## BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) BILL 2020

*Second Reading*

Resumed from 23 September.

**MR P.A. KATSAMBANIS (Hillarys)** [5.48 pm]: After more than six months of speaking from the lectern, or the dispatch box—it was a lectern rather than a box—it is quite unusual to rise from my chair to speak. I note that there is a return to a little normality in this chamber. I rise as the lead speaker on the Building and Construction Industry (Security of Payment) Bill 2020. I indicate at the outset that the Liberal Party will be supporting the passage of this bill. Let us be under no illusion about whether this bill is likely to be implemented any time soon. Quite some time ago now, I think it was either in September or October, the Leader of the Government in the Legislative Council, Hon Sue Ellery, gave the Liberal Party a list of legislation that the government intended to pass through the Legislative Council prior to the completion of this parliamentary session to ensure that that legislation could become law before Parliament is prorogued for the 2021 election. The government included some 16 bills on that list, including some bills that had yet to be introduced to the Legislative Assembly, lest it come up with that excuse now. The Building and Construction Industry (Security of Payment) Bill 2020 was not included on that list. From then onwards, the government flagged to the opposition that it was not working under any illusion that this bill would become law any time soon. That is very disappointing from a number of perspectives. This bill has been a long time coming—more than 20 years. The government gave a firm election commitment before the last election that it would introduce and enact this legislation during this term of Parliament.

I will provide a bit of history about how we got to this point. For quite some time there has been significant concern about payments made to some subcontractors in the Western Australian construction industry. It is not a problem that is unique to Western Australia; it has been happening right across Australia for quite some time. Subcontractors at the middle or the bottom of the chain of a series of contracts for construction have ended up in financial distress either because they do not get paid at all or because payment is disputed and delayed, and further disputed and delayed until the subcontractor comes to financial strife and has to enter into administration or liquidation or, in the case of a smaller business that might not be incorporated, into bankruptcy. There has been a lot more focus on that in recent years, but it has been happening for some time. Back in 1998, it was enough of a problem that the Law Reform Commission of Western Australia commissioned Mr Wayne Martin, QC, as he was then before he became Chief Justice, to conduct a report into financial protection in the building and construction industry in Western Australia. Amongst the recommendations of that report was the creation of statutory deemed trusts to better secure the payment of contractors and subcontractors in the building and construction industry. Between 1998 and 2015, the Construction Contracts Act 2004 was enacted in Western Australia, which provided some avenue of arbitration and quicker resolution of disputes. Questions were raised about the effectiveness of that act and its ability to protect subcontractors.

In 2015, the previous Liberal–National government commissioned Professor Philip Evans to produce a report on the effectiveness of the Construction Contracts Act 2004. That report was tabled in August 2015. In 2017, Mr John Murray conducted a review of security of payment laws, "Review of Security of Payment Laws: Building Trust and Harmony", which also interestingly recommended the introduction of statutory deemed trusts. In 2018, an inquiry was conducted by Mr John Fiocco. The minister will correct me if I am wrong, but I think Mr Fiocco was assisted by Hon Matthew Swinbourn from the other place. John Fiocco was commissioned—again, the minister will correct me if I am wrong, but I do not think I am—by the previous Minister for Commerce. Irrespective of that, in October 2018, Mr Fiocco presented a report titled "Security of Payment Reform in the WA Building and Construction Industry". One of its recommendations was the introduction of statutory deed trusts. It has been a long time coming.

As I said, somewhere in the middle of that was a firm commitment from Mark McGowan and the then Labor opposition in the lead-up to the 2017 election to establish a security of payments mechanism for government and non-government contracts to provide more transparency and structured progress payments between head contractors and subcontractors and ensure retention moneys are held in a project trust account to protect subcontractors in the event of head contractor insolvency. That was all well and good. The Labor Party made a firm commitment to establish that security of payment mechanism. Unfortunately, the government will fail to do that during this term of Parliament because it indicated to the opposition that it does not intend to progress this bill through the other place before Parliament is prorogued for the election. Irrespective, we have the legislation before us and it is worthwhile considering it.

The legislation deals with three key areas. It creates a series of new security of payment laws that are more consistent with the laws that exist in other Australian states and territories. It includes some of the best practice recommendations that were included in the commonwealth government's national review in 2017, which reported in December 2017—that is, the "Review of Security of Payment Laws: Building Trust and Harmony". Whilst Western Australians were

looking at it, the commonwealth government was also looking at this space. It includes some of those security of payment laws. It does not implement all the recommendations of that commonwealth government review. It also does not implement all the recommendations that Mr John Fiocco made in the "Security of Payment Reform in the WA Building and Construction Industry" report that he presented to the government in October 2018, but it implements some of them. There is the creation of a deemed trust scheme to protect retention money in the event of insolvency. That would be done through a deemed trust scheme that would apply right across the contracting chain. I will get to that in a minute. I think it is a good thing. It expands the power of the board to take action against building service providers who fail to pay court and adjudication debts and excludes those with a history of financial failure from holding registration. I think that is pretty important because it gives teeth to some of these provisions. There is a carrot but then there is a stick, and that stick is that building service providers will be denied registration to operate in the building and construction industry in Western Australia.

We have no major objections to the majority of the provisions that are being introduced; in fact, we support them. As I said before, it is interesting that the government did not introduce the statutory deemed trusts. I know it did not officially commit to them in its 2017 election commitment, but people out there in the subcontractor industry truly believe that is what the government committed to. I know the minister will say in response that there are significant problems with those statutory deemed trusts, and they could create a hell of a lot of red rape and difficulty. I tend to agree with that. I am not criticising the government for not introducing statutory deemed trusts across the entire chain; I am just pointing out that they were recommended in the Fiocco report.

*Sitting suspended from 6.00 to 7.00 pm*

**Mr P.A. KATSAMBANIS**: Before the break, I was explaining the three key areas that the Building and Construction Industry (Security of Payment) Bill 2020 deals with, as identified in the explanatory memorandum and the second reading speech. I made the point that, despite several recommendations from various bodies, including the Law Reform Commission's report that was headed by Wayne Martin, QC; the "Review of Security of Payment Laws" by J. Murray, AM; and the "Security of Payment Reform in the WA Building and Construction Industry" by John Fiocco, the government has chosen not to go down the path of statutory deemed trusts. On balance, I think that is probably a good thing because those sorts of schemes can have as many problems as they purport to solve.

There is no doubt that the legislation that was introduced is an improvement on what has gone on in the past, which is why the opposition is prepared to support it. We have all heard the horror stories about subcontractors not being paid, payments being dragged out and being put into dispute. Eventually, subcontractors can unfortunately end up in financial distress through no fault of their own. They have delivered work to a good standard but have not been paid. We have also heard the horror stories about builders further up the chain going into insolvency in one way or another, whether it is through administration, liquidation, or bankruptcy for some builders if they are unincorporated. The subcontractor is again left in the lurch. Having done the work, they are not able to secure payment. We know the distress that can cause as a result. Often, for smaller subcontractors in the building and construction industry, their major asset is their home. All, or a large part, of their business borrowings are often secured against their family home and the impact of a subcontractor not being paid can result in them and their family losing their home. There are both legal and personal ramifications, which are horrific and ought to be avoided.

This legislation sets up a system of new security of payment laws that will ensure that those who carry out building and construction work can get paid in a reasonable time frame and that any disputes that arise can be resolved quickly and, importantly, inexpensively. A real part of justice is having access to justice. If it is expensive, many smaller businesses will not be in a position to be able to access justice. The provisions are relatively well calibrated. They stipulate when payments need to be made and they allow for a series of cascading payments. When a dispute arises, they definitely allow for quick resolution in an adjudication. That is all well and good.

One legitimate issue has arisen from consultation that the Liberal Party has had on the bill. We have had some extensive consultation through ReBUILD Australia, Adjudicate Today, the Master Builders Association of Western Australia and various other property and construction bodies. There is a concern that, as drafted, clause 29(1)(a) allows for the construction contract to stipulate who the adjudicator would be in any proceedings that may happen under the contract. Of course, on the face of it, that seems like an agreement between the parties, which is what we all strive to do—let the parties agree amongst themselves what will happen. The problem in practice is that, particularly in the building and construction industry, small subcontractors are often takers in these contracts. Often, but not always, there is an imbalance in bargaining power. The construction contract itself is usually put together by the contractor. It appoints the adjudicator of the contractor's choice and the subcontractor is in a take-it-or-leave-it situation. This gives rise to an issue of perceived or apprehended bias. I am not saying there is actual bias because I think the adjudicators are people who take their role seriously. They are independent and they guard their independence jealously. When a subcontractor looks at it from the prism of the contract that is presented to them, an adjudicator that is stipulated by their counterpart contracting party leads to a perception that perhaps there is an undermining of the principles of neutrality and of independence with perceived or apprehended bias. It also removes any ability to

have some real tension in pricing for adjudicators. If the adjudicator is the adjudicator appointed under the contract, that adjudicator is essentially guaranteed the work and can price it accordingly. If there was an opportunity for the claiming party to appoint an adjudicator, the subcontractor could shop around at the time to find an arbitrator who was prepared to sharpen the pencil—to use the minister's own kind of terminology—and offer a better deal on the adjudication.

