



NORTHERN TERRITORY DEPARTMENT OF JUSTICE

DISCUSSION PAPER

REFORM OF LAW CONCERNING PAYMENTS DUE TO CONTRACTORS:

REVIEW OF THE OPERATION OF THE *WORKMEN'S LIENS ACT* – HOW TO BETTER PROTECT PAYMENTS DUE TO SUBCONTRACTORS IN THE NORTHERN TERRITORY

August 2002

This Discussion Paper has been prepared by the Northern Territory Department of Justice Review Team dealing with the review of the *Workmen's Liens Act* and other issues for better securing payments due to contractors and subcontractors. The views and propositions in this Discussion paper should not be taken as representing the view of the Northern Territory Department of Justice or the view of any arm of the Northern Territory Government

CONTENTS

1	COMMENTS SOUGHT	1
2	OVERVIEW AND SUMMARY OF THE OPTIONS	7
2.1	THE NEED FOR REFORM	7
2.2	OUTLINE OF POSSIBLE REFORMS	7
2.3	NATIONAL COMPETITION POLICY	8
3	STRUCTURE OF THIS DISCUSSION PAPER	9
3.1	THE TERMS OF REFERENCE	9
3.2	TIMETABLE.....	9
3.3	OTHER CURRENT NORTHERN TERRITORY REVIEWS	9
3.3.1	<i>Review by Risk Management Services.....</i>	<i>10</i>
3.3.2	<i>Review of contract administration within the Northern Territory Construction division</i>	<i>10</i>
3.3.3	<i>Licensing of builders</i>	<i>10</i>
3.3.4	<i>Discussion paper issued by the Northern Territory Law Reform Committee.....</i>	<i>10</i>
3.3.5	<i>Workmen’s Liens Amendment Act 2002.....</i>	<i>10</i>
3.3.6	<i>Western Australia Taskforce Report 2001</i>	<i>11</i>
3.3.7	<i>Northern Territory Government Reference Group.....</i>	<i>11</i>
3.4	NATIONAL ACTION	11
3.5	THIS DISCUSSION PAPER IS ALSO AN NCP ISSUES PAPER	11
3.6	METHODOLOGY - NCP PROCESSES TO BE FOLLOWED.....	11
4	THE INDUSTRY	13
4.1	DESCRIPTION OF THE CONSTRUCTION INDUSTRY.....	13
4.2	CURRENT INDUSTRY PRACTICES RELATED TO PAYMENT	13
4.2.1	<i>The Domestic Construction Industry.....</i>	<i>13</i>
4.2.2	<i>The Commercial Construction Industry.....</i>	<i>14</i>
5	THE NATURE OF THE CONTRACTUAL ARRANGEMENTS	15
5.1	CONTRACTUAL ARRANGEMENTS	15
5.1.1	<i>Standard Form Contracts.....</i>	<i>15</i>
5.1.2	<i>Special Project Contracts.....</i>	<i>16</i>
5.1.3	<i>Principal’s Own Form Contracts.....</i>	<i>16</i>
5.1.4	<i>Contractors’ and Suppliers’ Standard Forms.....</i>	<i>17</i>
5.1.5	<i>Verbal Agreements.....</i>	<i>17</i>
6	WHAT ARE THE PROBLEMS?	18
6.1	THE MAIN PROBLEMS.....	18
6.1.1	<i>Financial and Business Management</i>	<i>18</i>
6.1.2	<i>Contract and Risk Management.....</i>	<i>18</i>
6.1.3	<i>Unethical Conduct</i>	<i>19</i>
6.2	EFFECTS	19
6.3	EVIDENCE.....	19
6.4	ABSENCE OF WRITTEN CONTRACTS	20
6.5	WEAKNESS OF SOME OF THE CONTRACTING PARTIES	20
6.6	THE FAILURE OF DI MELLA CONSTRUCTION PTY LTD	20
7	WORKMEN’S LIENS ACT	21
7.1	THE CURRENT NORTHERN TERRITORY LAW	21
7.2	GENERAL OUTLINE OF THE <i>WORKMEN’S LIENS ACT</i>	21
7.3	SECTION 4 OF THE <i>WORKMEN’S LIENS ACT</i> - EMPLOYEE’S LIEN FOR WAGES	21
7.4	SECTION 5 OF THE <i>WORKMEN’S LIENS ACT</i> - SUB-CONTRACTOR’S LIEN FOR THE CONTRACT PRICE	21
7.5	SECTION 7 OF THE <i>WORKMEN’S LIENS ACT</i> - CHARGES ON MONIES BY SUB-CONTRACTORS AND EMPLOYEES	22
8	OBJECTIVE OF SECURITY OF PAYMENTS LEGISLATION.....	23
8.1	AUSTRALIAN PROCUREMENT AND CONSTRUCTION COUNCIL	23
8.2	IS THERE A NEED FOR SPECIAL PROTECTION FOR THE BUILDING AND CONSTRUCTION INDUSTRIES?	24
9	DOES THE <i>WORKMEN’S LIENS ACT</i> ACHIEVE THE OBJECTIVES?.....	27

9.1	THE ACTS' DRAFTING PROBLEMS.....	27
9.2	HOW USEFUL IS THE <i>WORKMEN'S LIENS ACT</i> ?.....	28
9.3	JUDICIAL CALLS FOR REFORM.....	29
10	ALTERNATIVES TO THE <i>WORKMEN'S LIENS ACT</i>	30
10.1	SOUTH AUSTRALIA	30
10.2	WESTERN AUSTRALIA.....	31
10.2.1	<i>1974 WA Report</i>	31
10.2.2	<i>2001 WA Report</i>	31
10.3	COMMONWEALTH LEGISLATION	32
10.4	CHARGE OVER MONIES DUE – WESTERN AUSTRALIA AND QUEENSLAND	32
10.5	ATTACHMENT PROCESS - TASMANIA.....	32
10.6	QUEENSLAND.....	32
10.6.1	<i>Sub-Contractors Charges Act 1974</i>	32
10.6.2	<i>Queensland Building Services Authority Act 1991</i>	32
10.6.3	<i>Domestic Building Contracts Act 2000</i>	33
10.6.4	<i>Queensland Directions</i>	33
10.7	NEW SOUTH WALES	33
10.7.1	<i>Contractors Debts Act 1997</i>	33
10.7.2	<i>NSW – Building and Construction Industry Security of Payment Act 1999</i>	33
10.7.3	<i>Possible changes to the NSW legislation</i>	34
11	OPTIONS FOR REFORM.....	35
11.1	NTLRC	35
11.1.1	<i>Direct payments</i>	35
11.1.2	<i>Implied conditions, such as “proof of payment” clauses</i>	35
11.1.3	<i>Stop notice</i>	36
11.1.4	<i>Compulsory insurance</i>	36
11.1.5	<i>Covenanting</i>	36
11.1.6	<i>Holdbacks</i>	36
11.1.7	<i>Builders' licences</i>	37
11.1.8	<i>A statutory trust scheme</i>	37
11.1.9	<i>Use of payment bonds</i>	39
11.2	WESTERN AUSTRALIAN PROPOSALS – 2001	40
11.2.1	<i>Scope</i>	40
11.2.2	<i>Clarity of Statutory and Contractual Rights</i>	40
11.2.3	<i>Prohibition of Unfair Practices</i>	40
11.2.4	<i>Default Conditions of Contract</i>	40
11.2.5	<i>Rapid Adjudication</i>	41
11.2.6	<i>Enforcement of the Adjudicator's Determination</i>	41
11.2.7	<i>Appeal Provisions</i>	41
11.2.8	<i>Appointment of Adjudicators</i>	41
11.2.9	<i>Differences between the New South Wales Legislation and the proposed WA legislation</i>	42
12	THE MAIN OPTIONS.....	43
12.1	FIRST OPTION - REFORM THE CURRENT ACT - “THE MODERN LIENS ACT”	43
12.2	SECOND OPTION – “STATUTORY RIGHT FOR PAYMENTS”	43
12.3	PREFERRED OPTION.....	43
13	ASSESSMENT OF THE MAIN OPTION	44
13.1	METHOD OF ASSESSMENT.....	44
13.2	THE 1995 NCP AGREEMENTS	44
13.2.1	<i>Competition Principles Agreement</i>	44
13.2.2	<i>Conduct Code Agreement</i>	44
13.2.3	<i>Agreement to Implement the National Competition Policy and Related Reforms</i>	44
13.3	LEGISLATIVE REFORM UNDER NCP.....	44
13.4	PRINCIPLES WHICH UNDERLIE A COMPETITION POLICY REVIEW OF LEGISLATION.....	44
13.5	RATIONALE FOR REGULATION	45
13.5.1	<i>Need to determine objectives of the legislation and confirmed then as appropriate</i>	45
13.5.2	<i>Need to indemnify any anti-competitive aspects of the proposals</i>	46
13.5.3	<i>Trade Practices Act Issues</i>	46

13.5.4	<i>Determining the costs of regulation</i>	47
13.5.5	<i>The benefits of regulation</i>	47
13.5.6	<i>The application of the public benefits test</i>	47
13.5.7	<i>There is a need to identify and consider alternatives</i>	48
13.6	IDENTIFICATION OF THE ANTI-COMPETITIVE PROVISIONS CONTAINED IN THE PROPOSALS	48
SCHEDULE 1 – WORKMEN’S LIENS ACT		52
	COMMON LAW	52
	WORKMEN’S LIENS ACT 1893.....	52
	NORTH AMERICAN ORIGINS OF THE WORKERS’ LIENS LEGISLATION.....	52
	THE SPREAD OF THE WORKERS’ LIENS LEGISLATION	53

1 COMMENTS SOUGHT

You are invited to comment by 31 October 2002 on the questions and issues set out in column 1. Detail in support of the questions and issues is set out in the subsequent Parts of this discussion paper.

Issues	Detail	Your comment
<p>1. Parts 4 and 5 contain a description of the construction industry.</p> <p>(a) Is this description accurate?</p> <p>(b) Are there any other factors of specific relevance to the Northern Territory?</p>	<p>See parts 4 and 5 for the detailed discussion.</p> <p>See pages 13-17.</p>	
<p>2. Part 6 contains a description of the problems with security of payments for the construction industries.</p> <p>(a) Are the following (i)-(vi) the problems?</p> <p>(i) slow payments;</p> <p>(ii) disputed payments;</p> <p>(iii) insolvencies;</p> <p>(iv) unethical conduct;</p> <p>(v) absence of written contracts;</p> <p>(vi) weakness of some parties in the construction contract chain.</p> <p>(b) Are there any other problems?</p>	<p>See part 6 for the detailed discussion.</p> <p>See pages 18-20.</p>	
<p>3. Part 8 contains an assessment of the possible objectives for legislation in respect of this area of business:</p> <p>(a) Should the legislation have the objectives of facilitating:</p> <p>(i) timely payments between parties to construction and related contracts;</p>	<p>See part 8 for the detailed discussion.</p> <p>See pages 23-26.</p>	

<p>(ii) rapid resolution of disputes concerning such contracts;</p> <p>(iii) mechanisms for the rapid recovery of payments for such contracts.</p> <p>(b) Are there any other objectives?</p>		
<p>4. Parts 7 and 9 describe the <i>Workmen's Liens Act</i>. That Act seeks to protect the interest of some workers and contractors. In respect of the current Act there are a number of issues:</p> <p>(a) Are the statutory liens and charges under the Act being used effectively?</p> <p>(b) Is the current drafting of the Act inhibiting its effectiveness and, if so, does this extend to all aspects of the Act or only part?</p> <p>(c) Are the statutory liens and charges under the Act effective mechanisms, both to protect the interests of employees and sub-contractors and, more generally, to help facilitate best practice in the building and construction industry?</p> <p>(d) Is there a need to repeal the Act and, if so, should any current aspects of the legislation be preserved?</p> <p>(e) Is there a need to provide special protection in relation to security of payment in the building and construction industry?</p>	<p>See parts 7 and 9 for the detailed discussion. See pages 21-22 and 27-29.</p>	
<p>5. Part 10 outlines the legislative position in other places in Australia. Part 11 outlines options for reform.</p> <p>(a) Are there any other options?</p>	<p>See parts 10 and 11 for the detailed discussion. See pages 30-42.</p>	

<p>(b) Do you agree that the WA proposals (as further outlined below - Issues 6-8) represent the best starting point in developing proposals for legislation?</p>		
<p>6. Pay if Paid clauses.</p> <p>(a) Should legislation provide for the prohibition of various contractual provisions considered to be unfair (eg "pay if paid" and "pay when paid" clauses, excessive payment clauses, provisions that prevent the payment of interest on outstanding payments)?</p>	<p>See part 6 and part 11. See pages 18-20 and 40.</p>	
<p>7. Default contractual provisions.</p> <p>(a) Should legislation provide for the imposition of default contractual provisions where no written provisions exist (eg the right to claim payment, assessment and notification terms, time to pay claims, interest on overdue payments, substitution of cash security)?</p>	<p>See part 6 and part 11. See pages 18-20 and 40.</p>	
<p>8. Rapid adjudication.</p> <p>(a) Should the legislation set out a mandatory scheme for the rapid adjudication of disputes with the scheme operating, in part, outside of the court system?</p>	<p>See part 6 and part 11. See pages 18-20 and 41.</p>	
<p>9. Part 13 outlines that National Competition Policy (NCP) requires that legislation or proposed legislation meets the objectives of the legislation.</p> <p>(a) Do the proposals (outlined in Issues 6-8) meet the objectives outlined in Issue 3 (above)(Part 8 of the Paper)?</p>	<p>See part 13. See pages 44-51.</p>	

<p>10. Part 13 outlines that National Competition Policy (NCP) requires that proposed legislation be analysed to see if it contains any provision that is anti-competitive. Part 13.5.2 identifies the tests for determining whether a provision is anti-competitive. Part 13.5.6 outlines the basis on which anti-competitive provisions can be justified.</p> <p>(a) As a first step in the NCP analysis, do you agree that the following provisions may operate anti-competitively:</p> <ul style="list-style-type: none"> (i) A statutory right to progress payments; (ii) A prohibition on pay when paid clauses; (iii) A prohibition on clauses permitting late payments; (iv) A prohibition on clauses requiring interest to be paid on outstanding payments; (v) The statutory imposition of standard contractual provisions; (vi) The statutory provision of dispute resolution clauses; (vii) Statutory imposition of a specified adjudication process; (viii) Statutory rules about what happens to security monies when a party becomes insolvent. 	<p>See Part 13, pages 44-51.</p>	
<p>12. National Competition Policy (NCP) requires that the costs of proposed anti-competitive provisions be identified.</p> <p>(a) What do you consider would be the costs of the proposals from the points of view of the various affected persons (industry, clients, the public, government)?</p>	<p>See part 13. See pages 44-51.</p>	

(b) Do you consider that the costs would be significant?		
<p>13. National Competition Policy (NCP) requires that the benefits of proposed anti-competitive provisions be identified.</p> <p>(a) What do you consider would be the benefits of the proposals from the points of view of the various affected persons (industry, clients, the public, government)?</p> <p>(b) Do you consider that the benefits would be significant?</p>	<p>See part 13. See pages 44-51.</p>	
<p>14. National Competition Policy (NCP) requires that the benefits of proposed anti-competitive provisions be greater than the costs.</p> <p>(a) Do you consider that the benefits of the proposals are greater than the costs?</p>	<p>See part 13. See pages 44-51.</p>	
<p>15. National Competition Policy (NCP) requires that the alternatives (especially non statutory alternatives) be identified.</p> <p>(a) Are there better alternatives than those referred to in Parts 10 and 11. If so, what are they?</p>	<p>See part 13. See pages 44-51.</p>	

Comments are sought on this Paper by 31 October 2002. They may be forwarded to:

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Detailed discussions of the issues (and associated propositions) are contained in the subsequent parts of this paper.

