

Queensland



**SUBCONTRACTORS'
CHARGES AMENDMENT
BILL 1998**



SUBCONTRACTORS' CHARGES AMENDMENT BILL 1998

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1998

A BILL

FOR

An Act to amend the Subcontractors' Charges Act 1974

Subcontractors' Charges Amendment

The Parliament of Queensland enacts—

1

Short title

2

Clause **1.** This Act may be cited as the *Subcontractors' Charges Amendment Act 1998*.

3

4

Commencement

5

Clause **2.** This Act commences on a day to be fixed by proclamation.

6

Act amended

7

Clause **3.** This Act amends the *Subcontractors' Charges Act 1974*.

8

Amendment of s 3 (Definitions)

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Clause **4.(1)** Section 3, '**3.(1)** In'—

10

omit, insert—

11

'**3.** In'.

12

(2) Section 3—

13

insert—

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' **"land"** includes land under water.

15

"project specific materials", for work the subject of a contract or subcontract, means materials that—

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(a) are made specifically to be incorporated into the work; and

18

(b) could not, without substantial change, be incorporated into other work.

19

20

"section 11B security" see section 11B.

21

"security", for securing, wholly or partly, the performance of a contract or subcontract, see section 3AA.

22

23

"structure", on land under water, includes a structure made up of

24

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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, but that are 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 but that are otherwise confined in their location by the pylons.

“supply of labour”, for work the subject of a contract or subcontract, does not include the supply of persons for performing an activity that is only the administration or supervision of the work.’.

(3) Section 3, definition **“work”**, after ‘and includes also’—

insert—

‘the manufacture of project specific materials for work the subject of the contract or subcontract, the supply of labour for work the subject of the contract or subcontract, and’.

Insertion of new s 3AA

Clause 5. After section 3—

insert—

‘Meaning of “security” for securing contract performance

‘3AA.(1) In this Act—

“security”, for securing, wholly or partly, the performance of a contract or subcontract, means a security that is in the form of any of the following or a combination of all or any of the following—

- (a) an amount of money (other than an amount held as retention money);
- (b) an instrument (including, for example, an instrument known as a performance bond or undertaking) under which a financial institution, insurer or other entity undertakes to pay the amount stated in the instrument (whether on the demand of the holder of the security, or on the happening of another event);

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- (c) bonds; 1
- (d) inscribed stock; 2
- (e) interest bearing deposits. 3

‘(2) A security mentioned in subsection (1)(b) to (e) is a security under 4
this section whether or not the security has been exchanged for, or is held 5
instead of, retention money.’. 6

Amendment of s 5 (Charges in favour of subcontractors) 7

Clause **6.(1)** Section 5(1), from ‘be entitled to’— 8
omit, insert— 9
‘be entitled to— 10

- (a) a charge on the money payable to the contractor or a superior 11
contractor under the contractor’s, or superior contractor’s, 12
contract or subcontract; and 13
- (b) subject to subsection (5), a charge on any security given for 14
securing, wholly or partly, the performance by the contractor or a 15
superior contractor of the contractor’s, or superior contractor’s, 16
contract or subcontract.’. 17

(2) Section 5— 18
insert— 19

‘(4) To avoid doubt, it is declared that money that is payable or is to 20
become payable to a subcontractor, and that may be the subject of a charge 21
to which the subcontractor is entitled under subsection (1)(a), does not 22
include the following— 23

- (a) damages for breach of contract or in tort; 24
- (b) an amount payable on the basis of an extra-contractual remedy, 25
including, for example, as reasonable compensation for work 26
done; 27
- (c) damages or other relief under another Act or an Act of another 28
State or the Commonwealth, including damages or other relief 29
under the *Trade Practices Act 1974* (Cwlth). 30

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- ‘(5) 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 cannot 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, except to the extent that the security is used for securing the performance of the contract or subcontract or in some other way provided in the contract or subcontract.
- ‘(6) To avoid doubt, it is declared that, for a subcontractor’s claim of charge for retention money only, 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.’.

