



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 54

Contractors' Liens

REPORT

OCTOBER 1974

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

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TO: THE HON. N. McNEILL M.L.C.
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. On 17 June 1974 you asked the Commission to advise on the practical effects of enacting liens and charges legislation (with particular reference to the South Australian and Queensland legislation), to protect the interests of persons involved in the building and construction industries.

INTERIM REPORT AND WORKING PAPER

2. On 24 July 1974 the Commission submitted an interim report setting out its tentative views based on the limited research it had then done. These views were that -

- (a) it would be undesirable at the present time to introduce legislation to protect head or subcontractors by liens against the owner's land;
- (b) a scheme could be devised to protect subcontractors by legislation creating a charge in their favour on money not yet paid by the owner to the head-contractor, but that there were difficulties which required to be resolved to make such a system operate satisfactorily.

3. The Commission recommended in its interim report that it follow its normal practice of issuing a working paper seeking public comment before submitting a final report. You agreed to this proposal and the Commission issued a working paper on 9 August 1974. The names of those who commented on the working paper are contained in Appendix I to this report and the working paper is attached as Appendix II.

LIENS AND CHARGES GENERALLY

4. At common law a lien arises in favour of a person who does work on movable goods and relates only to those goods. A person who does work on land or a building does not have, in the absence of a contractual provision, a lien on the land for work done or materials supplied in the course of the work. In those jurisdictions where liens exist for the protection of

persons in the building industry, they have been created by statute and are commonly known as contractors' liens. Legislation which allows for a contractor's lien provides that such a lien is registrable over the land upon which the building works are carried out. Once registered it acts as an encumbrance against that land. Subject to limitations imposed by the enabling statute, a lien holder is entitled to sell the land over which the lien is registered and apply the proceeds in satisfaction of the debt secured by the lien, having regard to any other encumbrances registered before the lien.

5. At common law a charge operates as an encumbrance against money payable by one person to another in favour of a third person. In the absence of a contractual provision, a subcontractor who does work on a building project has no right to a charge in his favour over money owing to the head-contractor under the head-contract. As in the case of liens, in those jurisdictions where charges in favour of subcontractors exist, they have been created by statute. It is not possible for a head-contractor to charge money due to him under his contract with the owner, because it would in effect be only a confirmation of the debt which already exists under that contract.

THE LAW IN WESTERN AUSTRALIA

6. The *Workmen's Wages Act 1898* gives a workman a first charge for unpaid wages up to \$20 on money payable by the owner to the head-contractor (see s.4). This Act appears to be in disuse. Reference is also made to s.283 of the *Mining Act 1904*, which enables employees working on a mining tenement to claim a lien for unpaid wages up to four weeks as a first encumbrance on the tenement. This provision is seldom used.

7. In the absence of a contractual provision to the contrary, a head-contractor or a subcontractor cannot claim a lien over the land on which he works or over materials supplied or installed by him on that land, nor can a subcontractor claim a charge on money due to the head-contractor in respect of work or materials supplied by him under his subcontract. In the event of the head-contractor's insolvency, his subcontractors rank as unsecured creditors (*Pritchett & Gold & Electrical Power Storage Co. Ltd. v. Currie* [1916] 2 Ch. 515).

8. At common law all materials and fittings once incorporated in or affixed to a building or land pass to the owner of the land. Moreover, some contracts provide that as soon as

materials are brought on to the building site they become the property of the owner of the land. Such a provision is designed to prevent materials passing to the receiver or trustee in the event of insolvency of the head-contractor or his subcontractors and for this reason may sometimes extend to cover plant (see generally *Hudson's Building and Engineering Contracts 10th ed.* (1970) Ch.12).

9. A subcontractor cannot bypass the head-contractor and have recourse against the owner because there is no contract between the subcontractor and the owner (*A. Vigers Sons & Co. Ltd. v. Swindell* [1939] 3 All E.R. 590; *quære Property Law Act 1969* (W.A.) s.11). Furthermore, the owner cannot pay to the subcontractor money due to the head-contractor unless the contract between the head-contractor and the owner so provides (In *Re Holte, ex parte Gray* (1888) 58 L.J.Q.B. 5). Such a provision usually only empowers the owner to pay a nominated subcontractor. It does not oblige him to do so and accordingly payment direct to the subcontractor cannot be insisted upon. Provisions empowering payment direct to a subcontractor are common in contracts for work done for Government instrumentalities, but the Commission is informed that the power is not often exercised. Mr. C.H. Smith Q.C., in his *Report of the Inquiry into the Building Industry of Western Australia 1973-74* (hereinafter called "the Smith Report"), said he had been informed that the inclusion of such provisions in building contracts was on the decline (see paragraphs 7.15 and 7.16). However many commentators on the working paper suggested that the practice is still common for air conditioning, electrical and other specialist subcontracts.

