

Queensland



SUBCONTRACTORS' CHARGES AMENDMENT ACT 2002

Act No. 2 of 2002



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MINOR AMENDMENTS

Queensland



Subcontractors' Charges Amendment Act 2002

Act No. 2 of 2002

An Act to amend the *Subcontractors' Charges Act 1974*

[Assented to 28 February 2002]

The Parliament of Queensland enacts—**1 Short title**

This Act may be cited as the *Subcontractors' Charges Amendment Act 2002*.

2 Commencement

This Act commences on a day to be fixed by proclamation.

3 Act amended

This Act amends the *Subcontractors' Charges Act 1974*.

4 Amendment of s 3 (Definitions)

(1) All words before definition “approved form”—

omit, insert—

‘3 Definitions

‘In this Act—’.

(2) Section 3—

insert—

‘**“land”** includes land under water.

“security”, for a contract or subcontract, means something—

- (a) given to, or for the direct or indirect benefit of, the party to the contract or subcontract for whom the work the subject of the contract or subcontract is to be performed, by or for the party to the contract or subcontract who is to perform the work the subject of the contract or subcontract; and
- (b) intended to secure, wholly or partly, the performance of the contract or subcontract; and
- (c) in the form of either, or a combination of both, of the following—

- (i) an amount of money, other than an amount held as retention money;
- (ii) 1 or more valuable instruments, whether or not exchanged for, or held instead of, retention money.

“structure”, for a structure on land under water, includes a structure made up of component parts that include—

- (a) component parts fixed to the land; and
- (b) component parts that rise and fall with the rise and fall of the water, and that are otherwise confined in their location by component parts fixed to the land.

Example of a structure included under this definition—

A marina made up of fixed pylons, and pontoons that rise and fall with the water level that are otherwise confined in their location by the pylons.

“valuable instrument” means any of the following—

- (a) banker’s undertaking;
- (b) bond;
- (c) inscribed stock;
- (d) guarantee policy;
- (e) interest bearing deposit;
- (f) another instrument, to the extent it is convertible into an amount of money.’.

4A Insertion of new s 3AA

After section 3—

insert—

‘3AA “Work” to include particular manufacture or fabrication and supply of labour

‘(1) This section—

- (a) is intended to establish a limited extension of what is work for this Act under section 3, definition “work”; and
- (b) is not intended to have the effect of causing anything that is work under the definition to stop being work.

‘(2) Under the definition, work includes work or labour, whether skilled or unskilled, done or commenced upon the land where the contract or subcontract is being performed by a person of any occupation in connection with a matter listed in paragraphs (a) to (d) of the definition.

‘(3) In this Act, **“work”** also includes the following—

- (a) the manufacture or fabrication, wherever it happens, of project specific components for the contract or subcontract;
- (b) the supply of labour for the contract or subcontract.

‘(4) In this section—

“manufacture or fabrication”, of project specific components for a contract or subcontract, does not include—

- (a) the manufacture or fabrication of project specific components for the contract or subcontract if—
 - (i) the components have not been fixed in place for the purposes of the contract or subcontract; and
 - (ii) the components could, without substantial change, reasonably be used other than for the purposes of the contract or subcontract; or
- (b) the manufacture or fabrication of project specific components for the contract or subcontract if the manufacture or fabrication consists merely of cutting something to size or mixing things together.

Example of mixing things together—

Mixing things together to make concrete or asphalt.

“project specific components”, for a contract or subcontract, means components meeting the particular requirements of the contract or subcontract, other than components that are standard or ordinary product lines of a commercially available specification.

“supply of labour” does not include the supply of a person to perform an activity that is only administrative in nature.’.

5 Amendment of s 5 (Charges in favour of subcontractors)

(1) Section 5(1), from ‘shall be entitled to’—

omit, insert—

'is entitled to—

- (a) a charge on the money payable to the contractor or a superior contractor under the contractor's, or superior contractor's, contract or subcontract; and
- (b) subject to subsection (4), a charge on any security for the contractor's, or superior contractor's, contract or subcontract.'

