

Financial Protection in the Building and Construction Industry

Terms of Reference

In 1985 the Commission was given a reference to recommend what changes in the law if any (other than contractors' liens and charges), should be adopted for the protection of the interest of subcontractors, workers and others in the building and construction industry in receiving payment for work done or materials supplied.

Background of Reference

The reference arose from sustained evidence of problems experienced by the building and construction industry as a result of the practice of subcontracting. In a conventional building contract the client pays the head contractor, who engages other contractors (or subcontractors) to perform particular work or supply materials. Problems occur when there are insufficient funds available to pay subcontractors for work done or materials supplied, for example if the head contractor is declared insolvent.

In a previous report,¹ the Commission recommended that contractor's liens and charges were not a satisfactory way of dealing with this problem. In this reference, the Commission was asked to examine whether any other suitable alternatives exist. In 1995 the Attorney-General asked the Commission to extend the scope of the project to cover financial protection for all parties involved in the building industry.

Nature and Extent of Consultation

The Commission issued a discussion paper in December 1995, along with a paper detailing the major matters under review and outlining the possible alternatives and their advantages and disadvantages. Thirty-one commentators responded including contractors, accountants, industry associations, unions, the Western Power Corporation and a number of individuals. The Commission delivered its final report on the subject in May 1998² following examination of the issues and consideration of submissions.

Recommendations

The Commission made 49 recommendations including:

- That the law should be amended to regulate the payment of head contractors, subcontractors, workers and others in the building and construction industry.
- That a trust scheme be established to ensure that any participant in a project who holds or receives money on account of the contract, and is under an obligation to pay another participant, should hold those moneys as a trustee.
- In the alternative, the Commission recommended the use of bonds as a means of securing payment.
- That certain statutory requirements of all building contracts be introduced by legislation.
- That certain schemes should not be introduced.³

Legislative or Other Action Undertaken

There have been no steps taken toward the introduction of a legislative scheme to implement the Commission's recommendations.⁴

¹ Law Reform Commission of Western Australia, *Contractors' Liens*, Project No 54 (1974).

² Law Reform Commission of Western Australia, *Financial Protection in the Building and Construction Industry*, Project No 82 (1998).

³ These related to insurance, stop notices, holdback funds and the grading or licensing of builders.

⁴ The *Building Legislation Amendment Act 2000* (WA) further regulates the registration of builders and contractors. However, this only indirectly deals with the issue and the Commission's Recommendation 49 suggests that this is not an adequate measure of resolving the problem discussed in the terms of reference.

During the production of the Commission's report there were a number of independent studies conducted on the subject of security of payment for subcontractors.⁵ One of these studies, conducted by the Australian Procurement and Construction Council, produced a proposal for a National Action on Security of Payment in the Construction Industry.⁶ The Western Australian Cabinet endorsed this and the proposals were implemented.⁷ However, this was criticised as relating primarily to contracts involving the government or an arm of government.⁸

The Minister for Works indicated that the Western Australian government was taking a 'watch-and-see approach' in respect of the New South Wales and Queensland legislative schemes⁹ and created a taskforce to further consider the issue.¹⁰ The taskforce has not yet reported any findings or recommendations to Parliament, however, the Department of Housing and Works has indicated that the taskforce is preparing a draft Bill for public comment.¹¹

Currency of Recommendations

Although the Government has endorsed the National Action on Security of Payment in the Construction Industry, the problem inherent with subcontractors securing payment remains largely unresolved. Therefore the recommendations made by the Commission are still current.

Action Required

The Department of Housing and Works indicated that the draft Bill being prepared by the taskforce was similar to the legislation in New South Wales and the United Kingdom. These jurisdictions have implemented trust schemes, of the kind recommended by the Commission in its final report. Given that the Commission's recommendations pertaining to the establishment of a trust scheme were made with particular regard to the law in all relevant jurisdictions, but designed to complement the laws of Western Australia, it would be prudent to make particular reference to the Commission's final report in the preparation of any Bill responding to the problem.

Priority – High

The desirability of swift action to address the problems outlined in the Commission's final report is supported by the frequency of reference to these problems in parliamentary debates and the reports of independent bodies and government departments. Legislative action ensuring security of payment to subcontractors in the construction industry would also assist in the maintenance of consumer confidence in the industry and enhance its overall stability.

5 Among these were studies conducted by the Victorian Government Taskforce, Building and Construction Advisory Council and Small Business Procurement Advisory Council.

6 This scheme suggested measures such as the introduction of pre-qualification of participants, the introduction of a code of practice, prompt payment in accordance with the treasurer's instructions, and statutory declarations from head contractors that subcontractors have been paid.

7 Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 September 1999, 909 (Mr Board, Minister for Works).

8 Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 1999, 2088 (Mr Baker).

9 Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 1999, 2089 (Mr Board, Minister for Works). The legislative schemes in other jurisdictions are summarised in the Commission's final report at pages 32–50.

10 The Security of Payment Taskforce. See discussion in Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 October 1999, 2422 (Mr Johnson, Minister for Works).

11 A media release on 27 August 2001 announced that the Taskforce was still canvassing in Broome on this issue. Department of Housing and Works, *Security of Payment Taskforce Chair Visits Broome*, Press Release (27 August 2001), <http://www.dhw.wa.gov.au/index_IE.cfm>.