Speech By

Stephen Bennett

MEMBER FOR BURNETT

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BUILDING INDUSTRY FAIRNESS (SECURITY OF PAYMENT) BILL

Mr BENNETT (Burnett—LNP) (8.14 pm): The Building Industry Fairness (Security of Payment) Bill seeks to provide security of payment in the building and construction industry by: introducing project bank accounts; amending the Building and Construction Industry Payments Act and the Subcontractors Charges Act; and enlarging the Queensland Building and Construction Commissions enforcement powers and mandatory reporting requirements.

What we do know is that the proposed amendments will create many stresses and financial and administrative burdens on head contractors. There are 143 amendments, which we received a couple of hours ago, that will go a long way to addressing some of the uncertainty in the industry, and particularly the fear that the legislation may have had the unintended consequence of collapses for large head contractors. During the committee process there were a lot of harrowing stories about the potential.

I know that the minister has taken a lot of advice in recent time and will move 143 amendments to address some of the more abhorrent parts of the legislation that a lot of people in the industry were telling the minister for a long time would have had unintended consequences. We look forward to working through the 143 amendments tonight as we only received them a couple of hours ago. We want to make sure that what we agree to tomorrow will benefit the industry.

That said, it is hardly helpful or productive for anyone to take a single view that does not appear to be supported by the majority of the industry. I have never denied the need for reform since nothing has effectively been done by Queensland Labor governments since 2004 to address the significant issues.

The issue of late payments to contractors and subcontractors requires significant cultural change in the building and construction industry. Every time I have met key industry stakeholders I have said to them that they all have skin in the game so they all have to participate in this cultural change if we are to make sure that this legislation is supported and its outcomes become a reality.

With bipartisan support the Queensland parliament enacted the Building and Construction Industry Payments Act 2004, known as BCIPA, which became operative on 1 October 2004. The object of BCIPA is to ensure that a person is entitled to receive and is able to receive progressive payments for construction works or the supply of related goods and services under an appropriate contract.

In acknowledging that the construction industry operates under a hierarchical chain of contracts with inherent imbalances in negotiation or bargaining opportunities, BCIPA operates to provide improved security of payment for contractors. To achieve this objective, BCIPA grants an entitlement to progress payments, the use or not of project bank accounts, responding to payment timeframes and the referral of disputed or unpaid claims to an adjudicator for a decision.

BCIPA has now been in operation for 13 years. Extensive stakeholder engagement over many years has proven the majority of stakeholders consider the act is an important piece of legislation intended to overcome the power imbalances between those who perform construction work or those who supply related goods and services and those who have construction work or the supply of related goods and services provided.

It is acknowledged, however, that BCIPA is polarising in the industry. The attitudes of those who would benefit from its continuation in its current form are most supportive and the attitude of those who have had the act used negatively against them have attitudes ranging from ambivalence to frustration and contempt.

We do recommend some change to the act while endeavouring to maintain the integrity of the act as the majority of industry stakeholders have learned to work and utilise its confines over the last 13 years. We must consider and be mindful that there are diverse views and 'if it isn't broke, don't fix it'. From our engagement we believe the act has had a positive impact on the majority of stakeholders in contract administration. Any changes to the act should not detract from those improvements, but seek to further enhance them. That is why good public policy debate over the next couple of days will be important.

I believe that BCIPA is by no means broken, but it is clear that many challenges to the integrity and operation of the act will require meaningful reform to support the building and construction industry. Again, I reiterate that I am looking forward to working through the 143 amendments that have been proposed. It is clear to me that reforms could be investigated to endeavour to ensure that BCIPA has as broad an application as possible to all involved in performing construction work or to those who supply related goods and services.

The time frames contained within the act more equitably balance the interests of both parties by ensuring the delivery of efficient outcomes to maintain cash flow for contracted parties versus the entitlement of contracting parties who must be given proper and adequate opportunity to put their case; that adjudications are delivered by suitably qualified and experienced adjudicators who act impartially and who are appointed independently of their own interests or the interests of a particular sector within the industry; and, to the extent possible, that the government refrain from unnecessarily involving itself in transactions between two commercial entities, save for if there is clear evidence of a significant power imbalance or prospect of abuse or misuse of market share.

It has been argued in correspondence and there have been several attempts made to lay the problems with the industry at the feet of the LNP. I will endeavour to provide some details of our 2014 reforms. Let us also remember that Labor governments have been in power 25 out of the last 28 years.

