BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT BILL 2013

Bill introduced on motion by Mr Andrew Constance, read a first time and printed.

Second Reading

Mr ANDREW CONSTANCE (Bega—Minister for Finance and Services) [4.10 p.m.]: I move:

That this bill be now read a second time.

I am pleased to introduce the Building and Construction Industry Security of Payment Amendment Bill 2013. The purpose of the bill is to introduce reforms that will provide greater protection for subcontractors and promote cash flow and transparency in the contracting chain. Over the three financial years to 2011-12 insolvencies in the New South Wales construction industry have accounted for at least 50 per cent of insolvencies across all States and Territories. Over the past two financial years more than 1,000 construction companies have entered into external administration in New South Wales. The effects and impact of insolvency in the construction industry are not confined to the failed company; the effects are felt by a score of other parties, in particular unsecured creditors further along the contract chain. More often than not, these unsecured creditors are small businesses ill-equipped to deal with a delay in payment, let alone non-payment of money owed.

When a building company is placed into administration it typically leaves unpaid debts to a significant number of subcontractors and other creditors. The Australian Securities and Investments Commission estimates that each year insolvencies result in the loss of hundreds of millions of dollars to unsecured creditors in the form of unpaid debts. In turn, these unpaid debts place other businesses at risk, with often devastating results throughout the contracting chain, particularly at the subcontractor level. These statistics include the failure of contractors engaged by government agencies to construct housing, roads and other significant capital works. In an industry that provides employment for more than 300,000 people and generates wealth and opportunities for many more in other sectors of the New South Wales economy, the Government recognises that the impact of insolvency, particularly on small business, needs to be addressed.

In August 2012 the New South Wales Government established the Independent Inquiry into Construction Industry Insolvency, chaired by Bruce Collins, QC. The final report of the inquiry acknowledged that the issues are complex and have been considered by all States and Territories over many years. The Government's reform package and response to the inquiry addresses issues relating to the causes and impacts of insolvency through, first, strengthening the existing legislative framework; secondly, establishing a retention trust scheme for subcontractors; thirdly, reforms to government construction procurement, including empowering the New South Wales Procurement Board as the peak policymaking body for all government construction projects from 1 July 2013 onwards; and, finally, an education campaign to improve the business and financial management skills of small business operators.

The reforms have been developed with a clear understanding of the contribution of the building and construction industry to employment and growth, and that the industry has only relatively recently

shown some signs of recovery. The New South Wales Government's response strikes a balance between providing greater protection for subcontractors and ensuring that additional regulatory and administrative costs to business are minimised. This bill represents the first phase of the reforms announced by the Government. The Building and Construction Industry Security of Payment Amendment Bill 2013 maintains this focus on fairness and promoting cash flow within the contracting chain. The proposed amendments will work to reduce the financial stress that delayed payment places on builders, particularly subcontractors. The Government acknowledges that the majority of the industry does the right thing. However, the inquiry found:

Subcontractor payment cycles are unacceptably long, and that the common practice is late, delayed or reduced payments to subcontractors which are pushing increased financial pressure down the contracting chain and contributing to the financial stress upon subcontractors and increasing the risk of insolvency.

The inquiry found that, while some subcontractors that provided labour-intensive services may be able to negotiate a payment cycle of 14 days, this was clearly an exception. Payment of subcontractors could extend to 90 or more days after the work was completed, with the inquiry estimating that the average payment term was somewhere between 45 and 60 days. Some of the worst examples of delayed payment practices heard by the inquiry involved standard payment terms of between 90 and 120 days after the work was completed by the subcontractor. Clearly, that is unacceptable and it is at this end of the market where the prompt payment provisions of this bill are particularly targeted and will have the greatest effect. The inquiry also identified a critical need for effective financial disclosures between parties to a construction contract, in particular the disclosure of payments to subcontractors.

Allegations of head contractors swearing false statutory declarations in relation to their payment obligations to subcontractors are longstanding. Indeed, in Moruya in my electorate of Bega there was an instance of that when subcontractors were left out of pocket despite claims being made about the signing of a false statutory declaration. This bill, through the supporting statement provisions, will bring new accountability to the sector. New enforcement powers and substantial penalties for non-compliance send a clear message to those in the industry who provide false or misleading information in relation to payments owed to subcontractors. Throughout the inquiry and following the release of the Government's response to its recommendations, industry has been engaged and consulted on all the key issues. Each of the peak organisations that formed part of the inquiry's industry reference group was consulted directly on the draft bill throughout June and July.