(2) Section 5—

insert—

'**(4)** The charge on a security to which a subcontractor is entitled under subsection (1)(b) secures a payment mentioned in subsection (2)—

- (a) only if the payment can not be satisfied by the charge mentioned in subsection (1)(a); and
- (b) to the extent of the security's maximum possible value for securing performance of the contractor's, or superior contractor's, contract or subcontract, other than to the extent that the security is required to be used for securing, wholly or partly, the performance of the contract or subcontract.

'**(5)** To remove any doubt, it is declared that, for a subcontractor's claim of charge relating to retention money only—

- (a) the charge to which the subcontractor is entitled under subsection (1)(a) is not limited to merely a charge on retention money; and
- (b) the charge to which the subcontractor is entitled under subsection (1)(b) is not limited to merely a charge on any security that has been exchanged for, or is held instead of, retention money.

'**(6)** Money that is or is to become payable to a subcontractor for work done by the subcontractor under a subcontract, and the payment of which is secured under subsection (2)—

- (a) includes money the payment of which is governed by a provision of the subcontract still to be complied with, including for example the following—
 - (i) a provision establishing a procedure for the certification of the amount, quality or value of work that has been performed;

- (ii) a provision establishing a procedure for the resolution of a dispute about the amount, quality or value of work that has been performed; and
- (b) does not include the following—
 - (i) damages for breach of contract or in tort;
 - (ii) an amount payable on the basis of an extra-contractual remedy, including, for example, as reasonable compensation for work done;
 - (iii) damages or other relief under another Act or an Act of another State or the Commonwealth, including damages or other relief under the *Trade Practices Act 1974* (Cwlth).’.

6 Omission of s 7A (Schemes of arrangement binding on subcontractors)

Section 7A—

omit.

7 Amendment of s 8 (Insufficiency of money to meet claims)

Section 8—

insert—

‘(2) For subsection (1), money that is or is to become payable under the contract includes money that is or is to become payable on the basis of a charge on a security for the contract, including money payable under section 11B or under an order of the court under section 11C.’.

8 Amendment of s 9A (Contractor to furnish information as to employer)

(1) Section 9A, heading—

omit, insert—

‘9A Supply of contract and security information to subcontractor’.

(2) Section 9A(1), from ‘shall forthwith furnish’—

omit, insert—

‘must without delay give the subcontractor—

- (a) the name of the contractor's or superior contractor's employer; and
- (b) the address of—
 - (i) the employer's place of business; or
 - (ii) if the employer does not have a place of business—the employer's place of residence; and
- (c) the identifying information about the contract between the employer and the contractor or superior contractor that the subcontractor needs for giving a notice of claim of charge in the approved form under section 10; and
- (d) advice as to whether there are any securities in existence for the contract between the employer and the contractor or superior contractor; and
- (e) if known to the contractor or superior contractor, the name and address of the holder of each security mentioned in paragraph (d).'

(3) Section 9A—

insert—

‘(1A) Subsection (1B) applies if—

- (a) a subcontractor makes a demand in writing under subsection (1); and
- (b) in response to the demand, a contractor or superior contractor tells the subcontractor of the existence of a security, but does not give the name and address of the holder of the security.

‘(1B) On demand made in writing by the subcontractor, the contractor's or superior contractor's employer must without delay give the subcontractor the name and address of the holder of the security.’

(4) Section 9A(2), ‘or superior contractor’—

omit, insert—

‘, superior contractor or employer’.

(5) Section 9A(2), after ‘subsection (1)’—

insert—

‘or (1B)’.

9 Amendment of s 10 (Notice of claim of charge)

(1) After section 10(1)(a)—

insert—

‘(aa) if a person other than the employer or superior contractor holds a security for the contract—must give notice in the approved form of having made the claim to the person holding the security; and’.

(2) Section 10—

insert—

‘**(1B)** A notice of claim of charge must be supported by a statutory declaration of the subcontractor, or, if the subcontractor is a corporation, of an officer of the corporation, about the correctness of the claim, including the correctness of the amount of the claim.

‘**(1C)** The statutory declaration must be in the approved form.

‘**(1D)** To remove any doubt, it is declared that when a charge on money payable under a contract is claimed, the claim includes a charge on retention money.’.

(3) Section 10(3), ‘under the contract’—

omit, insert—

‘under the contract mentioned in subsection (1)’.