THE LAW IN OTHER JURISDICTIONS

Australia

10. Legislation has existed since 1893 in South Australia providing for both contractors' liens and charges (see the *Workmen's Liens Act 1893*). In Queensland, legislation providing for subcontractors' charges has existed since July 1974 (see the *Subcontractors' Charges Act 1974*). However legislation providing for both liens and charges was in force in Queensland between 1892 and 1964. No other Australian State or Territory has statutory provision for either contractors' liens or charges.

11. In New South Wales some protection is afforded to subcontractors and workmen by the *Contractors' Debts Act 1897*. This Act enables such persons, after they have obtained judgement against the head-contractor, to obtain a statutory assignment of money due to the head-contractor from the owner. The Commission understands the legislation is not effective, presumably because of the delay in obtaining a judgement.

New Zealand

12. New Zealand has had legislation providing for contractors' liens and charges since 1892. The legislation now in force is the *Wages Protection and Contractors' Liens Act 1939*.

Canada

13. All the Canadian provinces, except Quebec, have legislation providing for contractors' liens and, to a limited extent, for charges. Unlike the other jurisdictions studied by the Commission, it is possible to contract out of the legislation. (For an account of the Canadian legislation see *Mechanics' Liens in Canada*, 3rd ed. (1972) Macklem & Bristow).

A comparative study of the legislation

Liens

14. The legislation in South Australia, New Zealand and Canada enables a head-contractor and subcontractor who has done work with the consent, express or implied, of the owner to register a lien against the owner's land to secure payment of the contract price. In South Australia a lien cannot be registered until money is due to the claimant under his contract. In New Zealand a claimant may register a lien as soon as he commences work, even though no money is then due to him.

Charges

15. In Queensland and New Zealand a subcontractor may claim a charge against money due to the head-contractor or any superior contractor, but in South Australia he may claim a charge only in respect of money due to his immediately superior contractor. Under the South

Australian legislation a subcontractor cannot claim a charge until money is due to him, but in Queensland and New Zealand he may claim a charge immediately he commences work.

Employees' Wages

16. The South Australian legislation permits an employee to claim a lien or a charge for unpaid wages, limited to four weeks wages or \$200, whichever is the less. In New Zealand an employee may claim a lien or charge for the full amount of his unpaid wages, but has a first priority only for wages accrued over a period not exceeding three months, up to a maximum of \$100. No provision is made for a charge in respect of unpaid wages in Queensland.

Enforcement

17. Liens and charges are enforced in South Australia in the court which has jurisdiction appropriate to the amount claimed thereunder. In New Zealand they may be enforced in the Magistrates' Court or the Supreme Court, as the claimant chooses. In Queensland all charges, irrespective of the amount involved, may only be enforced in a Magistrates' Court.

Priorities

18. In South Australia liens and charges for workmen's wages rank first in priority, then liens and charges of subcontractors, and finally liens of head-contractors. The New Zealand legislation provides that liens or charges for unpaid wages in excess of the limit referred to in paragraph 16 above rank after those for wages within that limit, and equally with liens and charges of subcontractors. A lien or charge of a subcontractor has priority over a lien or charge of the contractor with whom the contract is made. Liens of head-contractors rank last.

Suppliers

19. Under the South Australian legislation a supplier of materials who does not perform work on the land can claim a lien (but not a charge) for the cost of these materials (see *Ready Mixed Concrete (S.A.) Pty. Ltd. v. Constructions (Broken Hill) Pty. Ltd.* [1963] S.A.S.R. 340). The New Zealand legislation permits a supplier of materials to claim a lien or charge, provided the materials were brought on to premises to be used in connection with work on

those premises (see paragraphs 59 to 62 below). The Queensland legislation, which provides only for charges (see paragraph 10 above), extends to suppliers in the same way as the New Zealand legislation.

The Crown

20. In South Australia and New Zealand the Crown is not bound by the legislation. The Queensland legislation expressly binds the Crown.

Statutory retention

21. The New Zealand legislation differs significantly from that in South Australia and Queensland in that it requires the owner and any superior contractor to retain for thirty-one days after the date of completion or abandonment of work specified in the head-contract or subcontract, as the case may be, the following percentages of the money which has become payable under the contract -

- (a) 10% of the first \$200,000 or part thereof;
- (b) 5% of the next \$800,000 or part thereof;
- (c) 2½% of the next \$1,000,000 or part thereof;
- (d) 1% of the next \$2,000,000 or part thereof; and
- (e) ¼% of any amount in excess of \$4,000,000.