It is possible that the way this clause is constructed may detract subcontractors from using the adjudication process because of the perceived bias of the adjudicator, because, essentially, the contract that the head contractor gave the subcontractor stipulates an adjudicator chosen by the head contractor. At the moment, here in this chamber, if the government is unwilling to accept an amendment, we do not propose to move an amendment to this clause to allow the claiming party to nominate an adjudicator or to otherwise allow the parties to agree to the adjudicator at a time when the dispute arises rather than having the adjudicator nominated in the contract. If the government indicated a willingness to do so, we could do that. Because of the nature of how this bill before us is going to be treated, we can, effectively, treat it as a bit of a green bill. Unless the government indicates otherwise now, it is unlikely that it is going to pass during this term of Parliament. Perhaps that is one of the issues that can be considered. If government members consider it overnight and tell us tomorrow that they will amend it, we will happily come in to support that amendment. If it is done between the houses, that is great. If it is done in another term of Parliament, that is great, too. I just think it is worthwhile to consider the input from the stakeholders. I know a number of the stakeholders have said that they do not think this clause strikes the right balance, so perhaps it would be worthwhile tidying it up.

I want to spend a little bit of time talking about the retention trusts. Retention money is money that a head contractor withholds from a subcontractor to ensure that faults do not appear down the line and the like. It is money that is otherwise owed to the subcontractor but is held back by the terms of the contract until a specified time or a series of events is concluded. It could be to fix defective work or the like.

If we take away the statutory obligations that have existed over a long period and we apply a common-law test of what retention money is, it would be hard to argue that that money is not being held by the head contractor on trust for the subcontractor. The fact that it has not been considered to be money held on trust or perhaps a specific-purpose trust at a common-law level is a failing that has led to significant problems. We know that. That money is being held. Often it is being used by the counterparty of the contract as its working capital, which it should not be. Sometimes that counterparty falls into insolvency before the expiry of the period that is required for the retention money to pass to the subcontractor, and, again, that falls into money claimed by general creditors and does not go to the subcontractor and that is wrong. A lot of people have suffered harm. Do not forget that often, the entire profit margin of a subbie's job or the largest portion of a profit margin on a job could be in the retention money, and without it, they have done that job, essentially, without any fair recompense, so I have no problem at all with the proposed scheme around retention money.

I recognise that it is novel for the building and construction industry. It is a new thing. It is a form of statutory deed trust, but it applies only to retention money. It will add some administrative burden, but as I said earlier, if we went back to our old law school days—in the case of the Attorney General and me, and a few of the other people in this chamber—and if we had just applied the normal common-law reasoning around what a trust looks like, be it an actual trust or even a constructive trust for that matter, retention money has that appearance anyway, and good business practice would have been to keep it aside. We might not keep it in a trust-type bank account, but we would keep it aside if we were running a construction business because we know that that money is owed to someone else. Therefore, this bill formalises what should be good practice and we know in too many cases is not practised. It will add some administrative burden to the entire construction contract chain, including subcontractors, obviously, because some of those contractors may be head contractors in other contracts.

Because it is new and novel and will add some administrative burden—also some complexity for people who are great builders or great subcontractors but are not lawyers—it is absolutely fundamental that the government and the Building Services Board engage in a comprehensive education campaign to ensure that the industry is ready and able to transition to this new retention trust regime. I would be interested if the minister, in summing up perhaps, could indicate what plans the government has to embark on an education campaign to ensure that everyone involved in the system—the head contractors, subcontractors and the like—are, firstly, aware of their obligations and, secondly, given some information and knowledge to enable them to navigate through this complex process. As lawyers, we know that trust obligations are pretty serious and that they apply to a person personally, so we do not want people to fall foul simply through lack of knowledge and lack of understanding of complex laws. I would welcome the Minister for Commerce letting us know what is proposed in that area.

The expanded powers of the Building Services Board, which will enable it to take action against building services providers that do not pay court or adjudication debts, and that will exclude those who have a history of financial failure from holding a registration, are good provisions. The provisions give the board significant discretion. The minister's office arranged a briefing for the Liberal Party, which a number of us attended by electronic means. I will

take a segue here and say that the briefings by Zoom and other electronic means that we picked up through the COVID period are excellent because they save us all a lot of travel time and enable us to have briefings in non-sitting weeks and the like. I think they are to be commended—certainly for our original colleagues, they are even more beneficial.

**Mr D.R. Michael**: I think you'll find some government backbenchers also agree with you.

**Mr P.A. KATSAMBANIS**: Government backbenchers agree. I think ministers and ministerial officers agree, too, member for Balcatta. That is why they are still continuing to offer them, and I hope that continues. I really do.

In that briefing we were told that significant discretion existed so that the board could distinguish between those builders who have a history of financial failure that is related to their own bad activity—the bad actors—and the other group of builders, the subcontractors, who may develop a history of financial failure because they were not paid by someone who ought to have paid them. Again, I think that discretion of the board is worthy and well-calibrated. When the board is looking at people, it can decide whether they are people who have shown bad faith and therefore should be excluded from registration, or whether they were simply caught up in a problem not of their making but were subjected to financial failure because of the failure of other people up the chain to pay their obligations to these people, with all the consequent horrific outcomes that I outlined earlier, including potentially losing their life savings and family home. That discretion is well placed in the Building Services Board because it will have the history and it will have access to court and adjudication records and the like and can sort out who is a bad faith actor and deserves to have their registration withheld and who simply got caught up in a problem not of their making that resulted in them suffering horrific financial consequences. We want those people to continue. We do not want to exclude them; in actual fact, we want to protect them and make sure that they get paid.

The Building and Construction Industry (Security of Payment) Bill 2020 has been a long time coming. There seems to be at the very least an acceptance, if not broad support, in the building and construction industry that this legislation perhaps strikes a fair balance. It will give a lot more certainty and, perhaps, security to subcontractors that they will get paid for the job that they do. It will create a deemed trust scheme for retention money, which, as I said, makes perfect sense because the money will be held on behalf of the subcontractor until a series of events occur in the future. Clarifying that, the Building Services Board will be able to determine who the bad actors are so that they can be deregistered. It is a good first step along the way to fixing a problem that has existed in the building industry for a long, long time. Subcontractors do work in good faith and, through no fault of their own, they end up carrying the financial burden for the failure of people further up the chain to either pay them or manage their affairs in a way that puts them in a position to pay the subcontractor who has done the good faith work.

It is disappointing that the legislation has come so late in the piece. It is even more disappointing that it is unlikely to pass into law before the end of this fortieth Parliament, but this is a start. Hopefully, during the early months of the forty-first Parliament, this legislation will be dealt with in an expeditious manner no matter who is in government. If the minister indicates that it is the government's intention that it pass through both houses during this term, perhaps he should communicate that to the Leader of the Government in the Legislative Council so that —

**Mr P.J. Rundle**: No chance!

**Mr P.A. KATSAMBANIS**: My colleague the member for Roe tells me there is no chance at all. I am an optimistic person, member for Roe. I always like to be optimistic.

**Mr P.J. Rundle**: You've got to be realistic!

**Mr P.A. KATSAMBANIS**: An optimistic realist, a realistic optimist—whatever!

At this stage, there is no indication of the government wanting it to pass before the end of this Parliament. The correspondence that I referred to earlier between the government and the opposition parties does not list this bill as a priority for the government. That is disappointing. I know that it is a priority for subcontractors and the building and construction industry, even those elements of the industry that perhaps do not like this bill but at least want some certainty about when these legislative provisions will come into operation. Hopefully, they will come into operation sooner rather than later.

**MR S.A. MILLMAN (Mount Lawley)** [7.25 pm]: I rise to make a contribution to the debate on the Building and Construction Industry (Security of Payment) Bill 2020 and I start by indicating that I am in favour of this legislation. I thank the member for Hillarys for his contribution and for indicating the approach that will be taken by the Liberal Party. I need to point out one thing to the member for Hillarys; a constructive trust is an instrument of equity rather than of common law, as the member would remember from his days in law school.

**Mr P.A. Katsambanis**: Yes, it is. As you know, the common law term can be used in two ways; one to distinguish between equity, and the other, which I used it in, to distinguish between statute and non-statute law.

**Mr S.A. MILLMAN**: I will take it in that second sense.

I also agree with the member for Hillarys that this bill represents a good first step on the path to dealing with the issue of underpayment or non-payment of subcontractors, particularly in the building and construction industry. I acknowledge the work of the Minister for Commerce in bringing this legislation before the house. I also want to acknowledge the work of Minister Johnston before the dinner break, who was the minister with carriage of this portfolio when the McGowan government was elected in 2017, and to pause and reflect on the passage of the Work Health and Safety Bill 2019 and the amendments received from the Legislative Council. I saw Regan Ballantine sitting in the Speaker's gallery. The minister referred to her advocacy on behalf of the people she works with. The Work Health and Safety Bill 2019 does three things: it reflects prevailing community attitudes, updates legislation that is about 30 years old, and delivers on an election commitment. The reason that I raise those three points about the Work Health and Safety Bill is that the same three points can be made about the Building and Construction Industry (Security of Payment) Bill. Let me start by talking about some of the similarities.

