BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) BILL 2021

Second Reading

Resumed from an earlier stage of the sitting.

HON DR STEVE THOMAS (South West — Leader of the Opposition) [5.07 pm]: I am sure members are very keen to get back to the Building and Construction Industry (Security of Payment) Bill 2021 because it is very important.

Hon Matthew Swinbourn interjected.

Hon Dr STEVE THOMAS: I will come back to the parliamentary secretary in a bit because he has made a significant contribution in this area. I am looking forward to that.

During the debate, the opposition was trying to define the size of the problem that this legislation is trying to fix; that is, the enormity of the issue of security of payment not just in the construction industry but also across the entire economy. It is an enormous issue that impacts on every business. We have largely outlined to date the principles of why that occurs. Let us move on, I guess, to why is this bill coming in now and then what the functions of the bill will be, and why we should accept effectively what the government is attempting to do here. I suspect that the urgency of this bill, particularly in the other place, relates to the collapse of the Pindan construction company, because the bill was introduced very rapidly following that particular exercise. I noted that in the contributions in the other place—the place that shall not be named—there was a lot of government intent to try to lay the blame on this house for the equivalent bill not passing during the fortieth Parliament.

Hon Alannah MacTiernan interjected.

Hon Dr STEVE THOMAS: It seems to be the constant refrain of government members: anything they were unable to deliver was because they loaded up the Legislative Council with 40-odd bills in the last few weeks of the sitting year and they could not get their act together sufficiently to get the legislation in place so everything is going to be blamed on us. I see the minister had her puppy farming bill back in the lower house this morning.

Hon Tjorn Sibma: They let the dogs out again.

Hon Dr STEVE THOMAS: That is right; the government let the dogs out in the lower house this morning. Members will be very happy to know the government is rolling these bills back out. Now we will see every piece of legislation that did not even get debated in the Legislative Council that was apparently held up by the terrible Legislative Council, that terrible group. It is astounding how many times they are trying to lay the blame —

Several members interjected.

The ACTING PRESIDENT: I am battling to hear, and I am relatively good at hearing, so thank you.

Hon Dr STEVE THOMAS: Obviously, everybody in the Labor Party, particularly in the other chamber, wants to blame the Legislative Council for disrupting its legislative agenda. I suspect for every new bill they will come back with, "Those rotten upper house people didn't do it." At the end of last year, for those members who were here and remember, we had a list of priority bills from the government that it was determined to get through before the proroguing of Parliament. Parliament was prorogued in a very early manner, one that probably has not been fully explained as yet and might have as much to do with various reports that were to be presented as it did with the timely proroguing of Parliament to move into an election process. I think one day we should have a good look at why Parliament was prorogued on that early date. I suspect it might be not just the estimates process whereby ministers could ask members to put questions on notice in the full knowledge that any question put on notice would go beyond the time in which an answer is required. That was a nice, cunning, little plan. I do not think that was the real reason for the very early proroguing. I think the government was a bit concerned that some reports would come down that might not portray the government in the way in which it wanted to be portrayed.

Nevertheless, we ultimately had a list of legislation that this government wanted to get through. I am sure members would remember that a letter went out to all the party leaders. Bear in mind we had a few more parties in the fortieth Parliament than we do in the forty-first. We have had a slimming down of the crossbench and the number of parties. A letter went to all the parties and it said this is the list of legislation that we think we need to get through before the end of the year and the proroguing of Parliament. Can anybody guess whether the Building and Construction Industry (Security of Payment) Bill was on the list? Was it on the list, minister? Was that on the list? No?

Hon Alannah MacTiernan: Is that a rhetorical question?

Hon Dr STEVE THOMAS: No, it is a very straight-to-the-point question.

Hon Alannah MacTiernan interjected.

Hon Dr STEVE THOMAS: Was it on the list? On the list of priority legislation, the Building and Construction Industry (Security of Payment) Bill was not on the list. It was not on the list.

Hon Tjorn Sibma: What was on the list?

Hon Dr STEVE THOMAS: The list of 14 or 15 bills included the Criminal Law (Unlawful Consorting) Bill 2020. The Appropriation (Recurrent 2020–21) Bill was still on the list. Interestingly, the Dog Amendment (Stop Puppy Farming) Bill was even on the list, but not the highly urgent Building and Construction Industry (Security of Payment) Bill. It did not make it list. The Swan Valley Planning Bill made the list. Hon Tjorn Sibma did a fine job on the Swan Valley Planning Bill.

Hon Tjorn Sibma: I did everything I could to rush them through to help them out and this is the thanks we get. It is just appalling. No gratitude.

Hon Dr STEVE THOMAS: The Swan Valley Planning Bill went through, did it not?

Hon Alannah MacTiernan: Member, that was in the context of you refusing to sit any extra time—refusing.

Hon Dr STEVE THOMAS: That is not true either. It is not true.

Several members interjected.

The ACTING PRESIDENT: Order, members! Thank you.

Hon Dr STEVE THOMAS: Of course, I guess the problem when we open the door to interjections is that there is no truth value applied to them necessarily. We need to be cautious to make sure that we are getting accurate statements out there and, I have to say, that certainly was not one. No, this bill was not on the list of urgently required legislation and I suspect it probably still would not be on the list of urgently required legislation because remember that in the place that shall not be named it was made an urgent bill and debated immediately, and the reason for that has to be, surely, the collapse of the Pindan company and the impact on subcontractors in particular.