TABLE OF ABBREVIATIONS

APCC	Australian Procurement and Construction Council Inc., <i>National Action on Security of Payment in the Construction Industry</i> (Adelaide, October 1996)
British Columbia Questions and Answers	British Columbia Ministry of Employment and Investment and British Columbia Law Institute, <i>Questions and Answers on the - New Builders Lien Act</i> (1997)
British Columbia Report	Law Reform Commission of British Columbia, <i>Report on Debtor-Creditor Relationships (Project No. 2) - Part II Mechanics' Lien Act: Improvements on Land</i> (1972)
British Columbia Select Standing Committee	Select Standing Committee on Labour, Justice and Intergovernmental Relations of the Legislative Assembly of British Columbia, <i>Second Report - Builders Lien Act</i> (26 July 1990)
Elliott	Elliott, R.D., <i>The Artificer's Lien</i> (Melbourne, Law Book Co., 1967)
Macken, O'Grady & Sappideen	Macken, J, O'Grady, P. & Sappideen, C., <i>Macken, McCarry & Sappideen's The Law of Employment</i> 4 th ed. (Sydney, LBC Information Services, 1997)
Macklem & Bristow	Macklem, D. & Bristow, D., <i>Mechanics' Liens in Canada</i> 4 th ed. (Toronto, The Carswell Company Limited, 1978)
NCP	National Competition Policy
N.S.W. Green Paper	NSW Department of Public Works and Services, <i>The Construction Industry in New South Wales: Opportunities and Challenges</i> (October 1996)
Pyman & Voll	Pyman, S. & Voll, P., "Security of Payment in the Building Industry Review" (January/February 1998) <i>Proctor</i> 21-24
S.A. Select Committee	Select Committee of the House of Assembly, <i>Report of the Select Committee of the House of Assembly on the Operation of the Worker's Liens Act 1893</i> (1990)
WA Taskforce	<i>Security Of Payments Taskforce for the Western Australian Building and Construction Industry – Report to the Minister for Housing and Works, November 2001</i>
Sykes & Walker	Sykes, E. & Walker, S., <i>The Law of Securities</i> 5 th ed. (Sydney, Law Book Company Limited, 1993)
W.A. 1974	Law Reform Commission of Western Australia, <i>Report on Contractors' Liens</i> (Project No.54, 1974)
W.A. 1998	Law Reform Commission of Western Australia, <i>Report on Financial Protection in the Building and Construction Industry</i> (Project No.82, March 1998)
Wilson Wilson, J.,	<i>Contractors' Liens and Charges</i> 2 nd ed. (Wellington, Butterworths, 1976)

2 OVERVIEW AND SUMMARY OF THE OPTIONS

2.1 THE NEED FOR REFORM

The construction and like industries are significant for the economy and people of the Northern Territory. Problems within these industries can affect many people and businesses. There is a great variety in the size and scale of construction projects and of the businesses that participate in such projects. However, a common factor is that of many businesses in projects with many contractual interactions and inter-dependencies. If one party in the chain of contractual relationships fails to honour its obligations, the outcome may be the business failure of many other parties. Additionally, the project as a whole may be jeopardised.

In most cases, it is a business problem that is the underlying cause that leads to the failure of a party to honour its obligations. For example, the business may not have enough money to pay all of its debts. Some of the creditors (including clients) will miss out. Legislation and government policies cannot prevent business failures or remedy the unfortunate consequences for the creditors or the client.

Nonetheless, many governments, both in Australia and elsewhere, have attempted to sort out the problems. The solutions range from giving preferences to certain creditors (eg the Northern Territory *Workmen's Liens Act 1892*) to legislation that mandates various contractual obligations designed to ensure that there are both adequate contractual terms and fast payments of monies owing (eg New South Wales *Building and Construction Industry Security of Payment Act 1999*).

2.2 OUTLINE OF POSSIBLE REFORMS

In the Northern Territory it is generally accepted that the *Workmen's Liens Act* has not been particularly successful in protecting the interests of subcontractors. One of the objectives of this discussion paper is to test that proposition.

In the past 5 years new legislation has been introduced in New South Wales and Queensland. Draft legislation is currently under consideration in Western Australia. A second objective of this discussion paper is that of outlining these proposals for consideration for Northern Territory purposes.

Subject to testing the issues and options with the community, business and affected professional groups, it appears that the most likely option for reform in the Northern Territory, being reform consistent with national developments, is along the following lines:

1. Repeal of the *Workmen's Liens Act*.
2. Enactment of new legislation that:
 - ◆ *has the objective of facilitating:*
 - (i) *timely payments between parties to construction and related contracts;*
 - (ii) *rapid resolution of disputes concerning such contracts;*
 - (iii) *mechanisms for the rapid recovery of payments for such contracts.*
 - ◆ *applies to contracts for construction work, related professional services and supply of materials (with a capacity for other industries to 'opt in' following consultation between the industry and government);*
 - ◆ *applies to such contracts regardless of whether they are in writing and regardless of whether they are residential or commercial;*
 - ◆ *prohibits various contractual provisions considered to be unfair (eg "pay if paid" and "pay when paid" clauses, excessive payment clauses, provisions that prevent the payment of interest on outstanding payments);*

- ◆ *improves default contractual provisions where no written provisions exist (eg the right to claim payment, assessment and notification terms, time to pay claims, interest on overdue payments, substitution of cash security);*
- ◆ *provides statutory rights to protect retention monies and unfixed materials in the event of insolvency;*
- ◆ *establishes a statutory right to refer matters for rapid adjudication. The adjudicators will be as named in the relevant contract with a capacity for appointment of independent adjudicators for major contracts. The qualifications of adjudicators will be set by Regulation;*
- ◆ *provides for appeals from the adjudicator's decisions, but for the adjudicator's decisions to be enforced pending the outcome of any such appeal; and*
- ◆ *applies only to contracts entered into after the commencement of the legislation.*

2.3 NATIONAL COMPETITION POLICY

Proposals of the kind referred to in the previous paragraph are potentially anti-competitive. This is so because compliance adds to the costs of doing business. The consequence is that any proposal concerning such laws is required under the Commonwealth/State/Territory National Competition Policy ("NCP") agreements to be accompanied by an appropriate NCP analysis. This paper contains the relevant preliminary material for such an analysis.

At the conclusion of the NCP process the Government will, prior to supporting new legislation, need to be convinced that the benefits of the legislation to the community are greater than the costs.

The preliminary analysis is such that the costs are relatively slight and the benefits significant. However, that view needs to be tested in the community.

3 STRUCTURE OF THIS DISCUSSION PAPER

3.1 THE TERMS OF REFERENCE

The Northern Territory Government has directed the Department of Justice to prepare a discussion paper on the issues and options for the better protection of the interests of subcontractors ("the subcontractors"):

- where they are owed money for work done on the basis of a contract between themselves and the main contractor ("the contractor"); and
- where the principal who is responsible for the project as a whole ("the principal") is, in accordance with the contract with the contractor, in position to pay the contractor the monies owed for the work completed by the subcontractor.

The Department takes this direction as including a direction that the discussion paper also take into account law reforms elsewhere in Australia designed to ensure that payments are made as soon as practicable (so as to reduce the prospect that such payments may get caught up in an insolvency).

This discussion paper seeks to:

- identify the objectives of any such legislation;
- identify the extent to which the current legislation (namely the *Workmen's Liens Act*) is achieving those objectives;
- identify the various options that might be available to meeting the objectives;
- recommend proposals; and
- identify relevant NCP issues that may need to be resolved in respect of the objectives and the proposals.

The discussion paper will also attempt to consider the issues having regard to other Northern Territory Government policy and administrative developments concerning:

- builders' licensing; and
- Northern Territory contracts' terms and administration.

3.2 TIMETABLE

The timetable for the review is as follows:

1. 20 August 2002 - Release of discussion paper by the Department of Justice.
2. 31 October 2002 - Closing time for submissions.
3. 15 December 2002 - Finalisation of Report and provision of report to the Minister for Justice and Attorney-General.

3.3 OTHER CURRENT NORTHERN TERRITORY REVIEWS

There are other reviews occurring on related matters. Additionally, there have been other reforms that are incidental to the issues discussed in this discussion paper. These are summarised in the following subparagraphs:

3.3.1 Review by Risk Management Services

The Department of the Chief Minister (Risk Management Services) is examining the processes in place in relation to head contractors meeting obligations to sub-contractors. This report is understood to have been completed and is currently being considered by Government.

3.3.2 Review of contract administration within the Northern Territory Construction division

The Department of Infrastructure, Planning and Environment is examining various issues relating to the administration of construction contracts. Additionally, the Department is monitoring various national developments concerning procurement processes for construction contracts and security of payments.

3.3.3 Licensing of builders

The Department of Infrastructure, Planning and Environment is examining various issues relating to the licensing of builders.

3.3.4 Discussion paper issued by the Northern Territory Law Reform Committee

In March 1999, the Northern Territory Law Reform Committee ("the NTLRC") provided to the previous Northern Territory Government a Discussion Paper ("NTLRC Discussion Paper") concerning the *Workmen's Liens Act*. The NTLRC Discussion Paper focussed on technical issues concerning the operation of the *Workmen's Liens Act* and also what are the objectives of the *Workmen's Liens Act*. However, the NTLRC Discussion Paper was not given a wide circulation at the time of its release to Government.

This discussion paper contains, in Parts 7 and 11, much the same material as in the NTLRC Discussion Paper. The research and words in the NTLRC Discussion Paper have been accepted and duplicated in this paper¹. The work of the members of the NTLRC is acknowledged and they are thanked for preparing the original Discussion Paper on the *Workmen's Liens Act*.

3.3.5 Workmen's Liens Amendment Act 2002

The preparation and release of this paper follows the introduction into the Legislative Assembly of the Workmen's Liens Amendment Bill 2002 ("the Bill")² and the subsequent enactment of the Bill in May 2002. The *Workmen's Liens Amendment Act 2002* commenced operation on 15 July 2002. It removes the exclusion of liability afforded to the Crown in respect of most matters arising under the *Workmen's Liens Act*. The Act removes the unnecessary distinction between the liability of the Crown and the liability that the *Workmen's Liens Act* imposes on other contractors, sub-contractors, land owners, or occupiers of land. The Act has this very limited aim notwithstanding that it has been long recognised that there are significant operational problems with the Act, having been the subject of severe judicial criticism over the past 20 years.

¹ The NTLRC's Discussion Paper was prepared by a sub-committee of the NTLRC, and also canvassed possible alternative mechanisms for achieving the objectives sought to be achieved by the *Workmen's Liens Act*. The project officer was Dr Phillip Jamieson. The members of that Sub-committee were the Hon Austin Asche AC QC (Chair), Mr Richard Bruxner, Ms Sally Gearin, Ms Georgia McMaster, Ms Rosemary Simpson, and Mr Dirk de Zwart. The Registrar-General, Mr Greg Shanahan, had also been invited to be a member of the Sub-committee.

² The Workmen's Liens Amendment Bill 2002 was introduced into the Legislative Assembly on 28 February 2002. The Bill was debated during the May 2002 sittings of the Assembly. .

3.3.6 Western Australia Taskforce Report 2001

The Western Australia ("WA") Taskforce Report is described in Part 11. However, it should be noted at this stage that this paper, in terms of describing the industry, its operations and its problems, draws heavily on the Report of the *Security Of Payments Taskforce for the Western Australian Building and Construction Industry – Report to the Minister for Housing and Works*³ ("the WA Taskforce").

3.3.7 Northern Territory Government Reference Group

Given the existence of the three reviews dealing with matters incidental to the construction industry and payments within various sectors of that industry, a government reference group has been formed by the Department of the Chief Minister⁴.

It is proposed that the members of the reference group share resources and information so as to avoid and remove any unnecessary duplication in either consultation or outcomes.

3.4 NATIONAL ACTION

The APCC is actively considering issues relating to the harmonising of legislation concerning security of payments. The issues were discussed at a meeting that occurred in June 2002.

3.5 THIS DISCUSSION PAPER IS ALSO AN NCP ISSUES PAPER

The potential statutory regulation of payments due between parties to contracts has the capacity to increase compliance costs and may also favour some businesses over others. Such potential outcomes mean that any proposed legislation may be anti-competitive in terms of the NCP agreements entered into by the Northern Territory, the ACT, the States and the Commonwealth.

Accordingly, this paper also includes an NCP analysis of the issues.

3.6 METHODOLOGY - NCP PROCESSES TO BE FOLLOWED

It is proposed that this review be conducted in accordance with the principles that underpin an NCP legislation review⁵. That is:

- The objectives of any current or proposed legislation will be ascertained and each proposal will be examined in the light of those objectives. If a proposal does not operate so as to implement an objective, there can be no justification for the proposal;
- The costs and the benefits of each proposal will be identified so that an assessment can be made as to whether the benefits are greater than the costs; and
- Other alternatives will also be identified. If an alternative achieves the objectives at less cost than the proposal, it should be preferred over the proposal.

³ Report released November 2001 and available at http://www.dhw.wa.gov.au/asset/asset_sop.cfm

⁴ Working Group formed by Mr Paul Tyrrell, 17 March 2002 and comprising representatives from Department of Infrastructure, Planning & Environment (as the Chair), Department of Justice, Northern Territory Treasury, Department of Business, Industry and Resource Development and the Department of the Chief Minister. The role of the Working Group is to form a "whole of government approach to this issue".

⁵ See Part 13.

This issues paper does not contain an attempt to provide any conclusions about the objectives, the proposals' costs and benefits or the alternatives. As mentioned above, the aim is to ensure that there is enough factual information and ideas to facilitate strong submissions on the issues.

4 THE INDUSTRY⁶

4.1 DESCRIPTION OF THE CONSTRUCTION INDUSTRY

The Risk Management Services Review (see Part 3.3.1) identified that:

- \$836 million was spent in 2000/2001 and \$642 million in 2001/2002 on building works in the Northern Territory with some 39% (2000/2001) and 54% (2001/2002) being from government funding;
- some 75%-85% of the value of production was delivered by sub-contractors;
- up to 20 specialist subcontractors may be employed on a residential housing project;
- up to 200 specialist subcontractors may be employed on a major construction site.

4.2 CURRENT INDUSTRY PRACTICES RELATED TO PAYMENT

The building and construction industry forms a substantial part of the Northern Territory economy ranging from small household maintenance work to substantial infrastructure and industrial facilities. As a result, there are significant differences in the payment practices that apply to different parts of the industry, and different issues relating to security of payment.

In general, the industry can be divided into two main areas with differing payment practices:

- Domestic construction; and
- Commercial construction.

4.2.1 The Domestic Construction Industry⁷

Although there are national and international construction companies active in the domestic construction industry in the Northern Territory and the major project home builders are substantial businesses, there is also a significant number of small construction companies and sole traders active in the market. At the subcontract level, many of the labour intensive trades are carried out by sole traders or partnerships.

At the head of the contracting chain, home owners typically have little or no building industry knowledge and limited experience dealing with construction-type contracts. In many cases, the home owner is relying on mortgage finance and it is the financier that monitors construction and makes progress payments. It is because of this asymmetrical knowledge base between the owner and the builder that specific consumer protection legislation has been introduced in some jurisdictions. Such legislation typically provides specified minimum requirements for home building contracts and a compulsory insurance scheme for building defects.

In the project home market, the builder can set and market base prices for each model of home with reasonable certainty due to the use of standardised designs, construction techniques and materials and often a regular pool of subcontracted trades people. In a reasonably stable supply and demand environment, the projected volume of standardised work allows the project home builder to average variations in its margin-per-project over a large number of projects to maintain competitive base prices whilst maintaining overall profitability. However, fluctuations in the supply and demand environment in the industry can change the manner of operation. A building boom which creates labour and materials shortages relative to demand (such as occurred pre GST) may result in builders operating in a manner similar to the one-off home market.

⁶ The words in Part 4 have been taken from Security of Payment Taskforce for the Western Australian Building and Construction Industry ("WA Report"), November 2001, *page 6*.

⁷ Western Australia Taskforce Report, November 2001, *page 6*.