In response to concerns about the potential impact of the reforms in this bill on small business in the residential sector, upon becoming Minister for Finance and Services in August this year I undertook to conduct additional consultation with the industry. As a result of this consultation, the bill provides a limited exemption targeting small businesses operating in the residential sector. The Act has always excluded construction contracts for residential building work, as defined in the Home Building Act 1989, where the principal—in this case, a consumer—resides or proposes to reside in the premises where the work is undertaken. However, contracts between the head contractor and subcontractors working on those premises have always been covered by the Act. The exemption under the Act that currently applies to a residential contract between a head contractor and

consumer is extended for the purposes of new section 11 of the bill.

This means that the amendments will not apply to a residential contract that is connected to the contract between the consumer and head contractor—referred to in the bill as the "main contract". This limited exemption does not apply to other work that may be described as residential such as high-rise apartments and other commercial developments in the sector. Due to the existing exemption under the Act, the supporting statement provisions do not apply to a residential contract between a head contractor and consumer. The Housing Industry Association and the Master Builders Association support this exemption, and I thank both organisations for their constructive support. I am mindful, however, that the residential sector continues to experience a high number of insolvencies. The exemption will be assessed as part of the scheduled review of the Act in 2015, or earlier should the need arise.

I turn now to the prompt payment provisions set out in section 11 of the Act. New section 11 (1) of the bill provides that subject to this section and any other law, a progress payment to be made under a construction contract is payable in accordance with the applicable terms of the contract. This ensures that parties to a contract may continue to negotiate terms that apply to the process of assessing a payment claim made under a construction contract. New section 11 (1A) of the bill stipulates that a progress payment to be made by a principal to a head contractor becomes due and payable on the date occurring 15 business days after a payment claim is made under part 3 of the Act. New section 11 (1B) of the bill stipulates that a progress payment to be made to a subcontractor becomes due and payable on the date occurring 30 business days after a payment claim is made under part 3 of the Act. This provision applies to contracts between a head contractor and subcontractor as well as contracts between subcontractors, and subcontractors and suppliers.

These maximum payment periods are the safety net for both head contractors and subcontractors. A construction contract may of course provide for payment on an earlier date than these maximum payment periods. These prompt payment provisions are designed to start the faster flow of cash from the top of the contracting chain. Consistent with the exemption I have already described, new section 11 (1C) of the bill retains the existing due and payable provisions for construction contracts connected to an exempt residential contract. There are no changes in this bill to part 3 of the Act, which sets out the procedure for recovering progress payments, including how a payment claim is to be made. New section 11 (8) of the bill voids any provision in a construction contract that provides for payment of a progress payment later than the maximum payment periods set out in subsections (1A) and (1B).

In response to questions as to what impact or cost these changes may have on the capacity of parties to a construction contract to verify payment claims and related administrative practices, I draw attention to similar provisions that have been operating in Queensland since 2004 under that State's security of payment legislation, without adverse effect.
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The bill also removes the existing requirement under section 13 (2) (c) that a payment claim include a statement that it is a claim being made under the Act. The inquiry found that this requirement was one of the factors that had led to an under-utilisation of the Act by subcontractors and should be abolished. Many subcontractors are reluctant to include such a statement in their payment claims to

head contractors as it may be viewed as a signal of a possible dispute. The statement was made a requirement under the principal Act to ensure that respondents to claims were made aware of their obligations should a dispute arise. However, the Act is now in its fourteenth year of operation and is generally well understood by industry. An education campaign will communicate the reforms to industry.

In its final report, the Collins inquiry noted the almost universal support from those that provided evidence for the introduction of prompt payment provisions and the removal of the wording requirement for a payment claim. Proposed section 13 (7) introduces a new requirement for head contractors. A payment claim submitted by a head contractor to a principal must be accompanied by a supporting statement that includes a declaration that all subcontractors and suppliers, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.

This legal requirement will in effect replace the standard contractual requirement for a statutory declaration that includes a statement that all subcontractors have been paid what is due and owing to them to be provided by the head contractor to the principal with a payment claim. The provision addresses a key finding of the inquiry that statutory declarations made by head contractors under the Oaths Act for the purpose of securing a progress payment from a client are often false, not enforced and frequently amended to convey the appearance that what was due and owing to a subcontractor was no longer an amount owed by the head contractor.

Authorised officers from agencies such as the Department of Finance and Services will have powers to investigate and prosecute breaches of the provisions relating to supporting statements. There will be a maximum penalty of $22,000 for not complying with proposed section 13 (7). Proposed section 13 (8) creates a separate offence for knowingly providing a supporting statement that is false or misleading. A maximum penalty of $22,000 or three months imprisonment or both will apply.

These provisions introduce an element of transparency into payment practices that operate in the industry and provide a clear incentive for head contractors to pay subcontractors what is due and payable. The supporting statement requirement simply provides that a head contractor declare they have paid subcontractors what they are owed under contract. The requirement does not bring forward or create a new obligation to pay subcontractors. If at the time a head contractor makes a payment claim to a principal under a construction contract an amount is owed to a subcontractor or supplier then the provisions require the head contractor to confirm that these payments have been made.

