

TRANSCRIPT

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 Tony Robinson.

The CHAIR: Hello, everyone. It is great to be here today with the Environment and Planning Committee at 55 St Andrews Place.

Before I begin I would like to acknowledge that we meet on the lands of the Wurundjeri people and pay my respects to elders past, present and emerging and extend those respects to the lands that we all come from. My home Indigenous people in Ballarat are the Wathaurong people, and I extend my respects to them and all of the traditional owners and the country that you have come from.

It is great to be here today. We have got a really good line-up of MPs, with lots of regional voices and a mix of old and new, which is great. Hodgey, you do not mind being described as old, I hope. We have got David Hodgett, who is the Member for Croydon; Martha Haylett, the Member for Ripon; Martin Cameron, the Member for Morwell; Jordan Crugnale, the Member for Bass; Sam Groth, the Member for Nepean; and Daniela Di Martino, the Member for Monbulk. My name is Juliana Addison, and I am the Member for Wendouree.

The committee is hearing evidence today 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 taken 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 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 were to 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 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 organisation you are appearing on behalf of?

Tony ROBINSON: Tony Robinson.

The CHAIR: Today we have got you till 9:30, so would you like to make some initial statements and then allow us to ask some questions please, Tony.

Tony ROBINSON: Thanks, Chair, and members, and congratulations for the first day of your new committee. Committees do great work. I was on a few of them and chaired one for a term, so good luck with your work.

I want to talk about security of payment. For as long as there has been a building and construction industry, there have been bad payment practices. A lot of that is due to the chain of engagement, from the principal through to the developer to contractors – head contractor, contractor, subcontractors. Another way of looking at that is there is a transfer of risk with payments down that chain and the subcontractors are typically at the end. So when people say, 'I can't pay you because I haven't been paid,' they cannot say that to anyone else, and they are the ones who historically cop it in the neck. All of you have loads of these small subcontractors in your electorates, you have met them, and any number of them will tell you, without much encouragement, about lousy payment practices. Part of that is just the nature of construction industry contracts, but part of it is also really unethical conduct, and the two sort of feed off each other. Unfortunately the industry for a long, long time has put up with its fair share of spivs who just decide, 'I'll get ahead by withholding a payment. David, he's done good work, but I'm really looking to fund the next project – or that new Lamborghini that I like.' And this goes on all the time. Typically the behaviour is, 'Mate, I know we owe you, but look, I'll make sure you get the next job.' So it just washes through and people do not get paid.

The pity of it, as I have mentioned in the email, is that the people down the very end are the most exposed. They are often the mum-and-dad small business operator who have the business mortgaged to the home or

underpinned by the home and financed by the home, and they will lose their property – and that happens, and it is a bloody terrible thing – no fault of their own. Think about it in this day and age: if you are in your mid-40s and that happens to you, you will never get back into the property market, so that is your livelihood and your life, largely, ruined. And that happens every day, unfortunately.

So security of payment was an effort when we first came to government under Steve Bracks, because I had heard this and we adopted it in the party platform. We then had an inquiry, which I chaired, and we adopted, largely, a scheme based on the New South Wales scheme – it has probably been around the longest in Australia and is pretty effective. It was a watered-down version that was introduced, and that is a counterweight to the tendency within the industry to bad payment practices, so it is actually on the side of the small subcontractors. It gives them a statutory recourse to lodge a claim and to have an adjudicator investigate it and make a determination, and it gives them some say in getting that money back. The court can then enforce it. In some instances they can go to the party above the party they are seeking it from and get the money that way. So it is a good step forward. But it is a self-help scheme, in a sense. It pretty much pays for itself and does not cost taxpayers anything to run. Adjudicators are registered, they get a fee for doing it – it is a lovely little scheme.

It was introduced, though, with a couple of provisos. One was that it would continue to be reviewed because it was a pretty modest start. The Building Commission was pretty skittish about it at the time – you know, ‘It’ll scare off investors.’ You will hear that again today in this inquiry. We had a large number of stakeholders around the table, probably too many, and getting them to agree on something was a bit tricky. But it was a modest start, so it was going to be reviewed. It was reviewed once, in 2006. It was strengthened. But it was also intended that it would keep being reviewed and would eventually be the same as the New South Wales Act. We did not talk national standards then. We just talked about having an Act that was consistent with the New South Wales model Act because it was the best, and between Victoria and New South Wales that would become the de facto national standard. So that has not happened since 2006. It has not been reviewed.

