some sympathy for the minister in that the Building and Construction Industry Payments Act was developed to deal with conflicts between developers and subcontractors and changes to it are likely to favour one group over the other. It is not easy to walk that line, but that is why it is imperative that a proper consultation process be followed before the bill is introduced to parliament.

Although the minister charged Mr Andrew Wallace to conduct a review, further consultation should have occurred with all sectors of the industry before the bill was introduced. A complete exposure draft should have been released to industry for comment and feedback. If the minister had followed such a process, it is likely that the deficiencies of this bill could have been addressed.

Instead, the Transport, Housing and Local Government Committee had to conduct extensive inquiries and recommend wholesale changes to the bill. While the opposition does not agree with every element of the committee's report, we cannot fault its members and its secretariat for the serious way they have attempted to rectify errors in this flawed legislation.

The opposition is also aware of the fact that the minister has circulated extensive amendments to this bill. While some of these amendments address serious issues within the bill, they do not address all of the substantive concerns raised during the committee process. We commend the minister for correcting a small number of his own errors in these amendments. However, it is disappointing he has not sought to correct more by withdrawing this bill and starting again.

The scale of changes needed for this bill to pass muster are so great that it would be an abuse of this process to attempt to rectify them in the consideration in detail process. Despite the fact the amendments before the House only concern a small number of issues identified during the committee process, there are some 25 amendments. It is difficult for anyone in this House to properly assess these amendments in the short time available between their circulation and their debate. That task is made even more difficult when the explanatory notes fail to properly explain the amendments. For example, the explanation for amendment No. 6 merely states—

Amendment 6 reinstates current section 20(4) of the Act so that it is no longer omitted.

The relevant section of the bill's explanatory notes merely states—

Section 20(4) is omitted.

The paucity of information provided in these explanatory notes is simply inexcusable. The opposition has noticed a significant decline in the quality of explanatory notes during this term of government. We are not sure if this is a deliberate attempt from the government to hide from scrutiny, an overworked Public Service which is feeling the brunt of massive reductions in staff or simply the government's incompetence. Whatever the reason, it should be arrested immediately.

One of the key recommendations of the Wallace inquiry was the removal of responsibility for adjudicator appointments from existing authorised nominating authorities to the government itself. Labor does not have a philosophical objection to moving the responsibility of these appointments to the government. However, in a situation in which ANAs have held this responsibility for 10 years, we feel it is necessary for such a drastic change to undergo due diligence. The government must be able to show that there are problems with the current process. We do not believe this first condition has been satisfied. In his submission to the committee inquiry, Mr Jonathan Sive made the following observation—

A hard look at the facts and circumstances relating to the concern of bias and to all other administration issues identified in the Wallace Report in the various submissions cited in the report, when considered in their entirety and specifically in relation to the proceeding giving rise to an adjudicator's decision, does not reveal a pattern of conduct on the part of the Authorised Nominating Parties and Adjudicators that leads to a finding of bias, whether actual or implied ...

The evidence supplied on this issue is nothing more than anecdotal and it is a poor body of evidence on which to base a substantial change. It should be noted that some members of the committee shared that sentiment. During committee hearings, the member for Algester stated the following—

One of the reasons for the abolition of ANAs was this perception of bias. Mr Wallace has just given us chapter and verse on why he has made his recommendation and, as he has pointed out, none of those submissions to him were ever tested so they are literally allegations at this point. We have heard from a respected gentleman, Mr Sive, some statistical evidence that shows that the current situation is working, that there is no perceived bias in the system. I might say that the department has misled the committee because in one of the earlier hearings they used the argument for bias as a reason for this supposed, and you do not use the word 'abolition' of ANAs, but if you do not give them a role then they are abolished. That is really the guts of it. Mr Rivers, I am a little bit confused about this whole issue. We have someone telling us that statistically the system is working. We have a respected barrister saying that there are untested allegations out there, yet the department has chosen, hang on, we will take that argument and we will work on that. I do not get it. What is the department trying to achieve? Do you not want ANAs in the system? Because if that is what you want just tell us.

