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## Construction Industry in NSW: Background to the Insolvency Inquiry

by John Wilkinson

### 1. INTRODUCTION

The global financial crisis (GFC) significantly affected the house/office building and engineering construction industry in Australia. From the December 2007 quarter to the December 2008 quarter, for example, owner occupied housing commitments fell by 22%. Although (in early 2009) the Rudd government launched the \$42 billion Nation Building and Jobs Plan (70% of which was to be spent on schools, social and defence housing, insulation measures and various road/rail works),<sup>1</sup> many building companies encountered difficulties in the adverse conditions. During financial year 2011 – 2012 there were 1,113 insolvencies in the NSW building and construction industry. Those involved included Kell and Rigby (February 2012), St Hillier's (May 2012), Hastie Group (May 2012), Reed Constructions (June 2012) and Southern Cross Constructions (October 2012). Leighton Holdings reported an after-tax loss of \$409 million for financial year 2010-11. In the wake of the insolvencies, many subcontractors were left empty-handed. This situation, in turn, led the O'Farrell government to establish an [inquiry](#) (headed by Bruce Collins SC) into insolvency in the NSW construction industry and to consider possible remedies.<sup>2</sup>

This e-brief sets out to provide a general survey of the industry, the key areas of activity and the main participants. It also looks at the regulation of the industry and at the more important recommendations of the Collins inquiry.

### 2. INDUSTRY OVERVIEW

#### 2.1 Activities: Australia

Amongst the areas of activity that constitute the building and construction industry – engineering construction and house/office building – the commercial sphere is much bigger than the public realm. Within the commercial sphere itself, engineering construction is significantly bigger than house, apartment or office building, as shown in the table below:

**Construction and Building Work Done Australia (2011-12)<sup>3</sup>**

Engineering Construction (Commercial)	\$84.6 bn
Residences/Offices (Commercial)	\$67.0 bn
<b>TOTAL COMMERCIAL</b>	<b>\$151.6 bn</b>
Engineering Construction (Public)	\$31.6 bn
Residence/Offices (Public)	\$12.5 bn
<b>TOTAL PUBLIC</b>	<b>\$44.1 bn</b>
<b>TOTAL (COMMERCIAL AND PUBLIC)</b>	<b>\$195.7 bn</b>

**2.2 Activities: New South Wales**

In 2011-12 just under 20% of Australia’s engineering and building work was carried out in NSW:

**NSW Construction and Building Work Done: (2011-12)<sup>4</sup>**

Engineering Construction (Commercial and Public)	\$21.7 bn
Residences/Offices (Commercial and Public)	\$17.7 bn
<b>TOTAL (COMMERCIAL AND PUBLIC)</b>	<b>\$39.4 bn</b>

While the commercial sphere is larger than the public, it remains the case that the NSW government itself is a major contributor to the construction industry. This takes in place in different forms: including public/private partnerships (PPPs). In 2012, according to Tony Whitfield (NSW Deputy Auditor General), there were over 40 PPP projects in New South Wales.<sup>5</sup>

The Collins inquiry has produced the following estimates for the share of activity generated by the public sector in NSW:

**Public Share of NSW Building and Construction Expenditure: 2001 – 2012<sup>6</sup>**

Year	Total Building/Construction Expenditure (\$)	Public (%)
2001-02	\$18.4 billion	30.2%
2006-07	\$28.3 billion	28.0%
2009-10	\$35.8 billion	40.5%
2011-12	\$40.2 billion	35.9%

**2.3 Industry Participants**

The division of the building and construction industry – into clients/owners, principals, contractors and subcontractors - has had a long history. This hierarchy has recently been summarised by the Queensland Department of Justice and Attorney-General accordingly:

- **Client.** The project, building or facility owner.
- **Principal.** The person, entity or organisation responsible for contracting with a contractor for carrying out work.
- **Contractor.** The person, entity or individual responsible for the performance of the work.
- **Subcontractor.** A party that provides services to a contractor.<sup>7</sup>

Keith Hampson and Tommy Kwok have written that,

On many building construction projects, it is common for 80-90% of the total work value being performed by subcontractors. The working relationship between head contracting firm and subcontractors begins during the estimating bidding process, i.e. tendering stage. It ends when the final payment is made to the subcontractor. Thus, the working relationship between contracting firm and subcontractors is typically on a short-term basis – on a project by project basis.<sup>8</sup>

Subcontractors, according to Phillip Toner, typically provide services such as earthmoving, electrical work, carpentry and painting.<sup>9</sup> The Allen Consulting Group has written that “in 2012 the construction industry in NSW comprised about 107,000 businesses.”<sup>10</sup>

### 3. STRUCTURE OF THE INDUSTRY

#### 3.1 Share of NSW Industry Output

Building and construction ranks fifth in its share of the state’s combined industry output:

<b>Leading Industry Sectors’ Contribution to NSW Gross State Product(%): 2011-12<sup>11</sup></b>	
Financial and Insurance Services	14.1
Manufacturing	7.7
Professional, Scientific and Technical Services	7.4
Healthcare and Social Assistance	6.0
Building and Construction	4.9

#### 3.2 Employment

In New South Wales, in 2012, there was a total of just under 300,000 employees in the building and construction industry, of whom around 15% were part-time employees:

<b>Employees in the NSW Building and Construction Industry: 2008- 2012 (average)<sup>12</sup></b>	
<b>2008</b>	
Full-Time	259,200
Part-Time	39,400
<b>2012</b>	
Full-Time	250,200
Part –Time	44,500

#### 3.3 Value of the Industry: Australia

The combined value of the building and construction in Australia is almost \$200 billion. The tables below detail the value of the market for engineering

construction, and the value of the market for house and office building, for financial year 2011-12:

**Value of the Engineering and Construction Market: Australia (2011-12)<sup>13</sup>**

Mining and Heavy Industry	\$47.3bn
Roads	\$16.7bn
Electricity Generation Transmission and Supply	\$11.7bn
Railways	\$8.6bn
Harbours	\$5.5bn
Water Supply and Storage	\$5.0bn
Telecommunications	\$4.4bn
Pipelines	\$2.1bn
Other	\$6.7bn
<b>TOTAL</b>	<b>\$108bn</b>

**Value of the House/Office Building Market: Australia (2011-12)<sup>14</sup>**

New Houses	\$26.0 bn
New (Other) Residential Dwellings	\$13.9 bn
Alterations and Additions	\$8.6 bn
Health (Non-Residential Social and Institutional)	\$7.3 bn
Retail	\$6.0 bn
Offices (Non-Residential Commercial and Industrial)	\$5.5 bn
Education (Non-Residential Social and Institutional)	\$4.5 bn
Recreation (Non-Residential Social and Institutional)	\$2.5 bn
Hotels (Non-Residential Commercial and Industrial)	\$1.3 bn
Other (Non-Residential Commercial and Industrial)	\$5.1 bn
Other (Non-Residential Social and Institutional)	\$3.4 bn
<b>TOTAL</b>	<b>\$84.1bn</b>

**3.4 Value of the Industry: New South Wales**

Statistics from the Australian Bureau of Statistics (ABS), together with figures from the Housing Industry Association, provide the following breakdown of building and construction in NSW:

**Building and Construction Work Completed in NSW by Category and Value (approx.): 2011 – 2012<sup>15</sup>**

Civil Engineering	\$17.0 bn
Mining Engineering	\$5.0 bn
New Houses (Detached)	\$4.9 bn
Multi-Unit Dwellings	\$3.4 bn
Other Non-Residential	\$3.1 bn
Commercial	\$3.0 bn
Alterations and Additions	\$2.0 bn
Industrial	\$1.0 bn

### 3.5 Major Players: Civil, Non-Residential and Mining

Within the industry, there is a significant division between the relatively small group of leading contractors, and a very large contingent of subcontractors. The following are the twenty largest Australian contractors, by value of contracts, for the year 2011-12:

#### **Australia: Civil, Mining, Commercial and Industrial Contractors by Value of Contracts and Area of Operations (2011-12)<sup>16</sup>**

John Holland (Civil)	\$7.1 bn
Leighton (Civil and Mining)	\$6.5 bn
Thiess (Civil and Mining)	\$4.5 bn
Downer EDI (Mining)	\$4.5 bn
Baulderstone (Civil)	\$4.1 bn
Inpex Browse (Mining)	\$3.5 bn
Brookfield Multiplex (Commercial and Industrial)	\$3.1 bn
Abigroup (Civil)	\$2.2 bn
Hansen Yuncken (Civil, Commercial and Industrial)	\$2.1 bn
Monadelphous (Mining)	\$1.6 bn
Laing O'Rourke (Civil and Mining)	\$1.5 bn
Ghella (Civil)	\$1.5 bn
MacMahon (Civil and Mining)	\$1.3 bn
Grocon (Commercial and Industrial)	\$1.3 bn
Lend Lease (Civil, Commercial and Industrial)	\$1.3 bn
McConnell Dowell (Mining)	\$1.1 bn
Hutchinson (Commercial and Industrial)	\$1.1 bn
McDermott (Mining)	\$1.1 bn
Watpac (Commercial and Industrial)	\$926 million
BMD (Civil)	\$868 million

### 3.6 Mergers in Non-Residential Contracting

Amongst these concerns, two predominate: Leighton and Lend Lease. This occurred through these two companies' acquisition of other major contractors at the following points in time:

#### **Leighton/Lend Lease: Acquisition of Subsidiaries 1983 - 2011<sup>17</sup>**

<b>Leighton</b>	<b>Thiess (1983)</b>
	<b>John Holland (2000)</b>
<b>Lend Lease</b>	<b>Bovis (1999)</b>
	<b>Abigroup (2010)</b>
	<b>Baulderstone (2010)</b>

### 3.7 Overseas Multinational Ownership in the Australian Non-Residential Construction Industry

Recent years have witnessed an increase in the acquisition of Australian building and construction firms by overseas companies. At the time of Leighton's acquisition of Thiess (1983), the German company Hochtief had a 50% shareholding in Thiess. By virtue of Leighton's takeover of Thiess, Hochtief acquired a 9.9% interest in Leighton.<sup>18</sup> In 1993, Bilfinger Berger (Germany) acquired Baulderstone.<sup>19</sup>

In 2001, Hochtief raised its shareholding in Leighton to 51.5%. Meanwhile, in 2004, Bilfinger Berger acquired Abigroup.<sup>20</sup> In 2006, Laing O'Rourke (UK) acquired the Brisbane building company Barclay Mowlem. Towards the end of 2010, Bilfinger Berger grouped Baulderstone and Agibroup into an organisation called Valemus which was subsequently floated and acquired by Lend Lease. In 2011 the Spanish company Actividades de Construcción y Servicios (ACS) acquired 50% of Hochtief.<sup>21</sup>

In the meantime, in 2007, the Canadian company Brookfield acquired the locally-based Multiplex: the new operation subsequently known as Brookfield Multiplex.<sup>22</sup> Just recently (in April 2013) Besix Group (Belgium) acquired a 15.6% interest in the Queensland building company Watpac.<sup>23</sup>

### 3. 8 Major Civil Engineering Contractors: Operations in NSW

The following are large companies which have undertaken major projects in NSW:

- **Leighton.** Specialises in civil engineering. In NSW, in recent years, Leighton has undertaken projects such as the \$1.5 billion Westlink M7 (in conjunction with Abigroup); the \$550 million upgrade of the M2 (Hills) Motorway (with Fulton Hogan); the \$475 million Sapphire to Woolgoolga Pacific Highway upgrade; the \$422 million Kingsgrove – Revesby Rail Quadruplication project; the \$345 million Kempsey Bypass; and the \$214 million Tarcutta bypass.
- **Thiess.** Has a speciality in mine construction (such as BHP's Yandi mine in WA) but in NSW has undertaken projects such as the \$1.5 billion Hunter Valley Expressway (with Lend Lease) and the \$729 million redevelopment of the Royal North Shore Hospital.
- **John Holland.** Specialises in civil engineering. In recent years has undertaken projects such as the \$527 million Ballina bypass; the \$475 million upgrade of the Sydney-Melbourne railway line (for the Australian Rail Track Corporation); and the \$268 million third rail line project from Maitland to Whittingham.
- **Lend Lease.** Specialises in civil engineering. Has recently undertaken projects such as the \$1.5 billion Hunter Valley Expressway (with Thiess) and the \$400 million widening of 21 kilometres of the M5 Motorway.
- **Baulderstone.** Specialises in civil engineering. One of Baulderstone's biggest projects in New South Wales, during the last 5 years, is the \$500 million Port Botany expansion.

- **Abigroup.** Specialises in civil engineering: particularly road engineering. In recent years Abigroup has undertaken a variety of major projects include the \$1.5 billion Westlink M7 (in conjunction with Leighton).<sup>24</sup>

### 3.9 Major Players: House and Apartment Building

A number of companies specialise in either house and/or apartment building. The more important companies, in terms of dwelling starts, are as follows:

**Major House/Apartment Builders in NSW (by Dwelling Commencements): 2011-12<sup>25</sup>**

Company	Dwelling Commencements
Meriton	1,167
Eden Brae Homes	867
McDonald Jones Homes	733
Masterton	585
Mirvac	508
Clarendon	471
Allworth Homes	367
G.J. Gardner Homes	343
Metricon Homes	340
Hotondo Homes	253

### 3.10 House and Apartment Builders: Smaller Operators

The NSW house and apartment building industry essentially consists of a small number of sizeable companies and a much greater number of small operators. This is highlighted in the figures for individuals, companies and partnerships 2000/01 to 2010/11:

**Individuals, Partnerships and Companies Holding Licences under the NSW Home Building Act: 2000/01 to 2010/11<sup>26</sup>**

	Individuals	Companies	Partnerships	Total
2000-01	130,127	14,478	5,703	150,308
2010-11	148,131	21,851	5,908	178,890

### 3.11 Insolvencies: Prominence in the Building and Construction Industry

Collapses (or failures) in the building and construction industry are nothing new. Building companies are often susceptible to the boom and bust elements of business cycles. According to the [Collins inquiry](#), citing a report prepared by BIS Shrapnel,

The industry recorded the highest number of insolvencies of any defined industry for the financial year 2011/12, a total of 1,113 or 24.7% of external administrations reported to ASIC [Australian Securities and Investments Commission] across NSW. . .<sup>27</sup>

According to Kingsway Financial Assessments, building and construction ranked second-highest across Australia (by industry division) regarding initial external administrators reports lodged with ASIC:

<b>Initial External Administrator's Reports Lodged at ASIC (Australia-Wide): by Industry Category (2011-12)<sup>28</sup></b>	
Other (Business and Personal) Services	1,887 (23.4%)
Building and Construction	1,862 (23.1%)
Retail	864 (10.7%)
Accommodation and Food Services	611 (7.6%)
Manufacturing	474 (5.9%)
Transport, Postal and Warehousing	448 (5.6%)
Wholesale	246 (3.1%)
Rental, Hiring and Real Estate Services	244 (3.0%)
Agriculture, Forestry and Fishing	213 (2.6%)
Information, Media and Telecommunications	212 (2.6%)
Professional, Scientific and Technical Services	153 (1.9%)
Financial and Insurance Services	150 (1.9%)
Education and Training	95 (1.2%)
Mining	58 (0.7%)

## 4. INDUSTRY REGULATION

### 4.1 Fragmented Nature of Industry Legislation

Constitutionally, the regulation of the construction industry is primarily the responsibility of the states. As the state's Building Professionals' Board (BPB) observed in 2011,

The regulation of building practitioners in NSW is fragmented. It involves a number of government departments, is not integrated and does not comprehensively cover key professions, such as engineering and trades. . .<sup>29</sup>

### 4.2 Collaborative Australia-Wide Basis for Building Standards

Moves to develop nationally-agreed upon standards emerged in the 1960s when the Interstate Standing Committee on Uniform Building Regulations (ISCUBR) was established, tasked with drafting a model technical code for building regulation. The committee's work resulted in the publication of the Australian Model Uniform Building Code (AMUBC): released in the early 1970s. In 1980 the Local Government Ministerial Council agreed to form the Australian Building Regulations Co-ordinating Council or AUBRCC (superseding the ISCUBR). The task of the AUBRCC was to continue developing the model building code. In 1988 the first Building Code of Australia (BCA) was released.<sup>30</sup>

In the early 1990s a COAG taskforce recommended the institution of a national body to help achieve national consistency in building regulations. In 1994 an intergovernmental agreement was concluded (by the then