Thirdly, it would be actively promoted by the building commission. They would be out there educating people in the industry, because there is a long cultural practice of not doing the right thing and this could take years to get right. You would be out there advising, informing and giving free seminars to builders and constructing, actively promoting it, and I have to say as an observer I do not think that has happened very well. When that letter got written, again out of Parliament people would occasionally ask me, ‘What’s happening with security of payment?’ as if I knew. They wrote that letter because it was apparent to them that the Victorian scheme had fallen well behind. Other states had either introduced their own or amended theirs. Victoria had not, and the statistics speak for themselves. Those statistics, and they are several years old – they were from reports I think two or three years hence – were that by that point, Victorian contractors and subcontractors were relying upon their statutory scheme less often and for lesser amounts than people in New South Wales and Queensland. If you think about the relative size of their economies, that shows it had fallen behind. It is a pretty simple proposition: review the Act. Strengthen it. Get on with it, because people’s businesses fall over. This was pre COVID. It is much worse since.

The answer came back, ‘No, we’re pursuing national standards.’ Well, good luck with that. I was a minister, and we did get one or two things through in national standards. But it was bloody hard, and it should have been apparent pretty early on that if you continued to fiddle while Rome burned, Rome would keep burning. Here we are four or five years after that letter was written, and nothing has changed, as far as I can tell. It is pretty simple: strengthen the Act. Base it more on the New South Wales Act or even just adopt the New South Wales Act and actively promote it. It is an opt-in scheme at the moment, and I would suggest to you – maybe the VBA can tell you what the stats are – that overwhelmingly construction contracts in Victoria are not subject to it, because the person who is up the chain says to the person down the chain, ‘No, no, no. I don’t want to be captured by it, no,’ so behaviour does not change. That might be something for you to ponder, but it is a pretty straightforward thing. You could review it pretty quickly. The first inquiry only took a few months. The second inquiry only took a couple of months. It is not a hard thing to do. Anyway, I will leave that with you.

The CHAIR: Terrific. Thank you so much, Tony. Can I open it up to questions from the committee. Martin, do you want to kick off?

Martin CAMERON: Yes. In your opinion where is the problem? If we wanted to locate directly where the problem is, what is the hold-up? Why do we still have this actual problem?

Tony ROBINSON: There are probably any number of reasons. I am not involved in the industry, so it is only things I have reflected on. I think in Victoria traditionally – and this is a problem everywhere, so Victoria is not unique, but it is probably more of a problem in Victoria because for a longer time we tolerated bad behaviour further up the chain – there has always been this fear that if you are too prescriptive as to what people involved in the construction industry can do, particularly the developers, they will take their money elsewhere. At some point you can call their bluff and say, ‘Mate, there is only one capital city in Victoria. Where are you going to take your money to? You’re going to line up behind everyone else in this state? I don’t think so.’ So there has been this reluctance to really put that side of the industry under any pressure to reform its practices, and that part of the industry, unlike the part that I am more concerned about, the small contractors and subbies down the bottom, tend to take risks with other people’s money. They are the entrepreneurial class. They just see an opportunity and use borrowed money. For people down the end it is their own money, they are not borrowing anyone else’s, and they lose their houses because of it. There has not been sufficient recognition of the risk down that end. We have pandered too much to the threats up the top of the industry: ‘If you make it too hard, we’ll take our money elsewhere.’ Come on, it is not on. But anyway, that is my two bobs worth on that.

Martin CAMERON: That is where it is, yes. Thank you.

Sam GROTH: Tony, thanks for your time. You said the Act is not actually being prescribed or used by those higher up. Is that what you said?

Tony ROBINSON: Mmm.

Sam GROTH: Is there a reason that that is not being adhered to or not being used? What is the point of having an Act if it is not being followed?

Tony ROBINSON: I did not keep a copy of the original report. The VBA should have a copy of the two. I remember writing it up over the first summer we were in office. Part of it was it had to be promoted. The New South Wales scheme, when it came in, had all sorts of promotional activities. Morris Iemma, later Premier, was the minister who introduced it. They did an awful lot of promotional activities so that people would understand that this is something you can use to protect your interests. Today if you go out and ask subbies, some of them just shrug their shoulders and say, ‘I’ve never heard of it.’ It is still there. I am conscious that when that letter was written I did a bit of background checking, and my recollection is that the Queensland building commission, or whatever the entity there is, was very active. You could see there they were doing webinars and seminars and they had people travelling around telling builders and subbies, ‘This is your right. This is how to use the scheme.’ Here the people who are most likely to promote it are the legal firms if you need it. I think they might be working for the people up the chain, not down the chain.