Clearly the member for Algester at that time shared Labor's concerns that the sole basis of this significant change is just unsubstantiated allegations. If we were to accept the need to move to a system of the government appointing adjudicators, we should at least be able to expect the legislation to set out a clear and transparent process that would be followed. Unfortunately, that is not clear within this bill. I will quote Mr Sive again—

However, attempting to re-allocate the administration of the process completely to the BCIP Agency without a rulemaking process that is transparent and fully set out with notice to the public for comment and review does not diminish the amplitude of concern comprehensively outlined in the Wallace Report any more than rearranging the deck chairs or swabbing the deck in a frenzied panic on the Titanic prevents its sinking.

I note that the committee recommended that there could be serious perceptions of bias for the government to appoint adjudicators for which the government was a relevant party. I can understand the committee's concerns on that matter, given the lack of transparency on how the registrar would

appoint adjudicators under this bill. The committee recommended a separate process be used for matters in which the government is a party. Labor thinks it is untenable to run two different systems for the appointment of adjudicators, but we cannot fault the committee's intention on this point. If the minister had done a better job in drafting this legislation and set out a clear, transparent and rigorous process for the appointment of adjudicators by the registrar, this could have addressed concerns of partiality. Unfortunately, he has not done so.

I note that under the amendments circulated by the minister the Queensland Building and Construction Board will publish a paper which sets out the selection criteria that will need to be followed by the registrar when appointing adjudicators. While this is an improvement on the current deficiencies of the bill, we do not believe it is entirely satisfactory. First of all, we are being asked to accept in good faith that this board paper will be comprehensive and transparent. Given the significant problems with this bill, I am not sure that the opposition or the construction industry can have confidence that the board paper will be comprehensive. Further, we believe it would be a better practice to set out the principles under which the registrar must appoint adjudicators in the legislation.

One of the major concerns raised in submissions to the committee hearings was how it will affect the future of ANAs. Several ANAs made submissions to the inquiry suggesting they will essentially cease to exist under the changes to the bill. The Australian Solutions Centre stated the following—

ANAs were invited to attend a meeting with Michael Chesterman (Adjudication Registrar) and Steve Griffin (QBCC Commissioner) 8th April 2014. At that meeting the ANAs were told, amongst other things:

'The reforms will be outlined in this discussion and the official announcement will be made tomorrow;

There are 2 issues that will be discussed today and the first is that the appointment process of adjudicators will become within the QBCC from 1st September 2014, therefore there will be no ANAs in Queensland after 1st September 2014;

Every adjudicator will still be registered on 1st September;

The adjudicator will have the opportunity to be directly served with documents or appoint a commercial service agent to do what the ANAs will no longer be doing for them.'

This is in complete contradiction to the first reading of the Bill (extract as follows):

'The bill changes the role of ANAs, which will no longer appoint adjudicators. This removes the perception of conflicts of interest in the appointment process raised in response to the discussion paper. ANAs will continue to offer their services as a document service agent.'

While we accept the statements by departmental representatives during the committee inquiries that ANAs will be able to continue to fulfil many of their roles, there can be no doubt that there has been a significant failure of communications between the government and ANAs. For so many ANAs to be concerned about their future and for one to claim that they were told they would cease to exist is evidence that this minister has failed in his duties. If the minister had issued an exposure draft of this legislation and properly consulted ANAs, the concerns that have been raised could have been addressed. I note that Callum Campbell of the Australian Mediation Association stated in his submission to the committee—

I recommend the Bill be amended so that ANAs continue all their statutory functions other than the appointment of adjudicators. To keep costs down, ANAs should compete through the provision of information and quality of service to receive adjudication applications. The only difference will be that ANAs supply the Registrar with their nominations for appointment.

This seems to be a reasonable proposition, and it is clear that due to the minister's poor consultation process it was never properly considered.

I will quickly address the issue of complex claims as the minister has circulated amendments which address the major issue. Several stakeholders raised issues with the definition of 'complex claim' in the bill. The bill acts on a recommendation of the Wallace inquiry that a separate claims resolution process be used for complex claims. The bill defines a complex claim as one that is for an amount of over $750,000, involves a latent condition or a time related cost. Several submitters were concerned that too many claims would be considered complex under this legislation. The opposition understands that this definition will be amended, but it is yet more evidence that this bill was not properly considered before it was introduced to this parliament. It should be an embarrassment to this minister that he has to correct such a fundamental legislative error through amendments. Once again, if he had released an exposure draft, this issue would never have had to be raised in this House.