Planning, Housing and Local Government Ministerial Council) establishing the Australian Building Codes Board (ABCB). The ABCB was given the task of transforming the BCA into a performance-based document. Two years later, the Board released the first performance-based BCA: adopted by the states and territories between 1997 and 1998.<sup>31</sup> Currently the BCA provides minimum regulatory requirements for all building work undertaken in Australia. As the Productivity Commission has observed,

The code articulates (minimum) requirements for building practices for most building types and for a variety of aspects of building performance. The BCA covers all commercial and domestic buildings, but not 'non-building' or engineering constructions (such as roads and bridges).<sup>32</sup>

NSW implementation of the code was achieved through the *Environmental Planning and Assessment (Amendment) Act 1997* which transferred building approvals to the Act from the *Local Government Act 1993*.<sup>33</sup> Section 105 of the EP&A Act 1979 provided that regulations issued under the Act "may provide for the adoption and application of the Building Code of Australia".<sup>34</sup> Clause 98 of the *Environmental Planning and Assessment Regulation 2000* provided that "for any development that involves building work. . .the work must be carried out in accordance with the requirements of the Building Code of Australia." Clause 130 of the 2000 regulation provided that, "A certifying authority must not issue a complying development certificate for building work unless the proposed building. . . will comply with the relevant requirements of the Building Code of Australia".<sup>35</sup>

### 4.3 Absence of Overall Industry Regulation in NSW

The Building Code of Australia notwithstanding, in New South Wales there is no overall supervisory statute or body for building and construction. As the state's Building Professionals' Board also remarked, in NSW,

no single body or authority is responsible for the regulation and control of people involved in the design, approval, construction and certification of. . .[building] work.<sup>36</sup>

According to the Building Professionals' Board, the following situation existed with regard to supervision of industry activity in New South Wales in 2011,

- **NSW Fair Trading** licenced builders to carry out residential building work up to three storeys, and also licenced various tradespersons to carry out work such as carpentry, painting, bricklaying, fencing, flooring, structural landscaping, wall and floor tiling and waterproofing
- **Building Professionals Board** accredited building surveyors, engineers, land surveyors, and hydraulic services consultants with the right to issue a range of certificates under the EP&A Act and with the right to periodically carry out inspections of building work (with other government boards being responsible for the registration of architects and land surveyors)

- **Self-regulation** is the basis on which the following industry participants operated: high-rise residential builders, building designers, various engineers, disability access consultants, fire protection services consultants and various sub-trades<sup>37</sup>

The 2012 Collins review into insolvency in the building and construction industry observed the following in regard to the state's self-regulatory approach:

Aside from the Northern Territory, NSW is currently the only jurisdiction in Australia that does not require builders working in the commercial sector to be licensed. NSW stands alone in not requiring general building construction contractors to be licensed.<sup>38</sup>

#### 4.4 State Instrumentalities with Regulatory Responsibilities

As a result of the fragmented nature of industry regulation in NSW, there are a variety of government departments, and government bodies and independent bodies, which play a part in regulating the industry. The relevant organisations, and the legislation they are responsible for, are as follows:

##### Organisations with a Regulatory Role in the NSW Building and Construction Industry<sup>39</sup>

Organisation	Relevant Legislation/Responsibilities
NSW Fair Trading	Home Building Act 1989
Building Professionals Board	Building Professionals Act 2005
Self Insurance Corporation (Home Warranty Insurance Fund)	NSW Self Insurance Corporation Act 2004
Long Service Corporation (Building and Construction Industry Long Service Payments Fund)	Long Service Corporation Act 2010
NSW Public Works	Manages planning and delivery phases of construction capital works procurement greater than \$1 million
NSW Government Procurement	Application of the Procurement Code of Practice to Tenders for Government Construction
WorkCover	Workers Compensation Act 1987
Building Industry Co-ordination Committee	Co-ordination of Building Regulatory Functions across Government Departments

#### 4.5 Securing Payment after Completion

The Carr government obtained passage of the *Contractors Debts Act 1997*. According to Michael Brand and Philip Davenport, despite the good intentions of the legislation,

The *Contractors Debts Act 1997* (NSW) has rarely been used. This is because. . .the sub-contractor had to commence litigation and satisfy the court that the head-contractor owes the sub-contractor

money. . .Litigation is costly, time consuming and requires engaging a lawyer.<sup>40</sup>

Two years on the *Building and Construction Industry Security of Payment Act 1999* was passed.<sup>41</sup> In introducing the NSW legislation, the Minister for Public Works and Services (Morris Iemma) declared,

It is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. . .the government is determined to rid the construction industry of such totally unacceptable practices.<sup>42</sup>

The Act, as outlined by Brand and Davenport, “introduced new statutory rights for claimants such as: a right to progress payments. . .a right to interest on late payments. . .a right to suspend work”.<sup>43</sup> It similarly removed “pay-when-paid” provisions from contracts. The bill also provided for subcontractors to apply for an adjudicator to hear a claim.<sup>44</sup> Key sections of the Act are as follows:

### **Building and Construction Industry Security of Payment Act 1999: Principal Sections<sup>45</sup>**

Section 8	On and from each reference date, under a construction contract, a person (who has undertaken to carry out construction work) is entitled to a progress payment
Section 11 (2)	Interest is payable on the unpaid amount of a progress payment
Section 12	A “pay-when-paid” provision of a contract has no relation to any payment for construction work
Section 13	A person who claims to be entitled to a progress payment may serve a claim on the person liable to make the payment
Section 15	If the respondent becomes liable to pay the claimed amount, the claimant may serve notice (on the respondent) of the claimant’s intention to suspend work
Section 17	A claimant may apply for adjudication of a claim
Section 23	If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant
Section 25	An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction

The *Building and Construction Industry Security of Payment Act 1999* has had a certain amount of success in assisting subcontractors to seek adjudication. In 2008-09, for example, 940 adjudications claims were made by subcontractors seeking payment.<sup>46</sup>

### **4.6 Australia-Wide Company Legislation**

The Commonwealth regulates insolvency and company practices: primarily through the *Bankruptcy Act 1966* and the *Corporations Act 2001*.<sup>47</sup> Under the Corporations Act the position of subcontractors, in terms of their capacity to make a claim against a company, is that of an unsecured creditor: the latter defined by the Australian Security and Investments Commission accordingly,

An unsecured creditor is a creditor who does not have a charge over the company's assets.<sup>48</sup>

In terms of priority, subcontractors rank behind secured creditors.<sup>49</sup> As the Australian Security and Investments Commission explained, in May 2012,

unsecured creditors. . .do not have any priority under the Corporations Act and will only be paid after monies owing to other classes of creditors have been repaid.<sup>50</sup>

## 5. INQUIRY INTO CONSTRUCTION INDUSTRY INSOLVENCY IN NSW

### 5.1 Establishment of the Inquiry and Terms of Reference

In August 2012 the O'Farrell government established an inquiry into insolvency in the building and construction industry (headed by Bruce Collins SC).<sup>51</sup> The main terms of reference were as follows:

- Assess the extent and cause of insolvency in the construction industry
- Consider payment practices affecting subcontractors, as well as existing protections for subcontractors and the impacts of insolvency on subcontractors
- Consider legislative, or other policy responses that can be taken to minimise the incidence and impact of insolvency in the building industry<sup>52</sup>

### 5.2 Subcontractors' Concerns Bearing on the Inquiry

There were a number of considerations, regarding subcontractors, which influenced the conclusions in the report. These were as follows:

- subcontractors still expect to receive little or nothing in the event of a head contractor becoming insolvent
- subcontractors still find it difficult to enforce adjudicated decisions against contractors (and get money adjudged to be theirs)
- retained funds (retention money) are often still employed by companies as working capital – and lost if a company collapses<sup>53</sup>

A traditional (and current) payment arrangement, particularly affecting subcontractors, is that of "retention money". As described by the report of the Collins inquiry,

The holding of retention moneys, either by the principal or the head contractor, serves as an incentive to ensure the due and proper performance of the contract. In the case of subcontractors, retention money is held by the head contractor as both an incentive for the subcontractor to complete the project in an expedited manner, and as a safeguard against defects for which the subcontractor may fail to remedy.<sup>54</sup>

### 5.3 Recommendations of the Inquiry

In November 2012 the taskforce delivered its report. The Collins inquiry made 44 recommendations which can be summarised around a series of major proposals to remedy the impact of insolvencies on subcontractors:

**Cost-Benefit Analysis of the Establishment of a Building and Construction Regulatory Authority:** an initial cost benefit analysis should be undertaken to determine the worth of establishing a sole regulatory body for building and construction (to unify all bodies regulating the NSW industry).<sup>55</sup>

**Creation of a New South Wales Building and Construction Commission (NSW BCC):** in the event that a cost benefit analysis favoured establishing a BCC, the NSW government should proceed with its establishment. A legally instituted body, of this kind, would assume sole responsibility for industry regulation.

**Licensing of Operators:** a primary task of the proposed BCC would be to implement a licensing system wherein all builders and construction contractors would have to qualify within a particular graduated licence category (depending on their net financial position).<sup>56</sup>

Licensing of contractors is a particular feature of the Queensland Building Services Authority (QBSA).<sup>57</sup> Section 35 of the enabling legislation (the *Queensland Building Services Authority Act 1991*) specifically attached financial requirements to licences.<sup>58</sup> Determination of the relevant financial conditions was made a responsibility of the QBSA. Schedule 2 of the *Queensland Building Services Authority Regulation* (issued a year after passage of the Act) specified the necessary financial requirements to qualify for a licence to operate as a contractor.<sup>59</sup> The [Independent Inquiry into Construction Industry Insolvency](#) has declared that,

At the forefront of the Inquiry's response. . . must be placed the recommendation that the Queensland model is necessary to be implemented. . . The Queensland model presents the only solution to the problem of preventing insolvency *in the first place*.<sup>60</sup>

**Financial Monitoring:** a second key task of the proposed BCC would be the regular financial auditing and monitoring of the financial affairs of all builders and contractors in NSW (including spot checks).<sup>61</sup>

**Statutory Construction Trust:** under this proposal, Collins recommends that projects valued at \$1 million or more would require a construction trust. Any payment made (by a principal, head contractor or subcontractor) – in respect of (or on account of) work carried out or materials supplied – will be subject to a trust for the purpose of paying subcontractors and suppliers down the contractual chain. This trust will come into effect immediately on receipt of moneys by the trustee. The trust account will replace any other bank account used for the purpose of receiving/paying money related to the project works.<sup>62</sup>

Any payment (by a principal to a head contractor or by a head contractor to a subcontractor) on account of/in respect of any work done or materials

supplied (by the head contractor, any subcontractor, sub-subcontractor or supplier) would be made and treated in the following way:

- any cheque drawn upon a bank account in favour of the head contractor (in respect of such work) would be held in trust for the head contractor, any subcontractor, sub-subcontractor or supplier
- the proceeds of any such cheques (when banked) would be held upon the same trust for the head contractor, any subcontractor, sub-subcontractor or supplier
- where moneys are paid by the principal via electronic transfer, they will be deemed to be held in trust by the head contractor the instant they are received<sup>63</sup>