Comments have been made that the LNP's 2014 changes to BCIPA have made it harder for claimants—that is, subbies—to get paid. The main reason given is that the 2014 changes now give the builder a second chance to provide a payment schedule before a claimant can take action to recover the moneys owed. Some stakeholders who are most vocal about the 2014 changes seem to focus on this second chance. I note that Minister de Brenni pledged in February 2017 to remove this requirement.

The second chance comments refer to section 19(5) and section 20A(2) of BCIPA which require a claimant to give a respondent a second opportunity to provide a payment schedule before they can take action through either the courts or adjudication to recover the moneys owed. Whilst the 2014 changes added the requirement for a second opportunity to be given to the respondent to provide a payment schedule prior to commencing court action, it did not amend the requirement for a second chance prior to applying for adjudication. This requirement has always been in BCIPA. Section 21(2) of the 2004 version of BCIPA, as it was enacted, required the second opportunity to be given prior to applying for adjudication, and this requirement was not changed in the 2014 changes. Hence, the requirement for a second chance payment schedule was not something new in 2014 with respect to the adjudication process. It was only new for summary judgement applications, which are not often utilised due to the risk and involvement of lawyers.

There are a few other matters to consider with regard to the LNP 2014 changes. Another major issue that is often raised regarding the 2014 changes is the removal of authorised nominating authorities, ANAs. The relatively high number of adjudication applications that are found to be without jurisdiction—therefore, the adjudicator is unable to make a decision—since the QBCC registry took over the process is often cited as being evidence that the 2014 changes have not helped claimants. However, it seems that such information is evidence that supports the view that the ANAs were biased towards claimants and that they were assisting claimants to perfect their claims prior to submitting them to the ANA adjudicators for formal determination. This conflict of interest should never have been permitted and led to a complete lack of faith in the BCIPA process.

Natural justice is a fundamental right of each party in a dispute and must be afforded to some degree in any legislated process attempting to deal with disputes. Yet BCIPA under ANAs often provided the respondent will little natural justice. The amended BCIPA improves this position slightly but not enough to be considered a fair and reasonable process. Improvements can be made to the QBCC registry but private, profit-making entities should not be part of a legislated dispute process.

Another significant change that was made in the 2014 changes was the distinction between standard payment claims and complex payment claims. This change went a small way towards recognising that it was fundamentally unfair to allow a claimant to spend a long time to prepare a payment claim, yet only providing the respondent with five days to prepare a payment schedule, particularly when the respondent is unable to rely upon any reasons for withholding payment that is not included in the payment schedule.

Further, the 2014 change permitted the respondent to raise new reasons to withhold payment from a complex payment claim even though those new reasons were not included in the payment schedule. Whilst the arbitrary line of $750,000 has been often abused by claimants by putting in payment claims for $749,900, it at least affords the respondent a small increase in natural justice that was lacking in the original act.

The size of the payment claim does not, in itself, determine whether there are complex matters to be considered in a payment claim, but it goes some way towards recognising this. The time required to properly deal with a $20,000 payment claim is proportionately less than that required to properly deal with a $1 million payment claim. Furthermore, the financial impact of an erroneous order to pay, or not to pay, $20,000 is significantly less than a payment of $1 million.

The Queensland LNP government introduced a number of amendments to the Building and Construction Industry Payments Act 2004. The amendments implement some of the 49 recommendations made in a review of BCIPA by prominent barrister Andrew Wallace. The wideranging changes were aimed at addressing some industry concerns and changed the way claimants and respondents deal with payment claims.

The issue of minimum financial requirements has been raised and continues to attract debate and will continue to in the course of this debate. Our reforms were widely accepted and applauded as they endeavoured to address a number of issues. The minimum financial requirements policy no longer required licensed contractors to provide financial information demonstrating they comply with the financial requirements yearly at renewal. This represents a significant reduction in the regulatory burden and cost of maintaining their licence. Previously, each year, licensed contractors—those who have a licence allowing them to contract directly with the public—were required to submit financial information to the commission in the form of a report from their external accountant in order to renew their licence. Additionally, larger licensed contractors with a turnover in excess of $12 million had to submit audited financial statements. This was a costly exercise for those licensees. The total cost to industry of supplying those reports each year has been estimated to be around $30 million per year.

The commission, not the LNP, recognised the burden this placed on licensees so has removed the requirement to submit financial information every year at renewal in order to streamline the process for those licensees. Licensed contractors must still meet the minimum financial requirements at all times. However, the changes mean that contractors with an annual turnover in excess of $600,000 are only required to submit a financial report to the commission when they first apply for a licence or in order to upgrade their turnover limit. This is necessary to ensure licensees operating in the industry remain financially viable. Why did the QBCC make this change and how does the QBCC manage the risks of not checking licensed contractors' financial information yearly?