In the one-off home market, the owner is dependent on tenders or quotes from builders to determine the cost of the house, and builders are much more likely to seek quotes from subcontractors in order to develop the tender price. Because of the lack of known pricing and the often innovative design features in one-off houses there is greater risk in giving a lump-sum price and greater likelihood of payment problems arising.

Many of the trades in the domestic construction industry are labour intensive, and there is often not a long string of contractual liabilities to other contractors or suppliers. As a result, there are limited risks to the industry from the subcontractor underpricing the work. Anecdotal evidence provided to the Western Australian Taskforce indicates that a subcontractor facing cash flow problems will manage this by working longer hours or on weekends, or by diverting finance from a spouse's income earned elsewhere. Working capital or finance to cover a substantial non-payment from further up the contracting chain is often found by mortgaging the family home, or seeking cash loans from parents or relatives. Although there are limited statistics to demonstrate the extent of this, there is a strong possibility that the outstanding value for money in the Northern Territory housing industry, like the Western Australian housing industry, is to some small extent subsidised by cash flowing into the industry from these sources.

Although the use of these labour-intensive subcontracts with sole traders or partnerships is characteristic of the domestic construction industry, there are also many substantial businesses acting as subcontractors and suppliers in the domestic construction industry whose contracting practices are much more like those applying in the commercial construction industry.

4.2.2 The Commercial Construction Industry⁸

The commercial construction industry is a wide and diverse area where contracts and subcontracts can be for many millions of dollars and where participants can range from small local businesses to wealthy multi-national corporations. Participants in the commercial construction industry must have business and commercial capability commensurate with their contracting partners and relationships are usually regulated by written contracts.

Because of the greater technical sophistication in commercial construction, subcontractors are usually substantial businesses in their own right, and subcontracts include supply of materials and labour. As a result, an insolvent or slow paying subcontractor may have significant impact on the industry by starving smaller subcontractors and suppliers of cashflow down the contracting chain.

Except in specialised circumstances, prices in the commercial sector are usually determined by collecting subcontract prices and amalgamating these to give an overall tender price. In theory, this allows the person bidding for the work to set the price and avoid taking on projects at a loss. However, it also relies on contractors having sufficient knowledge of their costs structures to set commercially realistic tender prices. There is anecdotal evidence to suggest that one of the main payment issues in the commercial construction industry is insolvency as a result of naïve business practice and persistent under-quoting on jobs.

Participants in the commercial construction industry are more likely to limit liability through the use of "two-dollar" companies and trust structures so that personal assets are not put so much at risk in the event of insolvency. Because the consequences to the business owner are not so severe with these types of structures it seems plausible that owners may allow a company to fail through insolvency rather than commit external funds to discharge debts further down the chain. The industry has reacted to this issue of undercapitalised corporate structures by requiring personal or parent company guarantees, but in a competitive market those more desperate to win work will take greater risks. The result of this is that the core of the industry, made up of well run, properly capitalised businesses with good track records and sound ethics has constantly to compete for work against less reliable, higher risk businesses.

⁸ Western Australia Taskforce Report, November 2001, page 7

5 THE NATURE OF THE CONTRACTUAL ARRANGEMENTS

5.1 CONTRACTUAL ARRANGEMENTS⁹

Although each construction contract is likely to have its own particular characteristics, there is a high degree of consistency in much of the industry and a number of patterns can be observed in payment and dispute resolution provision. Contracts will normally set out the main payment parameters of:

- the amount to be paid;
- whether there are progress payments and if so, how they are to be calculated (valuation of work done, reaching of pre-agreed stage, etc.);
- who will determine the amount of the payment;
- when the payment should be made;
- whether retention moneys or other offsets can be withheld; and
- how disputes will be managed.

The extent to which contracts deal with these matters and the actual provisions made vary with the section of industry and the value of the contract. Some users, such as governments or large businesses will use detailed contracts for almost everything down to the smallest maintenance contract, while other users of construction contracts may regulate even quite large contracts on "back of form" conditions or even with only a verbal agreement.

Because of the variety of contract forms used in the industry that have broadly similar payment provisions it appears that many contractors and subcontractors do not take much interest in the written form of the contract and generally assume "normal" payment practices will occur. Typically a subcontractor will submit a payment claim on its ordinary stationery, and within a reasonable time the principal to that subcontract will make payment. It is only when payment is late or disputed that the parties will revert to the written contract, and then perhaps discover that the payment provisions are not what they expected.

The types of contract used within the building and construction industry can be considered in a number of categories – namely:

- Standard form contracts;
- Special project contracts;
- Principal's own form contracts;
- Contractors;
- Suppliers standard forms; and
- Verbal agreements.

5.1.1 Standard Form Contracts

The building and construction industry has pioneered the use of standard contracts and even agreements dating from several hundred years ago show remarkable consistency with current provisions. Standard form contracts are prepared by specialised industry bodies for general use in the industry and usually have a slight bias towards the industry group preparing them in the allocation of risk and obligations. Despite this bias, such contracts are accepted in the industry because the provisions are usually fair and well suited to the particular industry segment. Examples of such contracts are:

⁹ Western Australia Taskforce Report, November 2001, page 10.

- NPWC 3 prepared by the former National Public Works Council (now Australian Procurement and Construction Council) and designed for use by government agencies;
- The JCC set of contracts prepared jointly by the Royal Australian Institute of Architects, the Master Builders Association and the Property Council of Australia and designed for use in commercial building projects supervised by the designer;
- The SBW set of contracts prepared jointly by the Royal Australian Institute of Architects and the Master Builders Association, designed for use in small building works;
- PC-1 prepared by the Property Council of Australia and designed for use in commercial building projects.

The standard form contracts produced by Standards Australia are intended to be unbiased and to fairly allocate risk between the Principal and the Contractor. AS 2124 – 1992 was specifically prepared as part of a general industry reform movement and attempted to deal with security of payment issues by the introduction of statutory declarations for the payment of workers and subcontractors. This has now been followed by the substantially re-written AS 4000 series contracts. To the extent that there is a generally accepted “standard fair” set of payment provisions, the Australian Standards are the most appropriate model.

All these standard form contracts provide detailed payment provisions based around regular (usually monthly) payment claims that are vetted by a contract administrator (the architect, the engineer or the superintendent) and then paid within a specified time. Some standard form contracts also provide matching subcontract conditions so that, in theory at least, it is possible to have all participants in the contractual chain working to consistent and largely fair payment provisions.

Additionally, industry groups such as the Master Builders Association and the Housing Industry Association prepare standard domestic construction contracts that are widely used and understood. These contracts typically provide for payment at defined stages of the works and do not have provision for an independent contract administrator¹⁰.

5.1.2 Special Project Contracts

While standard form contracts are the backbone of owner – head contractor relationships, many projects have aspects that are not directly provided for in the standard form. For major projects, it is common for either the Principal to draw up a special contract and impose it on tenderers for the work, or for the preferred tenderer and the Principal to negotiate the contract terms. Such contracts are usually drawn up in the form of deeds by the parties' lawyers, and while often based on standard forms may have significantly different payment provisions to allow for the rights of project financiers or guarantors.

Special project contracts usually have comprehensive payment provisions that have either been directly negotiated by the parties, or drawn clearly to the parties' attention. Because of the nature of the projects that can justify special project deeds and the general sophistication of the parties the payment provisions are usually well understood and applied¹¹.

5.1.3 Principal's Own Form Contracts

Parties that are active in the construction industry and frequently acting as principal to contracts often prepare their own form of contract. Some end users such as major resource groups or governments will prepare their own forms as a way of imposing uniform policies on diversely managed projects. A good example of this is the C21 contract developed by the New South Wales government. More commonly, major head contractors

¹⁰ Western Australia Taskforce Report, November 2001, page 10-11.

¹¹ Western Australia Taskforce Report, November 2001, page 11-12.

or specialist subcontractors develop their own forms of contract and use their market power to ensure that these contracts are accepted.

There is a wide, and almost infinite variety of payment and dispute resolution provisions possible in such contracts. Most principal's own contracts have detailed payment provisions that, while potentially biased towards the Principal, are understood and commercially sound. However, it is likely that these types of contract will be used to transfer risk further down the contracting chain by the use of "pay if paid" and "pay when paid" clauses or the use of very long payment terms to ensure the subcontractor is effectively financing the project. Similarly, dispute resolution processes may be tied to processes further up the contracting chain, so that a subcontractor wishing to pursue a claim may have to finance an arbitration or litigation on a separate contract to which it is not a party¹².

5.1.4 Contractors' and Suppliers' Standard Forms

Many specialist contractors and suppliers set their own terms of contract as a condition of undertaking the work or supplying the goods. Most commonly these terms and conditions are set out in the "fine print" on the back of the quote or invoice. Such conditions will set out the payment provisions, but it is likely that the person responsible for making the payment will never read the fine print. In the vast majority of cases commercial good practice ensures that payments are made in reasonable time. Failure to pay may more commonly be handled by commercial debt recovery processes than formal dispute resolution procedures set out in the contract.

A common feature in such contracts is the use of "retention of title" clauses that provide for title in any goods supplied to only pass to the purchaser on payment, rather than on delivery. This can cause difficulties higher up the contracting chain if different provisions apply, and ultimately becomes intractable when the goods become fixtures on the land and therefore part of the real property owned by the landholder.

A different problem with the use of "fine print" on the back of a quote or invoice is the possibility of a "battle of the forms" where it is not clear whether the Principal's or the Contractor's terms and conditions apply. While the normal analysis is one of offer and counter offer there is always a considerable amount of doubt where neither party has formally acknowledged the conditions of contract that will apply.¹³

5.1.5 Verbal Agreements

Verbal agreements are commonly found in the domestic construction industry where a small subcontractor gives a verbal quote to do work and this is also accepted verbally or in writing with no indication of the terms and conditions that will apply. While commercial building companies normally have established processes that impose "fine print" conditions as part of acceptance of such quotes, householders seeking home improvement or maintenance work will rarely be able to do this and the problem of verbal agreements is largely seen in consumer protection terms.

Contractors and subcontractors in labour intensive trades are particularly vulnerable to any sort of dispute on a verbal agreement because there is often no clear evidence of the amount of work that has been done that can be used as evidence to substantiate a claim¹⁴.

¹² Western Australia Taskforce Report, November 2001, page 12.

¹³ Western Australia Taskforce Report, November 2001, page 12.

¹⁴ Western Australia Taskforce Report, November 2001, page 12

6 WHAT ARE THE PROBLEMS?

6.1 THE MAIN PROBLEMS

The two main security of payment issues are slow or disputed payment and insolvency of someone in the contracting chain. While there are limited statistics available dealing with insolvency and bankruptcy in the construction industry, there is no real evidence to demonstrate the extent of slow payment problems and their effect. Despite this there is strong anecdotal evidence of the types of problem and the reasons for them¹⁵.

6.1.1 Financial and Business Management

As in any industry, poor business practices will lead to disaster. The construction industry is perhaps more prone to this because it is usually technical skill rather than business acumen that induces people to become contractors or subcontractors. Particularly amongst smaller contractors, the key personnel are usually engaged on site during the day, and attempt to manage the business at night or with the assistance of a spouse or other family members. As a result, it is likely that many contractors do not have good day by day understanding of the financial health of the business. An unexpected financial crisis is more likely to end in insolvency than one which has been foreseen and managed before it became critical.

Because the mainstream construction industry is heavily fragmented and specialised with capital equipment usually available for short-term hire it is possible to commence contracting in the industry with very little working capital. So long as there is timely payment for work done, and suitably generous terms of trade and credit available from suppliers the business can survive on very high gearing or even cash flow alone. Although suppliers are often aware of the risks they run in dealing with undercapitalised contractors, anecdotal comments made to the Western Australian Taskforce suggest that refusing credit is not a viable option to most suppliers.

6.1.2 Contract and Risk Management

The building and construction industry is heavily based on the use of specialist subcontractors actually doing the work. Head contractors are essentially responsible for arranging and coordinating the work. In structuring this way the industry has effectively made the subcontractors and suppliers finance construction by the use of techniques such as:

- Extended credit and payment terms for subcontractors and suppliers, so that (for example) if the head contract provides for payment in 28 days the subcontract may provide for 60 or 90 days. This allows sufficient time for the subcontractor to do the work, the head contractor to claim and get payment from the owner, and for the head contractor to pay the subcontractor within the term allowed by the subcontract. In more extreme cases the subcontract only requires the head contractor to "pay when paid" or "pay if paid" so that there is no risk or financial draw on the head contractor at all. "Pay when paid" and "pay if paid" provisions in contracts are particularly objectionable to subcontractors because the head contractor is under no commercial pressure to seek payment from the owner, and privity of contract prevents the subcontractor from taking action against the owner directly.
- Transfer of risk to the contractor or subcontractor by the use of "guaranteed maximum price" contracts or removing grounds for claim for matters such as inclement weather, industrial disputes, and the like. Subcontractors are particularly vulnerable to these types of contractual provisions because they may not receive all the contract or tender documents when pricing the work and may not be aware of risks that should be priced, managed, or transferred.

¹⁵ Western Australia Taskforce Report, November 2001, page 7.

6.1.3 Unethical Conduct

Even when contractors or subcontractors have been able to make a fully informed assessment of the work and tender accordingly, some forms of unethical conduct in the industry can be used to reduce margins or impose further risks. These include:

- Bid shopping, where the lowest tender price is used as the basis for seeking even lower prices from other tenderers.
- Transfer of costs from contractor to subcontractor, such as site allowances negotiated by the head contractor but paid by the subcontractors.
- Underpayment of claims, where less than the full amount is paid in the knowledge that the cost of recovering the debt through the courts is too long and expensive to be worthwhile¹⁶.

6.2 EFFECTS

Security of payment issues can have a damaging effect on both individuals and their families and on the health and efficiency of the industry as a whole. The pyramidal structure of the construction industry can rapidly multiply the negative effects of partial, non and slow payment down and through the industry. A payment problem at any point in the contractual chain may choke cashflow further down the chain and result in further slow or non payments, hence exacerbating the problem. Because of the very tight margins in the industry, restricted cashflow and payment default can force good operators in to bankruptcy which can reduce the number of skilled operators in the industry and could result in skill shortages and subsequent delays and price rises. Resolving payment disputes under the current court system can be costly for individuals and the industry as a whole, where legal expenses, time delays and damage to good working relationships may result. Disproportionate contractual relationships can result in an "us and them" mentality and inhibit more productive, co-operative partnerships evolving¹⁷.

6.3 EVIDENCE

The Western Australian Taskforce was advised in its early briefings of attempts to quantify the security of payment problem and that an accurate statistical measure of payment problems is not currently possible. The Victorian Taskforce also reached the same conclusion. The chief reason is that payment difficulties most commonly appear to result in contractors and sub-contractors carrying bad debts. Occasionally the burden of this debt leads to the company folding, and/or a personal bankruptcy. At that point the payment problem translates itself into a statistical form but the Western Australian Taskforce could not identify any means by which it was possible to extract from the general records of bankruptcies and receiverships precisely how many could be attributed to a building and construction industry payment problem. In this way, conventional statistical measures fail to identify the significance of payment difficulties. Anecdotal evidence collected from a variety of sub-contractors and consultants remains strong that there is a persistent industry-harmful problem but hard evidence on the extent of the problem is not available¹⁸.

While it would be of assistance to formulate a precise measure of the problem, any effort in this direction is unlikely to achieve meaningful success in the short term and should not delay progress towards a balanced solution to known security of payment problems.

¹⁶ Western Australia Taskforce Report, November 2001, page 8.

¹⁷ Western Australia Taskforce Report, November 2001, page 9.

¹⁸ Western Australia Taskforce Report, November 2001, page 9.

6.4 ABSENCE OF WRITTEN CONTRACTS

Many arrangements between contractors and other parties in the business chain are not written. This may mean that there is a lack of understanding by the parties of their actual obligations concerning critical matters such as the timing of payments and the handling of disputes. Additionally, the absence of writing may be indicative of the fact that not all of the issues have actually been properly considered prior to entering into the contract.

