

CONSTRUCTION CONTRACTS BILL 2004

Second Reading

Resumed from 24 March.

MR R.C. KUCERA (Yokine - Minister for Small Business) [12.29 pm]: I will continue the comments I made in Albany last week. I do not intend to go into the issues raised in Albany about Consolidated Constructions - enough has been canvassed on that as it is. In many ways this Bill has been designed to protect small business and the subcontractors who have become embroiled in all that has transpired since that company has moved towards winding up its affairs. Often, small businesses involved in this issue face on-site industrial action. Last week, much was said about industrial action. However, the fact is that a subcontractor who cannot pay his workers is often a catalyst for industrial action on these sites. I do not carry a candle one way or the other, other than to say that I am a firm believer that workers' rights need to be protected regardless of the industry in which they work. In many instances this Bill will remove one of the key issues that causes industrial disputation on building sites. Is it little wonder that workers will go to their various unions if they are not getting paid? It is immaterial whether they are not paid by a small subcontractor or because of the failure of a larger company. The fact is that these payments need to be secured. My advice is that this is one of the recommendations of the Cole Royal Commission into the Building and Construction Industry, and much has been said about the way that has been enacted in this State. It is pleasing to see that this legislation will cover some of the issues raised in that report.

The Bill will also help subcontractors address many of the issues that were talked about in Albany. It is interesting that the Master Builders Association, which claims to represent the interests of subcontractors, has, until now, done very little to make sure that their interests as small business people have been met. As the Minister for Small Business, my role in this affair is to make sure that all subcontractors fit absolutely into the model of small business. In many ways this Bill champions the role of small business within the building industry. The key issue for me is that this legislation will help subcontractors address those issues by improving payment practices. Comments were made about government practices. This Government was proud to bring in and insist that government departments pay subcontractors within 30 days. That practice has now started to alleviate some of the issues.

One of the Bill's key elements is the prohibition of payment provisions in contracts that slow or stop the movement of funds through the contracting chain. I am pleased that the Opposition is supporting this legislation in that regard. However, with some of the diatribe we heard in Albany last week, one wonders if it is as sincere as it claims to be.

Mr R.F. Johnson: Do you actually know what you're saying?

Mr R.C. KUCERA: I can assure the member for Hillarys that I know a darn sight more about this Bill than he knows about Rottnest Island. However, this Bill will help subcontractors address these issues by applying fair and reasonable payment terms to contracts that are not in writing.

This Bill will clarify the right to deal in unfixed materials when a party to the contract becomes insolvent. A classic example of that happened recently at Osborne Park Hospital, in which a contractor had delivered his carpets the day before they were to be laid. The following day he was unable to recover the property that he had put on the site. No-one can argue with these kinds of provisions being placed in this legislation - even the member for Hillarys would not argue with that kind of thing because it is sensible and balanced legislation.

This Bill will provide an effective and rapid adjudication process for payment of disputes. Again, we are taking this process out of the vein of being discussed and disputed on the building site and providing a proper adjudication process that allows these things to occur.

The Bill will also cover contracts for the provision of related professional services. Through recent issues that were discussed in Albany, I am aware of one surveying firm that, at the very start of one of the major contracts that were talked about, undertook surveying services and is still waiting for payment for that. This legislation will make sure that within 28 days the first payments are paid or at the very least discussed and negotiated.

Mr R.F. Johnson interjected.

Mr R.C. KUCERA: I will not take the kinds of interjections the member for Hillarys is talking about because this is about small business and making sure that small business can survive in what is an extraordinarily competitive industry. This Bill will prevent contractors from making payment contingent on being first paid by another party. Again, a classic example of that has occurred in recent times under a separate contract. These "pay if paid" contracts are notorious, and the member for Kingsley was very succinct in the way she outlined the

problems with that kind of contractual arrangement. Again, that is discussed in the Bill. At the end of the day this legislation will create certainty for small business. Small business in such a competitive industry as the building industry absolutely needs that.

The most important thing to be gained from this legislation is the capacity to improve the bargaining power of small business in the building and construction industry generally by reducing the leverage that the big contractors and the bigger end of industry have. Improving the bargaining power of small businesses will alleviate much of the industrial dispute that is now talked about and is a key issue. In the building industry, much is made right across Australia about industrial dispute, and the key issue is that this Bill will assist with that. It will assist very much in making sure that small subcontractors can pay the people who work for them; it is as simple as that. From 28 days onwards certainty is brought back into the process; the certainty that is currently not there will be taken care of.