Sam GROTH: So would you be saying that the subbies are not aware of it and putting it into their contracts with the builder per se? The builder for their part would prefer it probably not to be undertaken because it leaves them less liable or –

Tony ROBINSON: Yes.

Sam GROTH: Okay, sure.

Tony ROBINSON: That is right. It is as simple as that.

Martha HAYLETT: Tony, you are talking about promoting it and making it much more widely known, but are there any other non-legislative things that you think we can do as a government to address the issue? You are saying that the Act needs to be reviewed, but are there any non-legislative things you think could be done?

Tony ROBINSON: Look, I think you have got to always make sure that the public sector is an exemplar on these things. Every arm, every institution and organisation in the public sector should have very, very good payment practices. I am not sure they always do. I get that managing construction contracts is tricky – I am not going to suggest it is easy. But I can think back to when we first had the inquiry – I was a new MP, and we were just newly in office – and I thought it was going to be three or four around the table and it was like 21 or 22. Half of these people were unions that were blueing with builders. It was a very character-building moment, I would say. But anyway. There was resistance from people like VicRoads. They behind the scenes did not actually want it. They wanted a watered-down version, and the argument was ‘Because managing construction

contracts is really difficult.' I get that, but so is looking out for people who lose their houses – that is worse than difficult. Sometimes I think you have just got to focus and say, 'Are we doing everything in the public service across government to make sure that we're demonstrating best practice?' That would help a lot. Beyond that, I think you have just got to promote it and then really use organisations like the VBA to be doing inquiries. You know, why isn't it being used? What is it that we do not know that is holding this back? Keep inquiring, keep asking, because it is good practice.

David HODGETT: Tony, I have a couple, if I can. You may or may not know, but is New South Wales still the most effective system in the country?

Tony ROBINSON: I think it probably is. They have been amending their Act. Victoria was still in 2019–20 saying, 'We've got this idea; we'll get a national model,' and New South Wales was updating its Act. I think it was even allowing parts of the domestic building industry to be covered by it. If you are a house builder and you have got a cranky, cantankerous client who just says no, because that happens sometimes too, you can actually use it against them, and that is useful.

David HODGETT: Yes.

Tony ROBINSON: I think New South Wales, because it started early and because they have been pretty good stewards of it up there through governments of different persuasions, is probably the best. Queensland has a very paternalistic building sector, if I remember. This is going back a few years, but at the time I went up there to look at what they were doing it was pretty top heavy and I think pretty costly. I do not know that we would think it was great, but others can make their own mind up. But I would stick with New South Wales. The other thing: they are the biggest part of the industry. If you have got Victoria and New South Wales together, that sends a signal to the rest of the country, doesn't it, that this is the standard.

David HODGETT: Yes. You said in your submission – you talked about that it was to be promoted by the building commission. Is there a role to have any sort of mandated processes or incentives, or do you know of any state that does that, rather than a voluntary sort of promoting of it?

Tony ROBINSON: Yes, it is a really good question. I am loath to say it should be mandated, because I think there is probably always going to be an exception.

David HODGETT: And how do you do it?

Tony ROBINSON: And how do you do it? But I think you could tighten it up and eventually have a goal of saying, 'It will be used unless' – you have to find an exception as to why it should be used, because clearly leaving it to the industry's own devices to change its culture is not working. There should be things like a survey done to actually get some metrics around this – how often is it being used? That is the stuff the VBA should be doing as a matter of course.

David HODGETT: The final one I had – I am hogging the questions.

The CHAIR: No, David, you are welcome.

David HODGETT: This talk about strengthening – I looked through a lot of the submissions. You might want to take this on notice: what areas should we focus on and what specifically should we be looking at strengthening?

Tony ROBINSON: I would recommend you talk to, say, the master plumbers and NECA and a few of the others. They can give you the fine points on practice. But it might be things like the time period required that needs to elapse before you can make a claim. It might be the quantum of the claim, the frequency with which you can make claims or the reasons that other parties have or the scope they have. There are a whole series of little things that can be tightened up. Ours was modest to start with, by necessity. So I think you would have to ask: if the Victorian provision is weaker than its equivalent New South Wales position, 20 years after Victorian scheme started, why?

David HODGETT: Yes.

Tony ROBINSON: In the interests of the parties – the ones that are not being paid – why wouldn't you just tighten it up to that standard?

David HODGETT: Okay. Thank you.