(4) Section 10—

insert—

‘**(4A)** However, if the reason for a failure to give notice under this section is merely a failure to give a notice under subsection (1)(aa) to the holder of a security, the charge does not attach to the security, but otherwise attaches.’.

(5) Section 10(6)(a), ‘in accordance with subsection (1)’—

omit, insert—

‘as required under subsection (1)(a), and supported by a statutory declaration under subsection (1B)’.

(6) Section 10—

insert—

‘(7) To remove any doubt, it is declared that a subcontractor may make 2 or more claims in relation to money payable or to become payable to the subcontractor for work done by the subcontractor under a subcontract.

‘(8) However—

- (a) each claim must be about a separate and distinguishable item of the work done by the subcontractor under the subcontract; and
- (b) there must not be more than 1 claim about any 1 item.

‘(9) In this section—

“**officer**”, of a corporation, means—

- (a) if the corporation is a corporation under the *Corporations Act 2001* (Cwlth)—a person who, under that Act, is an officer of the corporation; or
- (b) otherwise—a person, by whatever name called, who is concerned, or takes part, in the management of the corporation.’.

10 Amendment of s 10A (Qualified persons)

Section 10A(1)(c), ‘carry out, and supervise,’—

omit, insert—

‘carry out or supervise’.

11 Amendment of s 11 (Consequences of notice of claim of charge)

(1) Section 11(3)—

omit, insert—

‘(3) Within 14 days after the notice of the claim of charge mentioned in subsection (1) is given under section 10(1)(b) to the contractor to whom the money is payable, the contractor must give to the employer or superior subcontractor by whom the money is payable, and to the subcontractor giving notice of the claim of charge, a notice (“**contractor’s notice**”) in the approved form that the contractor—

- (a) accepts liability to pay the amount claimed; or
- (b) disputes the claim; or
- (c) accepts liability to pay the amount (the “**stated amount**”) stated in the contractor’s notice, but otherwise disputes the claim.’.

(2) Section 11(4), 'Where notice is given pursuant to'—

omit, insert—

'If the contractor's notice is given under'.

(3) Section 11—

insert—

'(4A) If the contractor's notice is given under subsection (3)(c), the employer or superior contractor by whom money is payable must pay to the subcontractor the amount the employer or superior contractor is required to retain, up to the stated amount.

'(4B) However, the employer or superior contractor is required to comply with subsection (4) or (4A) only if, after payment is made under the subsection, the retained amount will be equal to or more than the unsatisfied amount.'.

(4) Section 11(6), after 'any proceeding'—

insert—

'in relation to the amount paid'.

(5) Section 11(8), after 'withdraw'—

insert—

',' wholly or partly,'.

(6) After section 11(8)(a)—

insert—

'(aa) to the holder of any security to whom notice was given under section 10(1)(aa); and'.

(7) Section 11—

insert—

'(9) In this section—

“retained amount” means the total of—

- (a) all amounts still retained by the employer or superior contractor under subsection (1); and
- (b) all amounts paid into court by the employer or superior contractor under subsection (5).

“unsatisfied amount” means the total of all amounts of claims of charge for which a notice of claim of charge has been given, other than amounts that have been—

- (a) satisfied by payment under subsection (4) or (4A); or
- (b) the subject of a withdrawal of notice of claim of charge under subsection (8).

12 Insertion of new ss 11A–11E

After section 11—

insert—

‘11A Use of security for benefit of subcontractor if no contractor acceptance of liability for all claims

‘(1) If at any time the unsatisfied amount for a contract is more than the retained amount for the contract, the holder of a section 11A security for the contract must—

- (a) retain the security until a court in which a subcontractor’s claim is heard makes an order under section 11C about enforcing the charge over the security; or
- (b) instead of retaining the security—
 - (i) if the security is held as an amount of money—pay the amount, up to the difference amount for the contract, into court; or
 - (ii) if the security is not held as an amount of money but may be converted into an amount of money—convert the security, wholly or partly, into an amount of money and pay the amount, up to the difference amount for the contract, into court.

‘(2) If the holder of the section 11A security does not comply with subsection (1), the holder is personally liable to pay to a subcontractor the amount of the subcontractor’s claim to the extent that the security would have been capable under this Act, if the holder had complied with the subsection, of satisfying the claim.