Hon Alannah MacTiernan: Oh, my god! What an amazing forensic mind you have! Gosh, that was clever.

Hon Dr STEVE THOMAS: Was that a yes? That is an acknowledgement, surely. Surely the minister has just acknowledged that that is exactly what is going on. Thank you very much, minister! It is a bit like when the President made a ruling before about keeping questions short. I think answers from this government should be restricted to "yes", "no", "guilty" or "not guilty". I think we could probably get most of our answers from using just those four responses. We have had an acknowledgement that this bill has been made urgent because —

Hon Alannah MacTiernan interjected.

Hon Dr STEVE THOMAS: We will go back to the port and various other acknowledgements this minister makes because if we open up the door, we never know what might come out. In this case, she made the acknowledgement that the Pindan collapse was the driving force for the bill's urgency before the house today.

Hon Alannah MacTiernan interjected.

Hon Dr STEVE THOMAS: Absolutely right. It was a non-urgent bill last year, but it is an urgent bill today because of the Pindan collapse, as acknowledged by the government. That is good. It is a worthy bill. It is a worthy cause. Obviously, it was not urgent last year but it is urgent this year. It is probably politically urgent at the moment. I think this has been acknowledged by most people, but the funniest thing is that the now acknowledged driving force for this legislation to be rushed into Parliament, the Pindan collapse, would not be remedied to a great degree by the bill before the house. This bill before the house is a worthy bill in its own right and it is due proper consideration by the highly appropriate house of review, but it is not a solution to the issues around the Pindan collapse and the protection of those subcontractors and was never going to be that level of protection, which is why, as I said at the beginning of my contribution, I thought it was very bold for the explanatory memorandum to say that —

> The purpose of the Bill is to provide better payment protections to contractors working in WA's building and construction industry to ensure they get paid on time, every time.

This bill would not provide that all those subcontractors in the Pindan experience get paid. That is not to say that we think the bill is a bad bill. We are supporting the progress of bill and, as we always were during the fortieth Parliament, we are happy to progress it in a fairly rapid manner because we are here to help. However, it needs to be pointed out that the claims made are a little bit, if we can say, misleading, but at least optimistic. I will explain in a little bit more detail why this bill does not provide the level of protection that it would seem to want to deliver.

This bill is based on the work of a couple of significant reports over the last few years. That is not to say there have not been previous reports. This issue has been looked at for as long as I have been around looking at economics. The most recent review at a state level was done by Associate Professor John Fiocco in his report *Final report to the Minister for Commerce: Security of payment reform in the WA building and construction industry*. That report was published two and a half years ago and it is a significant and weighty document. Interestingly, for that report

he relied very heavily on a report done, effectively, almost a year earlier for the commonwealth government—John Murray, AM's *Review of security of payment laws: Building trust and harmony.*

We need to remember that, in effect, this massive problem will be fixed only by a combination of state and federal legislation. Although we have had a bit of fun talking across the chamber about the intent of the bill, the reality is that not one level of jurisdiction is capable of fixing this issue to the point that people will think it is fixed following the Pindan collapse. That is not actually the case.

This bill will do a number of interesting things and the opposition supports its intent and actions. The majority of the bill focuses on security of payments and speeding up payments so that they reach subcontractors, in particular, and main contractors. These are good provisions. Parts 2, 3, 5 and 6 of the bill—the bulk of the bill—deal with those provisions. For the first time that I am aware, Western Australia will be instigating a statutory right for people to receive payments and to make claims every month, particularly people seeking those payments. Enshrining that into legislation is a good idea because, otherwise, people will simply be having an argument based around a contract. Enshrining that into legislation is supported by not only the opposition, but also most of the industry, which has been consulted.

There will be some exclusions. Obviously, there will be a threshold of $500 000 for home owners and contractors. For any contract under that threshold, there will be alternative views in terms of home owners being able to go to the Building Commissioner to seek redress when there is an issue with the construction of a home. I have to say that I have been around long enough to know that there will be complaints about that process as well. No process is perfect, but it is a form of review of home construction, and it is worth sending constituents that way if they get that opportunity.

One thing I will ask when we get to the Committee of the Whole is about exclusions that will apply to loan agreements and financial institutions. There are exclusions in that area. The minister might like to go into some detail about the exclusions that form part of loan agreements in her reply. Those exclusions, I think, need a little more fleshing out.

Where we will get to is the capacity for claimants to have claims processed within a reasonable time. This is part of the good work of the bill. A claimant will be able to put forward a claim and there will now be a legislative process through which that claim will be assessed. Currently, of course, someone has to effectively go cap in hand to the person who has the money, and if they are unsatisfied with the result, they are left with legal avenues to get that money. Putting something in the middle of that to allow that to be assessed faster and in a less litigious manner is a good outcome.

A time frame will be put in place in the contract so that claims from a head contractor to a principal will need to be paid within 20 days. For subcontractors further down the chain, the claim will need to be paid within 25 days. Of course, the claim can be appealed. If a person purchases the contracted outcome and they believe that it has not been delivered, an appeals process will be put in place. Effectively, there is a restrictive way of going through that appeal, and that will then be adjudicated. Interestingly, the adjudication will not be up for appeal, but the adjudication in itself will be a simple decision as to whether a contractor has done the job and, therefore, should be paid. If there is a dispute about the extent to which the job has been done, and the level of achievement and whether it has been done to the satisfaction of all parties, the matter could still be taken to court if it is worth it. That will be a reasonably productive system. Those parts of the bill are good components.

