ELECTRONIC VERSION

BETTER PROTECTION FOR SUBBIES: THE SUBCONTRACTORS’ CHARGES AMENDMENT BILL 1998

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1. INTRODUCTION

High failure and insolvency levels of builders in Queensland have centred attention on security of payment in the building and construction industry. A number of government reports and discussion papers have focussed on these issues, particularly, the losses suffered by subcontractors and suppliers.¹ The Subcontractors’ Charges Amendment Bill is in response to recommendations made by the Implementation Steering Committee on Security of Payment in the Building and Construction Industry in its 1997 Report.² Various problems with the Subcontractors Charges Act 1974 (Qld) have been identified in this report and in the earlier discussion paper Security of Payment for Subcontractors in the Building

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The Subcontractors’ Charges Amendment Bill 1998 and Construction Industry. Numerous judicial pronouncements on the legislation have also been highly critical. For example Mr Justice Matthews described the Act as one which is “notorious for the obscurity of its expression and the difficulty of its application”. The Subcontractors’ Charge Amendment Bill addresses some of these issues and is the first substantial proposed amendment to the Act since 1976.

2. BACKGROUND TO THE SUBCONTRACTORS’ CHARGES ACT

2.1 THE COMMON LAW POSITION

2.1.1 Common Law Liens

A lien is a right at common law which generally allows a person to hold on to someone else’s goods until the accrued claims of the person in possession are satisfied. The common law position is then that a lien arises in favour of a person who does work on movable goods and relates only to those goods. So in relation to a subcontractor who does work on land or a building there is no common law lien on the land for work done or material supplied in the course of work, unless there is some contractual arrangement to the contrary. This is why a statutory right has been created in a number of jurisdictions. The legislation in force in Queensland between 1892 and 1964 provided for both liens and charges.

2.1.2 Charges

At common law, a charge operates as an encumbrance against money payable by one person to another in favour of a third person. Without a specific contractual

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4 Rees v Mount Isa City Council [1979] Qd R 553 at 556.


7 Law Reform Commission of Western Australia, Report on Contractors’ Liens, p 3.

8 Law Reform Commission of Western Australia, Report on Contractors’ Liens, p 3.
provision, a subcontractor who does work on a building project has no right to a charge in his or her favour over money owing to the head contractor under the head contract. This is because usually the subcontractor is not a party to that contract, and as such the doctrine of privity of contract precludes any third parties from gaining benefits from the contract. For example, the common law position has been stated by Lord Evershed as “only parties to a contract can sue for breaches of that contract, notwithstanding that some third party may be damnified by the breach”. The effect then of the Subcontractors Charges Act 1974, is to create legal rights between parties (the employer and the subcontractor) who would otherwise have no legal relationship because of the doctrine of privity of contract.

2.2 THE STATUTORY POSITION

Security of payment for subcontractors in the building industry has received legislative attention in Queensland for over a century. In 1889, the then Minister for Mines and Works, the Honourable JM Macrossan, introduced the Liens Bill which was aimed at establishing a system to protect subcontractors and other contractors against each other and also against the owner for whom they do the work. The Bill was never passed. In 1891 Sir Samuel Griffith attempted to introduce similar legislation but the Bill was eventually lost in the committee stage in the Legislative Council. Finally in 1906 the Contractors’ and Workmen’s Lien Act 1906 (Qld) was enacted. It was roundly criticised by the courts. For example, Mr Justice Philp of the Queensland Supreme Court endorsed the view that the Act was “a difficult, obscure and technical piece of legislation and one which presents serious problems in its practical application” and even described it as being a “lawyer’s nightmare”. The 1906 Act was repealed in 1964 because of the view that there was adequate

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9 Law Reform Commission of Western Australia, Report on Contractors’ Liens, p 3


14 Terrazzo Tile Co v Willis & Sons Ltd [1960] Qd R 475 at p 479.
protection for subcontractors.\textsuperscript{15} It was argued also that there was no justifiable reason to protect contractors from commercial risk or to give them preferential treatment, and as such the various problems created by the Act were found to outweigh any benefit attaching to its continued existence.\textsuperscript{16}