Firstly, there have been numerous prior inquiries for subcontractors, as there have been in the area of work health and safety. Secondly, there has been a ministerial process, and I will come back to that process and to Mr Fiocco's report. Thirdly, there has been extensive stakeholder engagement. Now that the work health and safety statutory regime is up to date, and now that legislation has been introduced to update statutory protections for subcontractors, it is incumbent upon us as legislators to scrutinise and evaluate the efficacy of the new statute and, if necessary, undertake further reform. In that regard, we have a road map should it prove necessary. Before I go to the road map, the member for Hillarys has traversed most of these and indicated the Liberal Party's support for the legislation, and I am grateful to him for that. For the purpose of supporting the passage of this Building and Construction Industry (Security of Payment) Bill in this chamber, I will leave aside the question of the passage of the bill in the other chamber, except to say that as legislators in this chamber, it is our obligation to deal expeditiously with matters that come before us and prepare them for debate in the Legislative Council. We are discharging our obligation to make sure that this legislation enjoys a speedy passage through the Legislative Council.

This legislation will do what I will describe as three main things, and I will deal with each of them in turn. It will implement the new innovative retention trust scheme that the member for Hillarys talked about. It will speed up cash flow and strengthen the legislative framework around the building and construction industry. Let me start with the security of payment laws. One can see that parts 2, 3, 5 and 6 of the bill will introduce new payment laws in WA to ensure that those who carry out construction work can be paid and disputes about payment can be resolved quickly and inexpensively through an effective process of rapid adjudication. Part of the problem in the building and construction industry is that if the work has been completed and the contractor has not been paid, it is a costly and expensive process, with extensive litigation, to try to establish their right to the money that has been withheld. I want to say this: one can always have sympathy with the proposition that he who does the work should be paid for it. The brand-new security of payment laws are important. This legislative regime contained in parts 2, 3, 5 and 6 of the bill are consistent with the rights that subcontractors in most other Australian states and territories have enjoyed for many years. Under this bill, a party who carries out, or undertakes to carry out, construction work or to supply related goods or services will have a statutory right to receive payment and make a claim for payment every month or more frequently if that is provided for in the contract.

The bill will require that when a party to a construction contract who is entitled to payment makes a payment claim, the party who receives the claim—that is, the respondent—will be required to either pay the claim in full within the stipulated time or provide a payment schedule within 15 days. This is important because of the issue of cash flow in the construction industry. Although it is important that head contractors have their cash flow, it is important that subcontractors, who are often working across a number of jobs, also have certainty of cash flow, because it can have a domino effect. If a party's cash flow is limited by one principal contractor not meeting their contractual obligations, that can have a significant deleterious effect for those subcontractors—those small family-run businesses that are sailing close to the wind and running tight margins. This is an incredibly important reform. That is the first thing it will do.

I want to highlight that the second thing is that the rapid adjudication process will be more consistent with that in other states and territories. Once again, this is good legislation introduced by the McGowan government that will bring us up to date with best practice in other jurisdictions. We have learnt from what is done in other jurisdictions and we will be implementing that through the introduction of this legislation. The bill contains a number of important mechanisms to ensure that the costs of engaging with the adjudication process are kept down, including for low-value disputes, to ensure that the process is accessible to everyone in the industry. If a principle is vitally important to me and has provided me the motivation to participate in the parliamentary process, it is the principle of advancing and advocating for access to justice. If we can keep the time and cost burden down for participants, it will have the effect of increasing access to justice, which means that people will get their entitlements in accordance with the legislation.

The third thing that the bill will do is improve fairness in contracting practices. In my view, part of the reason for the problems in this particular industry is the significant disparity in negotiating power between the contracting

parties. In other industries, other endeavours and other fields of pursuit, mechanisms are in place that balance the scales so that there is a relatively even negotiating position. The bill will introduce measures to improve the fairness and transparency of contracting practices in this industry. It will include a thorough and broader prohibition on "paid-when-paid" provisions that will prohibit other types of unfair terms and require certain contracts to be in writing and meet minimum standards. Importantly, part 2 of the bill contains a novel measure to improve fairness in contracting that is not found anywhere else in Australia—voiding unfair notice-based time bars in construction contracts. As well as being a great model for bringing into WA best practice in other Australian jurisdictions, it also has the element of innovation, whereby new and innovative rights and entitlements are encapsulated in the statute. This is something that the member for Hillarys has already alluded to, and I agree with him. It is a testament to the manner in which the Minister for Commerce has brought this bill before the house for debate.

The bill will achieve the time bar mechanism by establishing an avenue for a party that challenges the enforceability of a time bar provision, such as within the context of the adjudication process, if it is unreasonably onerous or not reasonably practicable to comply with. The comments that have been made around adjudication are apposite to the debate. I think our adjudicators are professional and skilled and will place themselves in the right frame of mind and the right context in order to discharge their professional obligations to parties to a dispute. I accept that it is a balancing act in which one party often has a great deal of experience with these types of contracts and is often the leading party in negotiating them and can often refer to their preferred adjudicator and note that person in the contract.

The fourth thing the bill will provide that I want to mention is the retention trust scheme. Again, the member for Hillarys has complimented the minister on this, and I think it is a compliment well paid. I echo that and add my voice to it. The bill will introduce a new mandatory retention trust scheme in WA, the first of its kind. The scheme will reduce the risks to builders, subcontractors and suppliers if the immediate contract counterpart becomes insolvent by ring-fencing money to ensure that it is not available for distribution to general creditors. This is a brand-new provision and it is important because the work that subcontractors do often does not crystallise into a profit until the retention money is paid. I want to pause and reflect on that for a second. The profit that these small family-run businesses make provides them with an opportunity to pay their employees. It provides them with an opportunity to grow their businesses and to explore new opportunities. If these small businesses are not making a profit from their work, it undermines free movement in the market and the effective operation of the market. The fact that this retention money is often the margin between success and failure on a construction contract is incredibly important for these small businesses, so we should applaud and endorse this innovative solution to this problem. It is a problem because the construction industry accounts for a disproportionate number of the business insolvencies that occur each year. Unfortunately, often those at the bottom of the supply chain are impacted the most. We as a community are already facing unprecedented economic challenges as a result of what we have experienced in 2020. As a responsible government and a responsible Parliament, we should be looking to ameliorate the effects of those economic challenges.

If we can put in place a light-touch, responsible and responsive regulatory framework that means that those who do the work get paid for it, that can only be for the good. In that regard, this complements the McGowan government's extended rollout of project bank accounts in July 2019 to the majority of state projects. I have said before and will continue to say that the state government needs to be a model player in the construction industry marketplace. As a state government, we often contract with providers to build infrastructure and commercial assets for the benefit of the people of Western Australia. That provides us with a unique position in the market to lead best practice, so that if we are doing the right thing in our jobs, that should flow on to other parts of the sector. It is setting a good example and backing it up with the regulatory framework that is required.

A whole bunch of provisions in the retention trust scheme deal with how that scheme is designed to operate. I do not propose to go into that in any great detail. The third part of the bill that I want to mention to members and provide my support for is the industry regulation. Part 7 of the bill in particular will substantially bolster the role of the Building Services Board in monitoring and enforcing compliance with certain standards of commercial behaviour in the industry. I know that other speakers are going to address this point so I will not dwell on it for too long. Unfortunately, there are players in this industry who are cowboys, renegades or mavericks and will not pay their subbies or their workers, and who then go bankrupt. They go insolvent. Six months later, we see them back on the block again with their phoenixing arrangements. We need to find those players and take them out of the industry. All they do is run the industry down and damage its reputation, damage the proper operation of the market and give the industry as a whole a bad name. If we can exclude those elements from the industry, that is only for the good. Strengthening the Building Services Board is not about more red tape; it is about monitoring and enforcing compliance with standards of commercial behaviour in the industry. That dovetails nicely with what I was saying about the lead that the state government can take in driving cultural change in the way this industry operates. A whole bunch of further industry regulations are contained in the bill that I think will all serve to bolster that combined carrot-and-stick effect.

Earlier, I mentioned a quote that I will reprise here, because it bears repeating —

> One can always have sympathy with the proposition that he who does the work should get paid for it.

I have taken that quote from Brian Ernst, who is a solicitor practising in the construction industry field. He told the construction industry conference at Parliament House in Canberra on 31 May 1991 exactly that proposition. I take that quote from the Collins "Inquiry into Construction Industry Insolvency in New South Wales" in 2012.

[Member's time extended.]