The Bill does not unduly restrict the normal commercial operations of the industry. The parties to a construction contract remain free to bargain between themselves as long as they put the payment and the provisions in writing and everything is clear and follows the line set out by this legislation; that is, the contract does not include the prohibited terms contained within this legislation. The Bill provides for fair and effective terms to be implied in a contract when there is no written provision covering the basic payment provisions or the right to be paid, how to deal with variations, how to claim payment, how to dispute it or the rate of interest on late payments. It also provides implied terms to deal with the contentious issues of ownership of unfixed goods and materials when a contractor becomes insolvent - I have already provided an example of that.

The Bill also deals with the status of the retention of moneys. Many small contractors have moved from a wages or a salaries position to become small business people in their own right. In many instances they are to be applauded for their courage to simply enter the small business arena, particularly in an industry that is as competitive as this.

As Minister for Small Business, I welcome this piece of legislation. Much can be said about the passage of this legislation and the length of time it has taken to get to this stage, but that is immaterial. The Bill is now before the House and it is being debated.

Mr R.F. Johnson interjected.

Mr R.C. KUCERA: The member for Hillarys throws in the usual rubbish that he does in these kinds of debates, and, as usual, it is uninformed rubbish. This Bill provides for parties to have clear, contractual payment rights and obligations so that misunderstandings and disputes are minimised.

All these issues come together in this Bill to protect small business. Liberal Party members, particularly the member for Hillarys, are always on their feet in defence of the big end of town or their mates at the top end of the terrace when it comes to this legislation. I am very proud to be the Minister for Small Business in a Government that champions the role of small business and the small subcontractor who goes into the building industry against that end of town. I make no apologies for the fact that we champion the role of the small subcontractor, which has been needed in this town for many years. I applaud the actions of the minister in bringing this legislation before the House and I commend the Bill to the House.

MR R.N. SWEETMAN (Ningaloo) [12.39 pm]: I will make a few comments on this legislation. I guess I must be quite dismissive of some of the comments made by the Minister for Small Business in his contribution to the debate. In reality, this is a minor piece of legislation, but it may have some benefit. The real problems within the construction industry relate to larger issues than simply terms of payment issues. I refer in particular to insolvency legislation. I know that is federal legislation, but the point needs to be made more clearly than has been made in the debate so far. It was not until the concluding paragraph of the minister's second reading speech that she got to the nub of most of the problems relating to payment issues in the construction industry. The final paragraph states that insolvency can be addressed only by commonwealth legislation. The minister is correct when she goes on to say that participants in the industry still have to look after their own commercial interests. Certainly that is a fact, but there is a real problem with the provisions of insolvency law in this country. Even under this Bill, if a person goes to a registered adjudicator, who finds in that person's favour that he has not been paid within the 50 days and that the fault clearly lies with the contractor for whom that person has done the work, and the adjudicator demands that the person be paid, nothing will prevent that payment being declared a preferential payment under the insolvency Act. The money can still be withdrawn. This Bill does not give any comfort to a person who does business with a contractor who is sailing close to the wind, because he must then hold on to the money for the next six months hoping it will not be called back by an administrator or receiver.

Mr R.C. Kucera: I do not disagree with you on that, but it does give people a clear indication that a problem is coming. That is the difference. Many small contractors do not even know a problem is coming. At least with

this Bill, they can put up their hands in 28 days and say, "I'm not getting paid. Why am I not getting paid?" There is an opportunity then to start to highlight the problem.

Mr R.N. SWEETMAN: That is right.

Ms A.J. MacTiernan: Although it is true that they can - I cannot remember the phrase that they use now - go back six months from the date of an act of bankruptcy -

Mr R.N. SWEETMAN: It is deemed to be a preferential payment.

Ms A.J. MacTiernan: My recollection of bankruptcy law is that when the payment for goods and services has been made on a bona fide basis, the doctrine of relation back does not apply when the money has been paid for goods and services on a bona fide basis. Certainly there are still problems, but I do not think they are problems of that nature.

Mr R.F. Johnson: If it is paid against a specific invoice, what you are saying is correct. However, in the past if it was just a payment on account, it has been deemed a preferential payment.

Ms A.J. MacTiernan: However, you are talking about a specific invoice. If an earthmover puts in his invoice for his services, he would then get a payment. My recollection - I can dig out the Bankruptcy Act - is that the doctrine of relation back will not apply if the payment that has been made is a bona fide payment and is not intended to defeat the proper distribution.

Mr R.N. SWEETMAN: I appreciate what the minister is saying, but the reality is that the administrator can challenge that payment and then the responsibility shifts back to the person who received the payment to defend his right to keep the money.