2.3 \textbf{The Current Subcontractors Charges Act 1974}

The aim of the Act generally, is to provide financial protection to subcontractors in situations where a contractor cannot meet their financial commitments\textsuperscript{17}, by providing the worker or subcontractor who is owed wages or money under a subcontract an opportunity to obtain such money out of moneys owed to the employer or contractor.\textsuperscript{18} The Act allows a subcontractor to claim a charge on money payable by an employer (owner) to a contractor, in respect of money payable to the subcontractor under the contract for work performed (s 5). The effect of the charge is that it places the onus on the principal to retain certain money payable to the contractor until the Court in which the claim is heard, directs to whom and in what manner it is to be paid.\textsuperscript{19}

A subcontractor is required to give notice of her or his intention to claim a charge on money payable under the contract to the subcontractor’s contractor or to a superior contractor. The notice must be given to the employer or superior contractor by whom the money is payable. The notice must specify the amount and particulars of the claim certified as prescribed by a \textit{qualified person}. A qualified person is a professionally registered architect, engineer, or quantity surveyor or a person licensed under the \textit{Queensland Building Services Authority Act 1991} to carry out the type of work to which the claim relates (s 10A). The notice must state that the subcontractor requires either the employer or superior contractor, to take the necessary steps to see that it is paid or secured to the subcontractor (s 10). Further a notice of having made the claim to the contractor to whom the money is


\textsuperscript{17} Hon WE Knox, ‘Subcontractors’ Charges Bill’, Second Reading Speech, \textit{Queensland Parliamentary Debates}, 9 April 1974, p 3701.

\textsuperscript{18} Duncan & Willmott, p 377.

payable must be made (s 10(1)(b)). If no notice is given then no charge attaches (s 10(4)). The notice can be given before the work is completed or the time for payment has arrived. If the work has been completed then the subcontractor has three months within which to give notice (s 10(2)).

The person in receipt of a valid notice is required to retain the money claimed until the Court gives a direction on the matter (s 11). If the person fails to retain the money, then they become personally liable to pay the amount required to be retained (s 11(2)).

A contractor in receipt of a notice may either accept liability or dispute the claim (s 11(3)). If the contractor accepts liability then the contractor/employer by whom the money is payable shall pay the subcontractor the amount the contractor/employer is required to retain (s 11(4)). After receipt of a notice, the contractor/employer may pay into Court, the amount required to be retained under the section (s 11(5)). Money paid into Court can only be paid as determined by the Court (s 11(7)).

Where the contractor/employer to whom notice of the claim of charge has been given, does not pay or make satisfactory arrangements for paying the subcontractor the amount claimed, the subcontractor may recover the amount of the charge from the person by whom the money subject to the charge is payable (ie this would mean the owner in most cases ) (s 12).

The legislation can not be contracted out of. That is any contractual terms which would have the effect of disentitling the employer, contractor or subcontractor to the benefits conferred by this Act will be invalid (s 24).

2.3.1 Application to Domestic or Residential Premises

The legislation does not apply to domestic building work, by virtue of s 110 of the Queensland Building Services Authority Act 1991 (Qld). This section as amended in 1996, provides that the Subcontractors’ Charges Act 1974 (SCA) does not apply to domestic building work relating to a duplex or single detached dwelling if the work is carried out by a building contractor for an individual and the work is not for a business carried on by the individual. The policy behind this seems to be to protect individual consumers by removing the potential for them to be embroiled in court proceedings where the work being carried out for them is of a private domestic nature and not a commercial enterprise. However recourse to the SCA is still available for apartment blocks, townhouses, hotels, units and similar commercial

projects including houses and duplexes being built for commercial developers.\textsuperscript{21} The 1996 amendment was in response to a Queensland Supreme Court decision which held that the original s 110 denies a claim under the SCA to a subcontractor who carries out building work on commercial premises if those premises are of a domestic or residential nature.\textsuperscript{22} The notice of charge in that case was for over $400,000, in relation to work done on a $28 million apartment building known as ‘Admiralty Towers’.\textsuperscript{23}

\section*{2.4 AT THE NATIONAL LEVEL}

The National Public Works Council, now the Australian Procurement and Construction Council (APCC) composed of federal, State and Territory ministers, endorsed a uniform set of principles to improve security of payment for subcontractors in the building industry in January 1996.\textsuperscript{24} This was the foundation for the Council’s 1997 \textit{National Code of Practice for the Construction Industry} (the Code). The Code expresses the general principles which Australian governments agree should underpin the future development of the construction industry in Australia.\textsuperscript{25}

The Code emphasises the maintenance of the highest ethical standards in all construction-related activities. The national principles incorporated in the Code deal with clients’ rights and responsibilities, business relationships, competitive behaviour, continuous improvement and best practice, workplace reform, occupational health and safety, industrial relations and security of payment.