‘(3) A payment of an amount under subsection (1)(b) discharges the holder of the security of all further liability for the amount paid and of the costs of any proceeding in relation to the amount paid.

‘(4) Subsections (1) and (2) do not stop the holder of the security from exercising an entitlement to use the security for securing the performance of the contract, including by keeping control of the security until, had this section not commenced, the security would be required to be surrendered, wholly or partly.

‘(5) A provision of the contract, or of another arrangement, about the section 11A security, including a provision of the security itself, and including a provision providing for the surrender, wholly or partly, of the security, is of no effect to the extent it purports—

- (a) to stop the holder of the security from complying with subsection (1); or
- (b) to operate to the detriment of a person if the holder complies with subsection (1).

‘(6) An amount paid into court under subsection (1)(b) may be paid out only under an order of the court.

‘(7) In this section—

“difference amount”, for a contract, means the amount by which the unsatisfied amount for the contract is more than the retained amount for the contract.

“retained amount”, for a contract, means the total of—

- (a) all amounts a person is retaining under section 11(1) for the contract; and
- (b) all amounts a person has paid into court under section 11(5) for the contract; and
- (c) all amounts the holder of the section 11A security for the contract has paid into court under subsection (1)(b) in relation to the security.

“section 11A security”, for a contract, means a security for the contract in relation to which all the following circumstances apply—

- (a) the security is held by an employer, superior contractor or other person;
- (b) under section 11(1), a person has become subject to a requirement to retain money that is or is to become payable by the person under the contract, to satisfy a subcontractor’s claim or claims or the claims of 2 or more subcontractors;

- (c) there have not been acceptances of liability under section 11(3) for the total of all amounts of claims of charge for the contract for which a notice of claim of charge has been given and not withdrawn.

“unsatisfied amount”, for a contract, means the total of all amounts of claims of charge for the contract for which a notice of claim of charge has been given, other than amounts that have been—

- (a) satisfied by payment under section 11(4) or (4A); or
- (b) the subject of a withdrawal of notice of claim of charge under section 11(8).

‘11B Use of security for benefit of subcontractor if contractor acceptance of liability for all claims

‘(1) If at any time the unsatisfied amount for a contract is more than the retained amount for the contract, the holder of a section 11B security for the contract must—

- (a) retain the security until a court in which a subcontractor’s claim is heard makes an order under section 11C about enforcing the charge over the security; or
- (b) instead of retaining the security—
 - (i) if the security is held as an amount of money—pay the amount, up to the difference amount for the contract, to the subcontractor or subcontractors to whom the acceptance of liability relates; or
 - (ii) if the security is not held as an amount of money but may be converted into an amount of money—convert the security, wholly or partly, into an amount of money and pay the amount, up to the difference amount for the contract, to the subcontractor or subcontractors to whom the acceptance of liability relates.

‘(2) If the holder of the section 11B security does not comply with subsection (1), the holder is personally liable to pay to a subcontractor the amount of the subcontractor’s claim to the extent that the security would have been capable under this Act, if the holder had complied with the subsection, of satisfying the claim.

‘(3) A payment of an amount under subsection (1)(b) discharges the holder of the security of all further liability for the amount paid and of the costs of any proceeding in relation to the amount paid.

‘(4) Subsections (1) and (2) do not stop the holder of the security from exercising an entitlement to use the security for securing the performance of the contract, including by keeping control of the security until, had this section not commenced, the security would be required to be surrendered, wholly or partly.

‘(5) A provision of the contract, or of another arrangement, about the section 11B security, including a provision of the security itself, and including a provision providing for the surrender, wholly or partly, of the security, is of no effect to the extent it purports—

- (a) to stop the holder of the security from complying with subsection (1); or
- (b) to operate to the detriment of a person if the holder complies with subsection (1).

‘(6) In this section—

“difference amount”, for a contract, means the amount by which the unsatisfied amount for the contract is more than the retained amount for the contract.

“retained amount”, for a contract, means the total of—

- (a) all amounts a person is retaining under section 11(1) for the contract; and
- (b) all amounts a person has paid into court under section 11(5) for the contract; and
- (c) all amounts the holder of the section 11B security for the contract has paid to the subcontractor or subcontractors under subsection (1)(b) in relation to the security.

