

BUILDING AND CONSTRUCTION INDUSTRY (SECURITY OF PAYMENT) BILL 2021

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Darren West (Parliamentary Secretary)**, read a first time.
Explanatory memorandum presented by the parliamentary secretary.

Second Reading

HON DARREN WEST (Agricultural — Parliamentary Secretary) [6.23 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 WA Labor Party, when in opposition, made a promise that if elected, we would pursue a bold reform agenda to provide a fairer system for all persons who carry out construction work or supply related goods and services in the industry. I would like to acknowledge my colleagues in the other place Hon Bill Johnston, MLA, for starting this significant reform, Hon John Quigley, MLA, Attorney General, for his work in attempting to pass these important reforms in the last Parliament and Hon Amber-Jade Sanderson, MLA, Minister for Commerce, for commandeering the bill through the house. It is with great privilege that I now seek to deliver on our promise to the people of this state. Aside from some technical drafting changes to improve the operation and clarity of various provisions, this bill is substantially the same as the bill that was introduced in the Legislative Council in November 2020 but which subsequently lapsed.

The building and construction industry is a vital part of our economy, providing the jobs, housing and critical infrastructure to meet the changing needs of all Western Australians. The industry is also a significant source of employment and income for both the Western Australian and 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, employees and their families suffering significant financial losses due to non-payment and mistreatment at the hands of unscrupulous industry participants. In many cases, these businesses provide their own capital up-front for materials and labour, so when the person they are contracted to does not pay or goes bust, the consequences can be absolutely devastating and can have ripple effects throughout the community. These include not being able to pay staff; owing large debts, such that people cannot ever restart in the industry; relationship breakdowns and even suicide. 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 is one with far-reaching ramifications for not only 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 businesses could guarantee that they would get paid for the work they do, they would have more confidence to build and expand. If they could have security of payment, they would be in a financial position to create job opportunities for staff, tradespeople and apprentices. The end result would be getting even more Western Australians into jobs and providing more opportunities for our young people to get their first job. Security of payment can provide the certainty that businesses need to grow and thrive, irrespective of the particular economic situation of the day. 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. Like my colleagues in the other place, I am proud to be part of a Labor government that is doing something about this. I stand here today to deliver on our commitment. This bill will improve security of payment and fairness across the Western Australian building and construction industry.

This bill is the result of an incredible breadth and depth of consultation across sectors of the industry. I take this opportunity to thank those at all levels of the building and construction industry for their 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 my colleague Hon Matthew Swinbourn, MLC, for spearheading the initial review process. Following his review, Mr Fiocco recommended a number of reforms to the government, including adopting many of the recommendations from 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 must change and 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 a person carries out the work, the law will support them to get paid, regardless of which state or territory they operate in. As a result, this bill will implement a substantial package of law reform to ensure all participants in the building and construction industry in Western Australia can be confident of getting paid on time

and every time, for the work they do. It does not matter whether you are a small business or contracting with big companies, if you do the work, you will have equal rights to get paid.

I will now 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 existing Construction Contracts Act 2004. The Gallop government introduced the first piece of security of payment legislation, the CCA, in Western Australia. It was a vital foundation for resolving construction disputes. In fact, Minister MacTiernan was the minister who introduced the then Construction Contracts Bill in March 2004. Although the CCA was revolutionary at the time for Western Australia, it is clear that the many challenges faced by businesses in getting paid, and paid on time, are not adequately served by the 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 to 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. Seventeen years later, it is another Labor government that 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 state 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. That will provide more transparency and structure to issues such as dates for claims, approvals and payments. 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 CCA has been that often subcontractors are not properly informed as to 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 to 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 payment, or commencing an adjudication process with limited or no knowledge whatsoever of the case they will face and the likelihood of success.

Under this bill, a party who carries out, or who undertakes to carry out construction work or supply goods and services—the claimant—is entitled to make a progress payment claim at the end of each month. To ensure 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 that is stipulated in the 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 that is stipulated in the construction contract. Payment claims for certain residential-related construction work will need to be paid by the date specified in the contract, or 10 business days if there is no date specified.

The party that receives a payment claim—the respondent—must issue a payment schedule within 15 business days of receiving the claim if they do not intend to pay the full amount claimed. The payment schedule must outline the amount to be paid and the reasons why 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 that is considered owing. If the claimant elects to go to rapid adjudication, the respondent cannot raise reasons for withholding payment during that process that are not otherwise included in the payment schedule, such as set-offs or cross-claims. This means that 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 their intent 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 is not 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 CCA 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 to 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 adjudicators. There are currently a number of organisations performing a similar

role under the CCA as appointors, 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 little 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 decisions are to be largely based on the payment claim, payment schedule and 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 to 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 will introduce a limited right to seek a review of an adjudicator’s determination by a senior adjudicator. This limited right of review will be available for only 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.

This 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 from the outset. If a party gets squeezed via the withholding of payment because they lack the same bargaining power as the other party, then some might invoke theories of free market economics to explain or even justify the situation. They may say, “Well, that’s just the way it is, and it’s always going to be like that.” I 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 all can and should expect when it comes to contracting practices in the building and construction 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 pay-when-paid provisions; as well as requiring certain contracts to be put in written form and meet minimum standards to remove any uncertainty as to 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. It will protect subcontractors’ retention money from being misappropriated or lost altogether in the event of insolvency. Often, retention money may equal or even 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.

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. If a party fails to fulfil its 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.

Another important feature of the bill is part 7, which will provide 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 court-ordered or adjudication debts. It is the McGowan government’s intention, by way of this bill, to impress upon the building and construction industry that the holding of a registration as a building contractor in this state is a privilege, 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. For too long now, the regulators have had insufficient powers to adequately deal with the poor and unscrupulous conduct displayed by some contractors who use the corporate form to avoid their responsibilities.

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. The Building Services Board's new powers will be extensive, and include the ability to apply an exclusion even when shadow or straw directors are used.

I conclude by emphasising that this bill will introduce significant and long-overdue 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 that the McGowan government delivered in its first term in office through expanding the 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 [223](#).]

Debate adjourned, pursuant to standing orders.