6.5 WEAKNESS OF SOME OF THE CONTRACTING PARTIES

Part 4 of this paper contains a description of the construction industries. It is comprised of powerful businesses and small businesses. The latter may not be in a position to know what needs to be in the contract in order to fairly protect their position. Even if they have this knowledge, they may not be in a sufficiently strong commercial position to force larger businesses to agree to fair terms.

6.6 THE FAILURE OF DI MELLA CONSTRUCTION PTY LTD

Di Mella was a major Northern Territory construction company. It collapsed in early 2001, owing money to many subcontractors. The collapse appears to have been a consequence of business problems experienced outside of the Northern Territory. At the time of the collapse Di Mella was owed monies by the Northern Territory Government in respect of the works completed by some of the subcontractors. In fact, by the time of the collapse some 97% of the monies due under the contract had been paid with the remaining amount (some \$21,000) not being due for payment because the works had not been completed.

Nonetheless, the sub-contractors called on the Northern Territory Government to pay the outstanding amounts to them rather than to the administrator of the company. The Northern Territory Construction Agency refused to do this because to do so would, in its view, have placed the Northern Territory in breach of its contract with Di Mella.

In April 2001, the then Deputy Leader of the Northern Territory Opposition called for Northern Territory Government to pay the subcontractors and urged the Government to:

"review the current procedures within the Construction Agency, particularly in regard to the Construction Agency's capacity to monitor and manage the downstream payments to local sub-contractors".

Subsequently, the then Leader of the Opposition introduced into Parliament the Workmen Liens Amendment Bill 2001. This Bill proposed that the *Workmen's Liens Act* be amended so as to apply to the Crown. The Bill was defeated.

7 WORKMEN'S LIENS ACT

7.1 THE CURRENT NORTHERN TERRITORY LAW

The current Northern Territory statutory response to problems with payments is the *Workmen's Liens Act*. Schedule 1 contains a description of the development of this legislation and the litigation to which it has been subjected over the past 20 years.

7.2 GENERAL OUTLINE OF THE *WORKMEN'S LIENS ACT*

While its creation of liens over land in certain circumstances is the identifying (and most contentious) characteristic of the *Workmen's Liens Act*, the Act is of significantly wider application. It makes general provision for a remedy by way of a statutory lien or charge to a contractor, sub-contractor or workman (employee) in certain circumstances in respect of money owing to the person (or materials furnished) with respect to work done to land or fixtures on it. The Act uses the term "lien" when dealing with the security it sets up with respect to estates or interests in land; the term "charge" is used when dealing with the security it creates over monies. While there "appears to be no logical significance in this terminology, ... it has practical advantages in distinguishing the remedies given by the Act".¹⁹

7.3 SECTION 4 OF THE *WORKMEN'S LIENS ACT* - EMPLOYEE'S LIEN FOR WAGES

Section 4 provides that a workman (employee) doing work for an owner or occupier, or for a contractor or sub-contractor for the benefit of an owner or occupier, has a lien for wages (for that work) on the estate or interest in land of the owner or occupier where either:

- (a) the work is done with the assent, express or implied, of the owner or occupier to the land or any fixture; or
- (b) the work is done in relation to the manufacture of materials which are, with the assent, express or implied, of the owner or occupier, used or intended to be used in or about work done, or intended to be done, to the land or any fixture.

7.4 SECTION 5 OF THE *WORKMEN'S LIENS ACT* - SUB-CONTRACTOR'S LIEN FOR THE CONTRACT PRICE

Section 5 provides that a contractor or sub-contractor has a lien for the contract price, so far as accrued due, on the estate or interest in land of any owner or occupier where either -

- (a) the work is done with the assent, express or implied, of the owner or occupier to the land or any fixture; or
- (b) where the materials are, with the assent, express or implied, of the owner or occupier, used or intended to be used in or about work done, or intended to be done, to the land or any fixture.

Clearly, the "purpose of ss4 and 5 is to give a lien to workers, contractors and sub-contractors over the land of any owner or occupier who has contracted to have work performed, or materials supplied to the property which the landowner owns".²⁰ Importantly, the Act provides that "the lien does not extend beyond that portion of the contract price payable by the owner or occupier under the contract for the purposes of which the work or materials were done, furnished, or manufactured and unpaid at the time when the owner or occupier

¹⁹ Wilson at 4, considering equivalent New Zealand legislation.

²⁰ Re Trademark Homes (Aust) Pty Ltd (1996) 67 SASR 107 at 112 (considering the S.A. Act).

received notice of the lien or of its registration (s6)".²¹ Thus, the "lien in all cases is restricted to the amount unpaid by the owner or occupier, so that a sub-contractor cannot claim a lien on an owner's property in circumstances where the owner has paid all amounts due and owing to the contractor".²²

The nature and incidents of the lien were reviewed by O'Leary CJ in Jennings *Constructions Ltd v Burgundy Royale Investments Pty Ltd*.²³

" ... It is available ... only if registered as required by the Act, and within the time therein specified: ss. 10,11. In the case of land under the provisions of the *Real Property Act*, a notice of lien lodged in the General Registry Office is deemed to be a caveat forbidding the registration of any dealing with the estate or interest sought to be affected by it, unless a dealing is expressed to be subject to the claim of the person lodging the notice, and the provisions of the *Real Property Act* relating to caveats apply to the notice, so far as they are applicable, and are consistent with the *Workmen's Liens Act*. s.12. In every case, a lien created under the *Workmen's Liens Act* is subject to every dealing, assurance, mortgage, encumbrance, or change (sic) on the estate or interest in the land of the owner or occupier registered before the registration of the lien, but takes priority of any dealing, assurance, mortgage, encumbrance or charge not so registered: s.9.

Upon registration of a lien, an action may then be brought in the court, within the time limited by the Act, to enforce it (s.21), and an order for enforcement, if made, may be carried into effect by a writ or warrant from the court for the sale of the estate or interest in land the subject of the lien: s.25. By s.32 of the Act, any person alleging he is prejudicially affected by the lien, or by registration under the Act, may at any time apply to the court to have the claim or registration cancelled."

7.5 SECTION 7 OF THE *WORKMEN'S LIENS ACT* - CHARGES ON MONIES BY SUB-CONTRACTORS AND EMPLOYEES

In addition to provision for remedies by way of lien, both sub-contractors and employees working for a contractor or sub-contractor have a charge on certain monies payable. Section 7 provides that:

- (a) a workman has a charge on any money payable to the contractor or sub-contractor by whom he/she is employed for wages in respect of work done for the purposes of the contract of that contractor or sub-contractor (s.7(1)); and
- (b) a sub-contractor has a charge on any money payable to the contractor (or sub-contractor) with whom he/she has contracted for that portion of the contract price payable to him/her in respect of work done or materials furnished or manufactured for the purposes of the contract (s.7(2)).

It is clear that the "purpose of s7 is to create a separate right, namely, a charge in favour of a worker or sub-contractor to allow those persons to intercept, as it were, payments to the contractor, sub-contractor or worker of a sub-contractor".²⁴ It is considered to be a "genuine security" in that "it holds valid against the official receiver in a bankruptcy and appears to exist and be enforceable independently of any question of direct legal action against the person contractually responsible in the first instance to the claimant".²⁵

²¹ Re Trademark Homes (Aust) Pty Ltd (1996) 67 SASR 107 at 112 (considering the S.A. Act).

²² Re Trademark Homes (Aust) Pty Ltd (1996) 67 SASR 107 at 112 (considering the S.A. Act).

²³ (1986) 43 NTR 1 at 3.

²⁴ Re Trademark Homes (Aust) Pty Ltd (1996) 67 SASR 107 at 112 (considering the S.A. Act).

²⁵ Sykes & Walker at 775.

8 OBJECTIVE OF SECURITY OF PAYMENTS LEGISLATION

8.1 AUSTRALIAN PROCUREMENT AND CONSTRUCTION COUNCIL

The Australian Procurement and Construction Council Inc. (APCC) is the peak council of Departments responsible for procurement and construction policy of the Australian Federal, State and Territory Governments. In 1996 it commented that the "building and construction industry in Australia has been unable to consistently ensure that participants are paid in full and on time".²⁶

The *Workmen's Liens Act* (although enacted more than a century ago) seeks to address this enduring concern, "protect[ing] persons at all levels of the building industry from persons at high levels so that the person at the end of the chain, the worker, is given rights not only against the owner, but also against the person who employs the worker".²⁷

Specifically, the legislation "protect[s] those who perform and supply materials on land from landowners or occupiers who fail to meet their contractual obligations".²⁸ When first introduced in 1893, it "was an advanced piece of social legislation to protect workers and small contractors from exploitation by employers who might use their economic strength to defeat or delay claims for work done or goods supplied".²⁹

While it is clear that financial insecurity can occur at any point in the construction chain, "[t]here is a popular perception ... that the worst problems occur with payments from head contractors to specialist sub-contractors and other suppliers further down the construction chain".³⁰ The Act seeks to protect these interests by providing "some sort of security for money due to workmen employed by contractors and sub-contractors and to sub-contractors contracting with contractors in respect of work done and materials supplied in connection with building and allied operations on land".³¹

"Broadly speaking, whereas previously the person to be protected was confined to his remedies as an ordinary unsecured creditor under his own contract, now an attempt is made to make available to him moneys due under the head contract to the other contracting party up to the amount of the protected person's debt".³²

The policy of the Act "removes workmen and sub-contractors in these circumstances from the ordinary ruck of unsecured creditors and gives them a statutory security",³³ on the basis that:

"those who supply labour, the benefit of which is necessarily incorporated, or material for the purpose of incorporation and which has been incorporated, in the land or chattels of another, shall, to the extent provided by the statute, have a lien upon such land or chattels, and upon the moneys payable in respect of the labour or material so supplied".³⁴

The Act operates on the assumption that "the land which receives the benefit shall bear the burden".³⁵ Moreover, in "provid[ing] some security for payment of wages and materials against the land which is

²⁶ APCC at 4.

²⁷ *Re Trademark Homes (Aust) Pty Ltd* (1996) 67 SASR 107 at 112-3 (considering the S.A. Act).

²⁸ *Re Trademark Homes (Aust) Pty Ltd* (1996) 67 SASR 107 at 112 (considering the S.A. Act).

²⁹ *Advanced Civil Engineering Pty Ltd v. Wyara Pty Ltd* (1986) NTJ 715 at 756. See further *Workmen's Lien Bill 1893* (Second Reading Speech, S.A. Parliamentary Debates, 26 October 1893) at 2,437.

³⁰ APCC at 4.

³¹ *Albert Del Fabbro Pty Ltd v Wilckens and Burnside Pty Ltd (Receiver and Manager Appointed)* (1971) SASR 121 at 124, per Bray CJ.

³² *Albert Del Fabbro Pty Ltd* (1971) SASR 121 at 124, per Bray CJ.

³³ *Albert Del Fabbro Pty Ltd* (1971) SASR 121 at 128, per Bray CJ.

³⁴ *Re Williams, Ex parte The Official Assignee* (1899) 17 NZLR 712 at 719 (considering equivalent New Zealand legislation).

³⁵ *Scratch v Anderson* [1917] 1 WWR 1340, quoted in Macklem & Bristow at 2.

improved by the work or materials,³⁶ such legislation also has the related object of "prevent[ing] owners of land getting the benefit of buildings erected and work done at their instance on their land without paying for them".³⁷

Another impetus for the enactment of the (South Australian) legislation was noted in *Re Trademark Homes (Aust) Pty Ltd* to have been not only to address the fact that a worker's lien did not extend at common law to real property, but also because the courts consistently refused to extend to a lien holder who has carried out work on goods the right to sell the goods in satisfaction of the moneys outstanding to the lien holder.³⁸ The Act gives to a (common law) lien holder who has bestowed work or materials upon a chattel the right to sell the chattel in certain circumstances (s.41) and to satisfy the debt from the proceeds of the sale (s.42).

The Report of the WA Taskforce did not analyse in any detail the objectives of any proposed legislation. However, it seems to have assumed that the objective is:

*"The promoting of security of payments in the building and construction industry"*³⁹

This statement is useful because it acknowledges the limited nature of any legislation. That is, the legislation is not aiming to absolutely protect payments.

Additionally, the WA Taskforce's drafting instructions set out the following as being the purposes of the proposed legislation:

"The purpose of the Act is to reform the law relating to construction contracts and, in particular, -

(a) to facilitate timely payments between parties to a construction contract;

(b) to provide for the repaid resolution of payment disputes arising under a construction contract; and

*(c) to provide mechanisms for the rapid recovery of payments under a contract"*⁴⁰:

8.2 IS THERE A NEED FOR SPECIAL PROTECTION FOR THE BUILDING AND CONSTRUCTION INDUSTRIES?

In assessing the current *Workmen's Liens Act* or any alternative it is relevant to ask whether there is justification for such special protection for security of payment in the building and construction industry.

It is often suggested that security of payment concerns are more pronounced in the building and construction industry than in others.⁴¹ The Law Reform Commission of Western Australia (LRC (WA)) noted that the industry is characterised by few employer/employee relationships with work in the industry predominantly being carried out by independent contractors.⁴² These independent (sub)contractors will normally be unsecured creditors in the event of insolvency by the head contractor. In the absence of privity of contract, the sub-contractor would not normally be able to bring action against the owner of the property in relation to which the sub-contractor is carrying out work.⁴³

³⁶ *Yukon Housing Corporation v Mason Construction* (Court of Appeal for Yukon Territory, 9 February 1996), considering *Mechanics Lien Act*, R.S.Y. 1986, c. 112. In the Canadian context, see further, e.g., *Ponoka-Calmor Oils Ltd v Earl F. Wakefield Co* (1959) 21 DLR (2d) 577 at 585 (Privy Council).

³⁷ *Hickey v Stalker* [1924] 1 DLR 440 at 441, per Meredith CJCP (CA) (considering equivalent legislation in Ontario).

³⁸ *Re Trademark Homes (Aust) Pty Ltd* (1996) 67 SASR 107 at 111.

³⁹ See Chair's Preface, Report of the WA Taskforce, *page 3*.

⁴⁰ Report of the WA Taskforce, Preliminary Drafting Instructions for a Construction Industry Payments Bill 2001, *page 1*.

⁴¹ See APCC at 4.

⁴² W.A. 1998 at pars. 1.5 - 1.7.

⁴³ Although note the potential application of clause 56 (contracts for the benefit of third parties) of the *Law of Property Act*.

Whether there is a need for independent contractors to have some form of security of payment has been examined by a number of bodies around Australia.⁴⁴ The LRC (WA) has noted the dearth of statistical information quantifying such a need.⁴⁵ On the other hand, it is clear that the industry has "quite low capital backing and a heavy reliance on cash-flows to sustain business".⁴⁶ The Committee considers that any recommendations for reform in the industry must recognise these underlying constraints.

The LRC (WA) identified the following considerations against the creation of a special statutory protection:⁴⁷

- * the payment of unsecured creditors in other industries is unregulated;⁴⁸
- * this best effects basic societal values such as freedom of individual action and minimisation of interference by government; and
- * this best effects a well-functioning competitive marketplace.

On the other hand, the Commission concluded that there should be some form of legislative intervention because:⁴⁹

- * despite the limited statistical material available, anecdotal evidence supported the conclusion that "deficiencies in existing security of payment arrangements result in serious harm to various individuals and firms";
- * the assumption that free market forces will provide a well-functioning competitive marketplace assumes parties are in equal bargaining power, which conflicts with the fact that sub-contractors "have apparently been unable to deal with the problem of protecting payments due to them by making appropriate arrangements";
- * unscrupulous head contractors and sub-contractors distort the ideal of a well-functioning competitive marketplace;
- * the industry is one in which those low in the structure are not sufficiently aware of the ability of those above them to meet their financial obligations or the consequences of their failing to do so;
- * the complexity of the legal relationships in large construction projects mean that many of those providing services on credit share no privity of contract with the owner/financier financing the project;
- * payment cycles in the non-residential sector of the industry expose sub-contractors to significant financial risk;
- * as sub-contractors perform most industry work they have a "special role";
- * alternatives to regulation are unsatisfactory - for example, submissions to the Commission suggested that credit insurance is relatively too expensive and disadvantages a sub-contractor in the bidding process;
- * because sub-contractors tend to work for comparatively few head contractors, their "cash flow base is necessarily narrower than in the other industries such as the retail industry and it is more difficult to sustain defaults by debtors";
- * trust funds exist in other industries protecting monies received on behalf of others;⁵⁰ and

⁴⁴ These are discussed in W.A. 1998, see esp. at par. 1.36.