“section 11B security”, for a contract, means a security for the contract in relation to which all the following circumstances apply—

- (a) the security is held by an employer, superior contractor or other person;
- (b) under section 11(1), a person has become subject to a requirement to retain money that is or is to become payable by the person under the contract, to satisfy a subcontractor’s claim or claims or the claims of 2 or more subcontractors;

- (c) there have been acceptances of liability under section 11(3) for the total of all amounts of claims of charge for the contract for which a notice of claim of charge has been given and not withdrawn.

“unsatisfied amount”, for a contract, means the total of all amounts of claims of charge for the contract for which a notice of claim of charge has been given, other than amounts that have been—

- (a) satisfied by payment under section 11(4) or (4A); or
- (b) the subject of a withdrawal of notice of claim of charge under section 11(8).

‘11C Authority of court for security

‘(1) This section applies if the holder of a security for a contract is retaining the security under section 11A(1)(a) or 11B(1)(a) or has paid an amount for the security into court under section 11A(1)(b).

‘(2) The court may make the order it considers appropriate for enforcing the charge over the security to which a subcontractor is entitled under section 5, including an order for realising the security.

‘(3) The court may make an order for realising the security only if the holder of the security is no longer entitled, under any contract or other arrangement about the security, including under the security itself, to use the security—

- (a) for securing the performance of the contract mentioned in subsection (1); or
- (b) in some other way provided for in the contract mentioned in subsection (1).

‘(4) Without limiting the orders the court may make under subsection (2), the court may order the holder of the security to produce the security to the court.

‘(5) A precondition or expiry provision for the security is of no effect to the extent that the provision could operate to stop the realisation of a security under subsection (2).

‘(6) In this section—

“expiry provision”, for a security, means a provision of a contract or another arrangement about the security, including a provision of the

security itself, under which the security stops, wholly or partly, having effect.

“precondition provision”, for a security, means a provision of a contract or another arrangement about the security, including a provision of the security itself, stating the circumstances that are to apply before the holder of the security may exercise an entitlement to use the security for securing the performance of a contract.

‘11D Certain subcontractor securities of no effect

‘To the extent that something is given by or for a subcontractor for securing, wholly or partly, the performance by a contractor or a superior contractor of the contractor’s, or superior contractor’s, contract or subcontract, it is of no effect.

‘11E Duty of employer or superior contractor to advise security holder about s 11A or 11B circumstances

‘(1) This section applies if a subcontractor who intends to claim a charge on money payable under a contract—

- (a) gives an employer or superior contractor a notice under section 10(1)(a); and
- (b) gives the holder of a security for the contract a notice under section 10(1)(aa).

‘(2) The security holder may ask the employer or superior contractor for information the holder reasonably requires in order to comply with section 11A or 11B.

‘(3) The employer or superior contractor must comply with a request under subsection (2) to the greatest practicable extent.

‘(4) Subsection (5) applies if—

- (a) the employer or superior contractor does not comply with subsection (3); and
- (b) because of the employer’s or superior contractor’s failure to comply with section (3), the security holder does not comply with section 11A(1) or 11B(1).

‘(5) The employer or superior contractor, instead of the security holder, is personally liable to pay the subcontractor the amount the subcontractor is liable to be paid under section 11A(2) or 11B(2).’.

13 Amendment of s 12 (Enforcement of charge)

(1) Section 12—

insert—

‘(1A) To remove any doubt, it is declared that a person who is an employer or superior contractor makes satisfactory arrangements under subsection (1) if the person pays into court under section 11(5) the amount the person is required to retain under section 11.’.

(3) Section 12(3A), after ‘section 10’—

insert—

‘, whose charge has not been extinguished under section 15.’.

(4) Section 12(3B), ‘(whether or not the subcontractor has given a notice of claim of charge)’—

omit.

14 Amendment of s 15 (Proceedings in respect of charges)

(1) Section 15(1)(b), ‘2 months’—

omit, insert—

‘1 month’.

(2) Section 15(2), after ‘money payable’—

insert—

‘or a security in existence’.

15 Amendment of s 17 (Power to proceed in absence of person against whom proceedings brought)

Section 17, ‘in accordance with section 16’—

omit.