Part 4 of the bill refers to retention trusts. It is this part that resulted in most debate in the other place. I think honourable members need to consider the two different options—that is, the retention trust and the alternative, which is a cascading statutory trust. The difference between the two is relatively significant. In the lower house the focus of the debate was on whether a cascading statutory trust could be implemented in the bill. The difference is based on whether it is a cascading trust or what is known as privity of contract applies. Basically, privity of contract means that it is restricted to the parties named in the contract. If there is a contract between one entity, be it a person or a legal entity, and a second person, privity of contract means that the legal actions and legal responsibilities are restricted to those areas. If a trust is based on the privity of contract doctrine, which is effectively what is being looked at in the retention trust, it is entirely based on contract law. If we move away from that system—the privity system into a cascading statutory trust—we would develop a system in which there is not just a contract between the purchaser and head contractor, for example, that might be established in a privity trust, but it would cascade down all the levels. The financial arrangement between the two listed entities in a trust could cascade down to subcontractors who might be working, and, in fact, it can go all the way down to the lowest subcontractor, the final subcontractor providing that final service. It is absolutely the case that if we wanted to protect everybody in the economic chain in a serious construction contract, we would have to look at cascading statutory trusts to protect all those people as we go down the path. In fact, both the Murray report and the Fiocco report looked at this in some detail.

I would like to take a moment to acknowledge Hon Matthew Swinbourn who had a significant input into and was a part of the Fiocco investigation. I think that the work he did was very good and I hope that at some point he will make a contribution to this debate. I think his work in this area is very good and I commend him for it.

The Murray report—remember this is the federal report—said this —

> … the most effective way that payments can be secured from misuse and the risk of head contractor insolvency is by implementing a cascading statutory trust.

That is directly out of the Murray report. That is true and we need to recognise the truth in that statement—that it is the most effective way. If our sole goal is to protect the supply chain all the way down and ensure security of payments, then this form of cascading statutory trust scheme is the way of doing it. In fact, the Fiocco report states —

> I agree with the conclusion drawn by Mr Murray … that a cascading trust approach should be preferred over a privity of trust approach.

The people who looked into this agreed that a cascading trust approach was the most efficient way of protecting subcontractors. I have to agree; I think it is the most efficient approach. The problem is that it is not necessarily the most efficient way of running the construction industry. Obviously, the focus of these reports, as with all reports, is very fixed on the question before them. If the question before them is, "What is the most appropriate method to protect subcontractors and to ensure that payment goes through?" it would absolutely be the case. Both the Murray report and Fiocco report agree that that is the most effective way of doing it, so much so that Mr Fiocco made two recommendations in his report. Recommendation 39 states —

> That the legislation that introduces the retention trust and statutory deemed trust schemes provides that debt appropriation orders not be allowed in respect of money owed under construction contracts.

More importantly, recommendation 40 states —

> That the legislation that introduces the statutory deemed trust scheme utilises the cascading trust approach such that any party that holds funds in trust as the trustee of a statutory deemed trust is deemed to hold those funds for all parties engaged below it on that project, not just for its direct subcontractors.

That is, effectively, the definition of a cascading statutory trust. That absolutely gives the maximum amount of protection. Why is the government simply not going with the recommendations of those two significant and weighty reports and including cascading statutory trusts in the legislation before the house? The first reason is probably that it would require a massive change to the legislation. I understand—when the minister gives her reply, she might want to comment on this—that the government looked into this issue in some detail. The issue we have with this, honourable members, is that it would become an immensely difficult and onerous financial task to deliver, in particular, for the head contractor or, even more, the organisational person purchasing the entire construction. If the person who is trying to fund a multimillion-dollar to a billion-dollar exercise is being forced to hand over into trust accounts a significant part of the cost, it can significantly impact on their business. I think we need to acknowledge that although the cascading statutory trusts are the best way to protect subcontractors, they are not necessarily the only way and not conducive to the continuation of business, construction and expansion, which this state relies upon. Everybody thinks we run off being a mining state, and in terms of exports, we do, but I think that the construction industry in this state employs more workers than the mining industry does. It is a massive industry and critically important. We cannot gut the industry and stem the flow of the industry to save every subcontractor, unfortunately, as much as I wish there were legislation that would do precisely that. I wish that were an outcome I could deliver and I wish I had the magic amendment that would do precisely that without impacting on the industry and gazumping government. I do not think that at this point that exists.

Hon Alannah MacTiernan: Does the National Party agree with that?

Hon Dr STEVE THOMAS: The Nationals WA agreed at the end of last year that it was not a piece of urgent legislation. They agreed that cascading statutory trusts are the most effective way to support subcontractors and I said exactly the same thing. I suspect the Nationals would say—as much as I would like to have the perfect amendment to provide that protection, I do not have it—I do not know whether the Nationals have it. We might see. The Nationals WA absolutely have an intent to protect subcontractors. We do not necessarily have the mechanism that we would like to deliver that intent. It would be great to see that we could do that. The issue is partly about cash flow.