Amendment of s 7A (Schemes of arrangement binding on subcontractors)

- Clause 7. Section 7A(a)—
- omit, insert—*
- ‘(a) any compromise or arrangement approved under the Corporations Law, part 5.1;¹ and’.

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

- Clause 8. 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 given for securing, wholly or partly, the performance

¹ Part 5.1 (Arrangements and reconstructions)

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of the contract (including money payable under section 11B² or under an order of the court under section 11C³).’.

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

- Clause **9.** Section 9A(1), from ‘to the subcontractor’—
 ~~omit, insert—~~
 ‘to 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) the name and address of the holder of each security in existence for securing, wholly or partly, the performance of the contract between the employer and the contractor or superior contractor.’.

Amendment of s 10 (Notice of claim of charge)

- Clause **10.(1)** Section 10(1)—
 ~~insert—~~
 ‘(aa) if a person other than the employer or superior contractor holds a security for securing, wholly or partly, the performance of the contract—must give notice in the approved form of having made

² Section 11B (Use of security for benefit of subcontractors if contractor accepts liability for all claims)

³ Section 11C (Authority of court for security)

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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 individual who acts on behalf of the subcontractor, 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 avoid 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—

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

(6) Section 10—

insert—

‘**(7)** To avoid doubt, it is declared that a subcontractor may make 2 or more claims if—

(a) each claim is about a separate and distinguishable item of the work done by the subcontractor under a subcontract; and

(b) no 2 claims are about the same item.’.

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

Clause	11.(1) Section 11(3)—	1
	<i>omit, insert—</i>	2
	‘(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 (the “ contractor’s notice ”) in the approved form that the contractor—	3
	(a) accepts liability to pay the amount claimed; or	4
	(b) disputes the claim; or	5
	(c) accepts liability to pay the amount (the “ stated amount ”) stated in the contractor’s notice, but otherwise disputes the claim.’.	6
	(2) Section 11(4), ‘Where notice is given pursuant to’—	7
	<i>omit, insert—</i>	8
	‘If the contractor’s notice is given under’.	9
	(3) Section 11—	10
	<i>insert—</i>	11
	‘(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 stated amount, to the extent of the amount the employer or subcontractor is required to retain under subsection (1).	12
	‘(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 total of all amounts still retained by the employer or superior contractor under subsection (1) or paid into court by the employer or superior contractor under subsection (5) will be equal to or more than the total of all amounts of claims of charge for which a notice of claim of charge has been given but which have not been satisfied by payment under subsection (4) or (4A) or withdrawn under subsection (8).’.	13
	(4) Section 11(5), from ‘into court’—	14
	<i>omit, insert—</i>	15

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'into court—

(a) if the employer or superior contractor has received a contractor's notice given under subsection (3)(c)—the amount the employer or superior contractor is required to retain under subsection (1), less the stated amount; or

(b) if paragraph (a) does not apply—the amount the employer or superior contractor is required to retain under subsection (1).’.

(5) Section 11(8), after ‘withdraw’—

insert—

‘, wholly or partly,’.

(6) Section 11(8)—

insert—

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

Insertion of new ss 11A–11D

Clause **12.** After section 11—

insert—

‘Use of security for benefit of subcontractors if no contractor acceptance of liability for all claims

‘11A.(1) A security is a “**section 11A security**” if all of the following circumstances exist—

(a) an employer or superior contractor, or another person, holds the security for securing, wholly or partly, the performance of a contract;

(b) under section 11(1), a person (the “**required 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 is a claim shortfall amount for the contract;