Several stakeholders have raised concerns about the amendment time frames for the adjudication process under this bill. Able Adjudications, an ANA, stated the following—

Currently, where there is a s18 payment schedule, the maximum timeframe for completion of an adjudication decision is 35 business days (7 weeks) from the date the payment claim is received.

Under the Amendment Bill, where there is a s18 payment schedule, the maximum timeframe for completion of a standard adjudication decision is 40 business days (8 weeks) and appears to be 105 business days (21 weeks) for a complex adjudication decision.

It is suggested that the additional 70 business days (16 weeks) for the complex adjudications is disappointing and unnecessary.

The government's response to these concerns was severely lacking. It erroneously claimed that the extended time frames only related to complex claims. This is demonstrably untrue. The report states—

The Committee notes the Department's response regarding the proposed new timeframes for complex claims but understands from the Bill that the extensions relate not only to the new, complex claims category but, in the case of adjudication responses, to the standard claims category.

The Committee notes that the purpose of BCIPA is to provide a "quick and easy cost-effective solution to resolving payment disputes" and has some concerns that the extension of timeframes generally provided for in this Bill are counter to these foundational objectives of the Act.

Labor shares the concerns raised by the committee and we do not think that the government has been able to justify its changes to time frames in this bill.

There are a number of other provisions of this bill that the opposition could potentially support. The changes in the definition of business days to exclude days around Christmas make sense as a method to avoid nuisance claims. We also do not have a problem with the reduction in the time allowed to lodge a payment claim.

I want to finish on an issue which is relatively sensitive, and that is the suitability of Andrew Wallace to conduct the review into the Building and Construction Industry Payments Act 2004. Before I do, I want to make it clear that I am not questioning Mr Wallace's experience or the rigour of his report. I do, however, believe it is necessary for the minister to satisfy the public that the appointment process was aboveboard. In her submission to the committee, Ms Helen Durham stated—

I note at the outset that I harbour significant reservations about the probity and quality of the Wallace Inquiry's recommendations as government inquiries are usually and quite appropriately headed by one or more eminent, independent persons, such as a senior judicial officer, retired senior judicial officer or senior barrister, and not by junior barristers, and especially not by junior barristers who have an economic or other stake in the outcome of the inquiry.

In this regard, I specifically note that Andrew Wallace, whose recommendations form the basis of the changes to be effected by the Bill, was a junior barrister and adjudicator immediately prior to his appointment to review and report on submission made in response to the Minister's "Discussion Paper". If Mr Wallace determines adjudication applications that are referred to him by the registrar, under the new powers that Mr Wallace recommended be reposed in the registrar, which were in turn the result of an appointment that the registrar undoubtedly had a hand in, Mr Wallace stands to benefit financially from the reforms that he has recommended and can therefore hardly be considered independent.

It should also be noted that in 2005 Mr Wallace was a candidate for LNP preselection for the federal seat of Fisher. In circumstances where an active member of the LNP is appointed to conduct a government review, it is incumbent on the relevant minister to assure the public that the appointment is aboveboard. The minister has so far not explained his selection of Mr Wallace and I would invite him to do so in his reply. Specifically, he should set out for the benefit of the House what process he followed to appoint Mr Wallace and how much Mr Wallace was paid to conduct this review. While he is at it, he may also want to answer the same questions in relation to the appointment of Mr Wallace to conduct the review of the Building Act 1975 and building certification in Queensland.

It is a matter of concern for the opposition that we are unable to support this bill. This should not be an ideological bill and I can easily envisage amendments to the act which could be supported by all parties in this chamber. Unfortunately, this bill falls significantly short of the quality that Queensland Labor expects from legislation. As I stated earlier in my speech, it should never have been introduced to this House in its current state. An exposure draft should have been released to relevant stakeholders so that the fundamental errors were addressed before reaching this chamber. The fact that this bill has been introduced in such poor quality is an indictment on the minister. The fact that the bill has limited industry support raises serious questions about the competence of the Minister for Housing and Public Works.

The opposition will not be supporting the legislation. We urge the minister to go back to the drawing board and start again.