Ms A.J. MacTiernan: As a general matter, that is not how it applies. For example, in the case of Consolidated Constructions there has been no suggestion that those subbies who have been paid to date will have their moneys brought back into the pot.

Mr R.N. SWEETMAN: It just depends on what the appointed administrator and, ultimately, the liquidator of the business decide to do. If he thinks that there will be a shortfall in funds such that he will not get his percentage for winding up the company, or if the secured creditors want to push the issue, it may well be that action is taken against subbies and suppliers who have received money in the preceding six months. It is open to challenge. Whether they are successful is for a court to determine. That is the problem. That is the sword of Damocles that is hanging over the heads of a lot of contractors and suppliers.

Mr R.C. Kucera: As you have quite rightly pointed out, that is a federal issue that needs to be sorted out by the federal Government. The vast majority of small contractors are not always in that position. Much of this legislation has been aimed at the bottom end - people who are building a shed or a house. Those payments are there and it is securing those sorts of things. Obviously it will flow right through. The federal Government needs to do something about the other issues. We do not disagree with what you are saying.

Mr R.N. SWEETMAN: In the past two or three decades federal Governments have just tinkered at the edges.

Mr R.C. Kucera: That is why I made the comment about the Cole royal commission. This is one of the recommendations. You cannot have the penny and the bun. If it is going to address the recommendations, it also should pick up the federal end. I am sorry; I am taking up your time.

Mr R.N. SWEETMAN: Certainly that needs closer examination. Under our powers as a State, I think we must clarify the situation for our law enforcement agencies as well, particularly the police. The police now are too quick to say that it is a civil matter in the event that prima facie there is a case of fraud, theft or deceptive conduct that is in any way related to business, even though it is blatant theft. Clear-cut examples have been given to me of people who have handed over substantial amounts of money for the supply of goods and who have gone to pick up the goods only to find that the goods have gone and the only person there is the administrator because the company has gone into voluntary administration. The company had been putting the squeeze on all the people for whom it had been working to get its money and, in many cases, prepayments. The company, having received the money, had not delivered the goods and immediately went into insolvency and incurred fewer debts as a consequence of shaking the tree and getting forward payments from people who were good enough to pay it money but who could not then take delivery of their goods. The police simply said that it was a civil matter. In one case, a person had ordered \$100 000 worth of goods, had organised finance and had paid \$30 000 to the finance company. The finance company then wrote a cheque for \$100 000 and paid the company. The person on whose behalf the finance company had done the deal then did not have goods to collect. His lawyer then had to do battle with the administrator just prior to the company being plunged into liquidation and being wound up completely and was able to win title to a partly finished item of equipment; that is all he got. He was insured for that scenario, but the insurance company said that the goods never existed so

the insurance was not valid. The insurance company said that it was absolved of any liability and did not have to pay out.

Mr R.C. Kucera: That is a much broader issue. Putting on an old hat that I used to wear, even if it is proved to be a false pretence, title still passes on the property. That is a much broader issue than we are talking about here.

Mr R.N. SWEETMAN: I know. People are interpreting the transfer of property to suit their own arguments. At the end of the day, the person who can least afford the problem and who has handed over money in most instances ends up carrying the can for all these problems. I think the police could do a lot more. Even if they did not see the issue through to conclusion, they could at least make investigations; it would certainly put the pressure on administrators to be a little more circumspect -

Mr R.C. Kucera: I do not disagree, but I think you are missing my point. I know that the minister beside me is a lawyer. If it is a false pretence, the title still passes. In most instances, the title is passed to the person who has committed the false pretence. Even if the police were able to seize the property, it would still become the property of the person to whom the title was passed. We could debate that all day.

Mr R.N. SWEETMAN: It does not make it right. It is hard to draft legislation that is sufficiently comprehensive to capture all those people. On the issue of the appointment of the registered adjudicator, I wonder how quickly this will work in the event that there are 28-day provisions in the contract for payment. In many cases, a lot of smaller subcontractors insist on fortnightly payments that are paid directly into their accounts on a given day based on the hours or amount in their remittance advice and usually lodged the day before. I am certain that this legislation will not in any way annul those arrangements or preclude subbies from being able to formalise those contracts with their employer in the first instance. That is taken as a given. I refer to the 28-day standard when no other arrangement is entered into between the contractor and the subcontractor. If one extended that to 30 days, another account could be sent stating that if payment were not made in the next couple of days, an adjudicator would be sought to be appointed to look at the matter. How long would that take? It might be just as quick to go to the Small Claims Tribunal, if the matter fits that category, or hire a lawyer. The proposal under the Bill may be a cheaper exercise, but I do not know whether it will get the payment any quicker than under the current scenario.