**Mr S.A. MILLMAN**: The reason that is important is —

**Mr J.R. Quigley**: Keep talking.

**Mr S.A. MILLMAN**: Sure thing, Attorney General. The reason that is important—it will be easier now that he has gone!—is that it is just one of a number of reviews that have been conducted into this industry and into this particular problem that has confronted this industry for a long time. Before he was Chief Justice of the Western Australian Supreme Court, Hon Wayne Martin was charged by the Law Reform Commission of Western Australia to conduct his own inquiry. That produced a Law Reform Commission report. That inquiry was started in 1985. If ever a piece of legislation has had a long gestation period, this is it. The Law Reform Commission started in 1985 and Wayne Martin's report was handed down in 1998. That contained a number of recommendations. That was the first one. The second one was, as I say, the 2012 Collins inquiry, which resulted in significant changes to the New South Wales legislative framework. I drew that quote from the Collins inquiry. Then, in 2017, John Murray, AM, conducted another inquiry, "Review of Security of Payment Laws: Building Trust and Harmony". That 2017 commonwealth inquiry reported on 24 May 2018. For members' interest, John Murray is a former national head of the Master Builders Association, so he is a stakeholder with a great deal of experience who provided a number of recommendations.

By way of background, we have three learned and thorough inquiries: the Collins inquiry, what I will call the Martin inquiry, and the Murray inquiry. That is a New South Wales inquiry, a Western Australian inquiry that is over 20 years old and a commonwealth inquiry. In 2017, the McGowan government was elected on a platform of inquiring into payments to subcontractors. I am here quoting from the Fiocco inquiry. During the debate in Parliament on this issue, Mark McGowan, then Leader of the Opposition, said about subcontractors —

> They are ordinary small businesspeople who need certainty because they spend money in order to undertake work, they have a line of credit with a bank, and they have a mortgage on the line for the work that they are undertaking. If they do not get paid, they lose their house and their business, and their workers do not get paid.

That was the view expressed by our Premier as Leader of the Opposition in 2016. In August 2016, WA Labor incorporated into its platform the introduction of policies to improve protections for subcontractors in the building and construction industry. As I say, that commitment was outlined in its WA election platform. As I said before, the work health and safety legislation not only reflects community attitudes, was the subject of extensive community consultation and is the subject of a thorough ministerial process, but also delivers on an election commitment.

In order to arrive at the proper form of this legislation, then Minister for Commerce, Hon Bill Johnston, requested Mr John Fiocco to lead an inquiry into the payment of subcontractors in Western Australia. I start by saying that Mr Fiocco is a former partner of mine. We were both partners at Slater and Gordon Lawyers—I declare that on the record—but what I say next will complement his credentials as a person well placed to undertake this sort of inquiry. He is now a barrister at Fourth Floor Chambers; he spent many years practising and teaching in the areas of bankruptcy, insolvency, commercial law and contract law; he also has experience in industrial law; he holds the position of adjunct associate professor at the University of Western Australia Law School; in 2010, he was elected as a life member of the Law Society of Western Australia; and in 2015 he was awarded Lawyer of the Year.

**Dr D.J. Honey**: He beat you, then!

**Mr S.A. MILLMAN**: He was never elected as the member for Mount Lawley! Mr Fiocco is uniquely placed to be the person charged by this government to inquire into and report upon what legislative frameworks would be required to address this problem of subcontractors getting ripped off. What is interesting to note is the degree of convergence between the Fiocco report and the Murray report. Before I go any further, I commend my colleague and friend Hon Matthew Swinbourn, who was the other participant in the Fiocco inquiry, who did a great deal of work. As well as formerly being a senior industrial officer and lawyer, Mr Swinbourn was also a sessional lecturer in employment relations at the University of Notre Dame Australia. I have spoken about the John Murray inquiry set up by the federal Liberal government in the Fiocco inquiry, which is a state inquiry set up by the Western Australian Labor government. The following recommendations in the Murray inquiry are adopted as recommendations in the Fiocco inquiry. They are recommendations 1 to 18, 20, 21, 23 to 27, 28 to 31, 39 to 42, 49, 51, 54, 59, 75, 77, 78, 81, 82, 84 and 85. The recommendations that diverge are 36 to 38, 43 to 48, 50, 52 and 53. For recommendations 19, 22, 32 to 35, and 60 to 65 there is no comment. A small number of recommendations are not adopted by the Fiocco inquiry, and a small number of recommendations in the Murray inquiry are not commented upon, but there is an

overwhelming degree of convergence between the recommendations made by the Murray inquiry. These are inquiries authored by the former national head of the Master Builders Association and the Fiocco inquiry.

In concluding, although this legislation does an incredible job discharging those three things I have already referred to—the brand-new security of payment laws, improving fairness in contracting processes and strengthening industry regulation—as the member for Hillarys said, this is the first step on the path to regulatory reform. There is a long history of reports, inquiries and debates that provide a solid intellectual, academic and professional foundation for us to look at what sort of legislative regime we want to put in place. This legislation is a good first step on that path to reform. Let me return members to the point I made at the start: although the Labor government has once again delivered on an election commitment, introduced legislation that reflects community attitudes and values and updated all legislation and consultation with important stakeholders—although we have done all of these three things both with work health and safety legislation and now this subcontractor legislation—it is still incumbent upon us to ensure it is fit for purpose and delivers the outcomes we say are important values for our community, for the strength and safety of our economy, and the benefit of our subcontractors and their families. I am confident that this legislation represents a good first step on the path to making sure that subcontractors are not ripped off by unscrupulous providers in the construction industry. If another step needs to be taken to ensure they are properly protected so they get paid, their businesses survive, the work they do is rewarded and recognised, their families are cared for and they can grow their businesses and put on more employees, we know what that success looks like because of the work that has been done by people like John Murray, the former head of the Master Builders Australia, John Fiocco and Hon Matthew Swinbourn. I am confident this legislation will pass the Legislative Assembly. I am hopeful that this legislation will pass the Parliament. I know it represents a good first step on the path to reform. Our duty now is to make sure that it does what it is designed to do, and on that I commend the bill to the house.

**MR P.J. RUNDLE (Roe)** [7.54 pm]: I rise to speak on behalf of the Nationals WA on this Building and Construction Industry (Security of Payment) Bill 2020. Firstly, I would like to point out that we support the bill in principle, but I will point out a few weaknesses and disappointments that have emanated from the Labor Party's election commitments and promises. I would probably give the bill about seven and a half out of 10 at this stage. As the member for Mount Lawley said, it is a good first step, but there is room for improvement.

One of the first things is disappointment about the cascading trust that I understand was originally proposed by the Labor government. It now seems to have vaulted into a scenario of a five per cent retention trust. A lot of big statements were made by the Labor Party in opposition around 2015–16, but when push came to shove and the Labor government had to knuckle down and put the legislation together, some adjustments were made. I will develop that shortly. I will also give examples of previous situations in my electorate of subcontractors being left high and dry. To be honest, this is one of the reasons I am glad this legislation has seen the light of day. I will go through some of the elements, including the retention trusts across the contracting chain, consistency with other states, the adjudication, the powers of the Building Services Board over phoenixing, the Small Business Development Corporation, payment time frames and the education campaign.

The first thing to point out, and I agree with the member for Hillarys, is that in some ways although this is not a pointless exercise, it is such a shame that this bill has come on so late in the scene. Because of the long list of bills in the Legislative Council, I think something in the order of 18 to 20—a lot of which will also not make it through before Parliament closes—I cannot see how the government can take this bill to the next level. That is why I questioned the Attorney General; Minister for Commerce in estimates about the $2.86 million, I think, that the government has allocated in the budget for implementing this legislation, which, as I said, may not see the light of day. I guess it is all about the Labor Party demonstrating that it has fulfilled its election commitment. Here it is. The cover of the document says "WA Labor: A Government for You", "Protection for Subcontractors". As I said, part of that policy was a lot of speeches made in 2016 about cascading statutory trusts, and now that has not seen the light of day. Another thing that was pointed out in the election commitment document "Protection for Subcontractors" was the demerit points system. I cannot really see that in the legislation, but I am happy to be corrected. According to the WA Labor policy promise, there was going to be a demerit points system. I just wanted to point that out, because presenting this bill at this time in the cycle is about this government demonstrating that it has fulfilled its election commitment, but unfortunately I do not see that the government is going to be able to take this bill to the next level through the Legislative Council.

The next thing that I want to point out is the disappointment of our subcontractors. On 25 September 2020, an article in *The West Australian* by Josh Zimmerman titled "Subbies' fury as protection laws diluted" stated —

> WA subcontractors are furious over proposed laws designed to protect payments to tradies working on big projects, saying they leave small business owners exposed to crippling losses.
>
> Before drafting the Bill, Commerce Minister John Quigley had been outspoken in his support for the introduction of "cascading statutory trusts".

> The trusts would force head contractors to set aside progress payments for subcontractors.
>
> Currently, there is nothing to stop project managers using that money however they see fit.
>
> But the key measure was omitted from the final legislation read into Parliament yesterday. The McGowan Government only moved to protect retention money, which usually represents just 5 percent of a contract's total value.
>
> Subcontractors Alliance spokesman Les Williams said that meant builders would continue to be permitted to treat tradies as lines of credit, forcing them to buy materials and pay their staff up front with no guarantee they would be compensated if the project goes bust.
>
> "What they have proposed doesn't … provide security for subcontractors," he said.

I have a tendency to agree with that. As pointed out by the Master Builders Association and others, the retention trust is a step in the right direction, but I wonder whether a retention trust of five per cent will be enough to protect our subcontractors. Our subcontractors are obviously not too happy about it and, in some ways, I can understand why. I think more work needs to be done on that. As the member for Mount Lawley pointed out, we need cash flow protection for all layers of contractors right through the chain.

