

SUBCONTRACTORS' CHARGES ACT AMENDMENT BILL 'THERE HAS BEEN MOVEMENT AT THE STATION'

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The Subcontractors' Charges Amendment Bill 2001 was passed on 21 February 2002 with the amendments to become effective on a date to be proclaimed (probably 1 June 2002).

OBJECTIVE OF THE LEGISLATION AND AMENDMENTS

The Queensland Government initiated a Commission of Inquiry into security of payment within the building and construction industry in March 1996. Its terms of reference included the consideration of the adequacy of the *Subcontractors' Charges Act 1974* ('the Act'). Following the Inquiry, in November 1996, a Government Discussion Paper on security of payment within the building and construction industry was released for public comment.

In response to the Discussion Paper, an Implementation Steering Committee was established in January 1997 to consider the issues raised therein.

The explanatory notes to the Amendment Bill indicate that it incorporates a number of the ISC recommendations, together with some additional amendments to enhance security of payment for subcontractors.

ACHIEVEMENT OF POLICY OBJECTIVES

The Amendment Bill provides that the proposed amendments are intended to expand the application of the Act to enable subcontractors to claim a charge, not only on moneys payable under the contract, but also on security for the performance of a contractor's obligations to the employer. Security may only be utilised if other moneys payable are not sufficient and the rights of the holder of the security will have priority over any other interests, including a subcontractors' charge. The amendments proposed also

expand the categories of persons entitled to claim a charge under the Act to include manufacturers of project specific components and suppliers of labour, thereby substantially increasing the number of parties that may claim a charge.

NEW DEFINITIONS

The definitions in the Act have been amended and updated to:

- include land that is under water;
- provide for a limited extension of the definition of work to include the manufacture or fabrication of 'project specific components' which includes components made specifically to meet the requirements of the contract/subcontract and excludes generic or standard products;
- include a new definition of 'security' to describe the instruments used to secure performance under a contract;
- include a new definition of 'supply of labour' to specifically exclude from the definition of 'work' the supply of persons who perform only administrative functions; and
- extend the definition of 'work' to include the manufacture of project specific components and supply of labour for work, the subject of a contract or subcontract.

MEDIATION AND CERTIFICATION

Section 5 has been amended to overcome recent Supreme Court decisions that have determined that money is not 'payable or become payable' if a contract requires certification of an amount due by an intermediary or a determination of the amount due by dispute resolution: *Re: Riteway Constructions Pty Ltd v Baulderstone Hornibrook Pty Ltd* [1988] 2 QdR 218 and *Re: Henry Walker Etlin Contracting Pty Ltd* [2001] QSC 189.

The amendment provides that notwithstanding contractual provisions such as certification or dispute resolution are 'still to be complied with', a subcontractor is entitled to claim a charge.

DISCLOSURE AND NOTICE

Sections 9 and 10 have been amended to:

- provide for disclosure of information to a subcontractor about the holder of security for the contract;
- require notice in the approved form to be given to the holder of security. If notice is not given to that security holder, the charge is not attached to the security, but otherwise attaches;
- require that a notice of claim of charge must be supported by a statutory declaration of the subcontractor in the approved form, stating that the claim is correct; and
- clarifies that a subcontractor may make two or more claims if each claim concerns a separate and distinguishable item of the work under the subcontract.

CERTIFICATION

Section 10A has been amended to allow persons licensed, within the appropriate class, as supervisors under the *Queensland Building Services Authority Act 1991*, to certify a claim of charge.

ACCEPTANCE OF LIABILITY

Subsection 11 has been amended to permit a contractor to give a notice accepting liability to pay part only of a subcontractor's claim. This section has also been amended to allow for partial withdrawal of a notice of claim of charge and provides that a withdrawal of claim must also be given to the holder of a security, to whom notice was given.

CONTRACT SECURITY

The new sections 11A to 11E apply if a contractor has not accepted

liability for the claim and if an employer or a superior contractor, or another person, holds a security for securing wholly or partly, the performance of the contract.

Contract security may be called upon only if the amount retained or paid into court by the employer or superior contractor is less than the total of all claims received. If there is such a 'difference amount' the contract security must be retained by the holder of the security, until a court gives directions in relation to the security.

The proposed new subsection 11C provides that a court may make any order it considers appropriate for enforcing the charge, including releasing the security.

ENFORCEMENT CHARGE

Section 15 has been amended to reduce the time period for commencement of court proceedings to enforce a notice of charge, from two months to one month.

APPLICATION TO CANCEL OR MODIFY

Section 21 has been amended to provide for specific instances where a person may be prejudicially affected by a claim of charge. The amendment attempts to limit the circumstances in which a subcontractor may successfully claim a 'leap frogging' charge by providing that a contractor is prejudicially affected, if it has already paid, to a person who is a contractor or superior contractor in relation to the subcontractor, 'an amount' for work the subject of the claim of charge. That is, if a contractor has already paid (an amount) for the work the subject of the sub-subcontract lower down the chain, then it should not be prejudicially affected by having its cashflow interrupted by a notice of charge by a 'leap frogging' sub-subcontractor for the same work.

CONCLUSION

There will undoubtedly be disagreement on whether a material is 'project specific' or not. The contractors' lobby may well be disappointed that a subcontractor can still lodge a charge notwithstanding moneys are not due, so long as the work has been completed and moneys are to become payable. Equally, the subcontractors' lobby may well be disappointed that time periods for institution of proceedings has been reduced and the ability to lodge a 'leap frogging' charge has been substantially restricted. It is debatable whether the provision of a statutory declaration will achieve the objective of obviating inflated or vexatious claims.

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