T R A N S C R I P T

LEGISLATIVE ASSEMBLY ENVIRONMENT AND PLANNING COMMITTEE

Inquiry into Employers and Contractors Who Refuse to Pay Their Subcontractors for Completed Works

Melbourne – Monday 29 May 2023

MEMBERS

Juliana Addison – Chair
Martin Cameron – Deputy Chair
Jordan Crugnale
Daniela De Martino
Sam Groth
Martha Haylett
David Hodgett

WITNESS

Mr John Murray.

The CHAIR: It is lovely to be back. We are here. We are now going for the last session of our inquiry today, and we are very pleased to welcome John Murray AM. Today the committee is hearing evidence in relation to the Inquiry into Employers and Contractors Who Refuse to Pay Their Subcontractors for Completed Works, and that evidence is being recorded.

All evidence is protected by parliamentary privilege as provided by the *Constitution Act 1975* and further subject to the provisions of the Legislative Assembly standing orders, therefore the information that you provide during the hearing is protected by law. You are protected against any action for what you say during this hearing, but if you go elsewhere and repeat the same things, those comments may not be protected by this privilege.

Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament. All evidence is being recorded. You will be provided with a proof version of the transcript following the hearing. Transcripts will ultimately be made public and posted on the committee's website.

For the Hansard record, can you please state your name and any organisations that you are appearing on behalf of?

John MURRAY: John Murray. I am not appearing on behalf of any organisation. I am an adjudicator – the chief adjudicator in Victoria, with an authorised nominating authority (ANA), but the views I present today will be my own personal views, not the views of the ANA or any of the other organisations that I have had past involvement with.

The CHAIR: Terrific. Well, thank you very much, John, and thank you very much for the submission that you made to this inquiry. It was really, really good to get across a number of the issues and the comparisons you made with the other states – a really great submission – so thank you very much for the time that you put into that.

I am Chair of the committee. I am the Member for Wendouree Juliana Addison. With me I have my Deputy Chair Martin Cameron, the Member for Morwell. Martha Haylett is the Member for Ripon. David Hodgett is the Member for Croydon. Jordan Crugnale is the Member for Bass. Daniela De Martino is the Member for Monbulk, and Sam Groth is the Member for Nepean. We are really looking forward to having you here today and hearing from you and being able to sort of dig a bit deeper into some of the issues that we would like to get our head around, but would you like to make some opening remarks?

John MURRAY: Yes, I would. Again, thank you for the opportunity to do a presentation. This is an issue that has been dear to my heart. I have been involved in the industry for close to 45 years. I in fact started off working in the industry as the legal officer for Master Builders Victoria, and for a number of years practised as a construction lawyer, then returned to the Master Builders movement fold and was its national CEO for 15 years. I have been involved with Standards Australia and a strong supporter of the notion of standardised contractual provisions for a long period of time. I was the inaugural chair of the Building Professionals Board of New South Wales. I stepped down from the role of Chief Executive of MBA when I turned 50 – I thought I needed a change at that point in time – and became an adjudicator and have probably done about 500, maybe 600 adjudication determinations ranging from payment disputes of $10,000 to three-quarters of a billion dollars, so a very wide spectrum. I adjudicate on payment disputes in virtually all jurisdictions except the Northern Territory.

I was asked in late 2016 to conduct a review of the security of payment laws because at that time the Turnbull government had called a double dissolution. One of the triggers for the double dissolution was the ABCC legislation. It did not have a majority in the Senate. It needed to negotiate with the crossbenchers, and the key crossbencher then was Senator Nick Xenophon. He had a lot of interest in security of payment. He contacted me, and he wanted to get that ABCC legislation through but wanted to annex a specific state-based legislation that would be the model legislation. I said, 'Look, none of them are really all that good,' and he said, 'What do you mean?' I said, 'Well, there are a lot of shortcomings, and all of the state legislation have the same

objectives but manifest an overwhelming intention of going in different directions as to how you achieve those objectives.' So I was asked to conduct a review. The then Minister, Michaelia Cash, asked me to do the review, and I spent about 18 months conducting that review. It was a wide consultation, so I consulted widely with all the key stakeholders. There were about 400 people that I ultimately consulted, and I looked at the legislative provisions in the various jurisdictions.