Let us talk more specifically about the construction component because we have talked about the general economics around this. Companies in the construction industry have absolutely not operated in a way that we would consider either moral or ethical, as there is in every industry, in every society and probably in every Parliament, although I am sure everybody's ethics here are a cut above, but some companies do not operate that way and, as we said earlier, some companies make their money by effectively cutting the throat of their subcontractors. That has always been the case. I am more aware of this in the eastern states where, although some companies do remarkably well, we would not want to do business with them. On occasions, Hon Kyle McGinn has raised in this place the issue of companies contracting very low and using variations with which to make their profit. I agree that that has happened and I suspect it will continue to happen. It will probably be not impossible but very difficult to get rid of it completely. In fact, some of the stuff in this Legislation Bill 2021 will try to make things more difficult for some of those companies. That is absolutely the case.

In terms of providing absolute protection. The proposal under part 4 of the bill is not to introduce cascading statutory trusts, but instead to introduce retention trusts. The difference primarily is that a retention trust will be between two parties in a contract, and the retention trust will be decided by the contract, so we will still be stuck at the end of this process with an issue of contract law. Probably at the end of the day, the lawyers will do the best out of it. It is based on an issue of contract law. The retention trust will be an agreed amount of money set aside in a trust between two parties—moneys that the subcontractor or one party to the agreement absolutely needs. My thought is that we look at the price of purchases that company will be stuck with as part of taking up that contract.

During the briefing, I asked for as much modelling as possible that had been done on both the retention trust proposals and on cascading statutory trusts. Unfortunately, I did not get a lot out. There was not much in the way of modelling; in fact, I got no modelling to look at so it was very difficult to see. It is one of the reasons it is hard for me to promote cascading statutory trusts to the level I might do otherwise, because there is no model that we can look at to see how effective they might be. I understand there is no model of it in Australian jurisdictions. We might look overseas to see where some attempts have been made to go down this path, but at this stage, in this jurisdiction we are stuck with what we have, which is this retention trust model.

It will be a trust between two legal entities. I was advised in the briefing of, generally speaking, where it works in the eastern states. Bear in mind that this is a replication of eastern states legislation; good government is often about stealing the best that other people have. We should all probably be a bit shameless about that; I do not have an issue with that. The modelling suggests we are looking at between five and 10 per cent of a contract price that may well end up in a retention trust. That in itself is a good thing. It is designed to ring fence it away from the capacity I described earlier—in my personal business experience—whereby unsecured creditors might lose out to secured creditors in a bankruptcy proposal or even in administration, depending on the jurisdiction or legislation. These are a good thing but a retention trust in the Pindan example would generally, at best, be between Pindan and a head contractor and would apply to somewhere between five to 10 per cent of each project. Five per cent of each project is not an insignificant amount of money. With a $100 million project there might be a five per cent tax in the profit margin. It is also probably the profit margin of a lot of the subcontractors in place, so it is a pretty competitive market place on occasions. Five to 10 per cent does not solve the issue of every subcontractor, which is why I raised earlier the comment in the explanatory memorandum that everybody would be paid and paid very quickly. When a company goes belly up and into administration, the bill before the house will not resolve that issue.

Hon Alannah MacTiernan: To be honest, I think you are conflating two issues here. Paid and paid quickly relates to the progress payments, not to the retention money.

Hon Dr STEVE THOMAS: Yes.

Hon Alannah MacTiernan: I think it is disingenuous to say, "How can it be paid and paid quickly", when it does not apply to the retention moneys that apply to the progress payments.

Hon Dr STEVE THOMAS: I take on board what the minister is saying, but I do not think she is right. Parts 2, 3, 5 and 6 in particular are the areas that streamline those payment processes when things are generally going well. That deals reasonably well, but not perfectly, with those businesses that are simply delaying the payment. Part 4 of the bill deals more with the disaster stakes and will ring fence payments that might otherwise be picked up by collapse and bankruptcy. What I am saying is still accurate. I understand what the minister is saying. We dealt before with parts 2, 3, 5 and 6, which are some of the good parts of the bill in terms of paying well. However, when a disaster occurs, the best that will be saved, on average, will be five to 10 per cent of the head contract price. That will not see every subcontractor paid. I am not suggesting that I have a magic solution to find a way to do that. Unfortunately, in business, there are always risks, which is why I took some time at the beginning of my speech to talk in detail about the acceptance of risk. Whether it is small business or big business, a part of that process is acceptance of risk. Obviously, businesses can do their best to mitigate that risk—they can insure and do all of those things—but there is risk in the process. I am not suggesting that the government has got it wrong in the bill before the house, but the bill should not be presented as a panacea for all the ills of business when the ultimate occurs. It is not going to be the case that everybody will be protected in all circumstances by this bill. I have said many times that I do not think the bill should be opposed simply on the basis that it will not do everything that some people would like it to do. I would love to have the magic answer to this, but I do not. That will be an issue. I agree with the minister that parts 2 and 3, in particular, which introduce a legislative requirement to pay those bills and bring in this administration process with adjudicators and all those things, are particularly good.

As we look further, the bill also strengthens some of the other parts of the legislation. I like the additional powers that the board will have in insolvency events and particularly phoenixing events, which we mentioned before. Phoenixing is when somebody starts a business but, when that business collapses, they hide whatever assets they can out of the business, start up again, repaint their signs, put it in the name of their spouse, child or cousin three times removed and suddenly they are doing exactly the same job with the same equipment, but nobody else has been paid the significant amounts they are owed. Phoenixing has been around for as long as I have been in

business. The bill before the house will not completely stop that from happening. It will give power to the board to look into those events in a more fixed way, which is absolutely a good thing. That will help the reputation of the construction industry.