\subsection*{2.4.1 Security of Payment Under the Code}

The principles of conduct dealing with security of payment are aimed at ensuring that all parties receive payments due to them, and that the highest ethical standards

\begin{itemize}
\item \textsuperscript{21} Hon RT Connor, p 2515.
\item \textsuperscript{22} \textit{Re Watpac Australia Pty Ltd} [1996] 1 Qd R 229, per Williams J, at p 231.
\item \textsuperscript{23} see further Amanda Smith, ‘Landmark High-Rise Ruling Hits “Subbies”’, \textit{The Master Painters News}, 15(1) February 1996, p 12.
\item \textsuperscript{25} APCC, \textit{National Code of Practice for the Construction Industry}, Canberra, 1997, p 1.
\end{itemize}
are observed throughout the contract chain. They include the following:

- participants in the industry have the right to receive full payment when it is due;
- all cash security and retention money should be secured for the benefit of the party entitled to receive them;
- payment periods lower in the contractual chain should be compatible with those in the head contract;
- outstanding payments to participants should receive priority over payments to other unsecured creditors, to the extent that this is consistent with Commonwealth and State legislation;
- all construction contracts should provide for non-payment to be a substantial breach;
- all construction contracts should provide for alternative dispute resolution mechanisms;
- only parties who have the financial and technical capacity and business management skills to carry out and complete their obligations should participate in the industry;
- all construction contracts in the contractual chain should be in writing.

The Code applies across Australia for Commonwealth funded projects and in states which have adopted the code for state government funded projects.

### 2.4.2 Application in Queensland

The Code was endorsed by the Queensland Cabinet in March 1998 and will apply to all State-funded construction projects and to private building projects on a voluntary basis. Successful tenderers on Government building projects must meet the Code’s requirements for health and safety, competitive industrial relations management, training, continuous improvement and security of payment. However the Code is very general in its statement of principles and provides that each Australian jurisdiction should develop compliance principles (or

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26 APCC, p 9.
27 APCC, p 9.
29 Hon S Santoro, p 1.
implementation guidelines) and appropriate sanctions.\textsuperscript{30} These are yet to be developed in Queensland. It is likely that the Queensland implementation strategies will follow the Commonwealth guidelines, with some modification to accommodate state concerns and state legislation such as the Subcontractors’ Charges Act.

The Commonwealth guidelines are intended to assist Commonwealth agencies to interpret and implement aspects of the code in relation to construction projects undertaken on their behalf.\textsuperscript{31} The Commonwealth guidelines do not deal specifically with security of payment, however section 5 is headed ‘Responsibilities of parties’ and paragraph 5.2 provides that contractors, subcontractors, consultants, and all employees undertaking work on the project must comply with the code and the industry guidelines, and require compliance with the code and the industry guidelines from all subcontractors and suppliers. Further it states that all contracts should specifically require code and industry guideline compliance.\textsuperscript{32}

\subsection*{2.4.3 Status of the Code}

The Commonwealth guidelines state that the Code is to be applied in the same manner as any other Government policy.\textsuperscript{33} The Code is not legislation and as such persons dissatisfied with its application cannot seek judicial review under the relevant judicial review legislation.\textsuperscript{34} However, affected parties could access the Ombudsman. The Code appears aspirational in nature and is a general statement of principle, providing the minimum level of compliance.\textsuperscript{35} It provides a contextual framework within which the \textit{Subcontractors’ Charges Act 1974 (Qld)} will operate.

\textsuperscript{30} APCC, p 10.

\textsuperscript{31} Department of Workplace Relations and Small Business and Department of Finance and Administration, \textit{Commonwealth Implementation Guidelines For the National Code of Practice for the Construction Industry}, Canberra, February 1998, p 1.

\textsuperscript{32} Department of Workplace Relations and Small Business and Department of Finance and Administration, p 6.

\textsuperscript{33} Department of Workplace Relations and Small Business and Department of Finance and Administration, p 6.

\textsuperscript{34} Unless the Code could be considered a non-statutory scheme pursuant to the \textit{Judicial Review Act 1991 (Qld)} s 4.