I want to give a couple of examples of things that have happened in my electorate of Roe, especially during 2018–19. There were examples of head contractors and other contractors further up the chain reducing invoices to squeeze lower level contractors. It was almost like an art form. They were quoting issues with subcontractors working on variation claims that, on some occasions, were substantially lower than the actual cost of work done. In some cases, the lead contractor decided whether the invoices submitted by the contractor for the work done should be paid either in full or partially. In some cases, the lead contractor decided how much to pay for things such as tip fees, licence fees and travel costs after those costs had already been incurred by the subcontractor. Quite often, they did not cover the full amount that the subcontractor had committed. There were small errors in paperwork that extended the payment period for many months. There were also cases of lead contractors and subcontractors going into voluntary administration, which ended up leaving local businesses in a very risky financial position. I will give a couple of examples that happened under this government. When I made a grievance on this issue, the previous Minister for Commerce was happy to point out that a couple of the contracts that I referred to of contractors failing to meet their financial obligations, such as those for the Narrogin and Katanning hospital projects, had been let under the previous government so he could not help out.

Another example was the Arthur River bridge works. The lead contractor was Marine and Civil Pty Ltd, which went into voluntary administration and left at least two of our businesses in Narrogin waiting on payments. A simple Google search found that Marine and Civil had been in voluntary administration at least once before. That surely should have put up a red flag in the government's tender management process. That was a frustrating case for my electorate and contractors in my electorate. Another example happened in the Shire of Dumbleyung. A couple of massive truck parking bays were to be managed for Main Roads Western Australia. The head contractor was Lendlease. The head subcontractor went into liquidation and all the subcontractors around Dumbleyung, Narrogin, Katanning and the like who had done work in good faith got left stranded. The head contractor said that that was unfortunate but there was not much that it could do about it. Luckily, Main Roads had not transferred the land for those truck bays from the farmers across to Main Roads, so the contractors were able to knock in signs that said to Main Roads and Lendlease that no-one else could get access to that land. That was the end of it. The contractors had some leverage, so they were able to negotiate with the head contractor, which had to get the work done by 30 June. If it had not been for that mistake of the land not being transferred over, they would have had nowhere to go. As the member for Roe, those examples quite upset me because some of those things have happened in my time.

For the Matagarup Bridge project, the government, funnily enough—because that was its project—was happy to honour some payments that were not made by the lead contractor, York Civil, when it went into voluntary administration. The government said it was okay and it would cover that money on behalf of the taxpayer. It happily cleaned that up because that was its project but, unfortunately, some other projects, especially in our regional areas, were left hanging out to dry. Those examples are from my grievance back in 2018 and give a demonstration of some things that have happened in my electorate.

I have consulted with industry and the likes of the Master Builders Association and many other subcontractors on this bill. I am disappointed that Subcontractors WA seems to have drifted away to some extent, so it is a little harder to find an organised body to talk to that represents all our subcontractors. I am sure that, as time goes by, another association will form.

I am encouraged by and congratulate the government, to an extent, for the Small Business Development Corporation recently seeming to have come to the fore with the changes in legislation. It seems to be playing quite a good role in dispute resolution. It is playing quite an important role, especially in these COVID times. I also give the government credit for its procurement policy, which I think has been an improvement. Those are a couple of things I would like to

compliment the government on for putting in place. Without going into too much detail, I think that the changes to the adjudication process are an improvement. We are making progress by bringing the rapid adjudication process into line with other states. However, I fear that the appointment of adjudicators and the operating model will still work in favour of the larger head contractors over subcontractors. It is the old story. It is about bargaining power and how contracts always favour the larger player. That is my concern about the adjudication process. I just want to point out that drawing up a contract at the same time as the adjudicating body is appointed could favour the head contractor or the larger player. But I also think that any adjudication process that makes the process quicker and more rapid is an improvement.

The changes to payment time frames are certainly an improvement. Claims from head contractors to principals will now need to be paid within 20 business days or any lesser period as specified in the contract; claims by subcontractors to head contractors, or subcontractors to sub-subcontractors, will need to be paid within 25 business days, or any lesser period specified in the contract; and claims involving certain types of home building works will need to be within the period specified in the contract, or 10 business days by default if no period is specified in the contract. I think that is a step in the right direction.

[Member's time extended.]

**Mr P.J. RUNDLE**: One key point about the payment claims is that if a respondent to a payment claim gives the claimant a schedule within the earliest contracted time of 15 business days after the payment is made and the respondent does not respond after 15 days, the respondent will have to make the payment. I understand that the Master Builders Association is concerned about what will happen if a respondent happens to be away on holidays or is diverted by some other reason and cannot respond within 15 days. They will be disadvantaged. However, I would be surprised if someone went away on holiday during a major project. I think that setting a limit of 15 business days is fine. In a lot of ways, it is all about education. It is about making sure that the parties understand their obligations and what they need to do to have these processes in place. I am not too worried about that. I think industry will adjust.

The highlight in the bill for me are the extra powers that will be given to the Building Services Board. The powers it will have to exclude individuals, non-corporate bodies and corporate bodies from registration when an insolvency event occurs is a great step in the right direction. It also prevents what I think is another art form—that is, when people install a spouse or family member as a director of a company in an attempt to circumvent their obligations. As I said, I believe that the stronger powers being given to the Building Services Board will control what I see as a big problem of phoenix companies and will prevent a company closing down and starting up again down the road with a similar project that leaves the contractor who has done the right thing and done the previous job—supplied the gravel or cement, or whatever is required at a local level—stranded. This provision is a great step in the right direction. I congratulate the minister for that. I think it is welcomed by all and many subcontractors.

As the member for Hillarys pointed out, education is a real imperative if and when this legislation goes through. I think it will take time to transition all industry participants. There are no two ways about that, but I think it is a step in the right direction.

In conclusion, the Nationals WA support many of the steps in the bill, because they will give greater protection to regional contractors, especially regional subcontractors who have been burnt in the past. As far as I am concerned, it is an improvement. The system needs more improvement, but the question is whether this legislation will go through. Even if it goes through in the next term, under a different government, which hopefully it will be, this will be a step in the right direction.

**DR A.D. BUTI (Armadale)** [8.15 pm]: I would also like to contribute to the second reading debate on the Building and Construction Industry (Security of Payment) Bill 2020. We have all heard the saying to do a fair day's work for a fair day's pay, and that if a person does a fair day's work, they expect to get a fair day's pay. Unfortunately, that is not necessarily always the case. That saying has been synonymous with the trade union movement and the Catholic social justice movement for a long time. Basically, people should not expect to be paid without doing the work, but if they do the work, they should get paid. It is as simple as that. Of course, our colleagues on the other side of the aisle would agree with that.

It was a good contribution by the member for Roe.

**Mr P.J. Rundle**: Thank you, member for Armadale.

**Dr A.D. BUTI**: No. I really enjoyed listening to his contribution. He made some very valid points, as did the member for Mount Lawley before him, and the member for Hillarys who always makes a very acute forensic examination of legislation.

This bill is basically dealing with the loss of confidence among subcontractors and their fear that if they do the work, they may not get paid. That goes for their employees and families who rely on that income. This bill seeks to address that lack of confidence. It is trying to bring some confidence into the building and construction industry. As the member for Mount Lawley mentioned—it was repeated by the member for Roe—this bill is a very good first step and we will need to see how it develops.

Before I go through various aspects of the bill, without doing it in any great detail because other members have already done so, the bill basically deals with a few main areas: to develop new security of payment laws, improve fairness in contracting practices, and retain the trust scheme and industry regulation. But I want to look at the background of the bill. The member for Mount Lawley mentioned the Fiocco report. In the lead-up to the 2017 election, the then Leader of the Opposition, now Premier, talked about the need to tackle problems in the building industry. When the McGowan government was elected, the relevant minister was the member for Cannington. He set up an inquiry and appointed John Fiocco, a very prominent and well-respected lawyer, and Hon Matthew Swinbourn to conduct it. I think it is informative to look at that report and at the letters written by Mr Fiocco and Hon Matthew Swinbourn to Hon Bill Johnston who was at that time the Minister for Commerce and Industrial Relations. The letter from Mr Fiocco to the then Minister for Commerce and Industrial Relations, Mr Bill Johnston, dated 31 October 2018, refers to the establishment of the inquiry and the terms of reference, which were amended on 17 April 2018. The letter states, in part —

> While the problem of security of payment in the building and construction industry is not a new phenomenon, this is the first time it has been considered in such a comprehensive manner in WA since 2001. It has become clear to me that despite the passage of 18 years the problem continues to exist today, confirming a need for further government action.
>
> In arriving at the recommendations in this report, I have been informed by the findings made in numerous reviews into security of payment across various jurisdictions, including the most recent review by Mr John Murray AM on behalf of the Commonwealth Government. However, all recommendations made in this report are honestly held, carefully considered and mine alone.

