

PROTECTIONS FOR SUBCONTRACTORS



A Government for You.

WA Labor Policy

August 2016

Protections for Subcontractors

A McGowan Labor Government recognises the contribution to economic growth and job creation made by the subcontracting industry.

As a high risk industry, recording some of the highest level of insolvencies, protections for subcontractors and broader industry reforms are urgently needed to safeguard these businesses. The reforms outlined here, together with the introduction of improved government support will provide a fairer system and more certainty for subcontractors and their families.

WA has a history of subcontractors who have suffered heavy financial losses, resulting in excessive debt as a consequence of providing their own capital upfront for materials and labour. The non-payment of subcontractors for supply of goods and services can be financially devastating and long term.

Subcontractors in many cases are our small business operators who absorb significant upfront risk. A McGowan Labor Government will implement protections for subcontractors, particularly in the event of non-payment and investigate greater industry reforms.

WA Labor has a Plan for Jobs that makes current and future small businesses a priority. Providing a fairer system and more certainty for subcontractors is yet another way a McGowan Labor Government will create a more vibrant and diversified economy and support small businesses.

Read more about our Plan for Jobs at markmcgowan.com.au/jobs



STAY INFORMED:

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A fairer system for subcontractors

A McGowan Labor Government is committed to introducing a range of initiatives to provide greater security for subcontractors.

As part of a WA Labor's Plan for Jobs a McGowan Labor Government will:

- Review how government departments implement the recommendations of the Construction Subcontractor Investigation Report and how complaints against government departments are processed.
- Establish a 'project trust account' for government contracts to protect access to progress payments between head contractors and subcontractors.
- Establish a 'security of payments' mechanism for government and non-government contracts to provide more transparency and structure to progress payments between head contractors and subcontractors.
- Consider introducing a demerit point system to encourage change in the subcontracting industry.
- Institute clearly defined procedures for calculating deductions from progress claims and examine the best method to ensure reimbursement payments are made within a 12 month period from completion of the subcontractors work.
- Ensure retention monies are held in a project trust account to protect subcontractors in the event of head contractor insolvency.
- Investigate a more reliable process of pre-tender assessment for head contractors throughout the construction industry and throughout all state government departments to minimise the risk of under-quoting on projects.
- Standardise and simplify subcontractor agreements and enforce the Australian Standards to make documentation fairer and more transparent for all.
- Apply mechanisms to clarify the procedures in the Construction Contracts Act 2004 relating to variation agreements between the head contractor and subcontractor, enforce approval of variation costs prior to commencement of works by instituting a penalty provision and ensure variations occur within the relevant project trust accounts.
- Work with industry and subcontractors on an accreditation process for subcontractors in various trades and task the Department of Commerce to establish a support mechanism to protect and assist subcontractors when dealing with head contractors.

These reforms together with improved government support for subcontractors will provide a fairer system and more certainty for subcontractors and their families.

Action on subcontractor recommendations

In March 2013, the Liberal State Government tabled the *Construction Subcontractor Investigation Report* which outlined a number of recommendations to protect subcontractors in the event of head contractor insolvency and non-payment.

Despite stakeholders pushing for broad implementation of the Report's findings, the Liberal Government only adopted recommendations within the office of Building Management and Works (BMW).¹ As a consequence, subcontractors continue to experience the same issues on State Government managed projects like the Perth Children's Hospital, managed by the Department of Treasury, where there are complaints of subcontractor non-payment.²

In Western Australia, subcontractors continue to experience uncertainty on government and non-government projects which is evidence of the need for broad industry reform. The Liberal State Government has had ample time to implement changes that will benefit subcontractors and has failed to do so.

- ***A McGowan Labor Government will review how government departments implement the recommendations of the Construction Subcontractor Investigation Report and how complaints against government departments are processed***

The Western Australian construction industry is primarily regulated under the Construction Contracts Act 2004 ('the Act'). This Act applies to contracts to perform construction work or provide

related goods and services on a site in Western Australia. The Act regulates both government and non-government construction projects.

The initiatives to be introduced by a McGowan Labor Government will address recommendations outlined in the report to provide more certainty to subcontractors in the future.

Protecting access to progress payments

A progress payment claim entitles subcontractors to be paid for work performed and materials supplied before the completion of a job. The use of progress payments is standard practice. Once a subcontractor lodges a progress payment claim, the head contractor is required to provide a certificate approving the amount being claimed.

In the case of government contracts, funds are provided to the head contractor when capital works commence. The creation of a 'project trust account' where a portion of the contract payment is placed in trust, will ensure the security of progress payments to subcontractors, mitigating the risk of contract dispute in the event of head contractor insolvency.