A similar requirement exists in the Canadian legislation, although there the amount to be retained is based not on the contract price but on the actual value of the work done, and is a uniform percentage rather than a variable one.

Statutory trust

22. Legislation in British Columbia, Manitoba and New Brunswick, in addition to providing for liens, provides for the establishment of a trust fund made up of the money paid by the owner to the head-contractor. The principal purpose of the fund is to provide a further security for the benefit of subcontractors and workmen. In Ontario a similar provision exists,

except that, in certain circumstances, money due to the head-contractor is held on trust by the owner.

Working paper

23. A more detailed account of the legislation in other jurisdictions is contained in paragraphs 9 to 31 of the working paper.

PROPOSALS FOR REFORM OF THE LAW IN OTHER JURISDICTIONS

24. Apart from the Queensland *Subcontractors' Charges Act 1974*, legislation providing for liens and charges was in the main enacted many years ago, when the present day complex chain of subcontractors did not exist to the same extent. This type of legislation has been the subject of much judicial criticism. For example, Philip J. said in *Terrazo Tile Co. v. Willis & Sons Ltd.* [1960] Qd. R. 475 that the criticism of the New Zealand legislation that it was "a difficult, obscure and technical piece of legislation and one which presents serious problems in its practical application", also applied to the Queensland *Contractors' and Workmen's Lien Act* of 1906. He suggested that the Queensland Act be repealed, "and if a substituted Act be passed that it be made intelligible to the lawyer and the layman" (p.479). The Act was subsequently repealed in 1964.

25. In New Zealand in 1965 a committee under the chairmanship of Mr. D.F. Dugdale recommended substantial changes in the legislation in that country to make it more workable. However the report of that committee has itself been criticised. The legislation has not been repealed or amended since then.

26. Similarly, legislation in the Canadian Provinces has been the subject of review by Law Reform Commissions and others, because of difficulties arising out of the operation of the legislation in practice. In most Provinces it has been the subject of frequent amendments. In its report in 1972, the Law Reform Commission of British Columbia said it was impressed with the cogency of the suggestions to it favouring repeal. However, that Commission recommended amendment, rather than repeal, on the grounds that business and labour had for so long fashioned their practices on the basis of the legislation and repeal could have far

reaching and uncertain effects (see the *Report on Debtor Creditor Relationships*, Part 2, (1972) p.25).

27. In South Australia, because of misgivings as to the operation of *the Workmen's Liens Act*, the Law Reform Committee has been asked to undertake a review of it. In Victoria in 1962 the Statute Law Revision Committee recommended against the enactment of legislation providing for liens and charges, and is currently considering the desirability of legislation to protect subcontractors.

IS THERE A NEED FOR LEGISLATION?

28. As one of a number of recommendations for the financial protection of subcontractors and employees, the Smith Report recommended that -

“legislation based upon the *Workmen's Liens Act 1893-1964* (S.A.) be enacted. Such legislation should bind the Crown and the financial protection which it affords should extend to all subcontractors and workmen, but not to persons who supply material and not services” (paragraph 10.3.B (iii)).”

29. Liens and charges legislation of the type mentioned in the Smith Report seeks to resolve the conflicting interests of the owner on the one hand, in limiting his responsibility to payment of debts he himself has incurred, and those of subcontractors on the other, in being paid for the work they have done.

30. The question arises whether the law should be amended to provide special protection for certain persons in the building industry, when it leaves other creditors unprotected. Mr. Smith suggested to the Commission that a special privilege should be given to subcontractors because his enquiries indicated that very few head-contractors actually performed much building work. His report indicates that subcontractors carry out between 80%-90% of the construction work in the house building sector and between 60%-70% in the case of larger projects (the Smith Report paragraph 2.15). Further, the Smith Report discloses that in the last two years there has been an unduly high incidence of insolvency in the building industry, particularly of building companies with small paid up capital, which has caused substantial loss to subcontractors (the Smith Report ch.7).

31. The underlying arguments in support of the need for legislation providing for liens or charges are that;-

- (a) the subcontractor has by his work improved the value of the owner's land; and
- (b) the owner should take some responsibility for the payment of subcontractors by reason of his having initiated the project.

In commenting on the working paper, the Master Plumbers' Association suggested additional reasons, such as preservation of the apprenticeship system and stability of the building and construction industries.

32. However, even if it is assumed that legislation placing subcontractors in the building and construction industries in a privileged position is desirable in principle, it is necessary to consider whether legislation can be devised which works satisfactorily, which in fact assists those for whose protection it is devised and which does not affect unduly the rights and interests of others.