Mr Fiocco then refers to the assistance he was given from Hon Matthew Swinbourn. Hon Matthew Swinbourn came into Parliament with extensive experience as a former senior industrial officer advocating for the rights of construction workers. Mr Fiocco could not have found anyone better in this Parliament to be involved in this inquiry.

Mr Swinbourn also wrote a letter to the then Minister for Commerce and Industrial Relations, Mr Bill Johnston. He states —

> The building and construction industry is a vital part of the economy, providing the jobs, housing and critical infrastructure to meet the needs of all Western Australians. Last year —

That is back in 2017 —

> the industry accounted for $20.3 billion in activity and the direct employment of around 140,000 people.
>
> Despite its contribution to our economy, a consistent problem in the industry has been ensuring that participants, particularly small business subcontractors, their employees and families have the confidence and security they will be paid for the goods and services they supply.

That is the crux of the problem that is sought to be addressed by the bill before the house. That is what Hon Matthew Swinbourn said in his letter to the minister upon the delivery of what is known as the Fiocco report. The full title of that report is "Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry". I repeat what he said —

> Despite its contribution to our economy, a consistent problem in the industry has been ensuring that participants, particularly small business subcontractors, their employees and families have the confidence and security they will be paid for the goods and services they supply.

The Fiocco inquiry produced a substantial report. There was wide consultation with key industry stakeholders on security of payment, with the aim of ensuring that people have confidence that they will be paid for the work they undertake and the goods and services they supply. Remember that I said originally that one of the major tenets of the trade union movement and social justice is that people are entitled to a fair day's pay for a fair day's work. That confidence has become precarious because of the behaviour of certain people. If people cannot have confidence that when they do work or when they supply goods and services, they will be paid, the whole system will come apart. As I have said, Hon Matt Swinbourn referred to the $20.3 billion in activity and the direct employment of around 140 000 people. Therefore, this is an issue that governments need to address. The former Minister for Commerce and Industrial Relations, Hon Bill Johnston, tackled this issue, and the current Minister for Commerce and Attorney General has now brought this bill before the house.

The Fiocco report states, in part —

> Despite recent reforms, it has become clear that WA's security of payment laws do not adequately ensure prompt payment or speed up cash flow through the contracting chain.

That is the other issue—it is not just the security of payments, but also the timing of payments that is important. It continues —

> Much of the reform the Government committed to prior to the 2017 State election is necessary for the long-term health, viability and for confidence to be restored in the building and construction industry.
>
> Finally, many of the recommendations in this report are not 'new'—they have been thoroughly considered and put forward by other inquiries. Almost 20 years ago, the former Chief Justice of WA, the Honourable Wayne Martin AC QC, then Chairman of the LRCWA, put forward comprehensive recommendations for a statutory deemed trust scheme to provide better financial protection for businesses operating in the building and construction industry. One can only speculate as to how things may "have altered in the building trade" had the recommendations been adopted at the time.

That is right. One can only speculate what would have happened had the recommendations of Hon Wayne Martin been implemented by government. Thank goodness the then Labor opposition made a commitment to tackle this important area. That process was instigated by the member for Cannington as the responsible minister and has continued under the current Minister for Commerce. I cannot stress enough the importance of bringing this bill to the house. As the member for Mount Lawley stated, this is a good start. This is incredibly important legislation to restore confidence that people who work in the building and construction industry will be paid for their work and for the delivery of goods and services.

The Fiocco report made 86 recommendations to government. It is obviously up to government to decide which recommendations it will implement and put into effect. As a result of the recommendations in the Fiocco report, this bill is now before the house for debate, and hopefully it will be passed. If this bill is not passed, the problem of the security of payments will remain. That will not be good for an industry that, as Hon Matthew Swinbourn said, in 2017 was worth $20.3 billion and employed around 140 000 people. Another issue is the multiplier economic effect of this industry. If this industry were to collapse, it would cause major economic and social problems in our community. That is why it is imperative that we put in place a legislative scheme that will provide confidence that people who work in the building and construction industry will be paid.

Let us now look a bit closer at the Building and Construction Industry (Security of Payment) Bill 2020. It delivers on many of the issues confronting subcontractors in the building and construction industry. It includes the establishment of defined processes to ensure payment of subcontractors in a quick and low-cost manner; effective mechanisms for resolving payment disputes to promote cash flow; the safeguarding of retention money; the management of poor commercial conduct of contracting parties; and the introduction of fairer contracting practices. Those are all very important elements of what this legislation will do. This legislation is, in many respects, a game changer. It will have a significant effect on improving confidence in the industry. Obviously, more things will need to be done in the future, but this is a very, very important bill.

Parts 2, 3, 5 and 6 of the bill will introduce new security of payment laws in Western Australia to ensure that contractors who carry out construction work can get paid, and that payment disputes can be resolved quickly and inexpensively through an effective process of rapid adjudication. It would be no good for us to provide solutions to disputes that are long and expensive; this bill will ensure that disputes can be resolved through an effective process of rapid adjudication.

The bill will ensure that in Western Australia, consistent with various other states and territories around Australia, a party that carries out or undertakes to carry out construction work, or to supply related goods and services, will have a statutory right to receive payment, or to make a claim for payment, at least every month, or more frequently if provided for in the contract.

[Member's time extended.]

**Dr A.D. BUTI**: When a party to a construction contract who is entitled to a payment—whom we refer to as the claimant—makes a payment claim, the party that receives the claim—the respondent—will be required to either pay the claim in full within the stipulated time or provide a payment schedule within 15 business days, setting out any reasons for withholding payment. It is a sad fact of life that we even need to have this legislation.

**Mr P.J. Rundle**: Hear, hear.

**Dr A.D. BUTI**: The member for Roe would have been brought up, as I was brought up, to understand that if you do your work, you get paid. That is how we were brought up, and our parents would have worked under the same principles, but unfortunately we do not necessarily live in that world anymore, which is why we need legislation that at least tries to improve people's confidence that they will be paid for their work in this industry.

The bill will ensure that payments flow down the contracting chain as fast as possible by creating staggered due dates for payment, depending on the claimant's position and the contracting claim. Claims by head contractors to

principals and owners will now need to be paid within 20 business days of the claim, or a lesser period if the contract provides; claims by subcontractors to head contractors will need to be paid within 25 business days, or a lesser period if the contract provides; and claims involving certain types of residential works will need to be paid within the period specified in the contract, or 10 business days if there is no period specified in the contract.

This will benefit not only the people who do the work, but also anyone seeking people to do this work, because if people have no confidence that they will be paid, they will leave the industry. There will therefore be a reduction in suppliers and labour, and under the normal economic laws of supply and demand, that will mean that prices for services and labour will increase. That will be good for anyone—the consumer or the supplier of labour. As I said, other jurisdictions already have these provisions in place; thank goodness we now have a state government that is willing to tackle this issue that Hon Wayne Martin highlighted more than 20 years ago. It is obviously something we desperately need.

As I said, the bill contains mechanisms for speeding up the processes of adjudication and to make those processes as inexpensive as possible. The prohibitive cost is always a problem when people try to enforce their legal rights. It would be no good for us to say, "You have the right to be paid", if people then have to go through a prohibitively expensive court or dispute mechanism to seek their payment. The legal fees can run into amounts that sometimes are nearly as great as the amount being sought. The member for Hillarys might remember one such case in Victoria. It was nothing to do with the construction industry, but rather was a family law case, in which the client received $1 million in the settlement but had to pay the lawyer $900 000. It was in Melbourne.

**Mr P.A. Katsambanis**: I don't remember the specific case, but anyway, it would've been initials v initials.

**Dr A.D. BUTI**: That is right. I will not mention the law firm that was involved, but that is just absolutely absurd.

**Mr P.A. Katsambanis**: Sadly, it's not uncommon.

**Dr A.D. BUTI**: Exactly right.

Part 2 of the bill introduces measures to improve the fairness and transparency of contracting practices in the industry. This will include the introduction of a broader prohibition on paid-when-paid provisions; the prohibition of other types of unfair terms; and the requirement for certain contracts to be in writing and to meet minimum standards.

[Interruption.]

**Dr A.D. BUTI**: Do we have a problem here?

**The ACTING SPEAKER (Mr S.J. Price)**: No; keep going, member.

**Dr A.D. BUTI**: I am just interested in the discussion! The member is not distracting me; I am just interested!

Part 2 includes a novel measure for improving fairness in contracting that is not found anywhere else in Australia—the voiding of unfair notice-based time bar provisions in construction contracts. That is actually a very important measure.

Was the Leader of the House trying to get more people into the house to listen to my outstanding speech?

**Mr D.A. Templeman**: It's very difficult to hold them!

**Dr A.D. BUTI**: That is right!

The bill seeks to strike an appropriate balance between competing principles of freedom of contract and the stark reality that subcontractors in the industry have to contend with unfair time bars that purport to unreasonably disentitle them to their right to payment. This is the perennial problem between freedom of contract and measures that seek to bring in fairness to the system. Some libertarians and free marketeers will always say that we should never interfere with freedom of contract, but as we all know, we do that all the time. Even if we do not do it by statutory mechanisms, there are legal mechanisms, which the member for Hillarys very well knows, that can interfere in freedom of contract, unconscionable behaviour, undue influence and the various equitable remedies and actions. Therefore, even if we do not have a statutory system, the law itself, the legal system, over centuries, has developed doctrines and principles that interfere with freedom of contract. Those who cry out that we should not have statutory interference in contracts, can cry that out and —

**Mr P.A. Katsambanis**: That's why it's been known as privity of contract rather than freedom of contract.

**Dr A.D. BUTI**: It is known as privity of contract—exactly—rather than freedom of contract. That is a good point, member for Hillarys.

