

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

*Second Reading*

Resumed from 3 November.

**MS J.M. FREEMAN (Mirrabooka)** [11.39 am]: I rise to speak on the Building and Construction Industry (Security of Payment) Bill 2020. I congratulate the Attorney General for bringing this bill before the house. This bill has clearly been a long and deep commitment of WA Labor. I particularly want to recognise the contribution made to this bill by members from the Legislative Council, in particular the President, Hon Kate Doust, who, throughout the many years of opposition from 2008 until 2017, was a champion for change in this area. She met with many contractors and pushed the then government to address the issue of non-payment of contractors. One issue that she raised in particular was the difficulties and plight of the many contractors who had done work on Building the Education Revolution projects. The Building the Education Revolution was an initiative of the then commonwealth government during the global financial crisis to provide much-needed economic stimulus by delivering projects and facilities at our schools. That money was gratefully received by the then state government, and the Department of Education and Training contracted out that work to builders, some of whom then subcontracted and sub-subcontracted that work to other people. The difficulty was that some of those people were either not paid, or had their retention money withheld for an extended period, and that impacted their business. People who had won a tender would devolve the risk to a contractor further down the line, and any additional costs for work that was not part of the original tender, or any disputes about the tender, would be borne by the people who could least afford it.

Over the last 20 to 30 years, employers have been able to use an Australian business number through the taxation system to effectively avoid their responsibilities, and the rights that flow to employees under an employment contract, by placing their employees on a subcontracting arrangement. Those subcontractors would fulfil all the contractual requirements and deliver the service. They would turn up to work on time, lay bricks or put in pipes and do all the things that form part of the usual employer–employee relationship, but they would not have the same rights as those who work under a contract of employment. The principle of providing labour in exchange for proper remuneration was broken. This is what has happened over the last 20 to 30 years in the construction industry as responsibility has been devolved down the line. It would not fall within the definition of a sham contract, but people have been able to mitigate the cost and the risk of direct employment by capitalising on the use of contractors and subcontractors. That was particularly the case with Building the Education Revolution projects. Those projects were managed well in terms of delivering buildings and facilities into our schools. However, because the then government devolved the responsibility for the delivery of those facilities to contractors and subcontractors, those people were disadvantaged by not being paid. When WA Labor came to government, we addressed that problem by establishing project bank accounts for government-funded projects to provide protections for small businesses. However, the problem with many large contracts in the building and construction industry is that the risk is still being passed down the line to those who can least afford it.

One of the foundations of our Australian labour laws is the age-old principle of a fair day's work for a fair day's pay. Australian labour laws are different from those in pretty much every other part of the world. We do not rely on common law contracts in accepting employment. We have a structure and framework that ensures that the foundation principle of a fair day's work for a fair day's pay is enshrined in our industrial relations system, our awards and our enterprise bargaining agreements. However, what has occurred in the broader construction industry is that a company may directly employ electricians, plumbers and fabricators but will then break that up into subcontract arrangements. The company would bear the risk of putting in a tender for a project and managing the project, but it would then break up a whole bunch of contracts into subcontracts and even sub-subcontracts so that the impact would be devolved down the line.

If I may digress for a moment, in the 1980s, government projects were delivered by then Western Australian Building Management Authority. Many of the schools in my electorate, and in the electorates of the members for Forrestfield and Belmont, would have been built by people directly employed by the government. That provided an opportunity for growth and development in the building industry, and also an opportunity for apprentices. That was devolved and government basically then funded contractors to deliver those services. That was reflective of what happened in the construction industry in the 1980s and 1990s and it is now, to the nth degree, how contracts work. Those were the sorts of issues that Hon Kate Doust championed. She understood very well how people's entitlements and right to be paid for a fair day's work were being completely undermined by systemic failures in contractual relationships. She also fundamentally understood that one of the difficulties for sub-subcontractors is that this is a small town with a small market and a small capacity, and they have to maintain relationships with the people providing work. She knew that whatever system was put in place would have to have the capacity to maintain those amicable relationships and have a fair dispute resolution system that would not pit people against each other, to avoid retribution being visited upon sub-subcontractors just for seeking fair payment.