The commission's statistics showed that only a very small number of licences were cancelled for failing to meet the old financial requirements at renewal each year. Financial information provided at the time of renewal under the old financial requirements was often stale or months old and did not truly indicate whether the licensee remained viable and should be able to continue to hold a licence. This indicated that the requirement to lodge reports with the commission annually was not achieving its aim and, considering the costs associated with it, it could be done a better way. The commission is now moving to proactively monitor licensees, particularly on the issue of non-payment of debts to ensure swift response times.

Non-payment of debts in the building industry causes financial distress, financial collapse and costs the industry, its participants and their families millions of dollars. The new MFRs require licensed contractors to pay all debts within agreed trading terms. Failure to pay a legitimately owed debt that is not subject to genuine dispute will result in loss of licence. The commission's tough stance on this complex problem in the industry is good news for all industry participants. This requirement ensured that the commission could move quickly and decisively to deal with issues of non-payment and ensures

that those licensees who do not pay their debts cannot string out the problem and continue to incur further debt they cannot pay. The message is: pay your debts and make sure you maintain your cash flow in order to do so or be forced out of the industry.

The previous financial requirements for licensing imposed vastly different requirements on licensed contractors depending on their size, including different report types, different rules for ages of information and different monitoring requirements. This was a source of confusion for licensees, particularly when they moved into different financial categories—that is, as their business grew. The new minimum financial requirements streamlined the process and set the same rules for licensees across the categories and bases those rules on good business and accounting practices that encourage profitable and viable businesses which ultimately benefits licensees.

The new minimum financial requirements introduce one report type for all categories and align the age of financial information and the regularity of financial monitoring for all categories. In addition, the policy has been completely rewritten and definitions clarified with the ease of the reader in mind. These things combined are intended to remove much of the previous confusion about how to comply with those requirements.

The changes to financial categories, allowing small business in the industry to grow, are welcomed. Under the old policy, contractors and builders had the option to self-certify by providing a declaration that they met the commission's financial requirements for turnovers up to $100,000 only for trade contractors and $300,000, being the entry level for builders. With ever-increasing costs to build the average house, the commission recognised this may have imposed a barrier to small businesses in the industry as the costs of compliance with the policy increased significantly once a licensee moved up into higher turnover categories. With this in mind, the new minimum financial requirements double the turnover limits for the self-certification categories. The annual turnover limits for those new self-certification categories are now $200,000 and $600,000 respectively.

Mr DEPUTY SPEAKER (Mr Stewart): Order! There is far too much audible conversation. Please take it outside or turn it right down. I am having difficulty hearing the member.

Mr BENNETT: The commission was ensuring that entry for new small businesses into the industry is less costly, and the 2006 limit for self-certifying financial requirements has been increased.

In monitoring business performances, all business owners go into business to make money and succeed. The building industry is one of those pillars of the Queensland economy that can be profitable for businesses operating in it providing those businesses keep an eye on their performance. The minimum financial requirements require all licensed contractors to monitor their financial performance at least quarterly. This aligns with BAS reporting requirements so it does not impose an additional burden on licensees, but the message is clear: keep an eye on the financial performance of your business and you should be okay. The aim of the policy was to promote financial viable businesses and foster professional business practices. This starts with business owners monitoring their own financial performance. In every financial report provided by the Queensland Labor government since the 2015 election, every report has highlighted the benefits of the minimal financial requirements policy that was introduced in 2014.

In the 2014-15 QBCC annual report, endorsed by the then Labor minister for housing and public works, the Hon. Leeanne Enoch MP, there are quotes from HIA members such as Warwick Temby, a Housing Industry Association and QBCC consumer reference group member, who welcome the reduced financial reporting obligations and the discounted three-year licence renewals that the QBCC has introduced. Another quote from Max Barton of the Association of Independent Retirees and QBCC consumer reference group states, 'The QBCC is a fairer, more efficient and effective building service authority for Queensland.' Another quote from Paul Bidwell of the Master Builders Association and QBCC industry reference group member states, 'We support the decision to provide three-year licences. This saves licensees time each year along with a 15 per cent fee discount.' Another quote from Warwick Temby reads, 'The new BCIPA processes and the online tools have made it a less confusing, more user friendly system.'