All subcontractors who have made claims upon a contractor would have the right to inspect the accounts of the trust. A head contractor would have to pay progress payment claims to the subcontractor within 28 days of receipt of those claims. If an adjudication hearing, held under the provisions of the *Building and Construction Industry Security of Payment Act 1999*, decides that a head contractor owes money to a subcontractor, then such money will be paid into the trust account.<sup>64</sup>

**Retention Money:** all retention funds are to be deposited into a trust fund. Retention funds are only to be used (by the holder of those moneys) for purposes afforded to the holder under the contract (signed between the parties). On agreement (between the principal, contractor and subcontractor) the funds are to be paid out.<sup>65</sup>

**Expansion of the Jurisdiction of the Building and Construction Industry Security of Payment Act 1999:** the Collins inquiry recommends that adjudicators' jurisdiction and powers under the Act be augmented through the following measures:

- enabling the adjudicator to decide (on an interim basis) disputes concerning bank guarantees, and whether or not a party was entitled to cash a bank guarantee
- providing for the resolution of disputes concerning the entitlement (or otherwise) to retain retention sums
- expanding the jurisdiction to enable adjudicators to resolve disputes in the home building sector (in respect of projects valued at \$1 million or more)
- giving adjudicators power to issue a final certificate (after hearing both sides to a dispute involving sums less than \$40,000)
- time limits be increased (yet remaining consistent with speedy resolution)
- removing the right of a claimant to choose their own adjudicator<sup>66</sup>

**Subcontractors Position as Unsecured Creditors:** despite trade organisations (such as the National Electrical and Communications Association) recommending a change to the position of subcontractors (under the corporations legislation), the Collins report did not support any alteration. The report stated that,

The Inquiry does not favour the idea of amending the Corporations Act 2001 (Cth) so as to give unpaid subcontractors a preferred position in the ranks of creditors in the event of insolvency.<sup>67</sup>

### 6. NSW GOVERNMENT RESPONSE

On 18 April 2013, the Minister for Finance and Services (Greg Pearce) issued a media release entitled [Government Acts on Building Insolvencies](#). The Minister declared that,

NSW will become the first state to set up a trust fund scheme administered by the Office of the Small Business Commissioner to protect retention sums.

To ensure subcontractors receive prompt payments we are introducing legislative changes to improve payment practices in the building industry and government contracts will be subject to reform.

Head contractors will be required to pay subcontractors progress payments within 30 days rather than the long payment cycles of 45-60 days. . .<sup>68</sup>

In terms of specific responses to the Collins report, the Minister announced that the O'Farrell Government would be implementing the following measures:

- establishing a cash retention trust scheme for subcontractors
- introducing prompt payment provisions to enhance cash flow and address the serious issue of delayed payment to subcontractors
- enacting a legal requirement for written statements by head contractors, to ensure all subcontractors are paid and allowing authorised officers to investigate and prosecute offences
- implementing a trial of project bank accounts on government construction contracts, where government will directly pay subcontractors – as well as revamped and more frequent financial assessments of contractors
- establishing an Industry Advisory Taskforce to develop an education program targeting subcontractors to improve business and financial skills in the industry<sup>69</sup>

Further to Minister's press release, NSW Finance and Services has produced the following synopsis of the Government's responses to the inquiry's recommendations:

#### Principal Recommendations of Insolvency Inquiry and Synopsis of Government Responses<sup>70</sup>

NSW Building and Construction Commission (Industry-Wide Regulatory Authority)	Conditional on Findings of Cost-Benefit Study
Licensing System	Contingent on the above Cost-Benefit Analysis
Financial Monitoring	Conditional on the Outcome of a Cost-Benefit Analysis for a NSW BCC

Construction Trust	Not Supported at the Present Time. Trial Use Only on Selected Government Projects
Retention Money Trust Account	Supported - Conditional on Regulatory Impact Statement and Consultation with Industry. If Established, Trust Fund (for Retention Money) to be Administered by the NSW Office of Small Business
Expansion of the Jurisdiction of the <i>Building and Construction Industry Security of Payment Act 1999</i>	Supported in Principle

## 7. CONCLUSION

The Collins inquiry has produced a major report on an industry of major importance to NSW. The inquiry focuses on the precarious position of subcontractors, in respect to which a number of significant recommendations have been made. In response to this the O'Farrell government has indicated that it will introduce some reforms in the near future, although the wider reforms recommended by the inquiry remain to be decided.

<sup>1</sup> Toong Khuam Chan and Ram Karthikeyan Thangaraji, "The Effects of the Global Financial Crisis on the Australian Building Construction Supply Chain" in the *Australasian Journal of Construction Economics and Building*, vol.12, no.3, pp.16-17.

<sup>2</sup> See "[Kell and Rigby Ceases Trading – Reports](#)" (9 February 2012) on the website of the *Herald Sun*; Bridget Carter, "[St. Hillier's Construction Arm Fails to Secure \\$150 m, Goes into Administration](#)" (16 May 2012) on the website of *The Australian*; "[Thousands of Jobs at Risk as Hastie Goes Under](#)" (29 May 2012) on the website of the ABC; Reed Constructions. *Media Release*. 18 June 2012; Simon Johanson, "[Building Firm in \\$230m Collapse](#)" (26 October 2012) on the website of the *Sydney Morning Herald*; Leighton Holding Holdings. *Media Release*. *Leighton Looks to the Future with \$46.2 bn of Work in Hand*. 15 August 2011; Bruce Collins (Chair), [Inquiry into Construction Industry Insolvency in NSW](#).

<sup>3</sup> Australian Bureau of Statistics (ABS), [Construction Work Done](#), Catalogue No. 8755.0 (2013), p.6.

<sup>4</sup> ABS, [Construction Work Done](#), Catalogue No. 8755.0 (2013), p.10 .