Daniela DE MARTINO: Tony, thank you. Victoria carves out residential. I note that you said: at the beginning, starting off small, not to scare the horses, in effect. Was there always a thought that it would then expand and extend into residential, or was it only conceived as remaining in the commercial space?

Tony ROBINSON: Again, I would have to go back and try and recover that report. The VBA has probably got it. I know we had the master builders and the Housing Industry Association on that original working group, and sometimes you have got to put them at opposite ends of the table. They do not always get along.

The CHAIR: We have got them both coming in today.

Tony ROBINSON: Well, yes. There is a funny story there. Brian Welch I got along well with, but Brian was a character. He said to me, 'You know, Tony, the only reason you've been able to get unanimous support for the scheme is that everyone hates me.' Well, Brian, I thank you for your service. You have done a great job. I was consumer affairs minister, and I get the incredible complexities. It was left out for good reason at the start. It would have been too big a transformation, and I think at that time too we had had all sorts of domestic building insurance problems. HIH I think collapsed the year before, so that was a no-go zone. But I do not think there was any intention that over time anything would continue to be off the table – eventually you want a maturity right through. I mean, bad practice is bad practice. It does not matter if it is domestic or commercial or construction or industrial. It does not matter – bad practice is bad practice. It has to be tackled where it can be.

Daniela DE MARTINO: Just following on, the working group of 2005 – following that group, statutory entitlements claimable were actually reduced. Are you able to give us a bit of history there on the why?

Tony ROBINSON: I cannot. I remember the 2005 review was reasonably quick. And that was not done with a big group, that was just done with me and a couple of people appointed from the Building Commission to check on things. We checked what WA was doing, because there was talk they were starting to think about this. But I remember again it went back into the departments and all that, and there was a bit of argy-bargy about whether this would work or that would work, and I do not know that we got all of what was recommended. I mean, there was just a little bit of a compromise. So I cannot recall what that was, but again the intention was that there would be another review not too long after that and the thing would continue to be reviewed until eventually you had sort of a consistent statute with what was happening in New South Wales.

Daniela DE MARTINO: Thank you.

Sam GROTH: Tony, I am sure the answer is probably going to be both, but if you had to start with the process that you have put in place in terms of promoting the Act as well as strengthening and reviewing it, which side would you start with? Would you start promoting out to sector that this is available now while you take that process on, or would you go and get the process right, get the Act right and then start the promotion?

Tony ROBINSON: Yes. Nothing is stopping the VBA today running a campaign. Hindsight is a great thing, but I mean, COVID has really hit the building and construction industry bad. The problems they have got now in supply chain shortages and labour shortages and inflation – I mean, it is just terrible. The Victorian building and construction industry, right down to the subbies, was in a weaker position before COVID because of the weaker Act and because the Act was not being relied upon. So if you just extrapolate those stats out, clearly not as many Victorians were going in and getting the statutory relief relative to the other states. And it was not because the people up the chain in Victoria suddenly had an epiphany and thought, 'Oh, actually I should do the right thing. They don't need to go to the scheme, I'll do the right thing.' No, no, they just were not using the scheme. So they were carrying more bad debts and suffering payment problems more often before COVID.

Look, the VBA could start today talking about promoting this scheme. You know, go out and just get every industry group, every chamber – you could find a million ways in which to go out and start saying, 'This protection is available to you. You need to start demanding it.' And they could start at the bottom of the chain

where the most vulnerable are and work all the way up and then say, 'If you're not using it, we'll be on your tail to try and figure out why.' You can do that because you are an authority.

Sam GROTH: Yes. I mean, obviously it needs to be reviewed and strengthened, but there is no reason they cannot be using what is already in place right now. Yes.

Tony ROBINSON: No. Absolutely.

The CHAIR: Terrific. We are almost on time, but we might have time for one more question if anyone has anything else that they would like to ask. Tony, is there anything that you would like to add that you feel has not been covered that might help us with this inquiry?

Tony ROBINSON: No. Good luck. Go hard. Ask questions.

The CHAIR: We are very fortunate we have got John Murray coming in today as well.

Tony ROBINSON: Oh, yes. Well, John will be good.

The CHAIR: Obviously he has done a mountain of work in this space as well. So we really look forward to having a really robust inquiry and hearing lots of different voices. And having your historical input is a great way to kick off today's proceedings, so we thank you very much. We will forward you a copy of the inquiry when it is completed. So thank you very much.

Tony ROBINSON: Good on you, and good luck with the project.

The CHAIR: Thank you.

Witness withdrew.