I will not take up a huge amount of time, but I go back briefly to the proposals for a retention trust or a cascading trust. The problem with the cascading statutory trust model is that the amount of money that will be required to be put in trust, ultimately to be able to fund effectively the cost of all subcontractors all through a major project, becomes an issue. That is why it would be great to do something with this bill, but I suspect that when the government responds, it will tell us that it has spoken to industry and industry has concerns around those areas. Putting aside five to 10 per cent in a retention trust that cannot be lost if a company goes under is a partial effort, and it is good. If an overall purchaser had to cover all of the potential costs, even on a monthly basis to mitigate the risk—under the legislation, subcontractors can apply for progress payments monthly; they are statutory payments, so they have to be acknowledged under law—they will have to have a huge amount of their finance picked up and put into a trust. It is a trust over which neither the purchaser nor their financial institutions will have control. When we talked about risk in business previously, that is the risk in this model: a significant amount of money will be tied up in an area they have no control over. That will impact both large and small businesses.

It is easy to say that this is all about the big developers in the leafy western suburbs or in the northern suburbs with Hon Tjorn Sibma, but the development industry is a quagmire. There are lots of carcasses of people who tried to do small to mid-range developments and discovered that the money they thought they were going to make out of those developments was not what they got at the end of the day. There are lots of aspirational millionaires and billionaires out there who are now going to work nine to five, because it is not that easy to put these developments together in the longer term. It will be harder for both big and small businesses if they have to effectively stump up a significant level of the total project cost into a trust over which they have no control. If they are a larger business, they are more likely to be doing multiple projects at once. This is one of the positives and the negatives of the industry. Larger businesses are much more likely to be using development money and profit money from one project to prop up a second project. I am sure members have probably heard horror stories, and I am sure that Hon Kyle McGinn will have a few stories about companies that have said to contractors they have not paid, "Hang on a minute, we're working on three projects and we're about to receive a project payment from this one, so don't make any noise and claim your payment now because we'll get it out of this and shuffle it across to there."

Hon Kyle McGinn: Then they go bust!

Hon Dr STEVE THOMAS: They do not always, which is the issue. But even a good company with a reasonable risk-management profile may still have to do that. There are companies out there that have gone bust and sent subcontractors broke. There are companies out there that have successfully traded their way through so that all of their subcontractors got paid. If we pass a piece of legislation that completely prevents that cross-subsidy process, we might find we put companies out of business and people out of work who were not necessarily going to go that way.

Hon Kyle McGinn: Don't you think it will make them work within their means, rather than extending themselves out to where they're possibly going under at the expense of smaller subcontractors rather than the major client?

Hon Dr STEVE THOMAS: It will do that to some degree, but it will also stymie some things. With all the best intentions, I think the member and I are agreeing that we will support the bill, but if we go to that extent, it may affect good companies that use those things in a positive way but find themselves in a situation not of their making. Being a member for the north west region, the member understands that a company will have good intentions to finish a contract, make a sale and have cashflow going through, but a cyclone can come along and delay everything by six to 12 months because suddenly it is the wet season and there is not much they can do.

Hon Kyle McGinn: And the contractor misses out!

Hon Dr STEVE THOMAS: Everybody misses out in that process, but if we make the rules too stringent, we will make it impossible for companies to trade their way out of that problem. In some circumstances, companies have failed to do so and the damage has been intense. If we can come up with a piece of legislation that identifies everybody who is trying to do the right thing and encourages them, and identifies everybody who is trying to do the wrong thing, that would be the perfect piece of legislation. I would love to do that. But I do not know how they would write that piece of legislation. We have to work on the basis that the majority of people are attempting to do the right thing. I agree that there are plenty of people who have not been doing the right thing and there are companies to be careful about getting into a contract with. There are companies that only work the margins. There are companies that put loss-making contracts in place and then use variations. There are companies that go into a project knowing that the only way they will make a profit is if they take money off subcontractors. All of that behaviour exists. I do not think that is the majority of the building industry. If that were the majority of companies in the building industry, the reputation of Western Australians being cowboys would be far worse than it is currently. I do not think that is the case. In fact, I think there are more proponents of that over east than in Western Australia, but they do exist, and I would love to remove them from the system.

Hon Kyle McGinn: They come over here as well.

Hon Dr STEVE THOMAS: Yes, some of them do. We probably know the same names. Even though we have parliamentary privilege, I am not going to test the waters tonight.

It would be great to have a perfect solution that asks a construction company to put in 80 to 85 per cent of the contract cost. But I do not know many construction companies that genuinely get a 10 per cent–plus hurdle rate, which is the rate of return out of these contracts. In the good old days, in the boom days when "Bondy" was running the show, they might have got significantly higher than that, but those days are no longer with us. If 80 per cent could be put aside and held in a statutory trust, it still would not meet the total costs for the contract, so it would not protect everybody. But it would make it almost impossible for industry to develop and go forward. I suspect industry in Western Australia would prefer a lower risk jurisdiction. There is the risk that if the laws are too onerous, it will drive activity out of Western Australia. We need to make sure that the laws we put in place are reasonable. To be honest, I think the laws proposed by the government are reasonable. I am keen for the government to acknowledge that the laws will not cover everything in every contract. It is absolutely the case that companies will still go broke and subcontractors will still miss out and go broke as well under the legislation before us tonight, if it is passed, but it will make improvements. It will make some things better. I think that the retention trust is a good move. They are generally accepted by industry. I am interested to know whether the modelling got any higher. A simple way to do that might be to try to put in retention trusts that are significantly higher. But I think business would struggle if it goes much higher.