The 2015-16 QBCC annual report, endorsed by the current Minister for Housing and Public Works, the Hon. Mick de Brenni, endorsed quotes like—

> The QBCC also oversees the adjudication process under the Building and Construction Industry Payments Act 2004 ... to help those in the building industry who are involved in a payment dispute. During the past financial year, the BCIP Act helped Queensland industry participants to get paid more than $73 million through adjudication.

Phil Kesby, the chairperson of the Queensland Building and Construction Board, stated, 'Under the MFR Policy, the QBCC undertook 445 non-payment of debt investigations, resulting in the suspension of 93 licenses' and has recovered $9 billion for its creditors. I will refer to some other

relevant facts that were endorsed by the minister at the time. From the BCIPA annual report of 2013-14 under the commissioner's report extract, since October 2004 more than 5,800 adjudication applications have been lodged under the act, resulting in about $1.1 billion being awarded to claimants through the adjudication process. I reject the claims that the LNP watered down the Building and Construction Industry Payments Act amendments as alleged. Consultation on proposed changes to BCIPA occurred over several years from 2012 involving hundreds of written submissions, individual interviews and a number of discussion papers.

It is simply not correct to allege that somehow because an LNP government was in place that the QBCC board contributed to the tragic Walton Construction collapse. The changes made to the minimal financial requirements happened later and have been widely accepted. It must be stated that any review of the current legislation before the House by the current Labor government on any reforms will be assessed on their merit. We have to have an open mind on determining what is good public policy. The claims made that non-payment incidents have skyrocketed is terribly misleading. Evidence can be found in the QBCC's annual report of 2015-16 that debt recovery has remained relatively unchanged over the last five years. In fact, there was over $4 million recovered in 2013-14 compared to $2.2 million recovered in 2015-16.

During a briefing to the Public Works and Utilities Committee reviewing this bill, departmental officers were asked several questions which they had to take on notice. One answer in particular is worth highlighting. The question asked by the committee read—

With regard to mandatory and prohibited contracts clauses proposed in the Bill, insertion of section 67GA and 67B to the Queensland Building and Construction Commission Act 1991 including mandatory and prohibited clauses into building contracts (which are not defined) while including fines for non-compliance leaves uncertainty. Could the department provide clarification on the type and wording of the proposed mandatory or prohibited clauses?

The response from the department was that clause 276 provides for proposed new section 67GA which prohibits a building contractor from entering into a building contract that does not include mandatory conditions prescribed by regulation. Clause 276 also provides for proposed new section 67GB which prohibits a building contractor from entering into a contract that includes a prohibited condition prescribed by regulation.

Mr DEPUTY SPEAKER: Order! Members on the government side, there is still far too much talk. I am having difficulty hearing the member for Burnett. Please keep the volume down.

Mr BENNETT: For the benefit of the House, I only have a couple of pages to go. Hang in there. I will jump forward a bit.

What does this mean for the industry? The answer from the department sheds little light as to the specific contract conditions that government has in mind in this regard. However, it is expected that conditions like unreasonable short time bars, termination for convenience and recourse to security without notice could be the first raft of prohibited conditions. If the implementation of PBAs is conditional on the government having to produce regulations mandating and prohibiting contract provisions to create a fairer and more accountable industry then it would appear that building contracts are about to be significantly changed and refined by the government.

The industry has been hearing a lot about the proposed legislation for a considerable period of time, including millions of taxpayers' funding to promote that everyone will be paid on time in full every time. The problem has always been that the government has only ever really consulted initially at a high level and then only broadly on the reforms. The problem has always been that the industry had never had an opportunity to review much of the detail to understand all the issues and potential problems.

Mr de Brenni interjected.

Mr BENNETT: I take that interjection from the minister. He tabled 143 amendments two hours ago and now tells me that he has consulted widely and not at a high level. I reject that claim.

We have to understand the issues and potential problems. We now see that there are considerable changes being proposed, but the real effects of the ramifications on the industry will not be known until we at least have a review of the legislation conducted after 12 months. At this point in time I acknowledge that two weeks ago the LNP travelled to Springwood and made a great announcement which has thankfully been taken up by the minister that the review is part of what the industry needs to do. Good policy should be about review. Good policy can be supported by all sides of this House. We thank the minister for acknowledging this with 143 amendments. We acknowledge the minister's review after 12 months, because I think the industry deserves to have some certainty that this will not cause diabolical consequences.

In conclusion, we remain committed to good policy. We welcome the communication and discussion on all of these issues. I take the opportunity to thank the departmental staff who I know have worked on these policy reforms for a number of years, including under the previous government. If these 143 amendments go a long way to supporting all key stakeholders in the industry, the LNP will be happy to support the bill.