After her great work in the lead-up to the Labor Party's 2017 election victory, these matters needed to be finessed because we wanted to be able to manage those amicable relationships. We did not want to put the least advantaged people in the system at the greater disadvantage of having to wear the consequences of disputes and grievances by being seen as difficult or adversarial and therefore losing work. Hon Matthew Swinbourn then took up the job of finessing these laws to deliver something comprehensive that would meet the expectations and needs of the community without bogging the system down with too much technicality. In that he was assisted by John Fiocco, who put his legal mind to these issues and, as always, provided a lot of clarity. I congratulate the Attorney General on bringing this legislation to the house, but I also acknowledge that this great piece of legislation, which will protect workers in the industry, has come about thanks to the work of many people, as many good pieces of policy do. I want to congratulate all the people I have mentioned and those whom I have not mentioned, including the unions and particular members of the unions, for their advocacy in this area. This legislation will have great application in the electorate of Mirrabooka. A great percentage of male workers in Mirrabooka work in the construction industry, and this legislation will have positive consequences for them.

I have received phone calls from constituents over the years about the hideous practice of “phoenixing”, whereby companies are deliberately run down to such an extent that they fold and subcontractors go unpaid. Frankly, I believe that that is very fraudulent behaviour. The company is then rebirthed under a new name, regains its various licences and resumes operations, leaving those who can least afford it with the consequences; after having ensured that that these companies delivered their projects, they remain unpaid. Some of the key features of this legislation that I really welcome are provisions to prevent the practice of phoenixing. The legislation will take into account companies' histories of financial failure, and the legislative capacity to temporarily or permanently ban such companies is to be welcomed.

The Attorney General's second reading speech was one of the longer second reading speeches I have read, and it was very comprehensive. What I really took from it was his passion in acknowledging that being a builder in Western Australia is not something to be taken as a right. We say that in this community there are regulations and conditions that must be followed, and to do that companies have to act in an ethical manner; the phoenixing of companies is not ethical at all.

The Building and Construction Industry (Security of Payment) Bill 2020 will ensure confidence in business continuity. The fact is that if sub-subcontractors are not paid, they cannot continue operating. They have responsibilities; they often have their own employees and apprentices.

[Member's time extended.]

**Ms J.M. FREEMAN:** They are the people who do the work and contribute to the economy on the ground. Ensuring security of payment is really welcomed in that regard. It will unlock cash flow in the industry and will support the industry. That is very important at a time when the WA Labor government has made its recovery package available, because it has a multiplier effect for the community in respect of construction and building. That is vital. I note that approvals for the HomeBuilder program for the month of September are 74 per cent higher than the figure for September 2019. At a time of such instability, the WA Labor government has delivered a COVID-19 recovery package that has greatly increased construction in our community compared with one year ago. If we want to ensure that sub-subcontractors and businesses are protected, this legislation is vital to that outcome. We want to stimulate our economy and make it thrive after a very scary and confronting time, and the best way to do that is to use our levers to make it happen. We do not want to see that effort gobbled up by unscrupulous contractors who withhold money or bog subcontractors down in disputes to the point at which they cannot afford the legal process and end up not getting paid for their input into projects.

The Attorney General said—I really want to emphasise this—that the purpose of this bill is to ensure that the building industry as a whole, particularly those people who do the work on the ground, gets paid on time, every time for the work it does, and I think that is to be applauded. This bill imposes significant consequences for failure of payment through an effective process of ensuring that people at the subcontractor and sub-subcontractor level have a clear-cut and simplified payment schedule process. Payment schedules act as a good foundation to a dispute so that the dispute is clear and concise and new factors are not suddenly brought into the dispute. Actions can be taken when a payment schedule was brought in and either the contractor to the subcontractor or the developer has not paid. Obviously, that action does not undermine legal action. People can still pursue their legal rights in court. However, the adjudication process ensures a clear dispute process that cannot be worked around or made more complex so that one party finds it too difficult to participate.

For those of us who have an industrial relations background, this legislation is about getting people around a table with someone to assist to just sort it out. One of the strengths of the industrial relations system in Australia is the conciliation process takes away the legalities, the letters and the lawyers at nine paces so that people can just get around a table to work it out. That means that people's businesses can keep operating and their business relationship can continue. This is a really important aspect of this legislation.