33. The Commission in its working paper referred to problems which would need to be resolved if liens or charges legislation were to be enacted in this State (see paragraphs 40 to 76 of the working paper). Few of the commentators on the working paper offered any solution to these problems. Some pointed out further difficulties, and most suggested forms of protection alternative to liens or charges (see paragraph 72 below).

LIENS

General

34. In its working paper the Commission expressed the tentative view that legislation should not be introduced to protect contractors by liens. Only the Master Plumbers' Association and the Master Painters, Decorators and Sign-writers' Association advocated such legislation. Most commentators, including the Master Builders' Association, The Royal Australian Institute of Architects (W.A. Chapter), the Law Society of Western Australia, the Local Government Association of Western Australia, the Perth Building Society, the Perth

Chamber of Commerce, the Main Roads Department, the Metropolitan Water Supply, Sewerage and Drainage Board and the Western Australian Chamber of Manufactures expressly opposed it.

35. In addition to having all the difficulties associated with charges (see paragraphs 41 to 56 below), liens legislation has, in the Commission's view, the fundamental objection that the registration of a lien against land may be detrimental to an owner who is in no way at fault. A registered lien operates as an encumbrance and may inhibit the owner's right to transfer, mortgage or otherwise deal with his land. A person relying on a mortgage to construct a dwelling house could find that because the land was encumbered by a lien, the mortgagee refused to advance further money since the recovery of those further advances would be postponed to the lien. This would be likely to cause hardship, particularly if the registration of one lien resulted in the registration of other liens, as commonly occurs in South Australia.

In its comments on the working paper the Perth Building Society said that the registration of a lien could possibly result in further advances under a mortgage being in breach of s.19 of the *Building Societies Act*. That section prohibits building society from advancing money on the security of property subject to a prior mortgage. If 'mortgage' includes a lien (and there is some doubt about this), it would be unlawful for a building society to advance money until all liens had been removed.

36. Problems could also arise for an owner of land due to the actions of third parties over whom he has no control. For example, a lien could be registered over an owner's land, to the extent of the interest created by a lease, because of work done for the lessee. Again, a person who buys a newly completed house under a terms contract could find that his land becomes encumbered by a lien for work performed for the previous owner.

Commission's conclusion as to liens

37. In the light of the foregoing, the Commission confirms the view in the working paper that legislation providing for liens should not be introduced.

CHARGES

General

38. In its working paper the Commission expressed the view that a scheme could be devised to protect subcontractors by legislation creating a charge in their favour against the money payable under the head-contract, though a number of difficulties had to be resolved for the scheme to operate satisfactorily. The comments received on the working paper suggest that there is more support for charges than for liens. However, only the Building Owners and Managers Association of Australia Ltd. saw an urgent need for charges legislation. The Perth Chamber of Commerce suggested that such legislation would be the best form of protection for workers and subcontractors involved in the building industry, provided it was coupled with an insurance scheme guaranteeing payment of the head-contractor's debts. While the Master Builders' Association said there were good arguments for the enactment of legislation similar to the Queensland *Subcontractors' Charges Act 1974*, it stated that such legislation could not be expected to provide "a panacea for [subcontractors'] ills".

39. The great majority of commentators, including the Allied Building Trades Association, the Association of Painting Contractors, the Builders and Painters Registration Boards, the Public Works Department, the Royal Australian Institute of Architects and the Western Australian Chamber of Manufactures suggested that subcontractors and others could be better protected by other means (see paragraphs 72 to 77 below). Most commentators were apprehensive that charges legislation would give rise to many difficulties in practice.

40. The Commission has not been able to find an adequate solution to many of these difficulties, which are discussed in paragraphs 41 to 56 below (and see paragraphs 40 to 56 and 60 to 61 of the working paper).

Problems as to charges

(i) *Finance for contractors*

41. The existence of charges legislation may make it harder for a contractor to finance the building project in its early stages, since until a progress payment becomes due under his

contract he must rely on his own resources. Commonly a contractor borrows money, offering as part of the security a floating charge or bill of sale over money to become payable under his contract. However, a charge would take precedence over such a security (see paragraphs 10 and 41 of the working paper), and banks and finance companies would probably be reluctant to lend money to any contractors but those of considerable substance.

42. The Commission can see no satisfactory answer to problems created by the subordinate position in which those who provide financial assistance to persons involved in the building industry would be placed as the result of a charge. One commentator suggested that it was not a problem at all, because it would prevent builders without adequate resources from entering or remaining in the industry. On the other hand it has been submitted that the result could be that it might tempt contractors without adequate financial backing into risky ventures.