Mr R.C. Kucera: You should tease that out in consideration in detail.

Mr R.N. SWEETMAN: Yes. The other issue is the Romalpa provisions under which title of goods do not transfer to the new owner unless money is paid. However, one must define "delivered". Delivered does not necessarily mean goods freighted to site or to the lay-down area at the site under the control of the contractor. If the goods are affixed to the site, that is delivered.

Ms A.J. MacTiernan: I've a particular interest in Romalpa clauses. I did a dissertation on them; they're as interesting as stamp duty.

Mr R.N. SWEETMAN: It depends which side a person is on. As a lawyer, the minister is on the happy side.

Ms A.J. MacTiernan: The tricky bit with Romalpa clauses is determining at what point goods remain unaltered goods. Once a product is used and transformed in any way, the Romalpa clause can no longer apply. For example, if you're supplying leather, and have a Romalpa clause in the contract, you can retain title to that leather. Once you start to cut up the leather, the courts have deemed that the Romalpa clause ceases to apply. It is a difficult situation with machinery, for example. If supplying an entire engine, and you have not transformed that engine but have put it onto a chassis, is that sufficient to transform it in the way you cut up leather to make a handbag? It is the issue of transformation rather than delivery that is the difficulty with Romalpa clauses. It is like with brickies. Once bricks have been put into a building, your Romalpa clause -

Mr R.N. SWEETMAN: It is delivered.

Ms A.J. MacTiernan: It's transformed into something else. It does not help you in that situation.

Mr R.N. SWEETMAN: The administrator argued that the contractor has possession of a site. He had a piece of paper to that effect, and the site was clearly defined. We had the Alf Fernihough and Sons case in Exmouth in which many contractors provided flashing, iron roof decking and window sashes that were in the lay-down area at the site under the control of the contractor. The material was classified as delivered. It was not fixed to the building and the windows had not been fixed, but the supplier of those goods had absolutely no right to go through the building -

Ms A.J. MacTiernan: Are you saying they had a Romalpa clause in their contracts?

Mr R.N. SWEETMAN: A couple did. If they did, it did not advantage them. They could not regain possession of the goods.

Ms A.J. MacTiernan: It is possible that a properly constructed Romalpa clause would have done that. One must constantly refine the clause. As case law peels away at the edges, people have responded with more sophisticated forms of Romalpa clauses. It may be that one can do it with a properly crafted clause. The absolute limit of effectiveness of a Romalpa clause - mind you, it's a few years since I did this stuff - is the point at which the goods are arguably incorporated into some other structure.

Mr R.N. SWEETMAN: I know this is only remotely linked to the legislation. Aspects require further thought. This legislation on its own will not do everything for contractors what we anticipated and hoped it would do for them. It simply represents another way of putting the squeeze on a delinquent contractor who plays the margins and runs accounts to 60 or 90 days rather than settling in the required 30 days. That provides his cash flow through a construction job; namely, using the subbies' money. This legislation might frighten them to pay 30 days earlier than would normally be the case, although that might still be 60 days after being invoiced for the work. Having interest apportioned is perhaps as effective as anything else in the legislation. Many companies say that if goods are not paid for in 30 days, interest will apply, but that can be challenged. Some legislative force may provide some comfort for contractors and suppliers that they can apportion interest in any subsequent accounts beyond 30 days. It is as significant a win as anything else in this measure.

Having referred earlier to administration and insolvency, I express some concern about the way the Australian Securities and Investments Commission has discharged its responsibilities on a range of issues over a long time. It seems that some issues are worthy of its consideration, and others are not. I understand that things are going on in the commercial and industrial world, and it cannot inquire into and oversee everything that takes place. Nevertheless, ASIC is negligent on occasions in discharging its functions. Some such issues have been highlighted over the past two or three years. Smaller issues are a problem as well. ASIC maintains a web site, but it is not sufficiently comprehensive. One should be able to go to the ASIC web site and find information on serial offenders; namely, people who misuse company structures and such things to deliberately scam money off people. It is happening all over Australia on a regular basis. These serial offenders are going seemingly unchallenged - although that is too strong a word and too harsh a criticism of ASIC. The Australian Securities and Investments Commission could be more diligent in pursuing such people. If people do not have the goods on them, more information could be provided on the ASIC site as a guide to potential contractors and suppliers to companies with which known offenders are involved. That would provide more information to individuals and companies when determining whether to do business with certain people.

I support the legislation, although I wish it had gone further. I understand some of the constraints placed on the Government by the restriction of powers as the federal Government deals with substantial issues relating to insolvency and such matters. If this Bill leads to quicker payment within the 50 days, and its provisions enable interest to be apportioned to overdue accounts, it will be a modest win for many suppliers and contractors in this State.