\textsuperscript{35} APCC, p 2.
3. PROBLEMS WITH THE CURRENT ACT

Judicial decisions, the Queensland Government’s Green Paper in 1991, and the Implementation Steering Committee’s Report in 1997, have identified a range of problems with the Subcontractor’s Charges Act. The discussion papers and reports seem to be a response to the significant publicity surrounding multi-million dollar losses sustained by sub-contractors as a result of the collapse of builders on major projects such as Gondwanaland at Southbank Parklands. The problems identified include poor drafting of particular provisions which has resulted in confusion as to the Act’s application, as evidenced by the large amount of litigation on the Act. Consequently only the sub contractors with the means to afford legal costs are able to take advantage of it.

3.1 IMPLEMENTATION STEERING COMMITTEE’S REPORT

The Implementation Steering Committee was formed after the 1996 Scurr Report on the Inquiry into Security of Payment within the Building and Construction Industry. The Scurr Report “never saw the light of day” because of the unpopular proposals it canvassed for trusts and up-front securities. However, ninety nine recommendations which received unanimous agreement were extracted from the report and were released as the ‘Queensland Government Discussion Paper’. The Discussion Paper called on feedback from industry with respect to the acceptability and implementation of these reforms. Realising the importance of the issues, some of the “industry’s movers and shakers” negotiated and formed an alliance between all the building industry associations whom then developed a proposal for the government. The proposal was an offer that industry would sort out the issues by


37 Implementation Steering Committee on Security of Payment in the Building and Construction Industry.


40 Huysing, p 14.


42 Huysing, p 14.
taking on board the 99 recommendations and formulating a submission that would be acceptable by all industry.\textsuperscript{43} From this sprang the Implementation Steering Committee (ISC). After eleven months, the ISC got all major stakeholders to agree to the package of reforms that the Hon Dr Watson described as comprehensive, far-reaching and practical.\textsuperscript{44}

The ISC’s report addresses a wider range of issues than subcontractors’ charges. It seems to be aimed at changing industry culture by proposing reforms on licensing and qualifications, contract provisions, dispute resolution, Queensland Government contract administration, and insurance. In relation to the SCA, the ISC saw value in addressing the following broad problems. That is:

- the lack of clarity of a claimant’s right to claim at any level in the contractual chain;
- the lack of clarity of proprietors’ rights to deduct their legal costs from money dealt with in accordance with a charge;
- the absence of effective disincentives to vexatious claims or claims which are overstated;
- the absence of a simple mechanism to allow for the substitution of guarantees for cash held against a charge to alleviate impact on cashflow. Although currently possible, it requires a formal Court application.
- the inability to charge non-cash retentions.\textsuperscript{45}

Specifically, the ISC recommended that the following amendments be made to the Subcontractors Charges Act:

- “contract” and “subcontract” be defined to enable differentiation of these terms;
- claims of charge should be allowed to be made against moneys held in alternative form to cash;
- claims of charge should be allowed against contract securities or part of those securities as may be returnable to a contractor. The principal may call up securities for the purpose of satisfying charges only in cases of termination or take-over of the contract, insolvency or after contract completion;
- claims should be able to made for work over, in or under Australian territorial waters;

\textsuperscript{43} Huysing, p 14.

\textsuperscript{44} Peter Morley, ‘Broke Builders to Face Five Year Industry Bans’, \textit{Courier Mail}, 26 November 1997, p 1.

\textsuperscript{45} Implementation Steering Committee on Security of Payment in the Building and Construction Industry, pp 42-43.
• the SCCA should be confirmed as allowing claims by subcontractors of subcontractors and so on, but confined to claims for moneys payable to the person with whom the claimant is contracting (ie no ‘leapfrogging’ allowed);

• a claim for moneys payable should include a claim upon retention moneys;

• a subcontractor should only be entitled to one charge in respect of any particular work, but that successive claims of charge may be made for different work under a contract;

• provisions in the SCCA should be updated to reflect changes relating to the Corporations Law;

• the subcontractors should be enabled to seek from the contractor identification of the head contract, and provide that the head contract must be identified in the Notice of Claim of Charge;

• it should be made clear that the claims of charge against retention moneys refer to retention moneys held pursuant to the head contract, not the subcontract;

• section 10A(1)(f) (now 10A(1)(e)) should be substituted with a provision enabling certification of a claim by a qualified person who is a relevant gold card licence holder under the Queensland Building Services Authority Act;