I also welcome the fact that the adjudication system will be enhanced and clarified and it will enable choice. One of the difficulties for any system involving an adjudicator, a conciliator or a mediator is that if they are seen to be part of the system or to be closely aligned to one organisation over another, the dispute resolution process can be hampered. It can be hampered if there are no good choices for the other party to that process. The other party needs to have confidence in the capacity and capability of the person who is adjudicating these matters. The very important purpose of the adjudicator is to keep the money flowing. That is very much one of the principles.

This bill also establishes a trust fund for retention money, to deal with the issues around warranties and whether defects need to be fixed. As I said at the beginning of my speech, the government has done that for project bank accounts, which are a somewhat similar mechanism. A mandatory retention trust basically indicates to the developer contractor that money needs to be put into trust while the work is delivered, and that retention money, which is 14 per cent of the contract, can be only withdrawn from the trust for fixing defects. It is not about covering the debt of the trustees or about covering wages; it is specifically for fixing defects and must be paid in a timely manner. My understanding is that part of the problem is that these things are not done in a timely manner.

This process is similar to how we deal with our bonds in residential tenancies when we put our bonds into a trust. That framework ensures that that money is held in trust and is not used for other things, and access to that money is done in an agreed fashion. Obviously, the company has to put the bond in; it is held by the company. But it is a good move to have such a trust fund.

In Mirrabooka, there is a building site next to the library. All the shops that were proposed to be built on the ground level had been sold and a number of the intended apartments above were presold before building commenced. The slab was laid, as it normally is, because that shows the people who bought the apartments that the developer has made some progress in complying with its obligations, but then the whole job came to a grinding halt. That situation always makes me wonder because my understanding is that developers are supposed to show that they have the finances to develop and build before they can embark on a project so that people know the project will be completed. But in this case, the developer went broke and many of the subcontractors who had been involved in the initial laying of concrete, the groundwork, the piping and a few of the structural aspects to the building have been left unpaid. The people of Mirrabooka have been left with a building site in the middle of the town centre, which remains undeveloped because that issue has not been resolved. However, my understanding is that this project is now with another developer, and so the hope is that the project will be underway very soon and we will see it completed.

I also want to congratulate the Attorney General for introducing fairness in contracts by ensuring that contracts do not have unfair clauses that deprive contractors the right to payment, and for introducing the unfair notice-based time bar provision so that if a subcontractor does not build a wall in a particular period of time, for example, the contractor cannot hold back the subcontractor's money. Unfair provisions are not allowed in this legislation. I am absolutely in agreement that this bill should increase industry regulation and ensure that the consequences for obstructing an investigation or breaching this law will result in good, solid fines and penalties to ensure that the legislation operates well and fairly in our community and across the construction industry.

It is a testament to WA Labor's commitment that this piece of legislation is before the house. All the people who have been involved in this legislation coming before the house need to be congratulated. I commend the advisers and everyone involved in making this legislation happen.

I commend the bill to the house.

**MR S.J. PRICE (Forrestfield)** [12.08 pm]: It gives me pleasure to stand in support of, and make a contribution to, the debate on the Building and Construction Industry (Security of Payment) Bill 2020. I would like to start by acknowledging and thanking the then Minister for Commerce, Hon Bill Johnston, for starting the process to bring this legislation to the house, and I would like to thank the now Minister for Commerce, Hon John Quigley, for actually bringing it in.

As we know, the building and construction industry is one of the largest industries in Western Australia and is extremely vital to our economy. It employs many thousands of workers. The work can be very intermittent, dangerous and in remote places. We know of the diversity across the industry. It can stretch from building a residential house or commercial property right up to some of the mega projects that we have seen more recently in Western Australia such as the Gorgon, Wheatstone and Roy Hill projects to name a few examples, plus the state projects such as Fiona Stanley Hospital and Perth Children's Hospital.

Unfortunately, in a lot of the construction industry now, projects are being built down to a price rather than up to a standard. That approach is having a significant impact on a lot of contractors and subcontractors and their workers and employees associated with this industry. In the lead-up to the 2017 election, WA Labor made a number of firm policy commitments to drive change across the building and construction industry. Since then, the McGowan government has advanced a number of other reforms in this area. These include the extended rollout of project bank accounts on government-funded projects, which is a significant step for anyone working on a government-funded project. To win some work, whether it be as a contractor or subcontractor on a government project, and have the

fear of not being paid for that work is something we absolutely cannot tolerate and should not be an issue when it is a government project. There should be no doubt and no concern about people being paid for the work they do on those projects.