(ii) *Effectiveness of charges*

43. In commenting on the working paper the Under Secretary for Works said that charges legislation would not remove financially insecure builders from the industry nor provide any substantial financial protection to subcontractors in the case of a builder's insolvency. The Western Australian Chamber of Manufactures agreed that charges legislation was likely to be ineffective from the subcontractor's point of view, particularly in the case of the head-contractor's insolvency. The Federal Minister for Housing and construction said that, as the result of a recent study undertaken by the National Public Works Conference, the Conference concluded that this type of legislation did not appear to serve a useful purpose and, except in isolated instances, the rights under the legislation were of little value. The Perth Chamber of Commerce, although advocating some form of charges legislation, agreed that in many cases such legislation would not of itself protect subcontractors where the owner had paid the head-contractor all the money due.

44. Doubt about the effectiveness of charges legislation is based on the fact that, if an owner acts in good faith, he cannot be required to pay more than he is ultimately liable to pay under the head-contract. Where a contract provides that the entire work is to be completed before payment is due, no money becomes payable if the work is abandoned before completion (*Sumpter v. Hedges* [1898] 1 Q.B. 673). Similarly, where the contract price is

payable by instalments, an instalment is not payable if the work is abandoned before payment of the instalment becomes due. Although money due prior to abandonment is payable, it is subject to deduction for damages. If therefore the head-contractor abandons the work a subcontractor's charge may have little value, even though that subcontractor has finished his work.

45. The Commission's enquiries reveal that, in the jurisdictions that have charges legislation, subcontractors seem reluctant to resort to charges or liens as a matter of course, for fear of antagonising head-contractors and reducing their chances of obtaining further contracts. They do not usually have resort to the legislation until they suspect the head-contractor will have difficulty in paying them. By then the owner may well have paid over to the head-contractor most of the contract price and any money still due to the head-contractor could be insufficient to satisfy the subcontractor's charge.

46. Experience in South Australia is that, although subcontractors are generally reluctant to resort to liens or charges, once one has served notice of a lien or charge, others usually follow suit. This prevents the owner advancing further money to the head-contractor until the liens or charges are satisfied, which often removes the latter's incentive to continue the job. In the event of a head-contractor not continuing, no further money becomes payable to him by the owner and therefore no money becomes payable under the liens or charges. Enquiries in South Australia suggest that on average little more than 5% of lien or charge holders are paid in full. Experience in British Columbia appears to be much the same (see the *Report on Debtor Creditor Relationships*, Part 2 (1972)).

(iii) *Delays*

47. Even where the creation of charges does not lead to the head-contractor abandoning the work it may well lead to the head-contractor and his subcontractors ceasing work until liability under the charges has been resolved. It could take a considerable time to adjust the respective rights of the owner, the head-contractor and the subcontractors.

48. If the entitlement to a charge is disputed, the matter must be determined by a court. The Commission understands that in Queensland it was considered that the delay was less in the Magistrates' Court than in the Supreme Court and for this reason the Magistrates' Court is

given exclusive jurisdiction to determine disputes over charges. In New Zealand the Magistrates' Court has concurrent jurisdiction with the Supreme Court to enforce charges and liens. In South Australia the Local Court and the Supreme Court have jurisdiction within their normal limits.

49. If the Government decides to introduce charges legislation, the Commission suggests that the South Australian approach should be adopted. In Western Australia the delay in the superior courts is no greater than in the Local Court, and there is nothing in charges legislation which would justify changing the normal rules as to the appropriate court.

50. In South Australia a claimant issues process to comply with the statutory requirement to enforce the charge or lien within the time limit and then, more often than not, leaves the owner to pursue the matter. This could be overcome by limiting the time during which a charge remains effective, with power for the court to extend that time.

51. To avoid unnecessary argument and delay and to keep costs to a minimum the Queensland *Subcontractors' Charges Act 1974* provides that, unless a contractor on whom notice of a charge is served denies his liability to pay the amount claimed, he is deemed to have admitted it. The Building Industry Subcontractors Organisation suggested that such a provision was desirable because it prevented "frivolous procrastination by head-contractors". The Commission does not favour such a provision which can be harsh on the contractor.

52. If a head-contractor is a company in liquidation, delays may occur in that a subcontractor may not be able to enforce his charge without leave of the court (see *Companies Act* (W.A.) ss.181, 230(3) and 263(2); see also In *Re Hollywood Homes Pty. Ltd.* [1964] S.A.S.R. 116 and R.D. Elliott *The Artificer's Lien* pp. 101-102).

(iv) *Time at which charge can be created*

53. The question of when a charge arises is important in determining priority between competing charges and other securities. In New Zealand a notice of charge can be given although the work is not completed, or the time for payment of the money payable by the owner, or the money claimed, has not arrived. The position in Queensland is similar. In South Australia it appears that a charge cannot arise before a debt is due under the subcontract and

there is some doubt whether it relates back to when the contract was made, or when the work commenced, or whether it relates back at all (see the cases cited in paragraph 44 of the working paper).