The report was tabled. I have got to say writing the report was the easy bit. I really had not appreciated the difficulty that I would have in terms of getting some of those recommendations implemented. With that said, at that stage, in 2016–17, security of payment legislation broadly fell under two models: the so-called east coast model, which was the legislation that applied in New South Wales and Victoria, and the west coast model, which was the legislation that applied in Western Australia and the Northern Territory. I made some recommendations, but most of the analysis that I conducted was predicated on trying to understand why the legislature should intervene in this particular space. Why should legislation be enacted to provide specific protection for a group of businesspeople? So I looked at the broad policy drivers, and it was these policy drivers that led me to make those particular recommendations. I recommended that at the very least there ought to be a single model, and I thought that the model that ought to be pursued should be the east coast model, for want of a better expression, with the provenance being the New South Wales legislation. Then I made a number of other recommendations, and I want to dwell on two areas perhaps later on – the issue of statutory trust and on the issue of unfair contracts – to comprehensively address the prime purpose of this inquiry, which is to look at how subcontractors get paid for the work that they carry out.

I was surprised but delighted that the Western Australian government had, after conducting their own review, decided they would adopt the east coast model. So that was very, very significant progress, because when I concluded my report I would have thought that, of all the state governments, it would be the WA government that would be most critical of the report. The legal profession, surprisingly enough, liked the Western Australian Act and clamoured and lobbied me in terms of saying, 'You really need to throw away the east coast model and adopt the west coast model', and the west coast model is pretty much predicated on the UK model. But the Western Australian government said, 'No, we are going down the east coast model', and they have since enacted their own legislation last year and it is probably the best of breed at the moment. It is clearly superior to New South Wales. That is not to say that New South Wales legislation is not good; it is okay. But out of all the state legislation, the one that is least fit for purpose is the Victorian Act. It is worst of breed. And it is surprising, because in 2002, when the then minister Mary Delahunty tabled the bill, it was predicated on the New South Wales legislation, and when you go through her second-reading speech you will notice that she emphasised the importance of having national consistency. And that legislation prevailed for about a four-year period, but then the amendments that came in in 2016 emasculated the whole essence of what the legislation is about. So that is, in broad terms, a quick snapshot.

I also, by way of opening comment, wanted to underscore the importance of what my submission was intended to highlight, and that was that the problems that bedevil our industry really reflect the structure on which the industry is based. This is an industry where at least 85 per cent of construction work and building materials supplied on construction projects are provided by subcontractors. The manner in which a building project is procured is based on a severe extent of subcontracting. The head contractor will subcontract all the key trades – the bricklaying, glazing, plastering, electrical works, plumbing. All those key trades will be subcontracted, and indeed some of the contractors will in turn subcontract some of the key components of their subcontract works to the sub-subcontractors. So you end up having this pyramid where the ones at the base of the pyramid are actually the ones that physically carry out most of the construction work, yet they are the ones that have the least bargaining power, they are the ones that during that whole contractual negotiation are presented with take-it-or-leave-it contract arrangements. The notion of freedom of contract in this industry is a charade; it does not exist. It may exist at the upper end in terms of highly sophisticated clients and highly sophisticated constructors, but, by golly, it certainly does not exist as you go down the contractual chain.

So what happens because of this structure and because of this subcontracting is that you get the head contractor subcontracting to the subcontractors, and during the course of, usually, every month the subcontractors will submit the progress claim for the construction work that they have carried out and the materials that they have supplied for that period, and the builder would assess that subcontractor's claim, satisfy itself that the work has been done for that particular value, bundle all the subcontractor claims together and submit it to the owner. The owner would then conduct its own separate assessment, but assuming for present purposes it accepts that the work done for that month has been carried out to that particular value – so of the claim made by the builder for

$100,000 for the month of May about $85,000 would represent work that has been carried out by the subcontractor, which the owner accepts has been carried out for that month – and bearing in mind it is payment on account, would pay the builder. Most right-thinking people would say that it would be appropriate for the builder to pass on that $85,000 promptly to the various subcontractors. But here is the thing: that does not happen, and it does not happen for a very good reason. When I ask myself why a builder would not pass on the work or delay payment or not make any payment to the subcontractor, because but for the subcontractor's work, the builder would not have been paid by the owner, I think the answer is that this is an industry that is undercapitalised. The players in the industry simply – the majority of the players, an overwhelming majority of the players – do not have enough capital. So a business model has been formulated by those undercapitalised contractors whereby they are using the payment that rightfully belongs to the subcontractor as free working capital.