**Mr P.A. Katsambanis**: Sorry to get into Old English.

**Dr A.D. BUTI**: No; it is good.

We have all these legal principles. Of course, one could seek to rely on those legal principles, but one may need to go to court and engage in expensive litigation that may take a long time, so that is why it is good to have a system that seeks to alleviate the unfairness between contracting practices and tries to seek some balance.

Part 4 of the bill introduces a new mandatory retention trust scheme in Western Australia. This is also the first of its kind in Australia. The scheme will reduce the risk to builders, subcontractors and suppliers when their immediate contractual counterpart on a project becomes insolvent by ring-fencing money to ensure that it is not available for distribution to general creditors. Often, retention money can represent a business's entire profit margin on a project. Basically, the bill will ensure that there is some security for and some protection of money that will have to be paid to the subcontractors rather than be distributed to general creditors. Where in the queue the subcontractor sits is always a problem in bankruptcy and so forth. This retention trust scheme is very important. Unfortunately, the construction industry accounts for a disproportionate number of business insolvencies that occur each year, which has a major effect on the supply chain. That is why it is very important that we have this retention trust scheme.

In conclusion, this bill is necessary. This bill has been a long time coming. It is this government that has acted. The Martin report, when he was head of the Law Reform Commission, was not acted on. Hon Bill Johnston instigated the Fiocco report. John Fiocco and Hon Matthew Swinbourn produced a fantastic report. Then we had the drafting of this bill, and now the current Minister for Commerce has the lead on this bill in this house. We need to have a statutory system that will return some confidence to the industry so that when someone does a fair day's work, they get a fair day's pay, which is a mantra and a principle that is imperative to social justice, the labour movement and the economic system that we work within.

**MS C.M. ROWE (Belmont)** [8.44 pm]: I rise proudly tonight to make a contribution to the Building and Construction Industry (Security of Payment) Bill 2020. As the member for Armadale just outlined in his great contribution, these reforms are absolutely necessary and very much overdue. I take this opportunity to acknowledge the work of the Attorney General and Minister for Commerce for not only bringing the bill to this house, but also championing these reforms before we even were elected. We committed to these reforms back in 2016 while in opposition. As other members have indicated, this bill will bring about major reforms to the construction industry. The reforms will result in a very positive and dramatic improvement in the outcomes for subcontractors and will ensure that greater protections will be in place for those industry participants.

It is fair to say that now more so than ever the building and construction industry is proving vital to our economic prosperity here in WA. It is also a great industry for generating jobs for many Western Australians right now during the post-COVID period here in the west. Literally hundreds and thousands of people's livelihoods right across WA depend on the building and construction industry. The current system clearly does not adequately protect subcontractors or small businesses operating in that industry to ensure that they get paid for the work they do and that they get paid in an appropriate time frame. That is the critical thing that has been the catalyst for introducing these reforms, because people were simply not getting paid and if they were, in many instances, it was a very protracted process to get that payment. That can have a ruinous effect on people's ability to live and it causes enormous stress and strain for many families.

The reforms contained within this bill seek to rectify this issue so that all participants in the building and construction industry can have confidence that they will get paid on time every time that they do the work. I think it was the member for Armadale who stressed this point: reinstating confidence in the industry for those subcontractors and small businesses is absolutely critical, because they do not want to put themselves on the line and get ripped off again by phoenixing companies and so forth. This is a critical thing that we are doing to provide that level of confidence for industry participants so that they know that they will get paid for the work that they do.

The key objective of this bill is to provide a legislative framework to provide an effective and fair process for securing payments to persons who undertake to carry out construction work or to supply related goods and services in the building and construction industry, and for related purposes. As others have indicated, the bill heavily draws from and relies upon the recommendations contained within the report written by the very well regarded barrister, based here in WA, Mr John Fiocco. The report that he provided to the minister is titled "Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry", dated October 2018.

As I have said, this bill addresses and rectifies many issues raised not only in this report, but also by many subcontractors right across the state over many years. A lot of their plights have been played out in the public domain and in the media, so there is no excuse for members in this place not to be aware of those issues that so many subcontractors have faced in this industry. Some of the reforms that we are looking to introduce include the establishment of a defined process to ensure payment of subcontractors in a quick, low-cost manner; efficient procedures for resolving payment disputes to promote cash flow; safeguarding retention money; managing poor commercial conduct of contracting parties; and introducing fairer contracting practices. I think everyone in the house here would agree that all these

things are important. I cannot see anyone disagreeing with those principles or with how important they are for that industry, given what it has gone through over many years.

More so than any other, our government understands very clearly the hardships faced by many families who have businesses in the construction industry and who have suffered serious financial losses due to non-payment or, as I touched on before, a lengthy or delayed payment time frame that is simply unmanageable and unsustainable for many small businesses and families whose livelihood depends on those moneys coming back to them. We know that in many instances businesses or subcontractors inject up-front their own capital for material, supplies and labour. When the person they work for does not pay or goes into liquidation, the flow-on effect means that those businesses cannot pay their staff and/or they accumulate huge, unsustainable debts. It often renders them unable to continue operating and it clearly ruins lives. Businesses go under and people lose their homes and many other assets. I would like to highlight this issue and the impact it has on families by referring to an article in *The West Australian* headed, "Subcontractors stung as another WA builder folds" from May 2018. It refers to a building company called Amberley Homes based, I think, in Kalgoorlie, which failed to fulfil three housing contracts, leaving one client $50 000 out of pocket. The article highlights the personal toll it took on this subcontractor. It placed enormous strain on his relationship and he was uncertain whether it could sustain the financial burden being placed on them. Another subcontractor caught up in this awful situation, Mr Holman, claimed that he was owed $20 000 by the same company for work he had conducted in 2016. Bearing in mind this article was written in 2018, he said that he had been trying to contact the company since the work had been finished in mid-2016 but had never heard back. The article also states that Mr Holman estimated that at least 20 other subcontractors were caught up in this Amberley Homes situation. There were 20 other subcontractors in Kalgoorlie owed approximately $300 000 in total. None of the contractors was confident that they would ever see any of that money recouped. That is clearly unacceptable. It was likely that, as subcontractors, this was their whole livelihood; they had to cough up the money up-front but were not paid for the work they did. It is absolutely unconscionable.

If the house will indulge me, I want to stress the enormous impacts such practices have had on subcontractors by drawing the attention of the house to another article in *The West*, which is a bit older, from June 2015, headed, "More unpaid subbie claims hit John Holland". I will read an extract from that article —

> Jeremy Pash, formerly trading as Elite Drainage Pty Ltd, told the West Australian that he was not paid for variations totalling $1 million late last year on Eastern Goldfields Regional Prison, culminating in liquidation and losses between $5 million and $6 million.
>
> It comes days after the $1.2 billion Perth Children's Hospital project was rocked by claims that several subcontractors were owed tens of millions of dollars by John Holland.

John Holland is a huge company, so for it to do this to subcontractors is absolutely disgraceful behaviour. The quote continues —

> Graffiti scrawled on PCH walls by workers last week blamed the company for the recent suicide of one of the subcontractors, Acrow Ceilings managing director Ross McGinn.
>
> Yesterday Mr Pash, who was subcontracted to put in sewerage and stormwater infrastructure at the $250 million prison replacement project, said unforeseen site issues such as asbestos removal required variation to the contracted scope of works, which were authorised but never paid.
>
> Mr Pash said his business went into a tailspin and liquidators RSM Bird Cameron had auctioned all his machinery and was pursuing his house.
>
> "I am not going to be left with anything," the 44-year-old father of two said.
>
> "Just the clothes on my back. To get to my age and work so hard and not be left with one dollar, that's disgusting."

He is right. I think these stories clearly highlight how critically important the reforms we are dealing with tonight are. We should keep those personal stories at the very forefront of our mind as we debate the intricacies of these reforms and remember that these are people's livelihoods. As Jeremy Pash said, he had nothing left. It would have been very difficult for him to rebuild his business and, indeed, his life after such an experience. It is people like him for whom we need to introduce laws such as this to provide protection mechanisms so that it does not happen again, because, clearly, big companies do not always do the right thing. In fact, they often do not.