54. Difficulties in practice could occur whatever is chosen as the earliest time at which a charge can arise. For example, if the relevant time is when a progress payment is due under the head-contract, a subcontractor who completed his work before this could be penalised. If the time is immediately the subcontractor's work commences, as suggested by the Master Painters, Decorators and Sign-writers' Association, the money paid to the head-contractor could be reduced, with consequent disruption affecting subcontractors working on the later stages of the project.

If the Government decides to introduce charges legislation, the Commission suggests that a charge should not be able to be created until money is due under the subcontract. The Commission submits that this alternative appears to have the least difficulties, though it may jeopardise a subcontractor working on the later stages of the project if the money remaining unpaid under the head-contract is insufficient to pay him.

55. The latest time which a charge could arise would be a date after completion of work under the head-contract. However this may lead to practical difficulties. The work may be substantially completed, yet defects remain to be corrected. The original completion date may be altered because additional work has been done. Possibly the problem could be overcome by providing that work is deemed to be completed upon possession being given and taken, or when the architect certifies completion, as the New Zealand Dugdale Committee recommended (Dugdale Report paragraph 21). But there could be difficulty if possession is taken of only part of the building or is taken before the date specified for completion in the contract.

(v) *Multiplicity of charges*

56. The Queensland and New Zealand legislation enables a subcontractor to claim a charge over money due to all contractors superior to him. Obviously the longer the chain of subcontractors the more charges there are likely to be in respect of the same work. This creates problems in determining priority between competing charges and adds to the delays in

the payment of each subcontractor. In South Australia a subcontractor is confined to a charge over money due to his immediately superior contractor but he has a right to a lien over the owner's land. If charges legislation is to be enacted, the Commission suggests that the Queensland and New Zealand position be adopted in this respect. Otherwise there could be a significant reduction in a charge's effectiveness, since it would be of value only when the debt due to the immediately superior contractor was likely to be paid.

The Commission's conclusion as to charges

57. For the foregoing reasons, the Commission concludes that the enactment of legislation providing for charges would not materially assist subcontractors and would tend to create more difficulties than it seeks to solve, and recommends that such legislation not be introduced.

OTHER MATTERS

58. If, contrary to the Commission's recommendation, the Government decides to introduce liens or charges legislation the following matters should be considered.

Suppliers of materials

59. In paragraph 66 of the working paper the Commission expressed the tentative opinion that suppliers who do not also perform work should be excluded from any legislation giving rise to liens or charges. This was one of the recommendations of the Smith Report (paragraph 10.3.B (iii)), but only one commentator supported that view. Many others, including the Western Australian Chamber of Manufactures, the Perth Chamber of Commerce, the Master Builders' Association and the Law Society of Western Australia, without necessarily advocating the introduction of such legislation, were of the view that suppliers should be included. The Perth Chamber of Commerce said -

“...there is no justification in principle in such a distinction. The contention that a supplier is better able to protect himself is questionable and in any event is no answer to the question if one accepts the principle that protection of the sort to be provided by the legislation is justified. The basis for the legislation is presumably that those who furnish labour and materials for a particular building project have a greater right to the monies due under the building contract than other creditors of the head-contractors. If

that is the basis for the principle the Committee cannot see that a distinction can be drawn between a person who furnishes only labour for the job and a person who furnishes only materials that are installed on the job."

60. The Commission concedes that difficulties have arisen where a distinction is made between subcontractors who perform work as well as supply materials and those who merely supply them (cf. *Motor Rebuilds Ltd. v. Ballard* [1956] N.Z.L.R. 954; *Ready Mixed Concrete (S.A.) Pty. Ltd. v. Constructions (Broken Hill) Pty. Ltd.* [1963] S.A.S.R. 340; *Caldow Properties Ltd. v. H.J.G. Low & Associates* [1971] N.Z.L.R. 311).

61. If suppliers were included in liens or charges legislation subcontractors might in some cases overcome the difficulty of obtaining materials on credit, since the supplier would be able to create a charge on the money owing under the head-contract (see paragraph 41 above).

62. In the light of the foregoing the Commission is now of the view that any liens or charges legislation should include contractors who supply material for or in connection with work on land as in New Zealand and Queensland (see paragraph 19 above).

Statutory retention

63. The question arises whether any legislation should require any statutory retention of the contract price (see paragraph 21 above). The Commission recommends against the introduction of such a scheme as it would reduce the amount of money available to subcontractors during the course of the work. The operation of the New Zealand and Canadian schemes has caused considerable complexities and met with criticism. None of the commentators on the working paper advocated the introduction of a statutory retention scheme.