One asks oneself then the ethical question perhaps as to why subcontractors should continue to be required to provide interest-free loans to builders. And when I asked that question of the various stakeholders, particularly those stakeholders representing head contractors, they were not really able to provide me with that answer except to say, 'It was always thus, John'. It was always thus. But you see, when a subcontractor does not get paid – bearing in mind they have provided 85 per cent of the work and they are the true employers of the employees – they still have to pay their workers. They still have to pay their suppliers. They have already given one month's credit to the builder, because they have submitted their claim and are waiting for the builder to pay them. In the meantime they are continuing to work on that project. So when the subcontractor – and they are usually small businesses, and being small businesses they rely on cash and cash is the lifeblood of the industry – do not get paid, they have to get loans from banks and pay interest on those loans. And we know of course in the current climate those interest rates are rising. So whereas the media focuses a lot on the insolvency of builders, when you look at the ASIC figures you will find that the overwhelming majority of the insolvencies are in fact subcontractors. But it is the builders that enter into contracts with the clients, and the knock-on effect from the media perspective is clearly focused on the head contractors, but there are many subcontractors that suffer unnecessary financial distress because builders do not pay when they should pay.

And there is another element to it as well – that when this business model whereby they rely, because they are undercapitalised, on the subcontractors, the moneys that they receive as free working capital, they also obtain loans from financiers based on providing a security on their cash flow. So what that means is that when the financier believes that the head contractor's solvency is now no longer viable financiers can drop the guillotine and force the issue of insolvency, and then at the time of insolvency, under current insolvency laws, after the liquidator has been paid and after the ATO has come in, the secured creditors would be the banks and all those subcontractors are then unsecured creditors. There is an issue of morality here. I mean, the bank is able to scoop up payments that rightfully belong to the subcontractors and the subcontractors at best might get 3 or 4 cents in a dollar – at best. None of the security of payment laws in Australia have addressed that issue, and I want to deal with that shortly – how to ring fence payments that rightfully belong to the subcontractors and ring fence that by way of trusts.

It is all about the cash in this industry, and everyone is trying to grab the cash. As some say, your cash, my flow. Even if you say, 'Well, get off your high horse, John; stop lecturing us on ethics' or if you reject the notion that if that is the way buildings are procured, then so be it – but, you see, a business model based on using other people's money is doomed to failure, and fail they do. All the major contractors for all intents and purposes, certainly over my 45 years – I have seen most of them disappear. Probuild, Concrete Constructions, taken over; Mainline, very early on; Jennings, ultimately Fletchers, but Fletchers are no longer here; then you have got Leightons taken over by the Germans, now owned by Acciona; Multiplex, really Brookfield, which is Canadian; and Grocon, no real contracting work anymore. So, yes, there are some family companies that have survived generation after generation, but as a general rule eventually time catches up with them if they adopt that flawed business model. So I do not understand why people want to continue propping up that sort of model. It causes undue hardship on subcontractors, and it is a business model that is not only unethical but doomed to fail.