<sup>5</sup> Tony Whitfield, "Auditing Public Private Partnerships: Experience in New South Wales, Australia" (presentation at the *Auditing PPP Conference*, The Hague, 26-27 November 2012) via the website of the Netherlands Court of Audit.

<sup>6</sup> Collins, n.2, p.37.

<sup>7</sup> See "[Industrial Relations: Definitions](#)" on the website of the Queensland Department of Justice and Attorney-General.

<sup>8</sup> Keith Hampson and Tommy Kwok, "Strategic Alliances in Building Construction: A Tender Evaluation Tool for the Public Sector" in the *Journal of Construction Procurement*, vol. 3, no.1, 1997.

<sup>9</sup> Phillip Toner, "[Long Run Shifts in the Industry and Workforce Structure of the Australian Construction Industry: Implications for a Sustainable Labour Supply](#)", paper presented at the *19<sup>th</sup> Conference of the Association of Industrial Relations Academics of Australia and New Zealand*, 9 – 11 February 2005, Sydney.

<sup>10</sup> The Allen Consulting Group, *Economic Impact of Construction Industrial Relations Arrangements and Investment in Infrastructure: A New South Wales Perspective* (Sydney, 2013), p.14.

<sup>11</sup> See "[Economic and Business Climate – Industry Structure](#)" on the website of the NSW Department of Trade and Investment and Regional Infrastructure Services (DTIRIS). A calculation of the construction industry share of NSW industry GVA, from statistics in the ABS *Australian System of National Accounts*, would yield a figure of 5.6%. See [Australian System of National Accounts](#), Catalogue No. 5204.0 (2012), p.33. The *Independent Inquiry into Construction Industry Insolvency* has produced an estimate of

- 8.1% for construction's contribution to Gross State Product or GSP (as at June 2011). See Collins, n.2, p.25.
- <sup>12</sup> ABS, *Labour Force Australia*, Catalogue No. 6291.0.55.003 (Table 05: Employed Persons by State and Territory).
- <sup>13</sup> See Lend Lease, *Investor Day Presentations* (2012), p.55 on the website of the Australian Stock Exchange.
- <sup>14</sup> Lend Lease, n.12, p.55.
- <sup>15</sup> See ABS, [Building Activity Australia](#), Catalogue 8752.0 (Table 13. Value of Building Work Done, States and Territories); [Construction Work Done](#), Catalogue No. 8755.0 (Table 07. Value of Construction Work Done, States and Territories); [Engineering Activity Australia](#), 8762.0 (Table 02. Value of Work Done, States and Territories). See also Economics Group, Housing Industry Association (HIA), *HIA-Cordell Construction 100 2011/12* (HIA, Canberra), Appendix 1.
- <sup>16</sup> Economics Group, Housing Industry Association (HIA), *HIA-Cordell Construction 100 2011/12* (HIA, Canberra).
- <sup>17</sup> *Leighton Newsletter* (June 1983); Gerard de Valance, "Globalisation and Changes in Ownership of the Building and Construction Industry", paper presented at the *10th International Symposium on Construction Innovation and Global Competitiveness*, Cincinnati, 9 – 13 September 2002; Carolyn Cummins, "Lend Lease No.2 after Big Buy" in *The Age*, 22 December 2010; ["Lend Lease"](#) on the website of *Company-Histories.com*.
- <sup>18</sup> *Leighton Newsletter* (June 1983).
- <sup>19</sup> See ["Family Ties"](#) in the Summer 2003 edition of the quarterly magazine for Baulderstone.
- <sup>20</sup> See Hochtief, Media Release, 2001, ["Hochtief Secures a Majority State in Leighton Holdings"](#); ["Bilfinger Berger Australia"](#) on the website of Company360.
- <sup>21</sup> ["Our History"](#) on the website of Laing O'Rourke; de Valance, n.16; ["Investor Relations"](#) on the website of Hochtief.
- <sup>22</sup> See ["Corporate Profile 2012"](#) on the website of Brookfield Multiplex.
- <sup>23</sup> Carolyn Cummins, "Seymour Puts Watpac Stake on the Block" in the *Sydney Morning Herald*, 10 April 2013, p.30.
- <sup>24</sup> Anthony Kelly, *Construction in Australia* (IBISWorld, Melbourne, 2011), pp.27-28; Anthony Kelly, *Road and Bridge Construction in Australia* (IBISWorld, Melbourne, 2011), pp.27-28; Baulderstone, *Annual Review: 2009*.
- <sup>25</sup> Economics Group, Housing Industry Association (HIA), *HIA-Colorbond Steel Housing 100 2011/12* (HIA, Canberra).
- <sup>26</sup> NSW Fair Trading, [Reform of the Home Building Act 1989: Issues Paper](#) (2012), p.6.
- <sup>27</sup> Collins, n.2, p.23.
- <sup>28</sup> See Kingsway Financial Assessments, [Financial Assessments, Corporate Insolvency in the Australian Construction Sector: Key Findings from ASIC Insolvency Data 2010 – 2011](#).
- <sup>29</sup> NSW Building Professionals Board, [Submission to the NSW Planning Review](#) (2011).
- <sup>30</sup> See ["ABCB – History of the ABCB"](#) on the website of the Australian Building Codes Board.
- <sup>31</sup> See ["ABCB – History of the ABCB"](#) on the website of the Australian Building Codes Board. Building performance relates to concerns such as structural provisions; fire resistance; access and exits; health and amenity (including room sizes, light, sound transmission and ventilation); services and equipment (including safety equipment and lifts) and energy efficiency. See Productivity Commission (PC), [Reform of Building Regulation](#) (PC, Melbourne, 2004), p.24.
- <sup>32</sup> Productivity Commission, n.30, p.23.
- <sup>33</sup> Benjamin Hughes-Brown, "A History of Alternative Solutions and the NSW Fire Brigades", paper presented to the *Australasian Fire and Emergency Services Council (AFAC) Conference*, Darwin, 8 – 10 September 2010.
- <sup>34</sup> *Environmental Planning and Assessment Act 1979*. Section 105.
- <sup>35</sup> *Environmental Planning and Assessment Regulation 2000*. Clauses 98 and 130.
- <sup>36</sup> NSW Building Professionals Board, n.29.
- <sup>37</sup> NSW Building Professionals Board, n.29.
- <sup>38</sup> Collins, n.2, p.353.
- <sup>39</sup> Collins, n.2, p.352.
- <sup>40</sup> Michael Brand and Philip Davenport, "Analysis of Recent Amendments Made to Security of Payment Legislation in New South Wales", paper presented to the *Royal Institution of*

