BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) BILL 2020

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Alannah MacTiernan (Minister for Regional Development)**, read a first time.

Second Reading

HON ALANNAH MacTIERNAN (North Metropolitan — Minister for Regional Development) [10.15 pm]: I move —

That the bill be now read a second time.

Today is a historic day for all participants in the building and construction industry in Western Australia. In August 2016, the Western Australian Labor Party, when in opposition, made a promise that if elected it would pursue a bold reform agenda to provide a new and fairer system for all persons who carry out construction work or supply related goods and services in the construction industry. The building and construction industry is a vital part of our economy, providing the jobs, housing and critical infrastructure to meet the needs of all Western Australians. The industry is also a significant source of employment and income for both the Australian and Western Australian economies. It hosts the largest number of small businesses in this state, with hundreds of thousands of people earning a living through the building and construction industry.

Our election commitment was made in recognition of the fact that the state's construction industry has a long history of businesses and their families suffering significant financial losses due to non-payment and mistreatment. In many cases, these businesses provide their own capital up-front for materials and labour; therefore, when the person they are working for does not pay or goes bust, the consequences can be absolutely devastating. These include not being able to pay staff, owing large debts such that people cannot ever restart in the industry, and suicide and relationship breakdowns. This is the problem of "security of payment", and it has been, and continues to be, a blight on our state.

The problem of security of payment has far-reaching ramifications, not only for industry participants, but also across the broader community. It weakens the industry and fundamentally stifles innovation, investment and economic growth. It makes sense that if people could guarantee that they would get paid for the work they do, they would have more confidence to build and expand their businesses. If they could have security of payment, they would be able to create job opportunities and be in a financial position to take on more staff, trades and apprentices. They could get more Western Australians into jobs, and provide our young people with their first job. But the current reality is that businesses need to contend with the constant fear of not getting paid on time or at all, and do not have access to effective rights and protections under the law.

The McGowan government committed to unlocking cash flow in the industry and supporting those who carry out the building and construction work in our state, particularly in this period of economic recovery. I stand here proudly today to deliver on those election commitments. This historic bill will improve security of payment and fairness across the Western Australian building and construction industry. It is the result of an incredible breadth of consultation across all sectors of the industry, including on a consultation draft released earlier this year. I take this opportunity to thank the building and construction industry for its engagement in the consultation process and acknowledge the productive and constructive input provided by a large number of groups and stakeholders into the development of this bill.

I also wish to thank Mr John Fiocco, and Hon Matthew Swinbourn, MLC, for spearheading the initial review process, which was established by my colleague and former Minister for Commerce Hon Bill Johnston, MLA. Following his review, Mr Fiocco recommended a number of reforms to the government, including the adoption of many of the recommendations of the national review into security of payment laws conducted by Mr John Murray, AM, on behalf of the commonwealth government. Mr Fiocco recommended, and this government has accepted, that Western Australia's security of payment laws should be made more consistent with the east coast model, which is based on New South Wales legislation. The principle of greater national consistency in this context is an important one, as it will ensure that if someone carries out work, the law will support them to get paid, regardless of which state or territory the person operates in. As a result, this bill will implement a substantial package of law reform to ensure that all participants in the building and construction industry in Western Australia can be confident of getting paid on time, every time, for the work they do. Make no mistake about it: the bill is a game changer for security of payment.

I want to address some of the major reforms that will be introduced. The bill will establish, for the first time in Western Australia, a new framework of security of payment laws that, over time, will replace the Construction Contracts Act 2004. The CC act, which was introduced by the Gallop Labor government, was the first piece of security of payment legislation ever introduced into Western Australia, and was a vital foundation for resolving construction disputes. In fact, I was the minister who introduced the then Construction Contracts Bill in March 2004. Whilst the CC act was revolutionary at the time for Western Australia, it is clear that in current times the many challenges

faced by businesses in getting paid are not adequately served by this existing legislation. The law needs to keep up the pace with the speed of change in this dynamic sector of the economy. It was made clear to Mr Fiocco, as well as Mr Murray in his review, that legislation based on preserving the commercial bargain struck between parties has not always achieved the right outcome in an industry plagued by inequality of bargaining power, unfair risk allocation and lengthy and delayed payment times. It was a Labor government that first addressed the problem of security of payment back in 2004, and, 16 years later, another Labor government stands ready to tackle it once again.