Because the legislature accepted that the structure of the industry was dominated by small businesses, because they accepted that being small businesses they really depended on cash, it was for that reason that they progressively over the last 20 years enacted security of payment legislation. The object of the security of payment legislation was to enshrine by law and give the party that carried out construction work a statutory entitlement to a progress payment. A progress payment was important because that was the only way that you

could maintain their cashflow. Regardless of what any of the contract said it was important that you had at the same time almost a dual-track system. You had your contractual rights, and they might say you are entitled to be paid once every three months, but now you had this statutory provision that said as a general rule– not in Victoria, but, say, in New South Wales – you are entitled to make a progress payment once a month. If you submitted that payment claim and that was rejected – and rejected sometimes for good reasons because 'Hey, the claim you've put in is inflated', 'You haven't done the work', 'The claim that you put in for variation was really work that fell within the original scope' or 'Your work's defective' – there were very good reasons. But where that was disputed then the security of payment legislation provided for a unique resolution mechanism, which was rapid adjudication based on the philosophy of pay now, argue later. An adjudicator would very quickly on the documents, without hearing lawyers and without conducting a hearing, make a determination within 10 business days of being nominated in terms of identifying the amount of payment that should be made, and once that determination had been made, the respondent, the other party, would be obliged by law to make that payment.

That is essentially the philosophy of the east coast model, and that is essentially the broad thrust of what the legislation is about. I have pointed out in my submission that the notion of excluded amounts in the Victorian Act has been an absolute disaster. The notion that a contractor cannot avail itself or invoke the benefits of the legislation in circumstances where a significant proportion of the work that it has carried out was in the form of variations is just so unfair – unfair because if you are a contractor in Wangaratta, you cannot claim for such work, but if you are a contractor carrying out similar-type work in Albury, you can. And lest it be said that variations are just a minor part of the industry, they are not. The latest adjudication determination that I did involved a contractor that had entered into a contract for a very large infrastructure project. The contract value was only $350,000, but during the course of carrying out that work it had already been paid $8 million and put in a payment claim, which was disputed, for $5 million. Now, that –

David HODGETT: That sounds like a major project.

John MURRAY: Such a claim would not be able to be heard under the Victorian legislation. The other exclusion that the Act has is if you are a civil contractor and you strike rock during your excavation, it is excluded. You cannot claim the work associated with the excavation of that rock under the Victorian Act. Time-based claims are excluded. Just perhaps think about that, because most head contractors are now saying that in the days of inflation that we are now experiencing we should not be allowed, or it is unfair for us, to be bulldozed into accepting fixed-price contracts. So they want contracts that are subject to a rise and fall.

David HODGETT: John, can I ask a question?

John MURRAY: Yes.

David HODGETT: I was interested in trusts. You mentioned it before, and it was in your submission. Can you perhaps talk us through that?

John MURRAY: Yes. Can I just finish that point?

David HODGETT: Yes.

John MURRAY: Because trusts – believe me, I really do want to talk about that a lot, because they are the thrust. Out of all the recommendations – 86 recommendations – everyone is focused on that one single recommendation, so I will talk about that. But going back to cost adjustment, because it is really important –

The CHAIR: And excluded payments.

John MURRAY: Well, that would be excluded. Assuming that a builder has in turn entered into a contract with a subcontractor subject to rise and fall, even though the client might have agreed to that – and the advice I am getting from the subcontractors is the number of contracts that subcontractors have entered into with head contractors you could count on an amputated hand – leaving that aside and assuming that a contractor, for example, wants to put in a progress claim for the increased costs due to rise and fall, it probably could not be done under the Victorian legislation. So here you have got the state government, presumably, demonstrating empathy with the plight of the industry because it is being forced into fixed-price contracts in the context of a high-inflation scenario but you have a piece of legislation that does not enable a contractor to invoke the Act in

circumstances where a client or a builder does not pay for the increased costs. So the excluded amounts concept is just appalling and unfair, and the manner in which claimable variations are defined is so complex that it defies the understanding of the majority of the primary users. I think the quote that I gave had Justice Vickery admitting that he had to read that a few times before he could get his head around what constitutes a claimable variation. If you have got a specific piece of legislation that is intended to be used by primary users, well, the legislation should be drafted as simply as possible so that the primary users can understand and make use of the legislation.

The CHAIR: I did appreciate the reference to the ACT legislation from 1936. I thought that was very good.

John MURRAY: Yes, the Motor Traffic Ordinance. Yes.

The CHAIR: It was great.