Under the Small Business Development Corporation Act, a system was in place to enable contractors on projects to approach the Small Business Commissioner to seek remedy in any payment disputes. However, under the original process, someone had to make an application that identified the person making a dispute against a contractor. The problem with that is if someone wins a contract or part of a contract on a project—these are pretty big key projects—it is normally to a higher contractor. That person would be there as a subbie, but the relationship that they form with that contractor is very important for the future of ongoing work for their subcontracting business. Subbies therefore do not want to be sitting at a table arguing over payment against someone, which might have a negative impact on their ability to gain future opportunities under that contractor's work. One of the changes we brought in was to allow the Small Business Commissioner to undertake his own investigations without the need to identify someone as a person who has a conflict with a more senior partner in a contract arrangement. That is a great step forward for subbies.

As we have heard from previous speakers about this Building and Construction Industry (Security of Payment) Bill, its primary objectives are to provide an effective and fair process for securing payment to people who have undertaken to carry out construction work or to supply goods or services within the building and construction industry. The provisions of the bill have been heavily informed by the recommendations made by barrister John Fiocco in his report of October 2018 to the government, the "Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry". This also took into consideration a lot of the recommendations from the commonwealth government's national review in December 2017, titled "Review of Security of Payment Laws: Building Trust and Harmony", undertaken by Mr John Murray, AM. Mr Fiocco was ably assisted by Hon Matthew Swinbourn, himself a lawyer with extensive industrial knowledge through his time as a legal representative at the Construction, Forestry, Maritime, Mining and Energy Union. I want to read a couple of points from the letters of transmittal contained in the final report from Mr Fiocco to Hon Bill Johnston at the time, who was then Minister for Commerce and Industrial Relations. In his letter, Mr Fiocco states —

The recommendations in this report have been arrived at following lengthy and extensive consultation with the Industry Advisory Group. The Industry Advisory Group comprised representatives from 19 member-based organisations, as well as 7 State Government agencies and other organisations who expressed a strong interest in contributing to the process.

Consultation with the Industry Advisory Group was undertaken over a 6-month period between March and August 2018. It involved the preparation of 4 detailed discussion papers, 4 formal workshops, 21 private meetings with individuals and groups, and consideration of 47 written submissions comprising some 300 pages in total.

The member-based organisations that have been consulted during the process represent the interests of over 175,000 businesses and individuals nationally, with an estimated 19,000 of their members here in WA. These organisations represent a broad spectrum of interests across the WA building and construction industry, including those of owners, head contractors, subcontractors, consultants, employees, legal practitioners and dispute resolution experts.

As members can tell from that, there was extensive consultation right across the industry in the formulation of the recommendations that came out of the report, which underpin some of the amendments in this bill. Mr Fiocco goes on to say —

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.

It took into consideration all the most current and up-to-date reviews taken around the country to look at this issue. In addition to Mr Fiocco, Hon Matthew Swinbourn also stated in his letter —

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 recommendations in this report have been arrived at following thoughtful deliberation and extensive consultation with key industry stakeholders, and will deliver on our government's commitment to better protect and support small businesses in the building and construction industry.

As outlined on page 24 of the Fiocco report, more than 16 per cent of all Australian businesses and around 19 per cent of Western Australian businesses are engaged in the building and construction industry. This is the highest number of individual businesses of any industry sector in Australia and is likely due to the subcontract-based nature of the

industry, resulting in a large number of small businesses and sole traders. The building and construction industry comprises three main sectors: residential, commercial and engineering construction. Typically, most of the work carried out in all sectors of the building and construction industry is done by independent subcontractors. Independent subbies engaged on smaller residential construction projects are often partnership or sole traders. However, subcontractors engaged on larger contracts are usually businesses with one or more employees.

In March 1998, the Law Reform Commission of WA released a report, titled “Project No 82: Financial Protection in the Building and Construction Industry”. It explains —

Where once much of the construction work was performed by employees of the builder, now the builder or head contractor normally carries out very little of the work with its employees ... Bricklayers, carpenters, plumbers, plasterers, electricians and other suppliers of services and materials are now usually independent subcontractors ...