*Chartered Surveyors Building and Construction Research Conference*, Salford, 12-13 September 2011.

- <sup>41</sup> In a number of respects the NSW legislation reprised significant elements of legislation secured by John Major's government in the UK: the *Housing Grants Construction and Regeneration Act 1996*. This legislation provided that a contract (for construction work) contain both a mechanism for determining what payments became due under a contract, and a final date for payment when they became due. The UK Act also removed the ability of contractors to tell subcontractors that the latter would get paid when the contractors themselves got paid (colloquially termed "pay-when-paid" conditions). It also introduced provisions for subcontractors to stop work in the event of a contractor's failure to pay money owed. See Julie Stagg, [Payment, Security and Challenging Times](#) on the website of Fenwick Elliott.
- <sup>42</sup> NSW Parliamentary Debates (Hansard). Legislative Assembly. 8 September 1999, p.103.
- <sup>43</sup> Michael Brand and Philip Davenport, "Proposal for a 'Dual Scheme' Model of Statutory Adjudication for the Australian Building and Construction Industry" in the *International Journal of Law in the Built Environment*, vol.3, no.3, 2011, p.257.
- <sup>44</sup> Adjudicators, in practice, were appointed to a panel by authorised nominating authorities (ANAs). In 2010 the following organisations were listed as ANAs: Abel Adjudication Pty Ltd; Adjudicate Today Pty Ltd; Air Conditioning and Mechanical Contractors Association of NSW LTD; Australian Solutions Centre Pty Ltd; Institute of Arbitrators and Mediators Australia; LEADR (Association of Dispute Resolvers); Master Builders Association of NSW Pty Ltd; Master Plumbers Association of NSW; Royal Institute of Chartered Surveyors Dispute Resolution Service. See NSW Services, Technology and Administration, *NSW Building and Construction Industry Security of Payment Act 1999 and Contractors Debts Act 1997: Discussion Paper* (2010), attachment 3.
- <sup>45</sup> *Building and Construction Industry Security of Payment Act 1999*. Sections 8, 11 (2), 12, 13, 15, 17, 23 and 25.
- <sup>46</sup> Matthew Bell, Jeremy Coggins and Robert Elliott, "Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia" in the *Australian Journal of Construction Economics and Building*, vol.10, no.3, 2010, p.18.
- <sup>47</sup> For the duties of directors see [Corporations Act 2001](#). Section 180 provides that, "A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise".
- <sup>48</sup> See Australian Securities and Investments Commission (ASIC), [Voluntary Administration: A Guide for Creditors](#) on the website of ASIC.
- <sup>49</sup> [Corporations Act 2001](#). Sections 555, 556 and 588D. See also National Electrical and Communications Association, [NSW Chapter Submission to the Inquiry into Construction Industry Insolvency in NSW](#) (2012), p.6.
- <sup>50</sup> See Australian Securities and Investments Commission, [Insolvency and Consumer Rights](#) (May 2012).
- <sup>51</sup> Collins, n.2.
- <sup>52</sup> Collins, n.2, pp.39-43.
- <sup>53</sup> Collins, n.2, pp.53, 73, 110.
- <sup>54</sup> Collins, n.2, p.106.
- <sup>55</sup> Collins, n.2, p.351.
- <sup>56</sup> Collins, n.2, p.353.
- <sup>57</sup> Collins, n.2, pp.82-87.
- <sup>58</sup> *Queensland Building Services Authority Act 1991*. Section 35.
- <sup>59</sup> *Queensland Building Services Regulation 1992*. Schedule 2.
- <sup>60</sup> Collins, n.2, p.4.
- <sup>61</sup> Collins, n.2, p.354.
- <sup>62</sup> Frank Bannon, Doug Jones and Narelle Smythe, *Recommendations of the Independent Inquiry in Construction Industry Insolvency in NSW* (Clayton Utz, Sydney, 2013), p.6.
- <sup>63</sup> Collins, n.2, pp.355.
- <sup>64</sup> Collins, n.2, pp.359, 364, 367.
- <sup>65</sup> Collins, n.2, pp.119-120.
- <sup>66</sup> Collins, n.2, pp.369.
- <sup>67</sup> Collins, n.2, p.30; National Electrical and Communications Association, n.49.
- <sup>68</sup> NSW Minister for Finance and Services (Greg Pearce MLC). [Government Acts on Building Insolvencies](#). 18 April 2013.

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<sup>69</sup> NSW Minister for Finance and Services, n.71.

<sup>70</sup> See [NSW Government Response to the Independent Collins Inquiry into Insolvency in the NSW Construction Industry](#) (18 April 2013) on the website of NSW Finance and Services.

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