John MURRAY: And here we are 70 years later having exactly the same piece of legislation. It is a disgrace. The other aspect of the legislation that I think works against the interests of achieving the objective is the due date for payment – those sorts of provisions, but they are enumerated and set out in my submission. I do however want to talk about trusts – I have not forgotten, Mr Hodgett, your question – and I do want to talk about unfair contracts as well.

But if you assume that in, say, Victoria in a progress claim that did not involve variations, the subcontractor put in a payment claim, went to adjudication, succeeded in getting the adjudication, then still did not get paid, went to the ANA, got the adjudication certificate, rocked up at the court, got the rubber stamp and then the next day the builder became insolvent. There is a major, yawning gap in the security of payment legislation. There is a high incidence of insolvency in the construction industry, and there is a high incidence of insolvency because of its undercapitalised nature and because the majority of the head contractor players have got that flawed business model. So you have got a high incidence of insolvency, and when a builder becomes insolvent this has a knock-on effect on subcontractors who may also become insolvent.

You need to address that issue, and that issue has been a focus of various inquiries in Australia since 1996. It was first carried out by Wayne Martin when he chaired the Western Australian Law Reform Commission back then. He recommended that the issue of the high incidence of insolvency be addressed by way of a statutory trust. It was considered by Terry Cole when he was the royal commissioner. He wrote a separate volume in his report, and he looked at the issue of trusts and looked at the issue of a single piece of legislation. But on the issue of trusts, he was given exactly the same arguments that everyone else has received, back from Wayne Martin's days in 1996 right through to even my days when I was doing the review – that it will impose a great administrative burden. He rejected that argument and thought that was overstated. That was in 2003.

The New South Wales government conducted a comprehensive review of insolvency in the construction industry in New South Wales. Bruce Collins conducted a review, and he arrived at the conclusion along the lines of saying that one needed to address that issue by way of a statutory trust. The Senate inquiry in 2015 looked at that issue as well and thought that maybe the time had come for statutory trusts. Then when I looked at that issue and when I looked at what had been done overseas in Canada, in most of the provinces in Canada, and in a significant number of states in the US, I found that they had gone down that issue of ring-fencing progress payments and that the industry in those parts of North America was flourishing and was not constrained or constricted by red tape at all. So I felt that that needed to be addressed. You asked me the question as to how a deemed statutory trust would operate: totally differently to the project bank account arrangements under the Queensland legislation.

My particular proposal, and a proposal that is consistent with the various inquiries that I mentioned, would be based on the fact that when a head contractor submits a claim which included claims that it does not dispute from its subcontractors and submits that to a client and the client is satisfied that that amount has been paid, or whatever amount that client pays – that payment is imputed by law, by an Act of Parliament, to be trust funds. That would mean that the funds would not go into 'Hodgett Construction' general account but would go into 'Hodgett Construction' trust account, and you would not need separate trust accounts for every contract that you enter into, which is the case in Queensland. I have had the instance of a head contractor saying to me, 'John, we've got 200 projects, and under the Queensland legislation we need to have two separate trust accounts for each contract, so that is 400 trust accounts we need to operate and report on,' with very harsh

prescriptive provisions if you do not comply with those arrangements. That is not what I am proposing at all; I am simply proposing that the funds be lodged into a trust account and that the builder would then deal with those trust funds by way of ledgers.

It would be no different to the bookkeeping practices most well-credentialed proper businesspeople would have in the construction industry. I get paid as a builder by a client, I put it in my account, I have got ledgers, I know that this particular project relates to 26 Smith Street, and I know that all the subcontractors are there and I have got all these ledgers. So to that extent the administrative impact that that would have would not be material. It would almost be invisible to those contractors because they would be able to understand the requested accounting practice. There would be the additional requirement that before the builder could access the funds from the trust account, it would need to pay all of the subcontractors first. That would certainly promote proper payment, because the builder will want to get access to the residual funds that belong to it. That will be done almost instantly, and with proper software you could do that really quickly – in the blink of an eye.