MR J.L. BRADSHAW (Murray-Wellington) [12.58 pm]: I support the legislation. It has come to my attention over the years that contractors and subcontractors have been out of pocket because companies have failed, leaving people with no access to their money. A \$2 company is valued at \$2. Where does one then go? People tend to hide behind \$2 companies. A number of people have been duded by \$2 companies, yet the people running those companies maintain a nice house and all the bits and pieces that go with it. They take their management fees etc out of the system, yet when the company fails, they walk away and start another \$2 company.

I refer here to finance brokers and the banking fraternity of the 1980s who took all the money. When the finance brokers matters arose, the same people popped up again losing money for people who invested in the financial broking firms. There needs to be more protection for those people. I know of a case in Pinjarra in which a contractor who did work on the road to the Ravenswood Sanctuary subdivision is owed around \$400 000. That work was done two or three years ago. He was recently told by the liquidator of the company for which he did the work that he has to fight for that payment in court because the little bit that will be left over after the mortgagee, the Commonwealth Bank, has got its money is being challenged by some of the people in the company who wanted the work done. They have put in their bills. About \$1.7 million is left, but there are claims for several million dollars. The subcontractor's claim is for \$400 000. He has been told he must go to court. He has already spent thousands of dollars - he has received one bill for \$12 000 and another for a couple of thousand dollars - trying to get his money back. The situation is sending him around the bend. I take the brunt of some of his anger and frustration. I am prepared to put up with that because I feel sorry for this person under the circumstances. His wife recently left him, but, fortunately, she has come back again. That is the sort of thing that happens to people who are owed a lot of money. He is threatening to rip up the road he built. I have told him to not do it because he would only get into more trouble. At one stage he put a caveat on the land, and the liquidator said that if he lifted the caveat, he would get his money. He lifted the caveat and then got told to go to court and fight for his money. That could take two years. Can members imagine how much money it

will cost him? I do not think there will be any money left for him even if he did fight it in court. Obviously the longer this goes on, the more money the liquidators will get out of the pile. They will certainly get the first bite.

Things must be put in place. It is sad that this legislation has taken so long, but at least there will now be some attempt to give protection to those people. I would like to know whether people who do not pay within 28 days will receive some penalty or whether somebody will step in. It seems that by the time the motions are in play, six months to a year will have passed. During the Albany Parliament, when I was talking about the Finance Brokers Control Amendment Bill - I am not sure how I got onto the subject - I discussed the Australian Securities and Investments Commission. I wrote to it early in the piece about the company trading while insolvent. ASIC's response was that the liquidators must tell it whether people have been trading while insolvent. That concerns me because the liquidators might not be diligent enough to pass on that information or they might be friendly with the company that has gone under and owes money. It certainly appears in the case of the company in Pinjarra that has gone belly-up that this person will not get any money. In my opinion, the company was, on the face of it, trading while insolvent. The problems continue for a long time. It is very frustrating for the people who are owed money that they are told to fight for it in the courts or wait, and in the meantime the money disappears through other avenues.

Mr R.C. Kucera: A number of provisions under divisions 6 to 9 of the schedule relate directly to what you are talking about. There are interest payments, the capacity to repossess goods - a range of issues.

Mr J.L. BRADSHAW: The subcontractor put down a road. It is pretty hard to take it back.

Mr R.C. Kucera: The bloke at Osborne Park the other day would have taken his carpet back if he had had half a chance!

Mr J.L. BRADSHAW: This guy wants to rip up the road.

Mr R.C. Kucera: There are provisions for interest payments.

Mr J.L. BRADSHAW: If there is no money -

Mr R.C. Kucera: That is an issue.

Mr J.L. BRADSHAW: Ten per cent of nothing is nothing. That is the trouble in this case. I do not think there will be any money on which to claim interest. In any case, this occurred prior to the passage of this legislation, so the subcontractor will not be affected by it in a positive way. However, we are at least moving in the right direction of trying to protect those people. I still think it will not totally protect people, because if people do not pay on the thirtieth day, the payment date will be extended to 60 or 90 days, then all of a sudden - bang! - the company will have gone. In those cases, there is generally not enough money in the system to pay out many of the subcontractors. However, the system will be better than it is now, and I hope this legislation has a very beneficial effect on some of the people who have missed out in the past.

MS A.J. MacTIERNAN (Armadale - Minister for Planning and Infrastructure) [1.04 pm]: I thank all the members who have contributed to this debate. It is a very important and, of course, timely issue for us to address. Some very interesting and valuable contributions were made. I regret that the member for Hillarys cannot be in the Chamber to hear my response.