In 2013 the Liberal State Government announced a trial of project bank accounts for selected BMW construction projects. The State Government has decided not to implement this initiative despite overwhelming support from the subcontracting industry.

¹GOVERNMENT DEPARTMENTS — SUBCONTRACTORS." Question without Notice, 17 Feb 2015

²Strutt, Jessica. "Contractors on New Perth Children's Hospital Project Not Being Paid, under Stress, Opposition Says." ABC News 29 June 2015. Web. <<http://www.abc.net.au/news/2015-06-26/contractor-payment-dispute-at-new-perth-childrens-hospital/6576766>>.

- ***A McGowan Labor Government will establish a ‘project trust account’ for government contracts to protect access to progress payments between head contractors and subcontractors.***

There have also been instances where head contractors pay an amount to the subcontractor that is less than the claim amount. Similarly, there have been instances where a discrepancy in payments is only identified at the end of the project, leaving subcontractors either out of pocket or forced to bargain with the head contractor for the money owed.

- ***A McGowan Labor Government will establish a ‘security of payments’ mechanism for government and non-government contracts to provide more transparency and structure to progress payments between head contractors and subcontractors.***

Amendments to the *Construction Contracts Act 2004* will provide more transparency and structure to issues such as dates for payment claims, dates for issuing invoices, progress claim approval and payment day. WA Labor will also impose penalties for the non-issue of progress claim certificates and will investigate more appropriate payment terms, in line with other States.

Demerit points system

To encourage a fairer system for Subcontractors, WA Labor will consider adopting a licence disqualification and demerit point system for offences including the non-payment of subcontractors.

A schedule of offences similar to those adopted by the Queensland Building and Construction Commission (QBCC) will be considered in conjunction with a public register to serve as an alert to contractors, suppliers and homeowners.

For example, the QBCC can ensure a Head Contractor who has not paid its subcontractors on three occasions will no longer be eligible to tender for government contracts. Following this, any Head Contractor who continues to not pay subcontractors will be disqualified from holding a QBCC licence all together.

- ***A McGowan Labor Government will consider introducing a demerit point system to encourage change in the subcontracting industry.***

Faster release of retention monies for completed projects

Head contractors under the Act have the right to retain monies, or deduct payments otherwise due to subcontractors, as security for proper performance of the contract.

Retention monies are comparable with rental bonds, which are required to be paid when an individual rents a property. Similar to rental bonds, retention monies are to be released at the completion of the contract. Upon completion of the job, the head contractor must reimburse one half of the retention monies to the subcontractor and the remaining half within a 12 month period from project completion.

In practice, for many subcontractors who provide labour and materials at the start of a project, their final reimbursement may not be received until 12 months after the completion of the entire project, leaving them out-of-pocket in some cases for years.

Providing for second reimbursement, 12 months after their component of work is completed will ensure subcontractors will see a faster return of retention monies.

Unfortunately, in practice the process of reimbursement is also often delayed beyond project completion. To compound this issue, the sector does not have a consistent calculation for reimbursement.

- ***A McGowan Labor Government will institute clearly defined procedures for calculating deductions from progress claims and examine the best method to ensure reimbursement payments are made within a 12 month period from the completion of the subcontractors' works.***

Further, retention monies are not returned to subcontractors if a head contractor becomes insolvent over the life of the project.

- ***A McGowan Labor Government will ensure retention monies are held in a project trust account to protect against head contractor insolvency.***

Tendering process to address under-quoting projects

The construction industry operates on a trickle down risk mitigation process. This process encourages head contractors to propose a contract price during the tender process that is less than fair value.¹

There are very few instances where a contract is not awarded to the lowest bidder in the tender process. As a consequence, head contractors can pressure subcontractors to provide their services at an incredibly low price.²

Many subcontractors struggle to break even and some report a loss of money. Subcontractors who have already purchased materials or dedicated labor hours are particularly vulnerable to this process.

- ***A McGowan Labor Government will investigate a more reliable process of pre-tender assessment for head contractors throughout the construction industry and throughout all state government departments to minimise the risk of under-quoting on projects.***

This will be implemented with a uniform and standardised tendering process to increase transparency and efficiency, as recommended in the Construction Subcontractor Investigation Report.

¹Eaton, David. "Final Report." Construction Subcontractor Investigation (2013) Print, p36

²Subcontractors for Fair Treatment Review of Construction Contracts Act 2004." (2014) Print

New subcontractor agreements to create fairer dispute resolution

Many subcontracting businesses in WA are small-scale, with few employees relative to the size of the head contractor. These businesses operate contract-to-contract and cannot generally afford to engage high-end legal advice.¹

Head contractors typically have in-house counsel or other dedicated legal representation. This creates a natural imbalance when a dispute arises between a subcontractor and head contractor.