Proposed sections 36 to 36B set out matters relating to the investigation of compliance with supporting statement provisions, dealing with documents produced in an investigation and ensuring that any information provided is handled appropriately by authorised officers. The director general may appoint a public service employee to investigate compliance with the supporting statement provisions. An authorised officer may request in writing that a head contractor or someone who is or was employed or engaged by a head contractor provide information and all documents relating to the payment of subcontractors by or on behalf of the head contractor. It will be an offence to refuse or fail to comply with a request for information from an authorised officer or knowingly provide false

or material information. A maximum penalty of $22,000 or three months imprisonment or both will apply. I also draw the attention of the House to the fraud provisions in the Crimes Act.

The regulations will provide the detail of what information is required to be provided by the head contractor in that supporting statement and will be subject to further industry consultation. Consideration will be given to how to capture information relating to any instances of non-payment of subcontractors not directly engaged by the head contractor. The regulations may also consider the need to consolidate supporting statement requirements with existing legal obligations relating to payroll tax, workers compensation and employee remuneration.

I can also foreshadow that the Department of Finance and Services, which is committed to encouraging voluntary compliance with this bill, will work with industry groups to focus its compliance efforts towards the "bad apples" in the construction industry. The department will publish guidance about how to comply with these provisions and give examples of what it, as the regulator, considers breaches the law and what practices comply with the law. As part of the second phase of reforms I will soon release a consultation paper on the proposed model for a statutory retention trust to protect subcontractors' cash retention—another key reform for the building and construction industry.

The amendments contained in this bill are part of the broader reform agenda outlined earlier and have been the subject of considerable industry consultation. As I advised members earlier, since being sworn in as the Minister I have undertaken to consult further with industry. Minor changes were made to the early consultation draft of the bill in response to feedback on the definitions in the original draft bill. These changes provide greater clarity, particularly in relation to the definition of a head contractor.

As I said, the exemption targeting small businesses operating in the residential sector will be reviewed within 18 months. There have been calls to exclude all residential work from this bill; however, to do so would leave the thousands of small business subcontractors operating in this sector without the protection afforded to other parts of the industry. The Government is acting through this bill and other reform measures to protect small businesses across the industry.

The provisions of this bill are supported by a broad cross-section of the industry and have the strong backing of subcontractors, the Master Builders Association and the largest peak organisation representing small business, the NSW Business Chamber. I acknowledge that there are parts of the industry that have expressed their disappointment at being portrayed as rogues in the media. I am sure that all members of the House appreciate the outstanding contributions made by the vast majority of men and women employed in the industry. It is a hard industry to succeed in, and those that do have contributed in a lasting way to our built environment. We know that the continuing difficult economic environment in which the industry continues to operate has played a role in the failure of many businesses. In this respect, the Government's approach to reform is measured and balanced, recognising that heavy-handed regulation would in many respects simply add further cost to doing business in this sector.

The O'Farrell-Stoner Government remains committed to providing a better deal for small businesses

in the construction sector. Our reforms are comprehensive and balanced and focused on those areas where we can and should influence behaviour. However, there is only so much a State government can do in this area. Corporations law, insolvency and bankruptcy are matters regulated by the Federal Government. The final report of the independent inquiry noted that there is more that can and should be done at the Federal level. The inquiry heard from too many builders about the problem of phoenixing—the deliberate liquidation of a company to avoid liabilities such as tax, employee wages and debts to other businesses and continuation of trade under another trading entity. Existing laws on matters relating to illegal phoenixing, insolvent trading and the legal obligations of directors under the Corporations Act must be better enforced by the Federal regulators.

The Government recognises the need to ensure that industry is informed as to the nature and scope of the changes and has sufficient time to make the necessary arrangements to ensure compliance with the new requirements. As part of the overall response to the recommendations of the Collins inquiry, an industry advisory group has been established to ensure continued effective industry engagement. Comprising key industry peak organisations including the Housing Industry Association, the Master Builders Association, the Australian Constructors Association, the Construction Forestry Mining and Energy Union as well as the Small Business Commissioner, the advisory group will assist in communicating the changes and reforms to industry and also develop an education campaign focusing on the financial and business management skills of small business. The Department of Finance and Services will develop information and compliance fact sheets and online resources to assist industry in this regard.

In summary, this bill provides for fairer payment terms for subcontractors, it will hold head contractors to account for the statements they make about payments to subcontractors and will make it simpler and easier for subcontractors to utilise the Act. I commend the bill to the House.

Debate adjourned on motion by Mrs Barbara Perry and set down as an order of the day for a future day.