Mr J.L. Bradshaw: He should not be too far away.

Ms A.J. MacTIERNAN: Go and get him, because I am desperate to have him in the Chamber. I miss him badly when he is not here.

Mr J.L. Bradshaw: I will see whether I can find him.

Ms A.J. MacTIERNAN: I thank the member. While we are waiting for the member to return, I will go through some of the comments of other members. The contribution of the member for Kingsley was particularly interesting. Her line was that it is all the unions' fault; that subcontractors do not get paid because of the trade union movement. That is a pretty extraordinary claim, even by someone from the BGC-sponsored faction of the Liberal Party. Indeed, the very reason we have a union movement stems from the sort of conduct we have seen from many contractors, particularly those very close to the member for Kingsley. There has been very serious abuse of subcontractors by a number of contractors. Contractors have strung payments out, in many instances for up to 120 days, to advance their position.

I am particularly pleased to have the opportunity to represent the Minister for Housing and Works in introducing this legislation because during my first four to six years in Parliament I did a lot of work with subcontractors. Day after day in the Parliament I put the arguments showing how subcontractors were in many instances being dealt with poorly by the current legal framework and some of the players. Subcontractors have effectively become the de facto financiers for the building industry. It is their credit on which building companies run their business. The companies extend payment to subcontractors out to 60, 90 and, in the case of many of the well-

known players, 120 days to provide a cash-flow benefit. The building industry is a highly competitive industry that operates in a completely unfair environment in that it is financed by building subcontractors. Until we put in controls like this, we will not change it. That is not because all civil construction companies or builders are bad people; however, if someone operating in a very highly competitive environment, such as the building industry, tries to go it alone and play the white knight, Joan of Arc or Mother Teresa, he will not last long in the industry. That is because some operators do these things. As we know, in this State there are some operators who are prepared to establish their limbo bar very low, which makes it hard for everyone else. This should not just be seen as a builder versus subcontractor issue. Having higher standards in place will benefit the whole industry because companies which want to operate in a responsible, reasonable way and which want to look after the interests of their subcontractors will not find themselves at the mercy of competitive forces. They will not be improperly undermined by other operators.

I thought the contribution of the member for Kingsley was very poor. Whatever may have been the relationship between the Construction, Forestry, Mining and Energy Union and Consolidated Constructions Pty Ltd, as a general rule the issue affecting subcontractors is not the fault of the trade union movement; indeed, the trade union movement was established to prevent this sort of thing. One of the areas in which we see subcontractors most routinely suffer is the housing construction industry, which is non-unionised. In many other areas there is some protection because there is a degree of unionism. The member for Kingsley used this not as an opportunity to address serious concerns but as an opportunity to continue her role as the leader of the BGC faction of the Liberal Party.

Mr R.C. Kucera: If I may give a classic example, last month the building union discovered asbestos at Mt Lawley High School. The site was shut down to remove it. The contractors then blamed the union for losing days of work. What was the alternative - to put people's health at risk? That is a nonsense. There are times when there must be a balance in the industry.

Ms A.J. MacTIERNAN: Yes.

Mr R.N. Sweetman: You did not use these words, but you said words to the effect that now an accreditation system is in place and contractors are appointed on that basis, so they will not go in under the incredible pressure that they would have normally been subjected to in a fiercely competitive environment, and because they are accredited, they will work at a reasonable price. Are you assuming that subcontractors and suppliers will win the work at slightly better margins for themselves?

Ms A.J. MacTIERNAN: Yes. I am saying that once this legislative regime is in place, it will not be possible to sail as close to the wind as has been the case in the past.

Mr R.N. Sweetman: It still will not stop the big contractors. Let me tell you the game that they play. When they win the work they have the security of knowing that they have won the job. They then routinely go back through all the people who supplied prices to them during the tender process. They normally try to squeeze 10 per cent off the price, and it is unusual if they do not get five per cent off the price.

Ms A.J. MacTIERNAN: This legislation will assist in reducing the contractors' capacity to extend payment. I believe the basic nub of the problem is that the construction industry is financed on the back of subcontractors, which is what the delay of payments is all about. Bank borrowings finance the activities of the manufacturing sector and service industries. Much of the business activity in the civil construction industry is effectively funded by the subcontractor.

Mr R.N. Sweetman: Including the profit. If the contractors do not pay subcontractors and suppliers for 120 days, the subcontractors and suppliers have bankrolled the contractor through the job, so the contractor gets two bites of the cherry.