Many industry documents and legislative requirements use legal terminology and can be unnecessarily complex. Further, dispute resolution processes can be prolonged and costly.

The current state of affairs has resulted in a system that is unfairly biased towards head contractors and does not allow for fair and objective mechanisms for dispute resolution.

- ***A McGowan Labor Government will standardise and simplify subcontractor agreements and enforce the Australian Standards to make documentation and dispute proceedings fairer for all.***

This will be implemented along with a tiered levelling system to be determined in consultation with industry. Amendments will also be made to permit an adjudicator, in exceptional circumstances only, to allow an extension of time within which an application can be made. This will ensure greater certainty for those claiming through the Act, ensuring that the original intent of the Act is being fulfilled.

¹Subcontractors for Fair Treatment Review of Construction Contracts Act 2004." (2014), Print

Clarifying variation agreements to reduce risk of disputes

Often there is an extension of scope or additional works required on a project.

The Act stipulates that no subcontractor should be required to do additional works unless there is a consensus of agreement between the head contractor and the subcontractor on the extent and total cost of the extension.

Reports point to this provision being ineffective in practice, as head contractors simply instruct a subcontractor to proceed with works without approval of variation price.

A McGowan Labor Government will:

- ***apply mechanisms to clarify the procedures in the Construction Contract Act 2004 relating to variation agreements between the head contractor and subcontractor;***
- ***enforce approval of variation costs prior to commencement of works by instituting a penalty provision; and***
- ***ensure variations occur within the relevant project trust accounts.***

The subcontractor industry moving forward

Western Australia does not have a peak association dedicated to the interests of subcontractors.

Additionally, many subcontracting trades have no formal certification requirements. These two factors bear a great influence over the relationship between head and subcontractors.

- ***A McGowan Labor Government will work with industry and subcontractors on an accreditation process for subcontractors in various trades and task the Department of Commerce to establish a support mechanism to protect and assist subcontractors when dealing with head contractors.***

Online application process

A McGowan Labor Government will establish an online application system for the lodgement of claims under the Act. The provision of a user friendly electronic application system that allows for claims to be submitted via the internet will allow all contractors to lodge an application with the press of a button.

The system will ensure accessibility to a wider section of the industry. The joint initiative between the Insurance Commission of Western Australia and the Western Australian Police for the online crash reporting facility is an example that will be used to develop a system that assists applications to be made by any contractor. Increasing the ability for applications to be lodged with ease will assist to deter non-payment within the industry.

The current head contractor and subcontractor relationship

Subcontractor arrangements are beneficial for subcontractors and head contractors and carry substantial economic benefits, allowing labour services in situations where a traditional employment relationship would be impractical or uneconomical.

Subcontractors are engaged in a business-to-business relationship, as opposed to the traditional employer-employee relationship. Subcontractors typically offer to provide services such as labour, tools, materials and experience under contract to the head contractor.

As subcontractors are expected to provide their own labour, tools and materials, they are particularly impacted by head contractor insolvencies, which often result in subcontractor non-payment.

Sadly, the construction industry records the highest level of insolvencies against all other industries, with the main causes being: inadequate cash flow; poor strategic management; poor financial controls; and under capitalisation.¹

Recently, concern has been expressed over the adequacy of protections available to subcontractors under the Act, particularly in the event of subcontractor non-payment.

Subcontractor non-payment has been reported on both government and non-government construction projects.

The implementation of these measures by a McGowan Labor Government will address many of these issues, protect jobs and give more certainty and security to the cash flow of thousands of subcontractor businesses throughout WA.

¹ Submission to the Senate Inquiry into Insolvency in the Construction Industry." (2015): 20. Web. <<http://insolvencyresources.com.au/Papers/ASIC-submission-to-Senate-Inquiry-Construction-Industry-April2015-11.pdf>>.



WA LABOR

PLAN FOR JOBS

WA Labor has a Plan for Jobs. It is a plan that will create a more vibrant and diversified economy with a broader range of industries and jobs. Our plan includes initiatives that will:

- Deliver more local content and local jobs on government projects.
- Support local business to compete for government work with the support of the Industry Capability Network WA (ICN WA).
- Increase local content requirements on State projects of strategic significance.
- Secure more manufacturing work for WA.
- Expand our industry and technology parks.
- Foster innovative industries and promote renewable industries.
- Develop a 20-year State Infrastructure Strategy to drive investment.

These initiatives will create thousands of new jobs and support the economic opportunities for small and medium businesses including subcontractors. Together with the initiatives outlined here a McGowan Labor Government will support subcontractors and provide them with more certainty and security.

Go to markmcgowan.com.au/jobs to get the full package of initiatives in our Plan for Jobs.



Better Protections for Subcontractors

Creating Jobs

Strong Economy

Diversification

Local Content



A Government for You.