Another thing to remember, of course, is that the retention trust amount is set by contract. If I sign a contract with Hon Tjorn Sibma, we have to agree on a retention trust. If we cannot agree on the level of the retention trust, one of us does not sign the contract. It is not a set amount; it is a contracted amount. The advantage of that is that if you are a free marketeer, like I am, then you allow the market to set the level. My right-wing politics gets to come out a bit—I like the thought that the market sets the level. The legislation will have to be tested and observed. Ultimately, we have to be careful that too many contracts are not set at a level of 0.1 per cent. It has to be observed over time to make sure it works.

Hon Alannah MacTiernan: There's a risk obviously that if you do that at the other end, you do not have the retention money.

Hon Dr STEVE THOMAS: That is right.

Hon Alannah MacTiernan: There's a natural balance built into it.

Hon Dr STEVE THOMAS: That is right. I think there is a lot of argy-bargy that goes on before a level is found. The experiment in the eastern states shows that that level sits somewhere between five and 10 per cent, which is probably a reasonable figure.

I took a fair while getting here, but this is very important, if fairly complex, legislation. If it included the ability to protect everybody, it would be 10 times as long, immensely unwieldy and highly expensive. As much as I wish we had that solution to put in place, I do not have it. Failing to have something better to offer, I think it is important to note that the opposition will support the bill before the house today.

Hon Alannah MacTiernan: Woo hoo!

Hon Dr STEVE THOMAS: We are here to help, minister. We do not oppose too many of the minister's bills. You never know, we might be able to make it better along the way!

HON TJORN SIBMA (North Metropolitan) [5.54 pm]: I hope to be somewhat of an encore to Hon Dr Steve Thomas' performance by reiterating: Yes, we are here to help. We are here to support the bill.

I want to deploy my time usefully and concentrate on issues that I think warrant further interrogation. That is most appropriately done through the Committee of the Whole deliberative process but I will, where I can, forecast some areas of concern. I know there was a lot of hullabaloo previously when we were talking about the genesis and timeliness of this legislation, who was to blame for what and the like. I do not necessarily intend to go over that ground, but I make the observation that if the government were ever to come under any criticism at all for the timeliness of this legislation, helpfully, it had the ready-made excuse of the COVID-19 pandemic last year, when probably 70 to 80 per cent of this chamber's time was spent dealing with COVID bills that were declared urgent. The government does not necessarily need to reach further into the bottom and blame the last opposition, because that trick will run out soon—we are where we are. It is not without coincidence that this bill was read in immediately consequent to the collapse of Pindan Group. If that was the prompt that the government needed to get on and move for this reform, so be it. But one of the important questions we need to ask ourselves when we test the detail of this bill is whether it would have averted what has happened to the subcontractors tied up in the Pindan collapse. That is certainly the imputation made in the minister's second reading speech, which states —

> Unfortunately, the current reality is that businesses, particularly small businesses, have to battle with the constant fear of not getting paid on time or at all, and without access to the most effective rights and protections under the law. If these businesses do not get paid, often their workers and suppliers do not get paid. Unfortunately, recent events involving the external administration of the Pindan Group and the uncertainty now facing its subcontractors, provide a clear indication of why reforms are needed.

That is a fine claim to make in justification for this bill and its timing, but that is a test the government has set itself and we will probably need to explore the dynamics of that particular situation against the remedy it brings forward today. The minister's second reading speech is an interesting precis. The narrative of the second reading speech is quite unlike most second reading speeches I have read. It has a very clear and compelling narrative force behind it. I think that probably comes at some risk. I am concerned whether certain claims or insinuations or assumptions made in the course of delivering what was a tub-thumping speech are actually delivered in the content of the bill. I suspect, on the basis of previous performances, that there will be some variation between the minister's media statement, the second reading speech, claims made to the media outside Parliament and the substance of the explanatory memorandum and the bill itself. But we will embark on this process of discovery together, hopefully in a cooperative spirit.

I refer to the second reading speech because the minister quite rightly identifies that the bill is the result of an incredible breadth and depth of consultation across all sectors of the industry. To give the government some credit, it has spent a lot of time trying to get it right. Yes, I am looking at you, Hon Matthew Swinbourn, because I know you have been integral to this process.

Hon Dr Steve Thomas: A fine fellow.

Hon TJORN SIBMA: Absolutely, but let us not praise him too early in the process. It just reflects that certain claims were made or concepts perhaps entered into at the embarcation point on behalf of the government and certain views have been dispensed with. Obviously, prior to the 2017 election campaign there was quite a lot of commentary that the only way we can fix the problems in contracting and subcontracting in the construction industry would be through the introduction of cascading trusts. I was prepared to entertain that as a concept. I note—I think it is probably for good reason—that that particular mechanism is not advocated for in this bill; instead, the government has chosen to implement a retention trust. The only question I would ask in respect of that is: on what fundamental modelling is it premised?