So for those that assert that the introduction of a statutory trust would weigh the industry down with red tape, that is misplaced. Not the system and the proposal that I had recommended – it is misplaced. But, yes, there might be some costs associated with that. I do not deny that. But there is a greater cost of not doing anything, and there is a greater cost in not addressing that issue, because it perpetuates that flawed business model. It is unfair that builders, good builders who properly price their work, should have to compete with other builders who have got a business model that is based on using other people's money and therefore undercuts a good builder and a good builder misses out. The builder that has based their model on using other people's money – using Peter's money to pay Paul – is allowed to flourish until it collapses, and the community suffers from that. If you had trust accounts and the subcontractors knew that their payments had been ring fenced, then under that Porter Davis scenario there would not be this manic race to go to the site quickly and remove as many of the materials that the subcontractor had supplied, because they would know their payments were secured. The progress from a builder that has collapsed to the subsequent builder would be more seamless because the subcontractors would be satisfied knowing that their monies are protected.

David HODGETT: So no-one is doing that, except Queensland is closest to it with their project-building account.

John MURRAY: Queensland has introduced those project bank accounts. They were intending to introduce that progressively. It has been a monumental –

David HODGETT: But no-one has progressed to an actual statutory trust?

John MURRAY: Yes. They were intending to progress it in a staged way. They have put it on ice because all of a sudden they have realised that it simply has just clogged up the industry, gummed up the industry. People do not understand how it works, and they have parked it there for a two-year period. You asked me the question, 'Have other states?' You would need to talk to your colleagues on that, but I know that when I did my report the then New South Wales minister publicly pronounced at the Building Ministers Forum that he would introduce a statutory trust. He was moved on to another portfolio, and that did not eventuate. I am advised that the matter did get to cabinet but did not proceed further. The Western Australian Attorney-General made a public pronouncement in the *Australian Financial Review* saying he would be proud to be the first minister to introduce statutory trusts in Australia. It went to cabinet; it did not get up.

Martha HAYLETT: John, just on the review that the Building Ministers Forum is currently considering, is there timing on that for how long they are going to take to consider it and when they are expected to have their response? Or is it, 'How long is a piece of string?'

John MURRAY: When I was told that my report would be referred to the Building Ministers Forum, a good colleague of mine, a leading construction lawyer, said it was the kiss of death.

Martha HAYLETT: Oh no, okay.

John MURRAY: They have flicked it off to the tip. It is an inland river, it will go nowhere – and true to form, it has not. It completely escapes me why we currently have eight separate pieces of legislation. We cannot even agree on a definition of a business day. Yet when you talk to most of the head contractor organisations, you talk to most members of the legal profession now – so there been that maturity in the last

four or five years since the report – most now say, 'Wouldn't it be good if each state adopted the same model legislation?' It need not be national legislation, but if you had model legislation that everyone could adopt, regulated by each state, that would be really good so that people would understand what they needed to do to avail themselves of the legislative regime, That would be really good, but I could not even get traction going on that – and that is the low-hanging fruit. The issue of trust is so important – so, so important – because when you have got an industry with high incidence of insolvency, that is a major problem.

The CHAIR: John, we are using up our time very quickly. I could listen to you for hours. Can you just show us that notebook? That writing is just incredible.

John MURRAY: No, no. I have not even looked at it, you see.

The CHAIR: You have not even looked at that.

John MURRAY: I think as I write, that is my problem.

The CHAIR: I will just open it up quickly to some questions. Obviously your work has been trailblazing in terms of what you would like to see the industry become. What questions do the committee members have? Sam, did you want to ask one?

Sam GROTH: It is extensive. What he has submitted and gone through is –

The CHAIR: It is amazing.

Sam GROTH: Yes.

The CHAIR: Daniela.

Daniela DE MARTINO: I do have a question, because we had HIA in here before, who were saying that in their experience they do not think that it is much of an issue in domestic building. What is your perception of that given that you see this apply across the country? Obviously there is a carve out here in Victoria. It would be great to see what the situation is over the borders.