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-
- (d) the security is not a section 11B security. 1
- ‘(2) Once the security is a section 11A security, the holder of the security 2
must retain the security until the first of the following to apply— 3
- (a) because of changed circumstances, there is no longer a claim 4
shortfall amount for the contract, or, for another reason, the 5
security is no longer a section 11A security; 6
- (b) the court in which any claim mentioned in subsection (1)(b) is 7
heard makes an order under section 11C about enforcing the 8
charge over the security. 9
- ‘(3) If a person who is required to retain the security under subsection (2) 10
does not retain it, the person is personally liable to pay to the subcontractor 11
the amount of a claim to the extent that the security would have been 12
capable under this Act, if the security had been retained, of satisfying the 13
claim. 14
- ‘(4) Despite subsections (2) and (3)— 15
- (a) if the security is held as an amount of money, the holder of the 16
security may pay the amount, up to the amount of the claim 17
shortfall amount for the contract, into court; and 18
- (b) if the security may be converted into an amount of money, the 19
holder of the security may convert the security, wholly or partly, 20
into an amount of money and pay the amount, up to the amount 21
of the claim shortfall amount for the contract, into court. 22
- ‘(5) A payment of an amount under subsection (4) discharges the holder 23
of the security of all further liability for the amount paid and of the costs of 24
any proceeding. 25
- ‘(6) Subsections (2) to (4) do not apply to stop the employer, superior 26
contractor or other person from exercising an entitlement to use the security 27
(including to keep control of the security until, had this section not 28
commenced, the security would be required to be surrendered, wholly or 29
partly) for securing the performance of the contract. 30
- ‘(7) While a security is a section 11A security, a provision of the contract 31
or another arrangement about the security (including a provision of the 32
security itself, and including a provision providing for the surrender, wholly 33
or partly, of the security) is of no effect to the extent that it purports— 34

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- (a) to stop the holder from acting under subsection (2) or (4); or 1
- (b) to operate to the detriment of a person if the holder acts under subsection (2) or (4). 2
3
- ‘(8) An amount paid into court under subsection (4) may be paid out only under an order of the court. 4
5
- ‘(9) In this section— 6
- “claim shortfall amount”** for the contract mentioned in subsection (1)(a), means the amount by which total A for the contract is less than total B for the contract. 7
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- “total A”**, for the contract mentioned in subsection (1)(a), means the total of all amounts (if any) the required person is retaining under section 11(1) for the contract, all amounts (if any) the required person has paid into court under section 11(5) for the contract and all amounts (if any) the holder of the security mentioned in subsection (1) has paid into court under subsection (4) in relation to the security. 10
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- “total B”**, for a contract mentioned in subsection (1)(a), means the total of all amounts of claims of charge for the contract for which a notice of claim of charge has been given but which have not been satisfied by payment under section 11(4) or (4A) or withdrawn under section 11(8). 16
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- ‘(10) If, for the definition **“total A”**, no amounts are being retained or have been paid into court, total A is zero. 21
22
- ‘Use of security for benefit of subcontractors if contractor accepts liability for all claims** 23
24
- ‘11B.(1) A security is a **“section 11B security”** if all of the following circumstances exist— 25
26
- (a) an employer or superior contractor, or another person, holds the security for securing, wholly or partly, the performance of a contract; 27
28
29
- (b) under section 11(1), a person (the **“required 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 30
31
32
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-
- subcontractors; 1
- (c) there are acceptances of liability under section 11(3) for the total 2
of all amounts of claims of charge for the contract for which a 3
notice of claim of charge has been given and not withdrawn; 4
- (d) there is a claim shortfall amount for the contract. 5
- ‘(2) Once the security is a section 11B security, the holder of the security 6
must retain the security until the first of the following to apply— 7
- (a) because of changed circumstances, there is no longer a claim 8
shortfall amount for the contract, or, for another reason, the 9
security is no longer a section 11B security; 10
- (b) the court in which any claim mentioned in subsection (1)(b) is 11
heard makes an order under section 11C about enforcing the 12
charge over the security. 13
- ‘(3) If a person who is required to retain the security under subsection (2) 14
does not retain it, the person is personally liable to pay to the subcontractor 15
the amount of a claim to the extent that the security would have been 16
capable under this Act, if the security had been retained, of satisfying the 17
claim. 18
- ‘(4) Despite subsections (2) and (3)— 19
- (a) if the security is held as an amount of money, the holder of the 20
security must pay the amount, up to the claim shortfall amount 21
for the contract, to the subcontractor or subcontractors to whom 22
the acceptance of liability relates; and 23
- (b) if the security may be readily converted into an amount of money, 24
the holder of the security must convert the security, wholly or 25
partly, into an amount of money and pay the amount, up to the 26
claim shortfall amount for the contract, to the subcontractor or 27
subcontractors to whom the acceptance of liability relates. 28
- ‘(5) A payment of an amount under subsection (4) discharges the holder 29
of the security of all further liability for the amount paid and of the costs of 30
any proceeding. 31
- ‘(6) Subsections (2) to (4) do not apply to stop the employer, superior 32
contractor or other person from exercising an entitlement to use the security 33
(including to keep control of the security until, had this section not 34