⁴⁵ W.A. 1998 at par. 1.26.

⁴⁶ APCC at 4.

⁴⁷ W.A. 1998 at par.3.1.

⁴⁸ The S.A. Select Committee saw no commercial justification for suppliers of materials in the building and construction industry to be given the advantage of a lien over suppliers in other industries (at 6).

⁴⁹ W.A. 1998 at pars. 3.3 - 3.4

- * it might encourage development of the industry in encouraging the return of those who have left with unpaid debts.

⁵⁰ For example, *Legal Practitioners Act* (NT), s.55; *Agents Licensing Act* (NT), s.49.

9 DOES THE *WORKMEN'S LIENS ACT* ACHIEVE THE OBJECTIVES?

9.1 THE ACTS' DRAFTING PROBLEMS

While ss.41 and 42⁵¹ of the *Workmen's Liens Act* appear to be "necessary and effective",⁵² the Act has been generally subjected over recent years to frequent and damning criticism.

There have been numerous references in the Northern Territory Supreme Court to the "obscure and unsatisfactory nature of the antiquated *Workmen's Liens Act*"⁵³ and the "notorious difficulty many judges have had over the years arising from the enigmatic language of the Act".⁵⁴ This has led to "conflicting judicial opinions as to the meaning of its sometimes puzzling language".⁵⁵ In *Parob Pty Ltd v Pipeline Properties Pty Ltd And Leichhardt Development Company Pty Ltd*, Maurice J went so far as to suggest that given "the many cases, particularly South Australian, where the meaning of the Act has been discussed, at some length, and a variety of interpretations suggested".⁵⁶

"So chaotic is the result that, being familiar with the various approaches, it seems better to sidestep them altogether - unless bound to do otherwise."⁵⁷

Particular criticism has been directed to those aspects of the Act dealing with the statutory lien, especially "the contentious question of what Parliament intended when it enacted s10" of the Act, which deals with the need to register the lien:⁵⁸

* "[t]he obscurity of the Act in that respect is manifest";⁵⁹

* "it is apparent that s.10(3) ... [is] poorly drafted in [its] application to corporate claimants for liens under the Act";⁶⁰ and

⁵¹ Sections 41 and 42 provide:

41. Persons having lien at common law may sell

Every person who has bestowed work or materials upon any chattel or thing in altering the condition thereof, or improving the same, and who is entitled to a lien on such chattel or thing at common law, may, while such lien exists, if the amount due to him in respect of such lien remains unpaid for one month after the same has become due, sell such chattel or thing by public auction, upon giving to the owner thereof, or posting to him at his last known place of abode 14 days before such sale, a notice in writing, by registered letter, stating the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the proposed auctioneer.

42. Application of proceeds of sale

Upon any sale under section 41 the proceeds arising therefrom shall be applied in payment of the amount in respect of which such lien exists, and of the costs of and incidental to such sale, and any surplus shall forthwith be paid to the Registrar of the Local Court nearest to the place of sale, to be held by him for the benefit of the person entitled thereto.

The Local Court may, on the application of such last-mentioned person, order payment of such moneys to him.

⁵² S.A. Select Committee at 6.

⁵³ *Jovista Pty Ltd v Pegasus Gold Australia Pty Ltd & Ors* (unreported, N.T Supreme Court, Bailey J, 4 February 1999) at 5.

⁵⁴ *Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd (Administrator Appointed)* (unreported, N.T Supreme Court, Angel J, 27 November 1998).

⁵⁵ *Leichardt Development Co Ltd v Pipeline Properties Pty Ltd* (1989) 62 NTR 1 at 11, per Angel J.

⁵⁶ *Parob Pty Ltd v Pipeline Properties Pty Ltd and Anor* (1988) NTJ 1546 at 1556.

⁵⁷ *Parob Pty Ltd v Pipeline Properties Pty Ltd and Anor* (1988) NTJ 1546 at 1556.

⁵⁸ *Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd (Administrator Appointed)* (unreported, N.T Supreme Court, Angel J, 27 November 1998).

⁵⁹ *Pipeline Properties Pty Ltd v Leichhardt Development Co Pty Ltd* (1989) 58 NTR 17 at 19.

⁶⁰ *Jovista Pty Ltd v Pegasus Gold Australia Pty Ltd & Ors* (unreported, N.T Supreme Court, Bailey J, 4 February 1999) at 5.

* "s.10(4) of the Act [is] a provision enshrouded in the fuliginous obscurity typical of the Act".⁶¹

Academic commentators have suggested that the conflicting state of authority involves "serious considerations" and is "more than the proverbial 'storm in a teacup'".⁶² Indeed, it was judicially concluded that the "present conflicting state of the cases [in relation to s.10], not only as to the decisions but as to the reasoning grounding those decisions, calls for an authoritative statement of the true construction and operation of the puzzling provisions of the *Workmen's Liens Act*".⁶³ To that end, Angel J in *Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd (Administrator Appointed)* has referred to the Full Court the question whether the fact that the plaintiff's liens in that case were not registered until more than 28 days after the contract price became due under the terms of the works agreement precluded the plaintiff from enforcing the liens.⁶⁴

9.2 HOW USEFUL IS THE *WORKMEN'S LIENS ACT*?

It is not only in relation to the ambiguity of expression in the legislation that concerns have been expressed. In *Advanced Civil Engineering Pty Ltd v. Wyara Pty Ltd*, Asche J commented that:

"this rather complicated Act has probably now outlived its usefulness.^[65] ... It has obviously lost any effectiveness so far as enforcement of claims for wages is concerned. It must have been a very long time since a workman sought the protection of the Act; for no amendment to s.4(3) has ever been promulgated and that subsection limits a workman's lien for wages to a sum 'not exceeding twelve pounds' [although this was amended by Act No.55/1991]. A vast mass of industrial law since 1893 has given workers protection in other ways more efficient than this rather cumbersome procedure. The Act now seems mainly used by corporate bodies against other corporate bodies, no doubt usually of comparable financial strength, to obtain a special form of security not available otherwise than in the Northern Territory and South Australia."⁶⁶

Consistent with this view, Asche CJ noted in *Leichardt Development Co Ltd v Pipeline Properties Pty Ltd* that the Act was there being used in circumstances having "nothing to do with exploitation of the economically weak by the economically strong".⁶⁷ In that case, one company resorted to the Act in respect of a claim by it to monies from another company for work done on the land of a third. The effect of doing so is that "the registration of a lien pursuant to s.10(3) is akin to the registration of a caveat, that is, a lien or caveat remains on the title until removed by one of the statutory methods".⁶⁸

"If it be complained that serious commercial harm may be inflicted on an owner or occupier of land, where a lien is registered on the land which can only be removed after protracted litigation between third parties (and sometimes not even then), the courts have only the gloomy satisfaction of pointing to the sort of warnings already referred to ...".⁶⁹

⁶¹ *Pipeline Properties Pty Ltd v Leichardt Development Co Pty Ltd* (1989) 58 NTR 17 at 20.

⁶² *Sykes & Walker* at 210.

⁶³ *Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd (Administrator Appointed)* (unreported, N.T Supreme Court, Angel J, 27 November 1998).

⁶⁴ *Henry Walker Contracting Pty Ltd v Pegasus Gold Australia Pty Ltd (Administrator Appointed)* (unreported, N.T Supreme Court, Angel J, 27 November 1998).

⁶⁵ See also *Leichardt Development Co Ltd v Pipeline Properties Pty Ltd* (1989) 62 NTR 1 at 2-3, per Asche CJ.

⁶⁶ (1986) NTJ 715 at 756-7.

⁶⁷ (1989) 62 NTR 1 at 3.

⁶⁸ (1989) 62 NTR 1 at 5.

⁶⁹ (1989) 62 NTR 1 at 6.

This is in no sense an indictment of a company that may seek the protection of the legislation; it is merely "taking advantage (successfully or unsuccessfully as events may prove) of a procedure properly open to it under the present legislation".⁷⁰ However, it calls into question whether the Act is currently achieving its intended objectives and/or is causing unforeseen difficulties in its operation.

On another occasion, the outcome of the application of the Act attracted the judicial comment that the "injustice which may be thought to result can be laid squarely at the feet of those who control legislative initiative in this Territory: they have ignored a chorus of judicial protest about the ambiguities and uncertainties attending so many aspects of this legislation, protest which was first mouthed over 60 years ago and to which the Chief Justice added his voice in the *Advanced Civil Engineering case*".⁷¹

In respect of legislation such as the *Workmen's Liens Act* the WA Taskforce observed:

*"Some other jurisdictions have enacted legislation that enables a contractor to place a charge or lien over assets in order to recover unpaid monies. This type of legislation has generally proven ineffective and some jurisdictions have repealed, or are considering repealing, their Acts."*⁷²

9.3 JUDICIAL CALLS FOR REFORM

In 1988, it was judicially suggested that it "seems desirable that the obscurities of this ancient Act be clarified by more modern legislation before it reaches its centenary; the needs of the construction industry of the late twentieth century should be met".⁷³ The Northern Territory Law Reform Committee in its discussion paper noted that the Act achieved its centenary some years now past.

It is noteworthy that related legislation in Queensland, *The Contractors' and Workers' Lien Act 1906* (Qld), judicially described as "a lawyer's nightmare" which should "be repealed",⁷⁴ was repealed in 1964. On the other hand, the Northern Territory legislation "has been subjected to an astonishing amount of judicial criticism which has so far been ignored by the Parliament".⁷⁵

⁷⁰ *Leichardt Development Co Ltd v Pipeline Properties Pty Ltd* (1989) 62 NTR 1 at 6, per Asche CJ.

⁷¹ *Parob Pty Ltd v Pipeline Properties Pty Ltd and Anor* (1988) NTJ 1546 at 1560.

⁷² WA Taskforce Report, page 14

⁷³ *Colmup Pty Ltd v Mecair Engineering Pty Ltd & Ors* (1988) 58 NTR 9 at 16.

⁷⁴ *Terrazzo Tile Co v Willis & Sons Ltd* [1960] Qd R 475 at 479.

⁷⁵ *Stadal Pty Ltd v Skykym Pty Ltd & Anor* (1994) NTJ 627 at 632.

10 ALTERNATIVES TO THE *WORKMEN'S LIENS ACT*

10.1 SOUTH AUSTRALIA

South Australia has legislation in place that is, in all material respects, the same as the *Workmen's Liens Act*. In 1990, the Select Committee of the South Australian House of Assembly reviewed the operation of the *Workers' Liens Act 1893* (SA). It reported that both the South Australian Attorney-General's Department and Department for Public and Consumer Affairs had been requested by "people disadvantaged by its operation" to amend or repeal it.⁷⁶ In recommending that the legislation should be repealed,⁷⁷ the Committee found that the legislation no longer reflected the needs or operation of the building and construction industry. Reflecting the concerns earlier expressed in the Territory by Asche J in *Advanced Civil Engineering Pty Ltd v. Wyara Pty Ltd*, the Committee concluded:

"When the Act was of relevance, labour costs were often considerably lower than the costs of materials, and four weeks wages [ss.4(3) and 7(4)] ... was reasonable. The original intent of protecting the wages of workers is no longer being met. The reorganisation of the industry so that most of the work is being done by sub-contractors and not workers employed by a builder also has nullified the original intent. The Act is now being used in the main by sub-contractors, many of them large organisations, rather than individual workers."⁷⁸

Indeed, the Committee found not only that "the Act no longer serves the purpose for which it was intended",⁷⁹ but that its operation was actually "imped[ing] the rational resolution of an insolvent builder's affairs" in "stopping the supply of money to building projects, the consequent reduction of payment to unsecured creditors and the disruption to the projects affected":⁸⁰

"The major assets an insolvent builder has are the works in progress and the debtors. However, once the liens are placed on the titles of properties, banks and mortgagees are not prepared to advance further money as the liens take precedence over floating charges and any prior arrangement with the owner unless the mortgage has already been registered on the certificate of title."⁸¹

The Committee found that the "builder in effect loses major assets and is prevented from trading out of difficulty, thus reducing any payments to unsecured creditors".⁸² The Committee also noted the irony that if the lienor ultimately failed to recover the amount claimed (where, for example, the owner had already paid the builder or the money was not due), the lien "has achieved nothing except to worsen each party's position".⁸³ This concern is exacerbated by the fact that "[i]n many cases, it is only after liens are registered that the lienor finds out that either the owner has already paid the builder or that money is not due under the terms of the contract".⁸⁴

In fact, evidence to the South Australian Select Committee was that only a small number of liens are legally successful, perhaps as low as 5%.⁸⁵ That Committee also found that the "[l]egal costs are such that many

⁷⁶ S.A. Select Committee at 5.

⁷⁷ S.A. Select Committee at 8.

⁷⁸ S.A. Select Committee at 5.

⁷⁹ S.A. Select Committee at 6.

⁸⁰ S.A. Select Committee at 5.

⁸¹ S.A. Select Committee at 5.

⁸² S.A. Select Committee at 5.

⁸³ S.A. Select Committee at 5.

⁸⁴ S.A. Select Committee at 6.

⁸⁵ S.A. Select Committee at 6.

solicitors advise sub-contractors against registering liens unless the amount to be recovered is in excess of \$2,000".⁸⁶ Indeed, it is understood that the Act is not used by employees at all as legislation such as the *Workplace Relations Act 1996* (Cth)⁸⁷ offers a more speedy and efficient means of obtaining unpaid wages from an employer.

Although South Australia is the only jurisdiction other than the Northern Territory which currently makes provision with respect to contractors' liens, the South Australian Select Committee recommended the repeal of the legislation, while also noting that various other jurisdictions⁸⁸ had then recently rejected the possibility of enacting similar legislation.⁸⁹

10.2 WESTERN AUSTRALIA

10.2.1 1974 WA Report

In 1974, the LRC (WA) concluded that legislation should not be introduced in that jurisdiction providing for the registration of contractors' liens.⁹⁰ It was considered that in limiting the rights of an owner to mortgage or transfer the land, "the registration of a lien against land may be detrimental to an owner who is in no way at fault".⁹¹ The Commission also concluded that legislation should not be introduced providing for the creation of contractors' charges,⁹² as it "would not materially assist subcontractors and would tend to create more difficulties than it seeks to solve".⁹³

It is also noted that the APCC considers that the use of statutory liens is not (or no longer) an appropriate mechanism for securing financial protection in the building and construction industry.⁹⁴

It is clear that although one might have expected that after more than one hundred years of operation, the Act would be working effectively and efficiently in achieving its objectives, it is clear that this is far from the case. It is significant that the adoption of similar legislation has not been supported in other Australian jurisdictions and its repeal has been recommended in South Australia.

10.2.2 2001 WA Report

The WA Taskforce recommended the development of new legislation with the proposed scheme drawing extensively on the United Kingdom *Housing Grants, Construction and Regeneration Act 1996*, the New South Wales *Building and Construction Industry Security of Payment Act 1999* and the New Zealand *Construction Contracts Bill 2001*, whilst addressing a number of shortcomings identified since implementation of the UK and NSW Acts.

The objective of the proposed WA legislation is to facilitate timely payments between parties, to provide for rapid resolution of payment disputes and to provide mechanisms for the rapid recovery of payments under construction contracts. The details of the proposals contained in the WA Report are set out in Part 11.2.

⁸⁶ S.A. Select Committee at 6. The number of notices of liens lodge in recent years has been: 18 (1995/96), 41 (1996/97) and 21 (1997/98).