• partial acceptance by a contractor of a claim of charge should be allowed. If the employer is at the time holding sufficient money to cover all Notices of Claim of Charge current under the contract, the employer may pay to the subcontractor, the moneys accepted by the contractor;

• provision should be allowed for payment into court by the employer of the full amount of the claim of charge which will excuse the employer from involvement in the court proceedings to enforce the charge;

• the subcontractor be required to serve proceedings upon the employer and contractor within 14 days of commencement of proceedings or such other time as the Court may allow to enforce a claim of charge;

• the Act should allow the service of notice under the Act upon the registered office of a company, and the usual place of business of the person;

• the regulation and all form be reviewed to ensure compliance with the amended Act;

• the claim should be supported with an appropriate statutory declaration of the claimant.\(^{46}\)

\(^{46}\) Implementation Steering Committee on Security of Payment in the Building and Construction Industry, p 48.
4. PROPOSED AMENDMENTS MADE BY THE 1998 BILL

The Subcontractors’ Charges Amendment Bill 1998 incorporates a number of the ISC recommendations, together with additional amendments to enhance security of payment to subcontractors.47

4.1 SPECIFIC CHANGES MADE BY THE BILL

4.1.1 New Definitions

Clause 4 amends several of the section 3 definitions in the Act. There is a new definition of

- ‘land’ to include land under water
- ‘project specific materials’ means materials which are made specifically to be incorporated into the work and that could not without substantial change, be incorporated into other work
- ‘structure’ on land under water, includes a structure made up of component part that include component parts fixed to the land; and 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
- ‘work’ is extended to include
  - the manufacture of project specific materials
  - the supply of labour for carrying out the work, but does not include the supply of persons who only administer or supervise the work

Clause 5 inserts a new s 3AA which defines ‘security’ for the purposes of securing the performance of a contract or subcontract, as cash (other than an amount held as retention money), undertakings to pay money by a bank, insurer or other entity, bonds, inscribed stock and interest bearing deposits. The categories other than cash are included irrespective of whether they are given in exchange for or instead of retention money.

4.1.2 Charges on Securities

Clause 6 amends section 5 which is headed ‘Charges in favour of subcontractors’. It inserts a provision entitling the subcontractor to a charge on any security given for securing the performance of a contract by the contractor or superior contractor

however this is subject to proposed s 5(5). It also inserts a provision to clarify that
damages for breach of contract or in tort; an amount payable as an extra-contractual
remedy (eg, reasonable compensation for work done); and damages or relief under
another Act whether Queensland, another State or the Commonwealth (eg. \textit{Trade}
Practices Act 1974 (Cth)) are not matters over which a subcontractors’ charge can
be claimed (proposed s 5(4)).

\textbf{Proposed s 5(5)} states that a charge only attaches to security to the extent that the
charge cannot be satisfied by other monies and is subject to the prior rights of the
employer to use contract securities to secure the performance of the contract. As
well it is subject to the rights of the employer to use contract securities to secure a
right conferred by the contract. So in effect, contract securities (ie those given for
securing the performance of the relevant contract) prevail over any charge on that
security. For example, if there is a $10000 security for performance of the contract
then under proposed s 5(5), a subcontractor’s charge on that security only secures a
payment if the payment cannot be satisfied directly by a charge on the money
payable to the contractor/superior contractor, and secondly only to a maximum of
$10000. However, if $4000 of the security has been used to secure the performance
of the contract or if the security has been used in some other way provided in the
contract, then the subcontractors charge on that security can only be to the extent of
the remaining portion - in this instance $6000.

Proposed subsection 5(6) outlines that a subcontractor’s claim for retention money
only, includes a claim for security, and that this applies whether or not the security
has been given in exchange for retention money. That is, the current Act allows
claims against retention money held by an employer as cash, but it has not permitted
charges against security given instead of retention money. These claims will now be
permitted\textsuperscript{48} even to the extent that the charges are not limited to security which is
given instead of retention money.

\textbf{Clause 7} updates section 7A to insert a reference to the Corporations Law.

\textbf{Clause 8} inserts a new paragraph (2).\textsuperscript{49} The current section states that where
money under the contract is insufficient to meet all the claims of 2 or more
subcontractors, then any insufficiency should be borne by them in proportion to the
amount of their claims. \textbf{Proposed sub-section 8(2)} states that in relation to
subsection 1, money includes money that is or is to become payable on the basis of a

\textsuperscript{48} see Hon DJ Watson, ‘Subcontractors’ Charges Amendment Bill’, Second Reading Speech,

\textsuperscript{49} Currently section 8 doesn’t have any subsections. Presumably the current section 8 will
become subsection (1).
charge on a security given for securing contractual performance. It includes money payable under proposed ss 11B or 11C.