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commenced, the security would be required to be surrendered, wholly or partly) for securing the performance of the contract.

‘(7) While the security is a section 11B security, a provision of the contract or another arrangement about the 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 that it purports—

- (a) to stop the holder from acting under subsection (2) or (4); or
- (b) to operate to the detriment of a person if the holder acts under subsection (2) or (4).

‘(8) In this section—

“claim shortfall amount”, for the contract mentioned in subsection (1)(a), means the amount by which total A for the contract is less than total B for the contract.

“total A”, for the contract mentioned in subsection (1)(a), means the total of all amounts (if any) paid under section 11(4) and (4A) for the contract, all amounts (if any) the required person is retaining under section 11(1) for the contract, all amounts (if any) the required person has paid into court under section 11(5) for the contract and all amounts (if any) that have previously been paid out in relation to the security mentioned in subsection (1) under section 11A.

“total B”, for the contract mentioned in subsection (1)(a), means the total of all amounts of claims of charge for the contract for which a notice of claim of charge has been given but which have not been satisfied by payment under section 11(4) or (4A) or withdrawn under section 11(8).

‘(9) If, for the definition **“total A”**, no amounts are being retained or have been paid into court or been paid out, total A is zero.

‘Authority of court for security

‘**11C.(1)** This section applies if the holder of a security is retaining the security under section 11A(2) or 11B(2) or has paid an amount for the security into court under section 11A(4).

‘(2) The court may make the order it considers appropriate for enforcing

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the charge over the security to which a subcontractor is entitled under section 5,⁴ 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 the performance of which it secures; or

(b) in some other way provided in the contract mentioned in paragraph (a).

‘(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.

‘Certain subcontractor securities of no effect

‘11D. To the extent that a security 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 is given by a subcontractor, the security is of no effect.’.

⁴ Section 5 (Charges in favour of subcontractors)

Amendment of s 12 (Enforcement of charge)

Clause **13.(1)** Section 12—

insert—

‘(1A) To avoid 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.’.

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

insert—

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

(3) Section 12(3B), ‘(whether or not’ to ‘claim of charge)’—

omit.

Amendment of s 15 (Proceedings in respect of charges)

Clause **14.(1)** Section 15(2), after ‘money payable’—

insert—

‘or a security in existence’.

(2) Section 15(3)—

omit, insert—

‘(3) Within 14 days after the proceeding is commenced, the subcontractor must give each person to whom a notice of the claim of charge, or a notice of having made a claim of charge, has been given under section 10(1), a notice in the approved form advising that the proceeding has been commenced.

‘(4) Subsection (3) does not apply for a person if, within the 14 days mentioned in the subsection, the subcontractor has served the person with a copy of the initiating documents for the proceeding.

‘(5) A charge is taken to be extinguished if—

- (a) the subcontractor does not commence a proceeding under subsection (1) to enforce the charge; or

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- (b) having commenced the proceeding, does not comply with subsection (3) to the extent that it applies.’.

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

- Clause 15. Section 17, ‘in accordance with section 16’—
omit.

Amendment of s 22 (Vexatious notice of claim)

- Clause 16. Section 22—
insert—

‘(1A) Without limiting subsection (1), a person gives a notice of a claim of charge without reasonable grounds under the subsection 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.’.

Insertion of new s 27

- Clause 17. After section 26—
insert—

‘Security for contracts entered into before Act amendment

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

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