Ms A.J. MacTIERNAN: The principle here will make it much harder for contractors to extend out the payments in that way. It will claw back the degree to which the civil construction industry relies on being funded by subcontractors. It may well be that ultimately we will see some increase in prices; who knows? Presumably some subcontractors are factoring into their prices, particularly now that it is a bit of a seller's market, the knowledge that, notwithstanding the terms of the contract, the practical reality is that they will probably wait 60, 90 or 120 days, so we will see that clawback. The same principle operated when we put in place road train accreditation. It put in place a framework that makes it easier for the good guys to continue to do good work without being so savagely undercut by those who are prepared to have no regard for vehicle maintenance standards or fatigue management principles. None of these things will ever be a perfect answer, but it is about redressing the balance. This Bill redresses the balance towards subcontractors.

The member for Kingsley was completely off the point and used the occasion to union bash; in fact, she demonstrated the reasons that the trade union movement emerged in the first instance. The member for Perth needs to be thanked for the very good work that he has done in chairing the committee and bringing this

proposition to the Parliament. The member for Merredin said that we should not have let contracts to Consolidated Constructions. I am not sure on what basis he said that, but no doubt we will have an interesting discussion on that tonight. All I can say is that having looked at it, I am confident that the Main Roads and Public Transport Authority processes were reasonable and that they acted reasonably under the circumstances. There is no reason to believe that they should have done anything other than award these contracts to Consolidated Constructions on the basis of the information that was available at the time.

I thank the Minister for Small Business for his support. He has obviously talked to many small business operators and contractors, and understands how significant this issue is for them. No doubt they will appreciate this legislation going through the Parliament. I keep saying that the member for Ningaloo should not be a member of the current Parliament because he has the wrong approach - he is so reasonable and non-confrontational. He always addresses issues in a most reasonable and rational fashion.

Mr R.N. Sweetman: Can I put you on my CV for the seat of South Perth?

Ms A.J. MacTIERNAN: Absolutely. I think as members we all have to play politics here, but the member always distinguishes himself by a real focus on the actual issues of concern.

Mr R.C. Kucera: I think he would be a great candidate for South Perth.

Ms A.J. MacTIERNAN: That is right. It would certainly be a change of direction in the representation of that seat. The member quite rightly raised some very serious issues relating to limitations and federal bankruptcy legislation. That does not mean that we should not do what we can under this legislation. However, it recognises that it is not failsafe - nothing ever is - and that there are serious issues with the bankruptcy legislation. I am not sure that I agree with the member, for the reasons we discussed by way of interchange, that the doctrine of relating back, particularly in the first six months, unfairly prejudices subcontractors. I have not got the Bankruptcy Act with me, but because there are such caveats as it being a bona fide payment, it is not subject to the clawback. I believe that most of the bona fide transactions are covered. One would very rarely find an administrator trying to get his paws on that. There are cases in which it happens. That is usually when someone's mate has been given a large payment. A bloke knows that he is going under but says that Rob or whoever is his best mate and that he must make sure that he gets a payment. The result is that he gets the whole of his \$200 000 or whatever and no-one else gets paid. If there is a suggestion that there has been a conspiracy of some type to defeat the normal distribution, the administrator will act. However, it occurs only under those circumstances. We would not want to say to the average subcontractors on any of these contracts that they are at risk under this doctrine, because it is only under exceptional circumstances that they would do that.

From what I have seen, I suspect that one of the bigger issues is the question of the impact of the secured creditor versus the unsecured creditor and the ease with which banks can have fixed and floating charges that gobble up the entire available funds. When we have sat down to work through these issues we have had great difficulty in finding an easy solution. We must recognise that the availability of credit is absolutely crucial to capital formation and economic activity in Western Australia. If we were to analyse what is going wrong in Third World countries, we would not find that it is a result of a lack of entrepreneurial spirit or even a lack of basic capital, but a lack of structures to allow them to leverage off that capital. That is what is really stopping Third World countries from engaging in substantial economic formation. If we tried to claw back the capacity of banks to protect their assets, we would run the risk of undermining our whole economic base. It is always good to bash banks. A situation involving a bank versus a plumber is easy, because everyone likes the plumber and not the bank. However, one must analyse the consequences of changing priorities by removing the power of banks to get fixed and floating charges. My view is that this would substantially undermine the amount of capital formation and economic activity that occurs in this country. The negative consequences would far exceed the mischief we are trying to deal with. It is much better to try to deal with the mischief in this way.

Mr R.N. Sweetman: Do you think we compound the problem? With government contracts, the contractor must first demonstrate that he has the financial capacity to do the work. That requires the approval of his bank; it requires endorsement by the bank of that tenderer. For government work, why can we not circumvent that by saying that we will give all subbies and suppliers on a contract secured creditor status because we know, under the schedule of quantities or whatever, that the contractors can do the job for that price? We are the client.