...

In effect, the modern builder has ceased to be a builder in a traditional sense and has instead become a project manager or organizer in return for a percentage of the construction price.

Over time, we have seen a significant change in the approach to construction right across the country, and it is exactly that. Now a number of tier 1 contractors work nationally and internationally, and a small number of big companies take on big projects; there are then smaller tier 2 and tier 3 contractors. The tier 1 contractor is just a project manager, who employs subbies to do the work. A varying number of contractors and subcontractors are involved in a project, depending on its size. It could be anywhere; it could be in the city, in a region or in very remote locations, as we have seen. Hon Matthew Swinbourn states in his letter to the minister that in 2017 the industry accounted for \$20.3 billion in activity and directly employed 140 000 people. The industry is significant and it affects a lot of people. Unfortunately, we have also seen a bad side to the industry. There was a period not long ago when a significant number of businesses faced financial difficulty as a result of historical practices within the industry involving delays in payment and the expectation for subbies to carry invoices for an unrealistic period. Unfortunately, some of those were played out publicly in the media. I will touch on a few media articles that refer to this. An article by Daniel Emerson in *The West Australian* on 30 June 2015 headed “More unpaid subbies claims hit John Holland” states —

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.

Unfortunately, we are all aware that the issues at PCH resulted in the suicide of one of the subcontractors. Another article dated 20 March 2018 by Kim Macdonald headed “Subcontractors WA fear four more construction companies on cusp of going under” states —

The State’s building industry is in upheaval after the collapse of more than 20 construction companies in five years, owing subcontractors tens of millions of dollars.

...

Subcontractor Mike Edmonds has called on the State Government to step in urgently to help an industry in turmoil.

...

He said most of the money was more than 60 days overdue, but like all subcontractors he knew that any outstanding debt not paid by December 1 tended not to get paid until January ...

An article on 3 May 2018 by Kim Macdonald and Josh Chiat titled “Subcontractors stung as another WA builder folds” is about a home builder in Kalgoorlie, Amberley Homes. It states —

It follows a spate of other building company collapses, with SubcontractorsWA claiming 20 builders have gone under in the past two years, leaving subbies owed millions of dollars in wages.

That was in Kalgoorlie, so it just shows that these things can happen anywhere.

I have never worked as a subcontractor, but previously I was secretary of the Australian Workers’ Union when it employed 17 others. Including me, we had a workforce of about 18 people. I am sure a few members in this place can attest to the fact that employers become more than an employer to their employees: they become their friend

and they get to know their family and are involved in their family events. The biggest concern they have is to make sure they can pay their wages because they have to look after the people who work for them and their families. Every week when looking at the projected cash flow, the number one priority is to ensure there is enough money to look after the people who work for them and their families. On top of that are other costs associated with running the business and weekly invoices from creditors, so a range of different people rely on the employer and the business to be successful, to ensure that they can carry on their lives. When someone misses a payment and that cash flow does not come in, it puts a lot of pressure on the person in control of that business. When we translate that back into being a subbie on a construction job, there is a piece of work that they do and they put in a price to perform that work, which takes in all of the overheads and has a small profit margin, but that is factored in as part of the costs they have to invest from their company to make sure that they get that work and then they can make some money on that. If they do not get paid for that work in a reasonable manner, or are not paid at all, that significantly impacts on their ability to pick up more work and it significantly impacts on their ability to keep their workers as well. That then has a flow-on effect of negative outcomes for people who work for them and their families and the people they use as creditors. It is important that we put in place protections for subbies working on those projects.

[Member's time extended.]

**Mr S.J. PRICE:** I will also touch briefly on some major construction projects, many of which have project agreements. Project agreements do a number of things, one of which is to set a level playing field for any of the contractors who want to work on a project. They set the wages, the terms and conditions, the expected safety standards and everything associated with working on that project. When a subbie comes to tender on work for that project, everything is level for everyone else. They are then tendering on the supply of equipment or services and the amount of profit they want to make. They are not forced to cut people's wages. They are not forced to cut back on safety and equipment and other entitlements and benefits their workers have. There is a lot to be said for that. We have had some good examples of big projects, such as Gorgon and Wheatstone. Those projects have over 300 agreements for contractors working on those projects. It did not matter whether there were 200, 300, 400, 500 or 5 000 employees, there was an agreement to work on that project and it was known what the wages and obligations for terms and conditions were and they were bidding on the service they were going to provide. It works very well and it protects a lot of people in those areas.