Hon Dr Steve Thomas has quite rightly identified that there does not seem to be any sort of prescriptive quantum of funds set aside, but if we inform ourselves of industry practices in other Australian jurisdictions, the portion of the retention trust might be between five to 10 per cent of the overall value of the project. I would dearly love to know and I will put this question in the appropriate place when we are in committee whether any modelling work of any kind has actually been undertaken by the department itself or in consultation with many of the stakeholders with whom it has been engaged these last four or five years or so, because that is not a non-material question.

I think we should try to appreciate what the actual financial and other outcomes of the imposition of this retention trust mechanism might mean for companies at different levels of scale who have different levels of capitalisation. I am talking about how much capacity does the big end of town, for want of a better description, have to absorb the inclusion—I will not say the imposition—of a retention trust as compared with what we might customarily describe as a husband-and-wife or family-run enterprise that might be dealing in projects of under $10 million or so. I think that is a material difference. It is also interesting that I would suspect that bigger, better funded, more practised enterprises will have the capacity to actually drive down the quantum of that retention trust as a portion of the contract, because why would they obligate themselves to the sterilisation of capital beyond their need?

Another question I will ask at the appropriate juncture—I do this only to be helpful and give an indication of my line of inquiry—is how this would apply to government financing of these major projects, and whether a five to 10 per cent potential market premium would be added onto the cost profile. It may well be a separate system, but I will ask about the implications on government-directed and government-funded major projects.

That is just to provide an indication, because at the moment—this is absolutely not intended as a pun, bad or otherwise—we are taking this on trust as something that is a definably good thing to do that will not compromise the market and will not lead to unintended consequences. I think it is absolutely manageable, but I would like to get a better sense of clarity about how this retention trust might be applied.

I suppose that leads to the very dense document that we are contemplating. Much of it seems to me to be tied up in the generation of future regulations, of which I do not have any particular insight. I also refer to a code of practice that I think is referred to at clause 97 in this bill. This is probably unrelated to matters that have proper discussion elsewhere, but I am interested in how that particular code is going to be generated, or whether this is a revision of an existing code. That is a question asked out of genuine ignorance but also interest. I picked it up through a scant reading of the explanatory memorandum and I seek further clarification.

Hon Alannah MacTiernan: Sorry, member, I was just getting some clarification on your other points. Can you run that past me again?

Hon TJORN SIBMA: Sorry. I am just seeking clarification on clause 97 of this bill. It is a code of practice for nominating authorities, and I think we might be dwelling on that issue of nominating authorities and the whole process around that. I quote from the explanatory memorandum —

> Clause 97 allows regulations to prescribe a code of practice for authorised nominating authorities …

I do not need to read the rest. What is the anticipated workflow on the generation or redrafting of the regulations that give effect to that intent, and with whom will the government negotiate and consult when it is attempting to make the actual application of the intent of this bill applicable?

When the time comes, I will seek some further insight on the process of rapid adjudication, I presume of outstanding claims, because I note that reference is made to that I think somewhere else in this second reading speech. I will get to this at the appropriate juncture, and I might retract this later on, but for me, at least, there was a question on the enforceability of these rapid adjudications. I just want to understand the legal framework under which that process of rapid adjudication will actually operate, because there is a pithy line in here. I did not just note the narrative breezy style of this for no good purpose. The line there about "pay now–argue later" is probably a quote that summarises the government's intent with this bill, but it would seem to me to sort of load the dice, in a way, which might compromise the application of natural justice and due process as the government attempts to move us to a regime under which rapid adjudications can be sought and are delivered.

Hon Alannah MacTiernan: But they are adjudications, so both sides have the opportunity to put their case, so I suppose this is an early decision, but a decision that is then capable of being reviewed, either through court processes or through seeking a review of the arbitration itself. But it is deemed to get things moving. I understand the point you're making, but if you look at the detail of the structure, there is nothing that predisposes the resolution on behalf of one side rather than the other.

Hon TJORN SIBMA: I take the minister at her word, and I found that to be a very constructive interjection. Perhaps it will prompt me at the appropriate juncture, which I think will be clauses 35 through 39 of the bill, to possibly seek further clarification on that point.

I suppose I will also have questions at the appropriate time about the overall intention of transition between the current legislative framework to the framework that is envisioned by this bill; what potential transition arrangements will apply as applicable to the operative parts of the bill under consideration here; and what indeed may be the resource implication on the Department of Mines, Industry Regulation and Safety in actually making this legislation operative. Then, as an adjunct to that, what education process the government intends to run, I suppose, for the builders who are the contractors, head contractors and subcontractors themselves. Can we expect a campaign of communications to emanate out of this? As useful areas of inquiry, minister, that is where I intend to go when we get to those points. I will make a similar point to the one made by Hon Dr Steve Thomas in his contribution. I am prompted to do this partly because of, on the one hand, a legitimate political imperative that the government now seems to be imposing on itself to get this bill through and, on the other hand, the tone that I am not necessarily alarmed by but alert to in the minister's second reading speech. I would genuinely like to see some substantiation of the problems. We know that there are problems in the industry, and we have seen that with the example of the Pindan Group, but there seems to be, whether intended or unintended, a reflection on the entire industry that it is composed of rogues and thieves and the like. I do not think that that is particularly fair or accurate. I bring this to the attention of the chamber because at the end of the Minister for Commerce's second reading speech, she states —

> A person who wants to be a registered building contractor needs to play by the rules, make sure they run their business properly, and pay the subcontractors who work for them, or else they might rightly be required to show cause to the Building Services Board as to why they should be allowed to be a registered player in the industry.