John MURRAY: If it is not an issue, then why was this? I think it is an issue. I mean, Porter Davis was a good example of this issue. If you look at the three sectors of the industry – civil, commercial and residential – the majority of the players are in the residential sector. As I explained, builders do not build these days. They supervise and coordinate and project-manage the site and coordinate the subcontractors. They do that, and some do it extremely well, but the majority of the building work – the laying of the tiles, the laying of the bricks, the plasterboards, the glazings and all of that – that is done by subcontractors, and the majority of them are small businesses. The greatest exposure, one would have thought, would be in the housing sector. I am speechless that they are not embracing the concept of people being paid for the work that they have done, because everyone in here would say it would be unfair, improper and immoral for workers not to be paid for the work that they have done. Yet it is an entirely different story in terms of delaying payment for those that have carried out the construction, and that is what the Act expressly and explicitly and unambiguously states in its objects clause.

The CHAIR: Any questions, Jordan?

Jordan CRUGNALE: No, it is very comprehensive.

The CHAIR: John, can I just ask: you used some pretty powerful language in terms of the unfairness and the unreasonableness and the fact that it is not fit for purpose – the current Act – so there is no misunderstanding there; from your perspective, can we tidy this up and make it fairer by removing section 10A and looking at section 10B and repealing some things or do we really need an overhaul of the whole box and dice?

John MURRAY: Well, the problem with trying to do some surgery is that you need to look at the various other provisions and the various court decisions that have interpreted the impact of those sorts of provisions. That is a difficult exercise, and it could be a very time-consuming exercise. You do have legislation, interstate legislation. I look at what happened in Western Australia. They, in a very methodical and structured way, went about producing a pretty good piece of legislation. It would have been great had they had statutory trusts, but at

least they got trusts for retention moneys and at least they have an express provision that enables an adjudicator or an arbitrator or a court to declare or determine that an unfair provision in a contract is unenforceable so that a party is not deprived of the entitlement to be paid. Look at what they did in Western Australia. They have come up with something pretty good and pretty special.

As I put it in my executive summary, in a better world you would have a single piece of legislation. You have a unique opportunity here. I mean, you now have a federal ALP government and you now have Labor governments across the mainland. It is a unique opportunity. You also have as federal ALP policy the resolution that they would adopt all of my recommendations, including statutory trusts, and that they would do that immediately. It has not happened since they have been elected, but none other than the Prime Minister – no higher than the Prime Minister – has given the undertaking to Senator Pocock that that will be looked at. So you have got, for the first time, a Prime Minister saying, 'We're going to do something in that area.'

But to come back to your question: if you had something like in New South Wales, it would put subcontractors in a better space. If you had legislation like in Western Australia, it would be better. Either of those two is a reasonable template. Do not even look at the Queensland legislation.

Martha HAYLETT: We have heard that a few times today, John.

John MURRAY: Not in your wildest hallucinations.

The CHAIR: Martha, is there anything you wanted to add?

Martha HAYLETT: I do not think so, no, not for now.

The CHAIR: David?

David HODGETT: John, you are an adjudicator. You mentioned the process. Is there anything we should be looking at to improve that, or does it work pretty well?

John MURRAY: Yes. I feel passionate about that. I see a lot of adjudication determinations that are not necessarily well written. I want to have a system that at least encourages good people to become adjudicators, and I want a process that can ensure that we can have a system that is cost effective. You need to look at something that is not hijacked by the legal profession, because the security of payment legislation has been. In New South Wales, the security of payment legislation is the most litigious piece of legislation ever. There have been 600 cases, and again it is all about money. As Bob Dylan said, 'Money doesn't speak, it swears,' so it is inevitable that you are going to have a lot of disputation there. But you need to have it cost effective, you need to have it rapid and it needs to be fair. There is a lot that can be done to improve the process, and this is set out in my recommendations.

David HODGETT: Thank you.

The CHAIR: What a great way to end today's inquiry. John, I would really like to thank you for your incredible contribution and for sharing your insights into the industry, not only here in Victoria but across the country. You have given us a lot to think about. I just want to remind you that there will be a copy of the transcript in a few weeks for proofreading, and we are really looking forward to doing some more hearings and really trying to get some good outcomes for Victoria in this space. So thank you very much.

John MURRAY: Pleased to hear that.

Committee adjourned.