⁸⁷ See generally the discussion in Macken, O'Grady & Sappideen at 287.

⁸⁸ Western Australia, New South Wales and Victoria. But also noting that New South Wales was to take a different position later on.

⁸⁹ S.A. Select Committee at 4, 8.

⁹⁰ W.A. 1974 at par.78.

⁹¹ W.A. 1974 at par.35.

⁹² W.A. 1974 at par.78.

⁹³ W.A. 1974 at par.57. The difficulties are identified at pars.41-56.

⁹⁴ APCC at 10.

10.3 COMMONWEALTH LEGISLATION

It has been noted that legislation such as the *Workplace Relations Act 1996* (Cth) already offers a more speedy and efficient means of obtaining unpaid wages from an employer. The South Australian Select Committee favoured the use of existing insolvency laws in protecting workers. The *Bankruptcy Act 1966* (Cth) and *Corporations Act 2001* both already provide a degree of priority in respect of the unpaid wages of employees.⁹⁵

10.4 CHARGE OVER MONIES DUE – WESTERN AUSTRALIA AND QUEENSLAND

While other forms of protection are available (at least in respect of employees), it is noteworthy that a number of jurisdictions provide additional protection to employees and sub-contractors in the building and construction industry, although this may not take the form of a proprietary interest by way of security. Other than in the Northern Territory and South Australia, a charge in the nature of a security interest is also conferred in both Queensland and Western Australia in favour of an employee over monies due to the employer from the principal: *Workmen's Wages Act 1898* (WA) (esp. ss.4, 5); *Workplace Relations Act 1997* (Qld) (Ch.9, Pt.2, Divn 2).

10.5 ATTACHMENT PROCESS - TASMANIA

In Tasmania, a form of attachment process is created which is dependent for its final operation on a judgment being obtained: *Contractors' Debts Act 1939* (Tas). Although the process confers rights directly against the principal, because "the process is dependent for its life on the judgment and gives no rights in rem other than such as normally flow from a judgment through the process of execution, it is thought that it does not create any rights of a security nature".⁹⁶

10.6 QUEENSLAND

10.6.1 *Sub-Contractors Charges Act 1974*

Legislation also exists in Queensland enabling a sub-contractor to lodge a charge on moneys owed to the contractor by the principal. However, it has been suggested that "there is evidence that [the *Subcontractors' Charges Act 1974* (Qld)] is of little benefit in practice".⁹⁷

10.6.2 *Queensland Building Services Authority Act 1991*

Part 4A of this Act provides for the regulation of building contracts other than domestic building contracts. The Act provides for:

- contracts to be in writing (with the Authority having the power to "suggest" contracts);
- right to suspend works if other party has failed to comply with an order of a court or tribunal;
- a right to lodge securities rather than retention bonds;
- implied conditions about prompt payment;

⁹⁵ See *Corporations Act 2001*, ss.556-561; *Bankruptcy Act 1966* (Cth), s.109.

⁹⁶ Sykes & Walker at 778.

⁹⁷ S.A. Select Committee at 4 and see further the discussion in "The Subcontractors' Charges Act 1974: Yet More Judicial Clarification" (August/September 1997) 55 *ACLV* 52-58 cf. the recommendations of the (Queensland) Implementation Steering Committee, "Securing Our Industry's Future" (October 1997), quoted in Pyman & Voll at 24.

- prohibition on pay if paid or when clauses.

10.6.3 Domestic Building Contracts Act 2000

This Act regulates domestic building contracts. It provides:

- that such contracts must be in writing;
- for various statutory warranties;
- for various other matters (eg repairs) that must be included in the contract.

10.6.4 Queensland Directions

It is understood that Queensland has recently completed a comprehensive review of security of payment in its own and other jurisdictions. It is further understood that review recommended adoption of the Western Australian model. It is also understood that there has been a high level of support for the introduction of a model almost identical to the WA model.

10.7 NEW SOUTH WALES

10.7.1 Contractors Debts Act 1997

Legislation was enacted in New South Wales in 1997 to "enable people such as tradespersons, labourers and others to recover debts owed to them for work carried out and materials supplied by them".⁹⁸ It provides for a person unpaid by a defaulting contractor to obtain payment of the debt from monies owed to the defaulting contractor by the principal. The process under the legislation is for the person to first sue the defaulting contractor for the money owed. The court may then issue a debt certificate which can be served on the principal as part of a notice of claim.

10.7.2 NSW – Building and Construction Industry Security of Payment Act 1999

This Act provides for:

- a statutory right for a party to a construction contract to progress payment for construction works and the supply of goods and services under the contract;
- such a provision in the contract, an amount determined in accordance with the Act;
- that the due date for payment is the date set out in the contract or in the absence of such a provision in the contract, the date 2 weeks after an appropriate payment claim;
- "pay when pay" contractual clauses to be of no effect;
- the right, in the event that a required payment is not made, to obtain a court order and to suspend carrying out further work on the contract;
- in the case of certain dispute about what money is owing, for adjudication by persons with prescribed qualifications; and
- for the adjudicator to order the monies to be held in prescribed trust accounts.

⁹⁸ Contractors Debts Bill 1997 (Second Reading Speech, NSW Parliamentary Debates, 19 November 1997) (3rd Series) vol.261 at 2141. See the *Contractors Debts Act 1997* (NSW).

10.7.3 Possible changes to the NSW legislation

It is understood that NSW is looking at the following minor or housekeeping changes to its Act. Some issues have been identified in respect of:

- potential confusion and incompatibility between statutory payment rights and contractual payment rights;
- the need to re-argue claims through the courts in order to enforce statutory debts or adjudicators' decisions; and
- the bad-faith use of appeals and the right to post security as a way of avoiding prompt payment of the amount determined.

11 OPTIONS FOR REFORM

11.1 NTLRC

Without attempting to be comprehensive of other possibilities, the Northern Territory Law Reform Committee canvassed in its discussion paper the more significant potential reforms that might be introduced. In identifying these as the more significant potential reforms, Northern Territory Law Reform Committee made much the same assessment as that made by the LRC (WA) in its 1998 report on changes to the law (if any).

11.1.1 Direct payments

The South Australian Select Committee favoured industry change through self-regulation. One such self-regulated reform envisaged was the standardisation of contracts to enable owners to pay sub-contractors directly.⁹⁹ The LRC (WA) acknowledged that an arrangement whereby "the builder by the terms of the contract acted purely as a manager for a percentage of the contract price and the owner paid the subcontractors direct" would better reflect modern building practices.¹⁰⁰ However, it cautioned that this would seem to require that the owner be a large commercial organisation capable of handling the accounting side of the project.¹⁰¹ The Committee also feared the increased potential for disputes in creating a contractual relationship in which the person supervising the work of the sub-contractors does not have a contractual relationship with them.¹⁰²

It is noted that the APCC has concluded that the use of direct payments is not an appropriate mechanism for securing financial protection in the building and construction industry.¹⁰³

11.1.2 Implied conditions, such as "proof of payment" clauses

One mechanism of protecting the financial interests of sub-contractors might be the implication in building contracts of terms shifting risks of non-payment to the contractor. Such provision might take a variety of forms, one example being the "proof of payment" clause. The implication of a "proof of payment" clause in the absence of provision for direct payment might, if statutory mandated, supplement the South Australian Select Committee's proposal to standardise contracts to enable owners to pay sub-contractors directly.¹⁰⁴ The effect of such a clause is to prevent a contractor receiving monies from the owner until all sub-contractors have first been paid.¹⁰⁵

While recognising that the APCC supports Government principals requiring head contract provisions for proof of payment down the contractual chain,¹⁰⁶ noted are concerns expressed by the LRC (WA) about the statutory implication of such a provision as potentially creating cash flow problems for contractors and increasing paperwork (particularly in combating possible resultant fraud).¹⁰⁷

⁹⁹ S.A. Select Committee at 7.

¹⁰⁰ W.A. 1998 at par.3.69.

¹⁰¹ W.A. 1998 at par.3.69.

¹⁰² W.A. 1998 at par.3.71.

¹⁰³ APCC at 10.

¹⁰⁴ See the discussion of this in W.A. 1998 at par.3.78.

¹⁰⁵ See generally the discussion in W.A. 1998 at par.3.76ff.

¹⁰⁶ APCC at 7. See also, eg. N.S.W. Green Paper; "The Property Council of Australia's Practice Note For Clients On Security of Payment In The Construction Industry (April/May 1997) 53 *ACLN* 42-45 at 43-44.

¹⁰⁷ W.A. 1998 at par. 3.79.

11.1.3 Stop notice

If statutory mandated, a stop notice issued by a sub-contractor would result in an owner being required to withhold monies owed to the builder to satisfy the claims of the sub-contractor. The monies would be released by the owner if payment were made by the contractor to the sub-contractor. The LRC (WA) did not endorse the use of stop notices for several reasons, including that they provide no protection should the owner become bankrupt or insolvent and that they can adversely affect the project in interfering with the flow of funds from the owner to the builder/contractor.

11.1.4 Compulsory insurance

The South Australian Select Committee concluded that a compulsory insurance scheme under which a sub-contractor insured against a builder becoming insolvent for "labour only or small sub-contractors and small suppliers of materials would provide a better level of protection for the industry than exists under the *Worker's Liens Act 1893*".¹⁰⁸

However, the LRC (WA) noted that the premiums for credit indemnity insurance may be relatively too high in relation to profit margins.¹⁰⁹ Indeed, a scheme developed by the Housing Industry Association ceased because the premiums were inadequate to meet claims on the fund.¹¹⁰ A subsequent scheme by the South Australian Division of the Association was withdrawn from the market in light of the little interest shown.¹¹¹ While concluding that any insurance scheme would need to be compulsory in light of the failure of these voluntary schemes, the LRC (WA) did not endorse such an approach since:¹¹²

- * it is inappropriate to compel the participation in such a scheme of sub-contractors able to otherwise protect their interests; and
- * there is a significant potential for fraud.

11.1.5 Covenanting

Under such an arrangement, monies payable to a head contractor are paid to a covenanting agency which, in turn, distributes the money as appropriate to the head contractor and sub-contractors. This approach was not supported by the LRC (WA) which held concerns about the premiums to be charged by the covenanting agencies, the administrative complexity of the arrangements and the fact that this approach addresses only the distribution and not also the security of the funds in question.¹¹³

11.1.6 Holdbacks

Where a person, under a legal obligation to pay a sum of money, pays part but also retains part of the monies owing, the amount retained is termed a "holdback". In the context of the building and construction industry, the holdback may be used to require a participant (for example, the owner) to hold back a specified part of the contract price for a period after the contract has been completed. Where these monies have been held back

¹⁰⁸ S.A. Select Committee at 7.

¹⁰⁹ W.A. 1998 at par. 3.93.

¹¹⁰ W.A. 1998 at par. 3.94.

¹¹¹ W.A. 1998 at par. 3.94.

¹¹² W.A. 1998 at par. 3.96 - 3.97.

¹¹³ W.A. 1998 at par.3.73.

by the owner, a sub-contractor of the contractor (to whom the monies are owed) may claim against the monies held back if not paid by the contractor.

To address concerns with the scheme as it applied to owners, a form of "multiple holdback" applicable to persons at various levels in the construction pyramid was adopted in the recent British Columbian *Builders Lien Act*.¹¹⁴ These reforms have been introduced to better relate the holdback structure to the statutory lien, which is also retained in the legislation.¹¹⁵

Even in the absence of provision for a statutory lien, a holdback scheme was rejected by the LRC (WA), as potentially causing cash flow problems for the contractor, adding to the cost of a project and possibly leading to poor business practices if reliance on the scheme results in proper credit checks not being undertaken.¹¹⁶

11.1.7 Builders' licences

In the context of the South Australian legislation, recommendations have been made for stricter and more closely monitored financial reporting requirements for builders' licences.¹¹⁷ While such reforms may assist issues of financial security in the industry, noted is the view of the LRC (WA) that these reforms are inadequate in themselves to effect the necessary improvements to the current system and would add significantly to the administrative costs of the Building Practitioners Board.¹¹⁸

11.1.8 A statutory trust scheme

A principal recommendation of the LRC (WA) was that a statutory trust scheme should be introduced.¹¹⁹ The Commission noted that "[w]hile the parties to a contract could include in the contract provisions setting up trust accounts for payments on account of the contract price they rarely do so".¹²⁰

The Commission identified the following advantages to the establishment of a statutory trust:¹²¹

1. it gives a means of ensuring payment to the sub-contractor for services and materials while keeping the contract monies within the control of the parties to the project;
2. it imposes ethical standards in an industry in which self-regulation has failed to control unscrupulous practices;
3. it facilitates good practice in project fund distribution and cooperative contracting;
4. by removing these monies from the property distributed in a bankruptcy or winding up, it "means that the position of a person further down the chain can be secured and the payment of funds downward can still take place";
5. a wider range of remedies is available than for a mere breach of contract; and

¹¹⁴ See discussion of the reform in British Columbia Questions and Answers at 20-21.

¹¹⁵ Where they are used in the Canadian provinces that are supplemental to a liens scheme: W.A. 1998 at 2.44.

¹¹⁶ W.A. 1998 at par.3.102.

¹¹⁷ *Report of the Ministerial Working Party on Insolvency in the Building Industry* (1990), referred to in W.A. 1998 at pars.2.37, 3.108-9. See further the recommendations of the (Queensland) Implementation Steering Committee, "Securing Our Industry's Future" (October 1997), quoted in Pyman & Voll.

¹¹⁸ W.A. 1998 at par. 3.110.

¹¹⁹ W.A. 1998 at par.3.15.

¹²⁰ W.A. 1998 at par.3.14.

¹²¹ W.A. 1998 at par.3.15.

6. speedier resolution of disputes and payment of sub-contractors may follow since generally all claims of the fund's beneficiaries must be met before the head contractor can withdraw money from the trust fund.

The use of a trust structure would be consistent, in part, with the Canadian approach to this issue. A trust provision was first adopted in Canada in Manitoba in 1932, and subsequently in various other Canadian provinces.¹²² Although Canada experienced a number of uncertainties about the use of a trust and various Canadian reports recommended against the introduction of a trust provision,¹²³ the Law Reform Commission of British Columbia recommended its retention in that jurisdiction.¹²⁴

The Commission found no evidence that the use of trusts was increasing difficulties experienced by contractors in obtaining credit facilities from lending institutions.¹²⁵ Moreover, it was noted that the trust is consistent with the general policy of the Act in attempting to retain contract moneys within the framework of the parties to the contract, and did not seem to be causing any additional slowing down of the flow of funds along the construction chain.¹²⁶ The *Builders Lien Act 1997* of British Columbia continues to employ a trust scheme. It is also relevant to note that under the Act the liens scheme continues to operate, but merely in conjunction with the trust arrangements.¹²⁷ This relationship, which has been one of the sources of uncertainty in Canada about the operation of the trust relationship,¹²⁸ would not arise if the liens scheme was replaced with trust arrangements.

One means of implementing a trust structure would be to establish a central trust fund into which all monies for construction and building work are paid. The South Australian Select Committee was concerned that such a central trust fund scheme would require a large administration, the costs of which had the potential to raise building costs significantly.¹²⁹ The LRC (WA) envisaged that to avoid the creation of a large bureaucracy, the trustee should not be a government body but be drawn from the ranks of the participants in the project (although free to appoint a person, including a trustee corporation, to act in its place: see *Trustee Act* (NT), s.11(1)).¹³⁰ However, although recognising that a scheme under which each builder opened and operated a trust fund for each project would be likely to involve lower administrative costs, the South Australian Select Committee noted that it would still require facilities for investigation and auditing purposes.¹³¹ It may be noted that the scheme in the recently enacted British Columbian *Builders Lien Act* does not require the trust funds to be placed in a separate bank account.¹³² The Committee is cautious about an approach under which trust moneys are to be commingled with the trustee's own moneys. It also notes that even from a purely costs perspective, resulting decreased fund administrative costs might easily be offset by increased investigation and auditing costs.

