

Subcontractors' Alliance

subbies fighting for security of payment & faster payment processes

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By email: **ADDENDUM**

SENATE INQUIRY INTO INSOLVENCY IN THE AUSTRALIAN CONSTRUCTION INDUSTRY

Freedom of Contract -- Hierarchical dominion:-

A1 "Freedom of contract" should be realistically interpreted as "Freedom to Strip Subcontractor's Rights"

To assist the use of insolvency as a tool to defraud or avoid debt and undertake phoenix activity, more and more conditions are being added to subcontracts with the intent to erode subcontractor's rights.

Two examples of this are the inclusion of

(a) "Novation clause" that assigns the right to transfer a subcontract without the subcontractor's permission and is necessary to undertake phoenix activity.

(b) Stripping subcontractor's rights in accordance with the Personal Properties Securities Act of 2009.

This activity is simply dismissed by regulators as "freedom of contract" at work. It is actually a text book example of bad faith dealing and representative of the "take it or leave it" mentality menacing the building and construction industry with the overarching impact being irreparable harm to subcontractors, their employees, their families and their supply network throughout Australia.

From Barrister Jonathan Sive's Report:

“An important consideration not to be overlooked is that the “evil hand” not being addressed by recent legislative amendments [Qld] relates directly to the fact unequal bargaining power (which exists not only between the contractor and the consumer, as that term is defined and used in the QBCC Act 1991, but also between the contractor and the subcontractor) does not permit freedom of contract to exist within the construction industry so that resources within the industry are allocated efficiently and fairly. The amendments to the QBCC Act 1991 do nothing to fill the statutory voids that currently exist within the QBCC Act 1991 and create serious and substantial future problems because of the relaxation of financial requirements for licensing. The marketplace is not properly balanced and consumer sovereignty, as enunciated in the Competition and Consumer Act 2010 is undermined when the allocation of resources between certain parts of the contractual chain favours un-bargained for windfalls being achieved by the stronger party at the weaker party’s expense with one of the outcomes being the complete demise of the weaker party.”

QBSA -- QBCC

A2 The corporate behaviour of Walton is not isolated within the construction industry. There have been a number of large construction industry insolvencies within the building and construction industry subsequently. They have all featured “pre-packaged” liquidations, asset transfers and the non-payment of unsecured subcontractors. This would be mirrored nationally.

Why? -- Because the lack of legislation allows it.

A3 It is said that an accurate indicator of impending “insolvency” is late financial reporting and meeting statutory obligations. In addition to Walton failure to meet their statutory obligations with the QBSA, Walton’s companies audited financials for the F/Y ending 30 June 2012 were submitted 19th December 2012 and late April 2013. What occurred with Walton was a failure on behalf of the QBSA to protect subcontractors who comprise 85% of the building and construction industry. The facts, in this regard, speak for themselves.

Discrimination in the Market Place

A4 An important consideration to be made is the constant threat to subcontractor’s ability to invest in infrastructure, technology and machinery. Due to the lack of security of payment for their services they are forced to access funding on poor commercial terms and thereby have those investments and personal property continually at risk due to the menace of non payment and construction company insolvency.

A4.1 Subcontractors have no representation on any boards controlling the industry and are not consulted despite their huge commitment to the industry.

Social Impacts

A4.1 Too numerous to detail in this submission but it includes the stigma attached to insolvency, the inability to restart, loss of personal property, marriages and tragically for some, their insolvency caused by others, ends in suicide.

Vested Interests

A5 No longer can we allow the vested interests of large construction companies and industry associations to be given preferential treatment when framing legislation in relation to the Building and Construction industry, as occurred with recent amendments made by the previous QLD state government to QLD’s BCIPA legislation. The curious passage of this discriminatory legislation was an example of an abuse of executive power.

There is no argument for any economic benefit for a select few by not providing Security of Payment legislation when compared to the irreparable harm now being inflicted upon 85% of the construction industry. The provision of such legislation will provide much needed confidence in the industry, increased productivity, and integrity.

Minimum Federal legislation

A6 The performance of building and construction work and the supply of related goods and services within the construction industry at all levels of the contractual chain are of such strong general social impact that the intervention of **fair** state regulation at some regulatory level is justified notwithstanding freedom of contract. The concentration of market power now rests with the construction companies and their corporate advisors, who are not affordable to subcontractors.

That power is now expressed by construction companies in the form of bullying and collusive behaviour. Existing within the industry hierarchy are significant and substantial market flaws of varying degree which result in and will continue to result in irreparable harm and injury to subcontractors, their employees and families, if permitted to remain unregulated.

This situation justifies urgent Federal intervention and regulation with the imposition of a model code for the construction industry. Failure to do this is not in the public interest.

Respectfully submitted on behalf of the Subcontractors' Alliance as an addendum to our submission dated 17th April 2015