It is interesting that on some of those major projects, the approach to the project agreement has been strongly supported by the Chamber of Commerce and Industry of Western Australia because it understands the benefits of ensuring that people are paid the appropriate money for doing their job and we have to make sure that people are not skimping in areas such as occupational health and safety in those workplaces.

I will quickly touch on the bill. I want to talk about the conclusion in the executive summary in the "Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry" by Mr John Fiocco. He states —

Despite a number of previous Commonwealth and State inquiries into payment practices in the Australian building and construction industry, evidence suggests that payment delay and default continues to be a problem in the industry.

This problem is referred to as 'security of payment' and is acutely felt by small-to-medium sized businesses carrying out specialist trade or subcontracting works. Although, it can affect all parties in the contractual chain, including head contractors, suppliers and the workers employed by these businesses.

The problem appears to be driven by three factors. Firstly, the hierarchical contracting arrangements ... used to deliver construction projects. Money passes down the chain from the owner at the top, through head contractors to subcontractors, sub-subcontractors and suppliers. Businesses at the bottom of the chain can face significant risk of payment delay and default. Payments may be delayed due to the action of either a direct contractual counterpart, or any party operating at a higher tier in the contractual chain which ripples downwards.

Secondly, the industry in WA has experienced a significant downturn in activity in the last 2–3 years, mainly due to reduced mining-related construction. The reduction in work has increased competition, leading to some businesses tendering at reduced, sometimes unsustainable, profit margins to 'win work'. These businesses then face an increased risk of cash-flow shortages and insolvency. In turn, the risk flows to other parties in the contracting chain, which either directly lose money owed due to the business failing, or indirectly, such as by not paying award rates or covering employee entitlements.

Thirdly, the power imbalance in the commercial relationship between head contractors and subcontractors often disadvantages subcontractors when negotiating contractual terms or leaves them unable or unwilling to enforce their rights for fear of losing future work.

That goes back to the increase in powers that we previously announced so that the Small Business Commissioner can investigate these things.

This bill is a game changer for all participants in the building and construction industry in this state and will implement reforms across four key areas. Parts 2, 3, 5 and 6 of the bill will introduce new security of payment laws in WA to ensure that people who carry out construction work are paid and disputes about payment can be resolved quickly and inexpensively through an effective process of rapid adjudication. For subcontractor statutory claims, this bill provides the shortest payment times in Australia other than in New South Wales. Subcontractors can now expect to be paid within a maximum of 25 business days, or any lesser period stipulated in the construction contract, whereas under the existing Western Australian Construction Contracts Act 2004, the maximum payment time frame is 42 calendar days or 30 business days.

Part 2 of the bill will introduce measures to improve the fairness and transparency of contracting practices within the industry. This includes introducing a broader prohibition on “paid when paid” provisions, prohibiting other types of unfair terms and requiring certain contracts to be in writing and to meet minimum standards. Importantly, part 2 also includes a novel measure to improve fairness in contracting that is not found anywhere else in Australia, and that is the voiding of unfair notice-based time bar provisions in construction contracts.

Part 4 of the bill will introduce a new mandatory retention trust scheme in WA, which is the first of its kind in Australia. This 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. The construction industry accounts for a disproportionate amount of business insolvencies that occur each year. Unfortunately, it is often those at the bottom of the supply chain who are impacted the most.

Part 7 of the bill in particular will substantially bolster the role of the Building Services Board. This is critical in monitoring and enforcing compliance with certain standards of commercial behaviour in the industry. There are increased penalties; for example, if a person obstructs an investigation by the regulator or fails to comply with a direction given by an investigator, they will now face even greater fines of up to \$25 000 per offence. New offences will be created under the bill, and individuals and companies with a history of financial failure can be temporarily or permanently banned from the registered building contractor market. This is to deal with phoenixing. We have all heard what phoenixing is and what an unconscionable act it is. Further, registered building service providers who have a building service debt, being an unpaid judgement debt or an adjudication determination, will not be able to be registered until such time as that debt has been paid.