The South Australian Select Committee favoured industry change through self-regulation - the inclusion in standard building contracts of provisions setting up trust accounts.¹³³ However, the more recent report of the LRC (WA) advocates a statutory scheme. The Commission considers that under its statutory model maximum

¹²² British Columbia Report at Ch.IX (1).

¹²³ Noted in British Columbia Report at Ch.IX (1-3).

¹²⁴ British Columbia Report at Ch.IX (2).

¹²⁵ British Columbia Report at Ch.IX (2).

¹²⁶ British Columbia Report at Ch.IX (2).

¹²⁷ This is typical of those provinces in Canada that use a trust scheme: W.A. 1998 at par. 2.44.

¹²⁸ See British Columbia Report at Ch.IX (3).

¹²⁹ S.A. Select Committee at 7.

¹³⁰ W.A. 1998 at par. 3.23.

¹³¹ S.A. Select Committee at 7.

¹³² British Columbia Questions and Answers at 61.

¹³³ S.A. Select Committee at 7.

protection would flow from all moneys in the hands of the owner to pay for improvements (including those received from financiers) being held in trust for the contractor.¹³⁴ This best "preserves the funds within the construction chain"¹³⁵ and would only require the owner to make the ordinary progress payments at which time the recipient would be the trustee in relation to any payments due to its sub-contractors and employees.¹³⁶

Under this structure, and consistent with the approach under the British Columbian *Builders Lien Act* discussed above, each participant in a construction project would be a trustee where under a contractual obligation to another participant.¹³⁷ Consistent with the recommendations of the Select Standing Committee on Labour, Justice and Intergovernmental Relations of the Legislative Assembly of British Columbia,¹³⁸ s.10(1) of the British Columbian legislation stipulates that money received by a contractor on account of the contract constitutes a trust fund as to persons with whom he/she has directly contracted.¹³⁹ Under this "privity of trust" approach, each trustee is a trustee only as to the persons with which it has contracted.¹⁴⁰ The LRC (WA), on the other hand, recommends that each trustee hold the trust funds for all persons lower in the construction pyramid,¹⁴¹ although a trustee's obligations would nevertheless be discharged on payment in full to the parties with whom it had contracted.¹⁴²

On the other hand, noted is the concern expressed by the APCC¹⁴³ that the use of statutory trusts in the payment chain is not justified given the potential costs of such a scheme flowing from the detailed legal, commercial and administrative burdens and obligations to which it would give rise.

11.1.9 Use of payment bonds

Payment bonds might be available as an alternative to the statutory trust.¹⁴⁴ This would require the owner or contractor to obtain a bond from an insurance company or bank, guaranteeing the payment of the contractor and all sub-contractors and employees.¹⁴⁵

The use of payment bonds is common in the United States.¹⁴⁶ However, their use there may be to provide some degree of protection to those higher up in the contractual chain (in particular, owners) from the rights of sub-contractors and employees to place a lien over land involved in the construction project.¹⁴⁷ They could perform a similar function in the Territory under the current legislative framework.

¹³⁴ W.A. 1998 at pars. 3.24 - 3.25.

¹³⁵ W.A. 1998 at par. 3.24.

¹³⁶ W.A. 1998 at par. 3.26.

¹³⁷ W.A. 1998 at par. 3.27.

¹³⁸ British Columbia Select Standing Committee at rec.#17.

¹³⁹ British Columbia Questions and Answers at 59.

¹⁴⁰ British Columbia Questions and Answers at 59.

¹⁴¹ W.A. 1998 at par. 3.28.

¹⁴² W.A. 1998 at par. 3.30.

¹⁴³ APCC at 10.

¹⁴⁴ See W.A. 1998 at par. 3.61.

¹⁴⁵ W.A. 1998 at par. 3.59.

¹⁴⁶ Noted in W.A. 1998 at par. 3.59.

¹⁴⁷ Noted in W.A. 1998 at par. 3.59.

11.2 WESTERN AUSTRALIAN PROPOSALS – 2001

11.2.1 Scope

WA legislation is proposed to be mandatory for all construction contracts for work carried out in WA and entered into after commencement of the Act. The definition of construction contracts is extensive, and includes written and verbal contracts, commercial and residential contracts. The Act will apply to contracts for construction work, related professional services and materials supply. Parties to contracts where the legislation is not mandatory can opt into the provisions of the legislation if they wish¹⁴⁸.

11.2.2 Clarity of Statutory and Contractual Rights

The WA Taskforce states that its proposed legislation seeks to support good contractual practices currently observed by the majority of the industry, but also to offer protection where unfair practices may occur. This would be achieved by:

- Prohibition of certain unfair contractual provisions: including “pay if paid” and “pay when paid” clauses, excessive payment terms, provisions that prevent the payment of interest for overdue payments, and contracting out of the Act;
- Imposition of default conditions where no written provisions exist: including right to claim payment, assessment and notification terms, time to pay claims, interest on overdue payments, and substitution of cash security;
- Providing statutory rights to protect retention monies and unfixed materials in the event of insolvency.

Consequently, the operation of fair and reasonable contracts will not be impacted, but minimum standards will be achievable for contracting parties with a disproportionately weak negotiating position¹⁴⁹.

11.2.3 Prohibition of Unfair Practices

The WA Forceforce:

- Noted that its proposed legislation is based on strengthening the contractual and commercial relationship between the parties to each contract in the contracting chain. Both in law and in practice the only control a participant in the industry has is with those entities with which it has a direct contractual relationship. As a result it is unfair to tie a party's right to payment to remote events over which it has no control; and
- Noted that the proposed legislation prohibits “pay if paid” and “pay when paid” provisions in contracts. Similarly the legislation limits the length of time before which a payment must be made, thus ensuring that there is prompt payment down the contracting chain¹⁵⁰.

11.2.4 Default Conditions of Contract

The proposed legislation provides default payment conditions of contract that will apply where there is only a verbal agreement, or where a written contract contains unfair provisions that have been struck out as unfair by the legislation. These default provisions generally align with the payment practices in standard form contracts and provide a strong exempla in the industry of fair payment terms¹⁵¹.

¹⁴⁸ Western Australia Taskforce Report, November 2001, page 19.

¹⁴⁹ Western Australia Taskforce Report, November 2001, page 19.

¹⁵⁰ Western Australia Taskforce Report, November 2001, page 19.

¹⁵¹ Western Australia Taskforce Report, November 2001, page 19.

11.2.5 Rapid Adjudication

The proposed legislation will establish a statutory right to refer a payment dispute to rapid adjudication. A payment dispute can arise when a payment claim is not paid in accordance with the contract, or the quantum of a payment claim is disputed.

To initiate rapid adjudication, a claimant must lodge an adjudication claim with the adjudicator and other parties to the dispute within 20 working days of a payment claim being rejected or disputed or of a payment claim not being paid by the due date. The respondent has 10 working days to respond. The adjudicator then has a further 10 working days to adjudicate the matter and provide a written determination to all parties.

The adjudicator's determination will be binding and summarily enforceable via a payment order from the court. The maximum period from lodging an adjudication claim to receiving a determination should be no more than 20 working days. The cost of adjudication will generally be shared equally between the parties to the dispute¹⁵².

11.2.6 Enforcement of the Adjudicator's Determination

The proposed legislation allows for an adjudicator's determination to be enforced in the same manner as a court order. The recipient of a payment determination has only to present the details of the adjudicator's appointment and determination to the relevant court for endorsement by the court officers and does not need to go through further legal processes to recover their money.

The proposed legislation will also establish a statutory right for claimants to suspend work without penalty if payment is not made in accordance with an adjudicator's determination, and, or place a charge or lien over any assets of the other party to secure any unpaid amount due under the contract if payment is not made in accordance with an adjudicator's determination¹⁵³.

11.2.7 Appeal Provisions

The proposed legislation aims to ensure that payment flows quickly down the contracting chain, and that the flow of funds is not unreasonably delayed by protracted disputes. Because of the speed of the process and the potentially limited information on which a determination is based it is essential to provide some appeal mechanism.

The approach recommended is to insist on payment being made in accordance with the rapid adjudication, but allowing the normal contractual and legal dispute mechanisms to run in parallel. If a party to a contract believes the outcome of a rapid adjudication is wrong it still has the right to dispute the payment (or lack of payment) through the formal dispute resolution mechanisms in the contract. Equally, if a party believes the rapid adjudication process is not following the procedures set out in the legislation it has the right to seek injunctive relief from the relevant court. The court is expected to rapidly restore the process so that a determination can be made as soon as possible, rather than debate the merits of the case¹⁵⁴.

11.2.8 Appointment of Adjudicators

The proposed legislation encourages pre-appointment of an adjudicator by agreement between the parties, but also calls for appointment via an independent appointing body for construction contracts only. Appointing bodies will be approved by the Minister and are expected to be independent of sectional interests in the

¹⁵² Western Australia Taskforce Report, November 2001, page 19.

¹⁵³ Western Australia Taskforce Report, November 2001, page 20.

¹⁵⁴ Western Australia Taskforce Report, November 2001, page 20.

industry. It is likely that at least one existing government authority will be approved as an appointing body to ensure the effective operation of the legislation and to control costs.

The proposed legislation provides for the minimum requirements for adjudicators to be established by regulation. The exact qualifications will need to be worked out in consultation with the industry but it is expected that adjudicators will have similar standing to people currently active as arbitrators in construction disputes¹⁵⁵.

11.2.9 Differences between the New South Wales Legislation and the proposed WA legislation

The WA Taskforce identified the key points of differentiation between the WA approach and that of NSW as being:

- WA establishes the right to be paid as a contractual entitlement. There is no blurring of contractual and legislative rights and obligations.
- WA establishes a maximum payment term and maximum adjudication claim periods.
- WA rapid adjudication timescale and trigger points differ from, and are linked differently, than NSW.
- WA rapid adjudication process compresses adjudication notification and claim into one step and includes less potential technical breaches, reducing overall timeframe, paperwork and potential failure of claim due to technicalities.
- WA allows binding and summarily enforceable adjudicator's determination. Monies paid as a result are not required to be placed in trust. Recovery of such monies paid subject to a determination can only happen via subsequent court proceedings.
- WA rapid adjudication model caters for centralised record keeping of payment dispute activity.
- WA allows both suspension of work and/or charges and liens over general assets as remedies when payments are not made in accordance with an adjudicator's determination.
- WA proposal includes domestic/residential construction contracts¹⁵⁶.

¹⁵⁵ Western Australia Taskforce Report, November 2001, page 21.

¹⁵⁶ Western Australia Taskforce Report, November 2001, page 22.

12 THE MAIN OPTIONS

12.1 FIRST OPTION - REFORM THE CURRENT ACT - "THE MODERN LIENS ACT"

The Modern Lien's Act option is to retain the current legislation but update it so as to clarify its operation. That is, maintain the concept of liens for outstanding monies with the liens being able to be registered against the land.

This option is not supported because it does nothing to encourage processes that prevent problems or which permit problems to be addressed as early as possible.

12.2 SECOND OPTION – "STATUTORY RIGHT FOR PAYMENTS"

The second main option is to give subcontractors the right to progress payments modelled on the proposals outlined by the Western Australian Taskforce. See Part 11.2.

12.3 PREFERRED OPTION

At this stage it appears that the most practical option is that mentioned in the previous paragraph. The reasons are:

- It is based on what appear to be sensible business practices – without any undue government intervention;
- It provides no unfair advantage for one sector of business over another; and
- It is consistent with the direction of reforms that are occurring elsewhere in Australia.

However, these views are tentative. They will be reviewed after comments are received on the issues identified in Part 1.

13 ASSESSMENT OF THE MAIN OPTION

13.1 METHOD OF ASSESSMENT

As mentioned in Part 3.6, the proposals are to be analysed in terms of NCP principles. The discussion and background relevant to such analysis is set out in the following sub-paragraphs.

13.2 THE 1995 NCP AGREEMENTS

On 11 April 1995, the Northern Territory Government, along with the Commonwealth, State and Australian Capital Territory Governments agreed to adopt the National Competition Policy (NCP) and signed three specific agreements relating to the implementation of the policy. These agreements are:

13.2.1 Competition Principles Agreement

This agreement, amongst other things, imposes on all governments (the Commonwealth, the six States and the two self-governing Territories) an obligation to review and, if necessary, reform all legislation, which restricts competition for which they are responsible. The agreement also applies to local government.

13.2.2 Conduct Code Agreement

This agreement creates various controls for the purpose of ensuring that, as a general rule, government businesses are subject to the same competition rules as privately owned businesses. Effectively, government agencies, corporations, professional bodies and natural persons shall be subject to Part IV of the *Trade Practices Act 1974* or its equivalent in place under State or Territory law.¹⁵⁷

13.2.3 Agreement to Implement the National Competition Policy and Related Reforms

The Agreement to Implement the NCP and Related Reforms provides a timetable for reform and for the making of payments by the Commonwealth to the States and the Territories, in respect of appropriate progress in the making of the national competition reforms.

13.3 LEGISLATIVE REFORM UNDER NCP

Under clause 5(1) of the Competition Principles Agreement, the guiding principle is that:

"Legislation should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be obtained by restricting competition."

13.4 PRINCIPLES WHICH UNDERLIE A COMPETITION POLICY REVIEW OF LEGISLATION

The following have been widely identified as principles which underlie a Competition Policy Review of legislation:

¹⁵⁷ *Competition Reform (Northern Territory) Act 1995*.

- There must be a presumption against statutory intervention and the onus of proof should be on the proponent of intervention;
- The direct costs of regulation should be borne by the immediate beneficiaries of the regulation; and
- Co-regulation, self-regulation and codes of conduct are all valuable regulatory mechanisms but are potentially subject to capture. There are regulations with minimal statutory support that are very targeted and cost effective. The provision of information is important. Ordinary market mechanisms should generally not be inhibited, subject to active enforcement of ordinary fair trading and other laws.

13.5 RATIONALE FOR REGULATION

The main rationale for government intervention in markets is to:

- ensure that public goods are supplied (eg some railways, defence forces);
- prevent externalities - this is where costs and benefits accrue or spill over to third parties to a transaction (eg the activities of lawyers acting for parties may adversely affect the courts and the public). The main form of intervention is that of enactment of general laws which create offences, impose taxes or impose minimum standards;
- prevent abuse of market power. The main form of intervention is the enactment of general laws (such as the *Trade Practices Act 1974*);
- limit information asymmetry. This is where one party knows more than the other party. Consumers and clients deal with the service provider in ignorance of the quality of the service that is being provided. Occupational regulation can aim to have the result of providing objective information;
- reduce transaction costs. Consumers/clients incur costs in locating services, changing between service providers, reaching agreement on price, ensuring compliance with the agreement. If the costs are too large clients/consumers may, because of the costs, desist from making sufficient inquiries in order to reach the correct decision; and
- achieve other social objectives. This basically relates to the failure of service providers. The intervention is designed to prevent financial loss, prevent substandard work, protection of health and safety and the prevention of criminal activity.

In accordance with the national understanding concerning the conduct of such reviews, all members of the Review Team are chosen because they can bring an appropriate degree of independence of view to the process. This means that members do not usually include representatives of an occupation or industry that might be affected by the legislation.

13.5.1 Need to determine objectives of the legislation and confirmed then as appropriate

This Discussion Paper must contain an assessment of what are the current objectives of any existing legislation and what should be the objects of any proposed legislation.

The objectives of an Act are not what the Act does, rather they are why the Act does what it does. Thus it is not enough to look at the long title to the Act or to summarise the contents of the Act.

There is often a need to find the objects. Some Acts have a neat statement. For example, the various land titles acts¹⁵⁸ have always contained an objects clause. However, for most Acts there is a need to examine the legislative history of the Act (eg the Second Reading Speech and the debates) and any reports or papers leading to the enactment of the legislation.

¹⁵⁸ *Real Property Act and Land Title Act.*

13.5.2 Need to indemnify any anti-competitive aspects of the proposals

This Discussion Paper must contain an assessment of what are the anti-competitive provisions in any proposed Act or in any proposed regulations or other delegated legislation to be made under the Act.