Employees' wages

64. The Commission's terms of reference are to examine protection by way of liens or charges legislation for persons involved in the building and construction industries, which includes employees as well as subcontractors. The legislation in South Australia and New Zealand permits an employee to claim a lien or charge in respect of unpaid wages, but that in Queensland does not (see paragraph 16 above).

65. In paragraph 75 of the working paper the Commission pointed out that, in considering whether or not liens or charges legislation should extend to unpaid wages, regard should be had to any existing protection afforded to workmen; the limit, if any, to be imposed on the amount of unpaid wages claimable under a lien or charge, and the priority to be given those liens or charges.

Only three commentators commented on this question. Neither the Trades and Labour Council nor any union connected with the building or construction industries commented. The Master Builders' Association and the Perth Chamber of Commerce stated that the right to claim for unpaid wages should be included in any liens or charges legislation. No one commented on the incidental matters raised by the Commission on this question.

66. Under the *Bankruptcy Act* wages due to the employees of a bankrupt, the extent of \$600 in respect of each claim, rank in priority before other unsecured debts. The *Companies Act* makes similar provision for unpaid wages where the employer is a company in liquidation, except that the maximum amount in respect of each such claim is \$1,500 for services rendered before the winding up. The *Companies Act* also provides that such an amount of unpaid wages takes priority over any floating charge over the company's assets. That Act also gives unpaid wages a preference over a floating charge when a company goes into receivership.

67. If liens or charges legislation were enacted in similar terms to other jurisdictions, a lien or charge holder would be a secured creditor, so that the money the subject of a charge would not be available for distribution in a bankruptcy or liquidation to unsecured creditors. If the employer had no other assets, and employees were excluded from the legislation, employees would in effect be deferred to those subcontractors who had a lien or charge over that money. On the other hand if an insolvent employer had assets other than the money owing under his contract his employees might be better off than his subcontractors, since as secured creditors they would not only have access to the money owed to the employer, but also as unsecured creditors have the benefit of the provisions mentioned in the previous paragraph, should the security be insufficient to satisfy their claims.

68. If the Government decides to introduce liens or charges legislation, the majority of the Commission consider it a matter of policy, to be decided by the Government, whether the

legislation extend to include charges or liens for unpaid wages. The other member of the Commission, Professor Harding, considers that any such legislation should include provision enabling employees to claim for unpaid wages.

If the Government decides to give employees the right to claim a lien or charge for unpaid wages in any legislation that might be introduced, it will be necessary to determine whether priority should be given to those wages and, if so, the extent of that priority. The Commission considers it reasonable to accord unpaid wages first priority for say, a week's wages or \$200, whichever is the less.

Frivolous or vexatious charges

69. A lien or charge can embarrass the owner or head-contractor. The New Zealand and Queensland legislation renders a vexatious claimant liable to damages, but this would be unsatisfactory unless he is a person of means. The South Australian legislation imposes a penalty of \$100 or imprisonment for six months for lodging a vexatious lien or charge with intent to defraud.

70. If liens or charges legislation is to be enacted in this State, it seems desirable to render a vexatious claimant liable to damages, and to provide for criminal sanctions against him. The Commission suggests that, in addition, the notice of the lien or charge should be required to be supported by an affidavit verifying the claim.

The Crown

71. The question arises whether the Crown should be bound by any liens or charges legislation. The Crown is not bound by the legislation in either New Zealand or South Australia. On the other hand the Queensland legislation expressly binds the Crown. The Commission considers that the Crown should be bound by any charges legislation, since a substantial proportion of building operations in this State is carried out by or on behalf of the Crown. The Commission does not consider it necessary to bind the Crown to any provisions relating to liens because the additional security provided would be unnecessary in its case.

ALTERNATIVE PROPOSALS

72. Twenty-four out of the thirty-five commentators on the working paper suggested that there were more effective ways of protecting those engaged in the building and construction industries than liens or charges. Alternative forms of protection suggested were:-

- (a) payment bonding of head-contractors;
- (b) statutory conditions for payment to subcontractors to be included in contracts;
- (c) grading of building contractors under a licensing scheme;
- (d) creation of statutory trusts in favour of subcontractors.

73. The Commission has not examined these alternatives in any detail, since they lie outside its terms of reference. It suggests that they should be carefully studied before any final decision is made as to whether or not charges or liens legislation is to be introduced. The Commission's comments in paragraphs 74 to 77 below are only in respect of those matters which are immediately apparent.