The McGowan Labor government is the government for workers. We are introducing legislation to not only protect contractors and subcontractors, but also improve worker safety. We have increased penalties for safety breaches and just two days ago passed legislation that, for the first time in Western Australia, introduces industrial manslaughter laws. I have to agree with Hon Bill Johnston, the Minister for Industrial Relations, when he said in the consideration in detail stage that we got everything we wanted in the bill. It was ludicrous and shameful that the Liberal Party delayed and stalled this legislation and then tried to say that we both came out of it not getting what we wanted. Additionally, we have introduced and passed new laws to modernise the state industrial relations system, which benefits the hundreds of thousands of workers in WA who are covered by the state industrial relations system.

This bill addresses a number of issues well known within the building and construction industry. In bringing the bill to the house, the McGowan government is once again delivering on an election commitment. I will reiterate that the primary objective of the bill is 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 a number of members have also stated, this is a first step in addressing payment-related concerns within the building and construction industry and rebuilding confidence within the industry. The success of these improvements will determine the need for further legislative intervention within the industry. All the industry participants will be responsible for the outcome of this.

I once again commend the Minister for Commerce; Attorney General, John Quigley, and everyone who has been involved in bringing this bill to the house. I commend the bill to the house.

**MR C.J. TALLENTIRE (Thornlie — Parliamentary Secretary)** [12.35 pm]: I rise to speak on the Building and Construction Industry (Security of Payment) Bill 2020. I acknowledge the experience and wisdom in this chamber and the contributions that other members have provided. My contribution really stems from the experiences of various constituents who are indeed independent subcontractors—people who work in businesses or have small businesses, often family businesses, and who have a real passion for providing an essential service in the construction area. These people often feel that the nature of the contracting arrangements around construction projects leads to them being at the bottom of a succession of cascading stages whereby they bear a lot of the financial risk and a lot of the challenges in actually delivering on a major project. I will use an example to explain this further. One of my constituents has spoken to me about their business, which is very much in the civil construction area, providing hard

stands and asphaltting on projects. They are often doing work that is part of some of the major projects that we see around town, such as railway works, when a contractor has subcontracted them to do a particular job. It is interesting to talk to them about some of the challenges that they face in ensuring that they are paid, and having to deal with the sad fact that, on occasions, they are not paid at all.

One problem seems to occur when the overarching contractor looks at the work. The particular example that I was given was a contract for \$60 000 worth of asphaltting work. The overarching contractor says that there is a dispute because it is not happy with whether the works have met the specification. Invoices are then held over while the ambiguity over the exact specification of the works is resolved, but, in the meantime, the subcontracted firm has to pay for the plant, the equipment and the staff—it bears the costs. That sort of problem has been quite prevalent. I am very pleased that this legislation addresses how those sorts of disputes will be resolved.

I think there was a particular example at the Fremantle train station, where there was a suggestion that the compaction rate was not adequate. On another occasion—I think, again, it was to do with compaction rates—the overarching contractor said, “We won’t pay you, subcontractor. We’ll just come in and fix up this problem ourselves.” The subcontractor was quite happy to meet the specifications that had become apparent after the original signing of the contract, but it was left in the situation of having done work and not getting paid for it. That is a very serious problem for a firm that is essentially a family business trying to do jobs around town, and doing a very good job, but somehow, because of poor communication of what the necessary compaction rates were, getting squeezed out. Another problem that seems to arise is when the overarching company goes to the wall and the subcontractor is left without getting any payment at all. Those situations arise, and I am really pleased that this legislation will help guard against that.

I also acknowledge the work put in by the previous Minister for Commerce, Hon Bill Johnston, and the now minister, Hon John Quigley, my colleague in the other place Hon Matthew Swinbourn, and John Fiocco for his report titled “Final Report to the Minister for Commerce: Security of Payment Reform in the WA Building and Construction Industry 2018”.