16 Amendment of s 21 (Application to court by person prejudicially affected)

Section 21—

insert—

‘(3) Without limiting the circumstances in which a person may be prejudicially affected for subsection (1), a person (the **“affected person”**) is taken to be prejudicially affected by the claim of charge of a subcontractor (the **“claiming subcontractor”**) if—

- (a) because of the claim of charge—
 - (i) the payment of any amount to which the affected person is entitled is delayed or otherwise affected; or
 - (ii) the release of a security for a contract or subcontract given by or for the affected person is delayed or otherwise affected; and
- (b) the affected person is a superior contractor in relation to the claiming subcontractor; and
- (c) the affected person has already paid, to a person who is a contractor or superior contractor in relation to the claiming subcontractor, an amount for work the subject of the claim of charge.’.

17 Amendment of s 22 (Vexatious notice of claim)

Section 22—

insert—

‘(1A) Without limiting subsection (1), a person gives a notice of a claim of charge without reasonable grounds if the person knows, or ought reasonably to know, that the amount of the claim exceeds, to an unreasonable extent in the circumstances of the claim, the amount actually payable to the person.’.

18 Insertion of new s 27

After section 26—

insert—

‘27 Transitional provision for *Subcontractors' Charges Amendment Act 2002*

‘(1) A provision of this Act about a security for a contract or subcontract does not apply to the security if the contract or subcontract was entered into before the commencement of this section.

‘(2) For subsection (1), to the extent that a contract or subcontract is amended on or after the commencement of this section, the contract or subcontract is taken not to have been entered into before the commencement of this section.

‘(3) The period of 1 month mentioned in section 15(1)(b) must be taken to be 2 months if the notice of claim of charge was given before the commencement of this section.’.

SCHEDULE

MINOR AMENDMENTS

section 3

- 1 Section 3, definition “court”, ‘Stipendiary Magistrate’—**
omit, insert—
‘magistrate’.
- 2 Section 3, definition “employer”, ‘shall not be’—**
omit, insert—
‘is not’.
- 3 Section 3, definition “work”, paragraphs (a), (b), (c), (e), (f)(i) and (f)(ii), at the end—**
insert—
‘or’.
- 4 Sections 3A and 18, ‘shall be’—**
omit, insert—
‘are’.
- 5 Section 3A(a), ‘shall include’—**
omit, insert—
‘include’.

SCHEDULE (continued)

6 Section 3A(a), at the end—*insert—**‘and’.***7 Sections 3B, 6, 10(1A) and (6), 11(2), 12(3A), 15(2) and (3) and 20, ‘shall be’—***omit, insert—**‘is’.***8 Sections 5(1), 8, 9(1), 11(1), 12(1) and 13, ‘Where’—***omit, insert—**‘If’.***9 Section 5(2), ‘shall secure’—***omit, insert—**‘secures’.***10 Sections 5(3), 10(4) and 10A(3), ‘shall’—***omit, insert—**‘does’.***11 Sections 7(1) and 12(2A), ‘shall have’—***omit, insert—**‘has’.***12 Section 7(2), ‘shall’—***omit, insert—**‘can’.*

SCHEDULE (continued)

13 Sections 8, 9A(3), 10(1), (2) and (3), 10A(2), 11(1) and (4), 15(1), 21(2) and 22(2), 'shall'—*omit, insert—*

'must'.

14 Section 9A(2), 'shall lie'—*omit, insert—*

'lies'.

15 Section 10(1A)(a), at the end—*insert—*

'and'.

16 Section 10(2), 'where'—*omit, insert—*

'if'.

17 Section 10(6), 'shall not be'—*omit, insert—*

'is not'.

18 Section 10A(1)(a), (b) and (d), at the end—*insert—*

'or'.

19 Section 11(6), 'shall discharge'—*omit, insert—*

'discharges'.

SCHEDULE (continued)

20 Section 11(7), 'shall not be paid out save'—*omit, insert—*

'may be paid out only'.

21 Section 14, 'shall apply'—*omit, insert—*

'applies'.

22 Section 15(1)(a) and (b), at the end—*insert—*

'and'.

23 Section 23, 'shall be'—*omit, insert—*

'is to be'.

24 Section 23, 'shall not'—*omit, insert—*

'does not'.

25 Section 24, 'shall to that extent be'—*omit, insert—*

'is to that extent'.