4.1.3 Information the Contractor is Required to Give the Subcontractor

Clause 9 amends section 9A by requiring the following information to be provided to the subcontractor upon written demand:

- 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
- 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
- the name of the contractor’s or superior contractor’s employer; and
- the address of the employer’s place of business or if the employer has no place of business, the employer’s residential address.

4.1.4 Notice of Claim of Charge

Presently, under section 10 a subcontractor who intends claiming a charge on money payable under the contract needs to give notice to the affected parties. Clause 10 inserts provisions into section 10 which require that:

- if a person other than the employer or superior contractor holds a security for securing (either wholly or partially) contractual performance, notice in the approved form must be given to that person (proposed s 10(1)(aa)). If notice is not given, then the charge does not attach to the security but will otherwise still attach against any moneys payable under the contract. (proposed s 10(4A)).
- a notice of claim of charge must be supported by a statutory declaration of the subcontractor, declaring that the claim is correct (proposed s 10(1B)). The statutory declaration must be in the approved form declaring that the claim is correct (proposed s 10(1C)). This is aimed at better protecting head contractors.\(^{50}\)
- a charge on money payable under a contract, includes a charge on retention money (proposed s 10(1D)).

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• **proposed s 10(3)** clarifies that the contract referred to in subsection s 10(3) is the contract between the contractor and the employer or superior contractor.

• **proposed s 10(7)** clarifies that a subcontractor can make two or more claims if each claim concerns a separate and distinguishable item of the work under the subcontract and no two claims concern the same item.

### 4.1.5 Effect of Claim of Charge & Partial Withdrawal & Partial Acceptance

Clause 11 amends section 11 of the Act. Provision is made here for partial withdrawal or a claim by a subcontractor, and partial acceptance of liability by a contractor (**proposed ss11(3) & (5) & (8)**). These provisions are intended to facilitate settlement of claims under the Act.\(^5^1\)

### 4.1.6 Use of Security for Benefit of Subcontractors if No Contractor Acceptance of Liability for All Claims

Clause 12 inserts **proposed section 11A**. It applies if the contractor has not accepted liability for the subcontractor’s claim, and where there is a holder of a security for securing performance of a contract. This contract security may only be called upon where the amount retained or paid into court by the employer or superior contractor under section 11 is less than the total of claims received. Where there is a **claim shortfall amount**, the contract security must be retained by the holder of the security, until the court gives directions in relation to the security, or the security is no longer required to be retained (**proposed s 11A(2)**). **Claim shortfall amount** is defined in **proposed s 11A(9)** in terms of subtracting total **A** (generally the total of amounts retained or paid into court by the security holder under s 11) from total **B** (the total of all amounts of the claims of charge), for the purpose of calculating the amount of security to be retained under the section.\(^5^2\)

Proposed **subsection 11A(3)** provides that a person failing to retain a security is personally liable to pay the subcontractor. Under **proposed s 11A(4)**, if the security is held as an amount of money or if it may readily be converted into money, the holder of the security may pay it into court. If payment is made into court under s 11A(4), then the holder of the security is discharged from all further liability for the amount paid and costs of any proceeding (**proposed s 11A(5)**). **Proposed s 11A(6)** provides that the earlier provisions of the section don’t apply in a way that prevents

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\(^{51}\) *Explanatory Notes, Subcontractors Charges Amendment Bill 1998*, p 5.

\(^{52}\) Similar definitions apply in **proposed s 11B**. See **proposed s 11B(8)**.
the employer or superior contractor from using the security for securing performance of the contract (ie it makes clear that the holder of the security has priority over any claim of charge).