Western Australian contractors will now have access to the same rights and protections under security of payment laws that their eastern states counterparts have had for many years. Crucially, part 2 of the bill will establish a statutory right to receive payment and an effective process to recover delayed payments through rapid adjudication and/or court proceedings. This will provide more transparency and structure to issues such as dates for claims, approvals and payment. The bill will require timely engagement in the payment process and impose significant consequences for failure to do so.

One of the biggest criticisms of the CC act has been that subcontractors are often not properly informed about why payments are being withheld or delayed. They are left to either wait until payment is due to find out whether they will be paid the full amount claimed, or commence an adjudication, only to then discover the full reasons for non-payment. This does not guarantee prompt payment and leaves the party who carried out the work in the unenviable position of chasing their cash or commencing an adjudication with limited or no knowledge of the case they will face and the likelihood of success.

Under this bill, a party who carries out or undertakes to carry out construction work or the supply of goods and services is entitled to make a progress payment claim at the end of each month. To ensure that cash flows quickly through the contracting chain, payment claims made under the bill from head contractors to principals will need to be paid within 20 business days of the claim or any lesser period stipulated in their construction contract. Payment claims by subcontractors to head contractors, or between subcontractors, will now need to be paid within 25 business days or any lesser period in the construction contract. Payment claims for certain residential-related construction work will need to be paid within the date specified in the contract or within 10 business days if no date is specified.

The party that receives a payment claim must issue a payment schedule within 15 business days of receiving the claim if it does not intend to pay the full amount claimed. The payment schedule must outline the amount to be paid and the reasons that payment is being withheld. Once presented with the payment schedule, the claimant can make an informed decision about whether to apply for rapid adjudication to recover the full amount it considers is owed. If the claimant elects to go to rapid adjudication, the respondent cannot raise reasons for withholding payment during that process not included in the payment schedule, such as set-offs or cross-claims. This means the respondent must treat payment schedules with the utmost care.

Alternatively, if the respondent does not give a payment schedule within the time required or pay the full amount claimed, the claimant may elect to either recover the full amount as a debt owed through the courts or apply for rapid adjudication. Before applying for rapid adjudication, the claimant must give the respondent notice of its intention to do so and a further opportunity to give a payment schedule within five business days. If no second-chance payment schedule is received, the respondent will not be entitled to provide a response or any submissions during the adjudication process.

The rapid adjudication process under part 3 of this bill, as under the CC act and elsewhere, remains a "pay now, argue later" scheme designed to deliver an interim, binding decision so that works can continue, but without affecting the parties' legal rights to go to court or use any other dispute resolution mechanism if unsatisfied with the decision. The adjudication process is to be carried out by an experienced, independent registered adjudicator within a compressed time frame. Applications for adjudication are to be made by the claimant to a registered adjudicator specified in the construction contract or, if no adjudicator is specified, the claimant is free to lodge the application with an authorised nominating authority of its choice. An authorised nominating authority is an individual or organisation approved by the Building Commissioner to appoint an adjudicator. Currently, a number of organisations perform a similar role under the CC act as "appointers", and elsewhere across Australia. It is expected that these organisations will apply to be authorised nominating authorities under the bill. The adjudication process is designed to ensure claims are determined with speed, efficiency and minimum formality and cost, so that money continues to flow through the contracting chain with minimum disruption. Once an adjudication application is made by the claimant, the adjudicator specified in the contract or appointed by the authorised nominating authority can make a decision within as few as 10 business days if the respondent does not provide, or is not permitted to provide, an adjudication response, or within 10 business days after a valid adjudication response is provided.

Clauses 35, 36 and 38 of the bill detail the powers and functions of the adjudicator. The process is not judicial and the decisions are to be based largely upon the payment claim, payment schedule, adjudication application and response, but the adjudicator can request further submissions, call conferences and carry out inspections of the

construction work. The adjudicator must decide the amount, if any, owed by the respondent to the claimant in respect of the payment claim, including the return or release of any performance security, the date on which the amount became or will become payable, and any interest that is owed. The adjudicator must give brief reasons for their decision in the form of an adjudication determination.