A provision is anti-competitive if it does any of the following:

1. Governs the entry or exit of firms or individuals into or out of markets;¹⁵⁹
2. Controls prices or production levels;
3. Restricts the quality, level or location of goods and services available;¹⁶⁰
4. Restricts advertising and promotional opportunities;
5. Restricts price or type of input used in the production process;
6. Is likely to confer significant costs on business;¹⁶¹ or
7. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.

Of the seven criteria, the main one to note is Number 6. This means that the mere imposition of costs is anti-competitive. Thus a provision can be anti-competitive even if all of the participants in the market are subject to the same costs imposed because of the legislation.

In assessing whether a provision is anti-competitive it is useful:

- To have regard to interstate NCP reviews;
- To look at other issues papers – local & interstate;
- Look at other NCP reviews; and
- Conduct some empirical research sample.

13.5.3 Trade Practices Act Issues

Northern Territory NCP reviews are also required to consider whether any of the provisions of the Act breach the *Trade Practices Act 1974* (Cth).

Part IV of the *Trade Practices Act 1974*, in its application to the Northern Territory, prohibits a person from engaging in certain anti-competitive practices. The Northern Territory Competition Code is in substantially the same terms as Part IV of the *Trade Practices Act 1974*.

Part IV of the *Trade Practices Act 1974* includes the following provisions:

- Section 45: This prohibits the enforcement of exclusionary provisions, whether or not they are anti-competitive, and arrangements which have the effect of substantially lessening competition;
- Section 45A: This deems horizontal price fixing to be anti-competitive, subject to some exceptions; and
- Section 45B: This prescribes covenants that have the effect of substantially lessening competition. In the case of price fixing covenants, these prohibitions are absolute.

¹⁵⁹ This includes restrictions on the types of business structure, form or ownership and size of a business.

¹⁶⁰ This would include restricting certain forms of conduct and provisions that inhibit innovation and differentiation of products and services.

¹⁶¹ This would include costs that are greater in the Northern Territory than on competitors outside of the Northern Territory and also include unjustifiable administrative burdens.

Part IV does not apply to activities which are expressly authorised by Northern Territory statutes. A provision can only provide such an authorisation if it states that it is an authorisation for the purposes of section 51 of the *Trade Practices Act 1974*.

13.5.4 Determining the costs of regulation

Regulation must be assessed for the costs it imposes by way of costs associated with administration compliance and enforcement and costs associated with detrimental effects of regulation on competition and hence on economic efficiency.

Competition policy reviews are only concerned with the provisions that materially restrict competition and not those which impose only insubstantial costs on participants.

At this stage there is no practical need to identify the costs other than in a very general manner. However, the costs need be identified (quantitatively or qualitatively) by the time of the final report.

13.5.5 The benefits of regulation

Benefits of industry regulation may consist of:

- Benefit for an industry group in having a better image;
- Benefit for the group by improving their competitive position concerning the others who are not regulated with some elements of monopoly;
- Reducing financial risks for members of the public;
- Reducing risks resulting from lack of information; and
- Reducing risks of dishonest or inappropriate behaviour.¹⁶²

At this stage there is no practical need to identify the value of the benefits other than in a very general manner. However, the benefits need be identified (quantitatively or qualitatively) by the time of the final report.

13.5.6 The application of the public benefits test

The public benefit test identifies the nature and incidence of the costs and benefits to the community of restricting competition. If the net effects from deregulation are negative, there is a net public benefit for retaining the existing arrangements.

Additionally, as a tool in the application of clause 5(2) of the Competition Principles Agreement, clause 1(3) of that agreement provides as follows:

“Without limiting the matters that may be taken into account, where this Agreement calls:

- a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
- b) for the merits or appropriateness of a particular policy or course of action to be determined; or
- c) for an assessment of the most effective means of achieving a policy objective;

¹⁶² Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, page 13, Victorian Regulation Review Unit and Law Reform Commission, 1988, Principles of Occupational Regulation.

the following matters shall, where relevant, be taken into account:

- d) government legislation and policies relating to ecologically sustainable development;
- e) social welfare and equity consideration, including community service obligations;
- f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- g) economic and regional development, including employment and investment growth;
- h) the interest of consumers generally or of a class of consumers;
- i) the competitiveness of Australian businesses; and
- j) the efficient allocation of resources."

At this stage there is no practical need to try to apply the test. It is usually not possible to quantify, with any degree of confidence, in monetary terms the value of these costs and benefits. However, it should be possible to identify regulatory and compliance costs (eg the price of a licence, the cost of audits etc). Additionally, broader costs and benefits may be able to be estimated using economic models or econometric methods. In most cases it is sufficient to express the arguments in qualitative terms.

More often it is a matter of judgment as to whether:

1. There are any actual benefits.
2. Whether the costs are not so high as to diminish the value of the actual benefits,

Additionally in terms of exercising the judgment it is useful to take regard of outcomes of similar NCP reviews in other States or to any of the background paper issued by the NCC.

13.5.7 There is a need to identify and consider alternatives

NCP requires that alternatives, particularly non-legislative alternatives, be identified. If an alternative can produce the same outcome (in terms of the objectives) for less cost then the alternates should be chosen.

13.6 IDENTIFICATION OF THE ANTI-COMPETITIVE PROVISIONS CONTAINED IN THE PROPOSALS

The following table¹⁶³ contains a description of the possibly anti-competitive restrictions in the key aspects of the various proposals.

¹⁶³ The table is set out in a form recommended by the Northern Territory Treasury.

THE PROPOSALS

Description of the restriction.	Competition or economic effects. Severity of the restriction. ¹⁶⁴
Statutory right to progress payments ¹⁶⁵	Is likely to confer significant costs on business
Prohibition on 'pay when paid' ¹⁶⁶	Is likely to confer significant costs on business
Prohibition on contractual clauses permitting payments to be made more than 35 days after the date of the submission of the claim for payment ¹⁶⁷	Is likely to confer significant costs on business
Prohibition on contractual clauses preventing payment of interest on outstanding amounts ¹⁶⁸	Is likely to confer significant costs on business
Inclusion of default provisions where contract does not contain lawful provisions about payment. Such a default provision would say something like: "The contractor may submit a claim for payment for work done under a contract" (a) at any time after the commencement of work under the contract; and (b) at intervals of not less than 20 days from the date of any previous payment claim ¹⁶⁹ .	Is likely to confer significant costs on business
Inclusion of default provisions concerning rejections or disputes about	Is likely to confer significant costs

¹⁶⁴ These terms, "trivial", "minor" and "substantial" are taken to have the following meanings:

Term	Meaning
Trivial	A trivial restriction is one that may look as if it could have some impact on competition but, for all practical purposes, appears to have no actual impact. Such trivial restrictions will not be analysed in detail.
Minor	A minor restriction is one that may have some actual minor impact on competition. Such restrictions will be analysed.
Significant	A substantial restriction is one that may have a major impact on competition. Even if the actual impact appears minimal such restrictions will, nonetheless, be subjected to analysis

¹⁶⁵ sections 8-11 of the NSW Act.

¹⁶⁶ clauses – section 12 of the NSW Act Clause 2.1 of the WA Taskforce Drafting Instructions.

¹⁶⁷ Clause 2.1 of the WA Taskforce Drafting Instructions.

¹⁶⁸ Clause 2.1 of the WA Taskforce Drafting Instructions.

¹⁶⁹ Clause 2.1 of the WA Taskforce Drafting Instructions.

Description of the restriction.	Competition or economic effects. Severity of the restriction. ¹⁶⁴
<p>claims.</p> <p>The WA taskforce suggested the following as the appropriate default provision if the contract did not contain written provisions:</p> <ol style="list-style-type: none"> 1. Claims for payment must be written and complete (ie contain date of the claim, details of the person making the claim, basis of the claim and the amount of the claim). 2. Duty of the principal contractor (if disputing) to respond within 10 days. The response must either: <ol style="list-style-type: none"> (a) Reject the claim on basis that it does not comply with the contract (and to contain date of notice, details of the person rejecting the claim and the reasons for rejecting the claim); or (b) advise that the principal disputes the claim. The "adjustment notice" should contain the date of the notice, the details of the person disputing the claim, the amount of the claim being disputed, the adjusted amount that will be paid and the reasons for disputing the claim¹⁷⁰. 	<p>on business</p>
<p>Default provisions for time to pay claims. The possible provision is:</p> <p><i>"within 20 days of receipt of a complete payment claim the principal must pay the amount of the claim, or if the value of the claim is disputed, the undisputed amount"</i>¹⁷¹</p>	<p>Is likely to confer significant costs on business</p>
<p>Default provisions for interest for overdue payments. The possible provision is:</p> <p><i>"If a party ...fails to pay monies. by the due date of payment, that party must pay interest on the amount payable to the other party. Interest is to be at the rate payable under the Rules of the Supreme Court on unpaid judgments..."</i>¹⁷²</p>	<p>Is likely to confer significant costs on business</p>
<p>Default provisions for substitution of cash security. The possible provision is:</p> <p><i>"At any time a party providing retention monies or cash security may substitute another form of security. To the extent that another form of security is provided, the other party shall not deduct, and shall promptly release and return, retention monies and cash security.</i></p> <p><i>The other security shall be in the form of cash, bonds or inscribed stock issued by the Australian Government or the Government of State or Territory ..., interest bearing deposit in a trading bank carrying in</i></p>	<p>Is likely to confer significant costs on business</p>

¹⁷⁰ Clause 2.3 of the WA Taskforce Drafting Instructions.

¹⁷¹ Clause 2.4 of the WA Taskforce Drafting Instructions.

¹⁷² Clause 2.5 of the WA Taskforce Drafting Instructions.

¹⁷³ Clause 2.6 of the WA Taskforce Drafting Instructions.

Review of Contractors' Security of Payments (including *Workmen's Liens Act*)

Description of the restriction.	Competition or economic effects. Severity of the restriction. ¹⁶⁴
<i>business in Australia, an approved unconditional undertaking given by an approved financial institution or insurance company</i> . ¹⁷³	
Obligation to comply with the adjudication process ¹⁷⁴	Is likely to confer significant costs on business ¹⁷⁵
In the case of insolvency of a party to a construction contract all security and retention monies under the contract are deemed to be held in trust for the purpose providing the security or retention monies. ¹⁷⁶	Is likely to confer significant costs on business; ¹⁷⁷ or Provides advantages to some firms over others
In the case of insolvency of the Principal to a construction contract, goods and materials supplied under the contract but not yet incorporated into the works or become a fixture on the land shall be deemed to be held in trust by the Principal until the contractor is paid for those goods and materials in accordance with the contract. ¹⁷⁸	Is likely to confer significant costs on business; or Provides advantages to some firms over others
If a payer fails to comply with an adjudicator's determination in accordance with the legislation, in addition to any other rights under the contract, the payee may place a charge or lien over any assets of the payer to secure the unpaid amount due under the contract (subject that this is not to bind the Crown) In the case of insolvency of a party to a construction contract all security and retention monies under the contract are deemed to be held in trust for the purpose providing the security or retention monies. ¹⁷⁹	Is likely to confer significant costs on business; or Provides advantages to some firms over others

In preparing this table the following proposition has been heeded:

*"The NCP review process involves assessing only those provisions which materially restrict competition and not those which impose only insubstantial costs on participants."*¹⁸⁰

¹⁷⁴ – sections 29-30 of the NSW Act.

Clauses 3.1 – 3.28 of the WA Taskforce Drafting Instructions

¹⁷⁵ This would include costs that are greater in the Northern Territory than on competitors outside of the Northern Territory and also include unjustifiable administrative burdens.

¹⁷⁶ Clause 4.1 of the WA Taskforce Drafting Instructions

¹⁷⁷ This would include costs that are greater in the Northern Territory than on competitors outside of the Northern Territory and also include unjustifiable administrative burdens.

¹⁷⁸ Clause 4.2 of the WA Taskforce Drafting Instructions

¹⁷⁹ Clauses 3.12 and 1.5 of the WA Taskforce Drafting Instructions.

¹⁸⁰ Freehills Regulatory Group Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 11.

SCHEDULE 1 – WORKMEN'S LIENS ACT

COMMON LAW

It is well recognised that the "common law recognised a lien available to a worker, or an artificer, who had carried out work on any chattel which had been delivered to that person for the purpose of work being carried out".¹⁸¹ However, such a lien applied only in respect of chattels, and did not extend to land. A worker or contractor who did work on land or fixtures on it had no lien at common law for work or materials.¹⁸²

WORKMEN'S LIENS ACT 1893

The *Workmen's Liens Act 1893* was enacted when the Northern Territory was part of South Australia. It continued to apply in the Northern Territory past 1 January 1911¹⁸³. Amendments made in South Australia after 1910 did not apply in the Northern Territory. Northern Territory amendments have been minimal¹⁸⁴.

The identifying (and most contentious) characteristic of the Act is its creation of liens over land in certain circumstances. While contractual provision may be made in a particular case to this effect, such rights are "essentially a creature of statute"¹⁸⁵.

NORTH AMERICAN ORIGINS OF THE WORKERS' LIENS LEGISLATION

Unlike many Australian statutory modifications of the common law, the *Workmen's Liens Act* did not originate either in an Australian State or in the United Kingdom. Rather it was developed from legislation in Maryland, USA, in 1791.¹⁸⁶ By 1972 legislation to this effect was noted to be "almost universal in the United States".¹⁸⁷

The Canadian experience has been similar to that in the United States. Such legislation came to Canada "by way of the United States".¹⁸⁸ First adopted in Canada in 1873 (in Ontario and Manitoba),¹⁸⁹ it has been adopted in every province.¹⁹⁰

¹⁸¹ As stated in *Re Trademark Homes (Aust) Pty Ltd* (1996) 67 SASR 107 at 110.

¹⁸² Noted in Elliott at 85. The contractor's lien is "a well known feature of the civil law" (British Columbia Report at Ch.III (1) fn.1), to be found in all European countries governed by the civil code (Macklem & Bristow at 1). It derives from Roman law": British Columbia Report at Ch.III (1) fn.1; Macklem & Bristow at 1.

¹⁸³ 1 January 1911 being the date that the Northern Territory ceased to be part of South Australia and became a Territory of the Commonwealth of Australia. The Act applies by virtue of ss.2 and 3 of the *Northern Territory Justice Act 1884* (S.A.), ss.6(1) and 7 of the *Northern Territory Acceptance Act 1910* (Cth) and s.57 of the *Northern Territory (Self-Government) Act (Cth) 1978*.

¹⁸⁴ As noted in *Advanced Civil Engineering Pty Ltd v. Wyara Pty Ltd* (1986) NTJ 715 at 727-8. But also noting the textual amendments made by the *Registration Amendment Act 1991 (NT)* (this was a statute law revision amendment made to the Act in 1991 that somewhat awkwardly substituted in the Preamble to the legislation that it is enacted by the Legislative Assembly of the Northern Territory).

¹⁸⁵ *Blythe Green & Anor v Sienna Pty. Ltd.* (1986) 38 NTR 1 at 2.

¹⁸⁶ British Columbia Report at Ch.III (1).

¹⁸⁷ British Columbia Report at Ch.III (1).

¹⁸⁸ Macklem & Bristow at 1.

¹⁸⁹ British Columbia Report at Ch.III (1); Macklem & Bristow at 1.

THE SPREAD OF THE WORKERS' LIENS LEGISLATION

Outside of the United States and Canada, legislation creating such liens over land has received a mixed reception. While enacted in New Zealand (repealed in 1987),¹⁹¹ it has never been enacted in the United Kingdom. In Australia it remains only in South Australia and the Northern Territory, although it had also existed in Queensland until repealed in 1964.¹⁹²

¹⁹⁰ W.A. 1998 at par.2.44.

¹⁹¹ *Wages Protection and Contractors' Liens Act Repeal Act 1987* (NZ).

¹⁹² *The Contractors' and Workmen's Lien Acts Repeal Act 1964* (Qld).