One cannot necessarily argue with the intent behind that, but it does not go without observation that a hectoring, condescending tone is embedded in it, which I do not necessarily think is particularly helpful. That is why I am probably more alert to whether the assumptions made or the answers provided about the technical application of this bill actually hold water. Yes, we come from a particular political culture and practice in which members opposite are not participants, and they are probably very pleased about that at this point. But as helpful advice to the government, things like this are, in my eyes, and probably the eyes of my colleagues, red flags. I would go so far as to say that in large part they are unnecessary and unseemly. I recommend to the government that if it wants to move forward with its legislative agenda, it should not necessarily poke people in the eyes in this particular manner. I know that the minister representing the minister in this place would never do such a thing as this and was not the author of this second reading speech. Perhaps in another iteration she was, but with time and experience comes wisdom and proportion. I look forward to the representative minister answering my very interesting questions with that

spirit in mind. I want to reiterate this point: this comment indicates that we are out to get them—that every person engaged in private enterprise is out to rip off somebody. I do not necessarily think that that is a particularly fair or accurate assessment and it indicates a level of, dare I say it, class bias and apprehension that I thought that we as a body politic —

Several members interjected.

Hon TJORN SIBMA: I know that members opposite are very different. I know that they are probably among the most militant members here and they wear that as a badge of pride. However, there are people who exist outside the Australian Labor Party branch structure and outside the union movement. They are legitimate law-abiding citizens. I do not subscribe to the very pessimistic and juvenile view of the world that just because they do not man an ALP booth or show up diligently to caucus, they are somehow morally suspect. I know that none of the members opposite do either, but I am just saying that ministers should give themselves the very best opportunity to put their best foot forward when they explain the bills that they bring to this house and their reasons for doing so. In the conduct of that activity, they should not take the low road and make up things about this opposition, previous or present, stymieing their agenda. They have absolute control at the moment. The Premier is the most powerful in the country and the luckiest Treasurer in the western world, and the government controls both houses of Parliament. There is absolutely nothing beyond the government's reach. I was expecting some sort of transition or quantum leap in approach. I am very disappointed by the government's first effort, but I hope it improves its game and I look forward to intellectual debate at the appropriate juncture.

HON NEIL THOMSON (Mining and Pastoral) [6.15 pm]: It is with some pleasure that I get to have my first conversation during the debate on the Building and Construction Industry (Security of Payment) Bill 2021. I ask that those opposite give me some leave as I find my feet in this place, but maybe that will last for only a minute or two. That is okay with me, by the way.

Several members interjected.

The PRESIDENT: Order! I welcome your first contribution not necessarily inviting interjections.

Hon NEIL THOMSON: That is true. I am very interested in this bill that is before the house. It made me reflect a little on my time when I worked in the Department of Treasury in the 1990s and 2000s and also on the discipline applied, as I mentioned in my inaugural speech, in the area of regulatory reform, particularly as it applies to the discipline of providing regulatory impact statements. I do not know about the process of bills in government at the moment. My knowledge of the process of bills and the work that is undertaken is from a decade or so ago, but I know that those processes, which I mentioned in my inaugural speech, around competition reforms, and then later, even in the Rudd era, when I represented the state in the business regulation and competition working group of the Council of Australian Governments, were quite disciplined around the provision and analysis of the impact of bills such as this as they came into a legislature.

I commend the intent of the bill because we all know of the terrible impact on a small business when it does not get paid. Certainly, in the Mining and Pastoral Region, I have heard anecdotes of terrible cases in which people have lost tens of thousands of dollars. They are just small business people who have invested money in a development, only to find that the developer has gone broke and they cannot get their money back. We have heard horror stories about contractors in the dead of night having to break into the sites that they have worked on to get their tools back and some of the equipment that they have paid for with no prospect of getting any of their money back. We all know of those examples.

Hon Alannah MacTiernan: Can I just warn you here? Be careful because Hon Tjorn Sibma is warning us against class war and reflecting adversely on businesspeople. I am seeking to help you take a consistent line here.

Hon NEIL THOMSON: I will keep going. The point is that we all know the cases of hardworking people, small businesses, that we in the Liberal Party support strongly and who make up the bulk of our membership, especially in the regions, and play such a critical role in those regional towns; the minister would be surprised!

We all know the important role they play. The last thing we want is for those people not to be paid.

I have looked at the explanatory memorandum and the intent of the bill. The intent is a good one. There are at least two points that really stand out. They are that funding must be set aside to meet the requirement for payment, and that there is a schedule for payment; and the capacity for the Building Services Board to take action against providers and intervene if there is a prospect that payment will not be made.

If we look at it in simple terms, those things seem fine, and I will support them, because they absolutely are required. If we look at the provisions of the bill, we have had some comments from Hon Tjorn Sibma about modelling the impact of this on business. We cannot really see that information. It may be that some public servant in the Department of Finance or the commerce unit in the Department of Mines, Industry Regulation and Safety has undertaken that work. I hope that work has been undertaken, because it certainly should be a requirement. It was a requirement of the Labor government in early 2000. I mentioned in my inaugural speech Hon Eric Ripper, who was a strong

proponent of a regulatory review before any bill came before the Parliament so that we would have an independent assessment of the benefits and costs of the provisions in the bill.

Debate adjourned, pursuant to standing orders.