As the parties retain their rights to go to court or commence other dispute resolution processes, adjudication determinations under the bill are not, as a general rule, open to appeal or review. However, part 3 of the bill introduces a limited right to seek a review of an adjudicator's determination by a senior adjudicator. This limited right of review will be available only for high-value disputes, but will provide an aggrieved claimant or respondent with an alternative remedy to be exhausted outside of curial proceedings. This review mechanism is based on similar laws in Singapore, and the recommendations of Mr Murray's review for the commonwealth government.

The bill will also introduce measures to improve the overall fairness of contracting practices in the building and construction industry. Too often people find that the rules are stacked against them right from the very outset. If a party gets squeezed because it lacks the same bargaining power as the other party, some might invoke theories of free market economics to explain or even justify this situation. They might say, "Well, that's just the way it is, and it's always going to be like that", but I resoundingly reject the notion that an enhanced bargaining position in a free market is a licence to withhold moneys from those who are entitled to it. As a community, there are certain standards that we can all and should all expect for contracting practices in the industry.

This bill will introduce a range of mechanisms to improve the fairness of contracting practices across the industry. These include voiding unfair notice-based time bars, which operate to unfairly limit or restrict a contractor's entitlement to claim or to receive payment under a construction contract; enacting a broader prohibition on paid-when-paid provisions; as well as requiring certain contracts to be put in written form and meet minimum standards to remove any uncertainty about each party's rights and obligations.

Another key pillar of reform is the introduction in part 4 of the bill of a retention trust scheme that will apply down the supply chain. This is a first of its kind in Australia, and it will protect subcontractors' retention money from being misappropriated or lost altogether in insolvency. Often, retention money may equal or exceed a subcontractor's profit margin for a construction project. But right now, under the law of this state, it is perfectly legal for a party holding or withholding retention money to use this money as they see fit. They can use it to prop up or increase their own cash flow, or even apply it for purposes totally extraneous to the construction contract, such as buying a luxury car or financing an expensive holiday. When a party holding retention money fails, the moneys owed by way of retention are almost always unsecured claims; therefore, a subcontractor can, on average, expect to receive next to nothing of what they are owed. The McGowan government believes that subcontractor retention money should be protected. It should no longer be treated within the industry as an interest-free loan that one can use for whatever purpose they choose. For that reason, the bill will impress retention money with trust status by force of law and require that it be ring-fenced in a dedicated trust account to separate it wholly and completely from the trustee's general pool of assets. When a party fails to fulfil their obligations as a trustee of the retention money, beneficiary subcontractors will have access to existing general law remedies, and, in some cases, a statutory right to suspend ongoing construction work or the supply of related goods and services.

Finally, part 7 of the bill provides the building industry regulators—the Building Commissioner and Building Services Board—with new powers to remove from the industry building contractors with a history of insolvency or not paying down court-ordered or adjudication debts. Let it be known that the holding of a registration as a building contractor in this state is a privilege; it is not a right. Those with a history of ripping off subcontractors, or engaging in phoenixing activity by driving a construction business into the ground and then re-emerging from the ashes with a brand-new business, will be placed squarely within the line of sight of the regulator's new powers. If someone wants to be a registered building contractor, they need to play by the rules, make sure they run their business properly and pay subcontractors who work for them, or else they may rightly be required to show cause to the board as to why they should be allowed to be a registered player in the industry.

I conclude by emphasising that this bill will introduce historic reforms to give confidence back to subcontractors. These reforms will promote business growth and innovation, and make this state a fairer and more desirable place for all to do business; safeguard the livelihood and wellbeing of the Western Australians behind our construction businesses; and complement measures the McGowan government has already delivered through the expanded use of project bank accounts on government projects and enhancing the investigation powers of the state's Small Business Commissioner.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 4601.]

Debate adjourned, pursuant to standing orders.

House adjourned at 10.34 pm