One of the critical areas of reform in this Building and Construction Industry (Security of Payment) Bill 2020 is the introduction of new security payment laws to make sure those who carry out work in the construction industry are paid and, importantly, disputes about payment can be resolved quickly and inexpensively through the efficient process of rapid adjudication. I think this element of the reforms is particularly important because it will expedite the process. Just as occurs in other parts of the country, those who carry out work in the construction industry will have a statutory right to receive payment and to make a claim for payment every month or, if the contract provides it, even more

frequently. We are setting an example by providing subcontractors with the shortest payment time for statutory claims in the country, with the requirement for payment within a maximum period of 25 business days. Those who do not comply with the payment claim requirement will potentially face significant consequences. Under these reforms, claimants will be able to elect to refer a matter for rapid adjudication. I believe one of the critical elements of the bill is the inclusion of mechanisms to minimise costs relating to this process. It will ensure that the process itself will remain completely accessible to everyone in the industry. By that I mean that they will not be caught up in legal fees, as the member for Armadale mentioned, for example, in a Family Court dispute when the payout was $1 million and $900 000 was paid in legal fees. No-one wants to see that; that is completely unfair and inequitable. One of the fantastic things about this process is that it will be accessible, quick and inexpensive. It has been specifically designed to enable claims to be dealt with and determined swiftly and efficiently. Limiting those formalities will obviously reduce costs. This is being done so that funds can continue to flow through the contracting chain, and I think that is really important.

Another area of the bill I would like to highlight is part 4, which looks to establish a mandatory retention trust scheme. This will be the first of its kind in Australia. It will essentially ring-fence money in a dedicated trust account for subcontractors and suppliers to ensure that it is not available to general creditors if their contractual counterpart becomes insolvent. Given that, and as other members have touched on, this is an industry that has a disproportionate number of insolvencies every year, it will provide an important safety measure, particularly for subcontractors. Again, it speaks to our commitment to reinstate confidence that we are looking out for subcontractors and smaller operators in this industry. This provision seeks to protect subcontractors' retention money from being misappropriated or even lost entirely due to insolvency. There are a number of examples—I think the Fiocco report highlights some—of money being used for all different types of purposes and often lost entirely. I think that we all agree that is a completely inappropriate use of that money. Under current law, it is legal for a party holding retention money to simply raid these funds. Clearly, that is not appropriate. We need to make sure that we are protecting that money on behalf of subcontractors. I think that is a completely reasonable element within this bill.

Yet another important element of the bill to highlight is the enhanced regulation of the industry, which is covered under part 7 of the bill. Principally, it does this by boosting the role of the Building Services Board in its capacity for oversight and compliance across the industry to really focus on stamping out predatory behaviour by some operators, but it will not simply be a toothless tiger. New offences will be created under this bill and fines will be increased. One new offence that this bill seeks to introduce that I think is very important is that a person who threatens or intimidates others in relation to exercising their statutory rights to make and receive progress payment claims will face prosecution and fines of potentially up to $50 000 for individuals and up to $250 000 for body corporates. I think that really signposts to the industry that we are taking these matters seriously and that they should be on notice.

Can I please request a very small extension?

**The ACTING SPEAKER (Mr S.J. Price)**: No, but you can have an extension, yes.

**Mr D.A. Templeman**: Just make it small!

**Ms C.M. ROWE**: Thank you. I will make it very small!

**The ACTING SPEAKER**: You can have 10 minutes.

[Member's time extended.]

**Ms C.M. ROWE**: This is a really important point. This bill will provide the Building Commissioner and the Building Services Board the power to remove from the industry building contractors who have a history of insolvency or not paying court order debts. This is one of the most critical elements of the bill. I know I have said there are a lot of really important and significant parts of this bill, but this is particularly important, because this looks to stamp out phoenixing. As others have said, phoenixing occurs when a company deliberately drives itself into insolvency. Directors strip out assets and cash and it goes into liquidation, only to re-emerge as a brand-new company shortly thereafter and recommence, even though it has left a litany of unpaid creditors behind. This shocking practice has ripped off so many hardworking subcontractors and Western Australians, leaving them absolutely devastated and financially ruined. I feel this provision in the bill is especially important as we will hopefully see the end of this terrible practice in WA for really hardworking West Aussies. I would be very happy to see the back of phoenixing. The industry and particularly subcontractors have been calling for this for a long time, and I am really pleased that we are listening to those subcontractors and providing these safety provisions for them. I think that these reforms will provide greater fairness and protection for subcontractors and give much-needed peace of mind and confidence to so many West Aussies in construction businesses. They want to know that they are going to get paid for the work that they do, every time. I think that is the essence of this bill. With this legislation, they will be able to go into projects with the confidence that they will get paid for the work that they do. I highly commend this bill to the house.

**MR Z.R.F. KIRKUP (Dawesville)** [9.03 pm]: I, too, rise to speak very, very briefly on the Building and Construction Industry (Security of Payment) Bill 2020. I appreciate the contributions from many members. Of course, in his

contribution, the member for Hillarys indicated our support for this bill and that he will make sure to continue his forensic work on all legislation that the Attorney General; Minister for Commerce brings to this place.

I have one very brief story that reminds me why this legislation is so important. My father was a plumber and for some time was in civil construction. For most of his life, albeit for a very brief part of the boom, he did not earn much money. He would get paid by cheque and things like that, and oftentimes, when I was a younger boy, of course, we did not have a whole lot of cash around the house. We were often struggling to make ends meet. I remember very vividly—it is one of those memories that is imprinted on my mind—an occasion when my father was waiting, unsure whether someone he was subcontracted to was actually going to pay him. My parents never had much money. The cheque came through I think on 22 or 23 December. I think it may have been a Thursday, because it was late-night shopping, or maybe it was extended trading. That night, I can vividly recall, as a young kid, getting ready and going into the City of Perth with them to get presents. I did not know at the time, but they were buying presents for me. Absent of the fact of that cheque coming through and clearing, there would not have been a Christmas that we would have known about. Certainly, we would not have got the presents that we did. I remember that.

I think that small subcontractors capture the spirit of entrepreneurship in Western Australia. They are outstanding contributors to our economy, they are resilient individuals who time and again build our state and make it the state it is, but so often they get crushed underneath the wheel of speculative practice by head contractors who, as the member for Belmont and other members quite rightly pointed out, phoenix from time to time or do not pay. Certainly, for some government projects in which there is usually a certainty of being paid, that money is not forthcoming. We should not assume—I do not think this house does—that this is a matter of one big company not paying another big company that then has the means to provide through civil remedy in the courts; that is not the case. It is the people like my father who would otherwise have very little money, who rely on—certainly, we did—cheque to cheque, project to project, to keep their family going. That is why the legislation we have before us is so important. That is why I personally think that this is something we should have got around to doing when we saw many companies fall over under the former government. We saw that happen on a number of government projects. There was a flurry of building and construction, as is often the case in the building industry, with a number of developments. Companies brought in a lot of subcontractors, which is obviously a very easy way for them to do business. Companies would collapse under the weight of the litany of projects that they had on, and because of the stiff competition, often with very small margins, typically expecting that they would get variation orders or something like that to keep themselves going, they would fall over. Typically, there is not much recourse. As members, including the member for Belmont, have pointed out in their contributions, those companies simply find another way to continue existing with the people who have conducted those speculative practices continuing on, but the subcontractors like my father are much, much worse off. It breaks families. It breaks individuals who, in the spirit of Western Australia's entrepreneurship, continue to strive time and again.

I appreciate the contribution of all members of this place. I have been advocated to quite strongly by residents in my district, particularly Gary Brown, whom I suspect the member for Mandurah knows equally well. Those people have strongly advocated for these measures. I think that they are important measures. As the member for Mount Lawley has indicated, this is probably a path along what will ultimately be a much longer journey for what this may look like in time; I do not know.

The only concern I have is that, of course, this will not pass. This legislation, whilst needed, comes at a time when I think there is more economic uncertainty than ever before—a time when more people are uncertain about their futures. Small businesses have the opportunity now to strive to work as much as they can to try to hold on to as much money as they can because they are unsure about what tomorrow might bring. I suspect that all of us sit here in a state of anxiety, if only about the presidential election results in the United States, let alone what the future is going to look like in COVID recovery, and certainly what that might look like until 2023 when the Reserve Bank of Australia has indicated it will not increase interest rates beyond 0.1 per cent. There is a lot of uncertainty out there.

The only failure in this case is that the bill will not get passed. This is not a criticism of the minister who has brought the bill to this place, because I know that the Minister for Commerce; Attorney General has been exceptionally busy in bringing legislation to this place. I know, because the member for Hillarys has largely been the lead on that for our party for most of the last nearly four years in Parliament. It is a shame that the legislation will not see the light of day. That is a pragmatic response. We know that the bill will not be a priority for the Legislative Council if and when it reaches it. I suspect it is unlikely for it to get out of this place until the end of this week, which means that, given it is not a priority of this government in the Legislative Council, it will have to be put off until the forty-first Parliament and the priority is assumed within that. Within this time, all the practices that members have spoken about, that I have seen happen with my own family and that have been experienced across my district will likely continue. This is at a time when I am most concerned about the level of uncertainty in our economy.

**Ms C.M. Rowe**: The upper house has been invited to sit for an extended time and the opposition has agreed with that.

**Mr Z.R.F. KIRKUP**: I appreciate that, member for Belmont, but, as the member would be aware, there are 16 pieces of legislation that this government has indicated are priorities, and this was not one of them. I expect that if that was the case, we would see as much cooperation in that place as possible, but the legislation was not one of the priorities. With that, I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman (Leader of the House)**.