As has been said by other members, a lot of construction work is going on around Western Australia, and it is very important that we have the right legal framework and contracting arrangements in place to protect subcontractors so that work can happen. I see different methods being tried. In my electorate, the new Thornlie community centre and bowling club will combine with the tennis club. The City of Gosnells, in a very novel fashion I think, is subcontracting to specialist subcontractors without having to go through the umbrella contractor. The City of Gosnells has a very good executive director in Mr Martyn Glover, who was able to bring in the right expertise and contractors to do the work. He has also been able to get it done very efficiently and, as it turns out, at a much better price. The old method of just giving the whole job to one big construction firm that then subcontracts to small firms turns out to be much more expensive. I will really be watching with a lot of interest how that construction project that the City of Gosnells has underway delivers a real quality asset for our community. I acknowledge that it is a project that has received funding from federal, state and local governments, and contributions from the clubs involved, to give us a really good community asset.

There is this whole issue of people cascading down risk and responsibility. A lot of people have made a lot of money by putting the risk away from them and down the chain. In fact, we could say that some people who are about to leave the White House might have made some of their money doing something along those lines. It is a way of delaying payment. That is what this legislation tackles as well—that is, the clarity about the time frames by which people will be paid. That will be very welcome news to subcontractors in my electorate and across the state. It is such an important sector that delivers so much for us. It clearly deserves to have the very best legal framework possible. That will help a lot. There is a need for payment schedules. When there is some sort of dispute, and something needs to be clarified, this legislation provides very clear provisions around when payments should be made. A respondent to a payment claim cannot just put their head in the sand. We cannot have people ignoring payment claims, because this legislation has built into it some really serious ramifications. Indeed, if a respondent fails to provide a payment schedule or make a payment within 15 business days, the claimant will be entitled to elect to refer the matter to an appropriate court for rapid adjudication to recover the amount claimed as a debt. Those provisions will be very reassuring to subcontractors and give them a much greater degree of confidence to provide the really valuable work that they do.

Another issue that has been raised with me by subcontractors is the complexity of the legal agreements they are asked to sign when they subcontract. I am told that typically a contract will have 70 pages and they need to have it signed in a very short time; otherwise, someone else will get the job. There is a need for us to visit that issue of how we make sure that contracts are clear, nothing is left to chance and all the detail is there, but are readily readable by the subcontractor so it is clear what they are getting into. A lot of subcontractors around would be signing up for jobs. They probably have a high degree of confidence and trust in the umbrella contractor that has built up over the years, but they are still being asked to sign and trust, without always having the time to go into the detail or to commission their own legal advice. In fact, they may not be inclined to want to commission legal advice because



of the costs involved. It is an issue making sure that the legal arrangements between contractor and subcontractor are as clear and simple as possible so business decisions can be conducted quickly and efficiently.

The legislation before us is very welcome. It will be very reassuring to that significant percentage of the population in my electorate who are subcontractors. They are people who work really hard and are very proud of their achievements and their contribution to all sorts of projects around the state. This will be a valuable protection to enable them to deliver on their commitments and to conduct good, successful businesses that are profitable for them and their families and that make sure that we keep building the state in the best possible fashion. I commend the bill to the house.

**MR J.R. QUIGLEY (Butler — Minister for Commerce)** [12.47 pm] — in reply: I rise to thank honourable members for their contributions to the debate on the Building and Construction Industry (Security of Payment) Bill 2020. I appreciate that all members of this house support the reforms contained in this bill. This is a very important bill that touches on the lives of some 140 000 Western Australians who earn a living in the building and construction industry in the state, and the 42 361 local businesses that operate in the industry. The McGowan government is acutely aware of the plight faced by many subcontractors and suppliers in getting paid for the work that they do, and it strongly believes that all participants in the building and construction industry should be paid properly for the work they perform on time and every time.

In the lead-up to the March 2017 election, WA Labor made a firm set of policy commitments to drive much-needed change across the industry. Most importantly, we committed to implementing long-term solutions, not simply short-term fixes. The bill delivers on this commitment. A check of our election manifesto will confirm that we promised to introduce trusts for all retention moneys held back from contractors or subcontractors in the course of construction contracts. This bill delivers on that promise to introduce those retention trusts. I will say more on that later. Because of the comments made by one or two members, I thought it appropriate to define what the election promise was: it was to introduce trusts for retention moneys. Some members, especially members of the opposition, have commented on the timing of the introduction of the Building and Construction Industry (Security of Payment) Bill 2020 in October 2020.

Debate interrupted, pursuant to standing orders.

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