Ms A.J. MacTIERNAN: We are moving in this direction with this legislation. We must always be careful of the long-term consequences, because quite often these things have unintended consequences. We are moving to put in place a modest regime, but one that we believe will have real practical effect. We will have to look at what we have done and the way in which we might take another step forward. These things often have long-term consequences. We should face the fact that we are talking about capitalism. It is all about ventures, risks and entrepreneurialism. The private sector will not be 100 per cent risk free. The only way to have a situation that is 100 per cent risk free is to put in place something like a privatisation contract, under which so-called private sector entrepreneurs get cost-plus contracts. We will never eliminate risk in a capitalist system. If we did not

have a capitalist system, we would not have the dynamic economic environment that we have today. One is the flip side of the other.

The member also raised the interesting issue of Romalpa clauses, which represent efforts by suppliers of goods to change the balance of power over time. A Romalpa clause is essentially one that allows suppliers to retain ownership of assets supplied until payment has been made. I have not looked at these clauses for 10 years because I have been out of commercial law for that period. The courts have placed a limit on the effectiveness of Romalpa clauses so that they do not apply once a good has been transformed. There has been an awful lot of debate about what constitutes transformation. Cutting a piece of leather into the shape of a handbag is transformation. Whether inserting a motor into the body of a vehicle is transformation has not been determined. These are the sorts of issues that have occupied many fine, black-letter lawyers over the years. The clauses are constantly evolving in response to cases. The member spoke about the point at which a product has been delivered and the essence of delivery. I presume that this will depend to some extent on how the clause has been defined. One often finds documents in which Romalpa clauses have not been kept up-to-date with the latest developments in the law. It is always a moving feast. They are certainly not a fail-safe mechanism. However, they represent an attempt to re-balance the power between secured and unsecured creditors.

Mr R.N. Sweetman: One of the points I made was about when Alf Fernihough Building Contractor went into liquidation on a large Homeswest contract in Exmouth. I think I made the point that neither the people who had Romalpa on goods they had delivered nor those who did not were advantaged. In the end, that was never tested in court because it was resolved by the department sitting down with all the contractors. It never had to be tested.

Ms A.J. MacTIERNAN: It is by testing these things that we find out which ones work and which do not and where the courts are prepared to draw the line. Suffice to say it is a mechanism that has limitations but has been designed to change that balance. It often used to annoy building suppliers who had put in their product but had not been paid for it, because they could not take the product back. In a general sense, if a product has not been used and incorporated into a building, and if a supplier has a properly structured Romalpa clause, he will be able to get his stuff back because title has not changed and it therefore does not become part of the goods that are provided. Some other provisions effectively make some payments trust payments. A range of measures in this legislation will go some way towards addressing that balance of power between secured and unsecured creditors. The member for Murray-Wellington made some comments and supported the legislation. He cited some instances in his electorate in which this had been a problem.

I note with great disappointment that my very great friend the member for Hillarys has not reappeared in the Chamber for the debate on this important Bill. I understood that he had carriage of this legislation for the Opposition. It is a pity that the member for Hillarys is not here because he is labouring under a fantasy that is extraordinary even given some of the mindless optimism that we often see from him. The member for Hillarys spent most of his speech centred on a claim that he had done all the work for this legislation during that great golden age of housing and works when he was minister. That industry is still stunned by the glory of his performance. He stated that he had done all the work and that the legislation was ready to go immediately after the election. That was a blatant misleading of Parliament. The reality is that he was minister for 18 months. He did not take any action. The first action was taken in November 2000, after the Court Government had been in power for at least seven and a half years. That was three months before the election. The previous Government set up a task force chaired by Chris Baker. All it had done by the time the election was called in 2001 was to contact the key stakeholders and start to get information. The task force had not even developed a set of recommendations. It had not obtained cabinet approval. The previous Government had not drafted any legislation. Effectively, the then government member had sat for over seven and a half years on this matter, no doubt because their operations are bankrolled by so many players in the building industry. Not until the eleventh hour did they take action. That contrasts with the Government, which, within a space of three years, has gone through an entire consultation process, created a series of recommendations, obtained cabinet approval, drafted legislation and introduced it into the Parliament. The relative interests of our parties and our capacity to provide for subcontractors speaks for itself.

I thank members for their contributions, and I make a special mention of the member for Perth for his excellent work in chairing the task force. I hope we see a speedy passage of this legislation through the Parliament.

Question put and passed.

Bill read a second time.