Payment bonding

74. The greatest number of commentators favoured payment bonding of head-contractors, which the Commission understands is in use in some of the States of the United States of America. Payment bonding requires a head-contractor to obtain a bond from an insurance company guaranteeing payment to all subcontractors. One commentator suggested that initially this form of insurance might be undertaken by the State Government Insurance Office. The Commission considers that one disadvantage of this scheme is that the cost of the bond would be likely to be passed on to the owner, thereby increasing the costs of building. Another possible disadvantage is that some builders may be driven out of the industry because they could not offer the insurance company sufficient security to obtain a bond. The Victorian Statute Law Revision Committee in 1962 examined payment bonding, but recommended against it.

Statutory conditions

75. Some commentators suggested that the use of standard form contracts containing protection for subcontractors be made mandatory. Such a contract would contain a provision requiring the owner to pay a subcontractor who had done work for which he had not been paid by the head-contractor. In the Commission's view this has many of the objections associated with charges (see paragraphs 41 to 56 above), and interfere in a substantial way with the freedom of the owner's right to contract on whatever terms he wishes.

Grading of builders

76. The grading of builders by way of a licensing scheme was recommended in the Smith Report (paragraphs 7.26 to 7.28). Under this scheme head-contractors would be limited to contracting for work the value of which was in accordance with their skill, training and financial resources. Some commentators suggested that the grading of builders should be ancillary to a scheme for ensuring payment to subcontractors.

Statutory trust

77. One of the least popular among the alternatives was a trust fund scheme similar to that operating in Canada (see paragraph 22 above). The Commission considers that a major difficulty with such a scheme is that, in order to render it effective, money the subject of the trust would be required to be paid into a central fund, or be guaranteed by a bond. The Commission agrees with the Smith Report (paragraph 7.36) that a scheme providing payment of trust money into a central fund would be an administrative nightmare. To guarantee payment of the trust money by a bond, in addition to its cost, would be little different from payment bonding.

SUMMARY OF RECOMMENDATIONS

78. The Commission recommends that -

- (a) legislation providing for the registration of contractors' liens should not be introduced;

(see paragraph 37 above)

- (b) legislation providing for the creation of contractors' charges should not be introduced.

(see paragraph 57 above)

- (c) alternative proposals be examined by the Government for the protection of those engaged in the building and construction industries.

(see paragraph 73 above)

79. If, contrary to the foregoing recommendations, the Government decides to enact liens or charges legislation such legislation should -

- (i) include suppliers of materials;

(see paragraph 62 above)

- (ii) bind the Crown to the extent that it provides for charges;

(see paragraph 71 above)

- (iii) provide for subcontractors to claim charges on money payable to all superior contractors;

(see paragraph 56 above)

- (iv) provide for the creation of a lien or charge by a subcontractor only after money becomes due to him;

(see paragraph 54 above)

- (v) provide for liens or charges to be enforced in the court with jurisdiction appropriate to the amount claimed;

(see paragraph 49 above)

- (vi) impose a time limit within which liens or charges must be enforced;

(see paragraph 50 above)

- (vii) require a claimant for a lien or charge to verify his claim by affidavit and provide for damages for frivolous or vexatious liens or charges.

(see paragraph 70 above)

E.G. Freeman
Chairman

B.W. Rowland
Member

R.W. Harding
Member

8 October 1974

APPENDIX I

The following are the names of those who commented on the working paper -

Allied Building Trades Association of W.A.
Associated Banks in W.A.
Association of Consulting Engineers Australia (Western Australian Chapter)
Association of Painting Contractors
Atkins Carlyle Ltd.
Australian Finance Conference (Western Australian Division)
Builders and Painters Registration Boards of Western Australia
Building Industry Sub-contractors Organisation of W.A.
Building Owners and Managers Association of Australia Limited (W.A. Division)
Bunning Bros. Pty. Ltd.
Burton R.H. S.M.
Committee of Architects in Private Practice
Commonwealth Industrial Gases Limited
David Hooper Investments Pty. Ltd.
Federal Minister for Housing & Construction
G.E.C.-A.E.I. (Australia) Pty. Limited
Law Reform Committee of South Australia
Law Society of Western Australia
Local Government Association of Western Australia
Main Roads Department
Master Builders' Association of Western Australia
Master Painters, Decorators & Sign-writers' Association of Western Australia
Master Plumbers Association of Western Australia
Metropolitan Water Supply Sewerage and Drainage Board
Munyard C.E.
Perth Building Society
Perth Chamber of Commerce
Port D.F.
Public Works Department
Royal Australian Institute of Architects (Western Australian Chapter)
Shinkfield M.
State Crown Solicitor
State Electricity Commission of Western Australia
West Australian Chamber of Manufactures
Western Australian Employers' Federation