4.1.7 Use of Security for Benefit of Subcontractors if Contractor Accepts Liability for All Claims

**Proposed section 11B** applies if the contractor has accepted liability for all subcontractor claims in respect of a contract and there is a **claim shortfall amount** (defined in **proposed s 11B(8)**) for the contract. It follows a similar pattern to proposed section 11A. **Proposed s 11B(2)** provides that while section 11B applies to a security, the holder of the security must retain the security until there is no longer a claim shortfall amount, or the court makes an order about the security. A person who fails to retain a security is personally liable to pay the subcontractor to the extent to which the security would have satisfied the claim (**proposed s 11B(3)**). Under **proposed s 11B(4)**, the same thing applies as for **s 11A(4)** except that instead of the security being paid into court, the holder of the security must pay to the subcontractor the amount accepted up to the amount of the claim shortfall. **Proposed s 11B(5)** is the same as **s 11A(5)** and simply provides that if the money is paid to the contractor under **s 11B(4)** then this discharges the holder of the security of all further liability for the amount paid and of the costs of any proceeding. Once again, the rights of the holder of the security have priority over any claim of charge (**proposed s 11B(6)**).

4.1.8 Authority of Court for Security

**Proposed section 11C** deals with the court’s powers in relation to securities retained under **ss 11A or 11B**. The rights of the holder of the security to secure performance of the contract or to secure another contractual right, are preserved by **proposed section 11C(3)**. The court has the power to make any order it considers appropriate for enforcing the charge over the security (**proposed s 11C(2)**). This includes an order for realising the security (**proposed s 11C(2)**) and ordering the holder of the security to produce the security to the court (**proposed s 11C(4)**). **Proposed s 11C(5)** provides that a **precondition** or **expiry provision** of a security is of no effect to stop the realisation of the security under **proposed s 11C(2)**. Precondition and expiry provision are defined in **proposed s 11C(6)**.
4.1.9 Certain Subcontractor Securities of No Effect

A security given by a subcontractor is of no effect to the extent that it secures the performance by a contractor or superior contractor of their contract or subcontract (proposed s 11D).

4.1.10 Enforcement of Charge

Section 12 is amended by clause 13, which inserts proposed s 12(1A). It clarifies that payment into court by an employer or superior contractor, is a “satisfactory arrangement” under s 12(1). Section 12(3A) is amended to make it clear that it does not operate to revive a charge which has been extinguished. Section 12 (3B) is amended by deleting the words “whether or not the subcontractor has given a notice of claim of charge”, the implication being that all subcontractors who wish to enforce a charge by becoming a party to the court proceedings must have given notice as required by section 10.

4.1.11 Court Proceedings in Respect of Charges

Clause 14 amends section 15. Section 15 (2) is amended to provide that in proceedings in respect of a charge under the Act, it is sufficient if the subcontractor proves that the charge attached to money payable or a security in existence prior to the date of hearing.

Notices After Commencement of Proceedings

Proposed subsection 15(3) requires a subcontractor, within 14 days after commencing proceedings, to give a written notice in the approved form, to each person to whom a notice of claim of charge has been given under s 10, advising them that the subcontractor has commenced proceedings. However, if the subcontractor has served the relevant persons with a copy of the initiating documents for the proceeding, then a s 15(3) notice to that person need not be given (proposed s 15(4)). The effect of non-compliance by the subcontractor with ss 15(3) or (4) is that the charge will be extinguished (proposed s 15(5)). Further, a charge will be taken to be extinguished if the subcontractor does not commence a proceeding to enforce the charge under s 15(1) (proposed s 15(5)).

53 Only the terms in bold are new to the section.
4.1.12 Vexatious Notice of Claim

Clause 16 amends section 22 and provides that a notice of claim of charge is given without reasonable grounds if the person making the claim knows or reasonably ought to know, that the amount of the claim significantly exceeds the amount actually payable to the person.

4.1.13 Application to New Contracts Only

Clause 17 inserts a new section 27 providing that amendments to the Act allowing claims of charge over contract security will only apply to contracts entered into after the commencement of the new s 27.

5. CONCLUSION

A complex web of contractual arrangements, securities, enforceability and priority of claims and charges, underlies the amendments to the Subcontractor’s Charges Act. The Subcontractor’s Charges Amendment Bill attempts to clarify a number of these issues, however due to the complexity inherent in the original Act, the amendments tend to add to that complexity. The Bill extends the operation of the Act to include charges not only against moneys payable but on security for contractual performance, and on security given instead of retention money. The Bill expands on a number of the provisions to clarify their operation. It promotes settlement of claims by allowing for partial acceptance of liability and partial withdrawal of claims. The National Code of Practice for the Construction Industry, recently adopted by the Queensland Government, will provide a further framework within which the Subcontractors’ Charges Act will operate.
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