

WHAT IS A SUBCONTRACTORS' CHARGE?

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Subcontractor's Charge (Charge) is a means by which a subcontractor can recover a debt owed by a builder for building works

During good economic times, good contractors are hard to come by. However, when the economy starts to turn, as it has in recent years in Australia and particularly in Queensland, subcontractors are often left being owed huge sums of money when developers or head contractors become insolvent or are placed under administration.

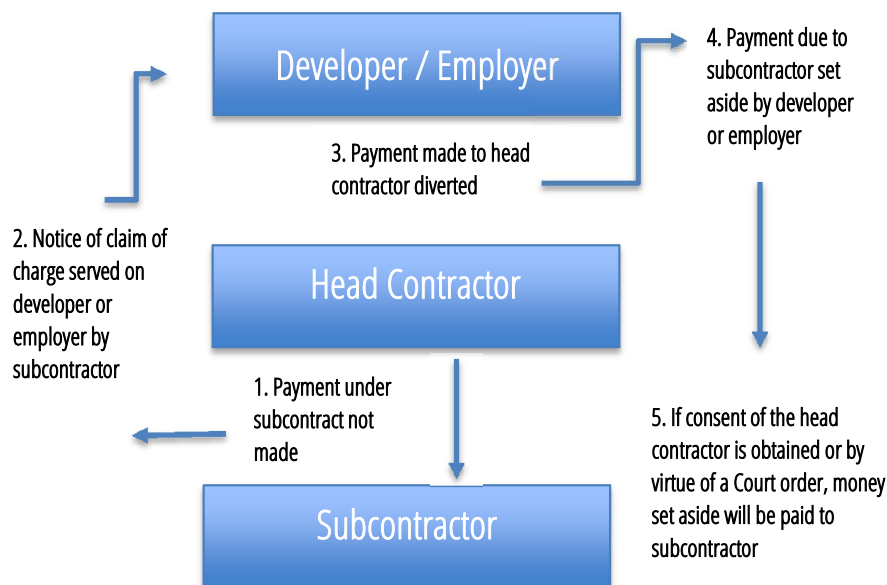
In Queensland, subcontractors can rely on two pieces of legislation to secure payment for works they've done. These two pieces of legislation, Subcontractors' Charges Act 1974 (**the Act**) and the Building and Construction Industry Payments Act 2004 (**BCIPA**) create a process which subcontractors can utilise to ensure they are paid. This article will deal primarily with the regime under the Act.

With the Act or BCIPA, subcontractors could only sue for the recovery of their fees from the head contractor, as they were the ones that the subcontractor had a contract with. Under the Act, the law tries to remedy this by making the funds held by the developer to pay the head contractor available to subcontractors. It's particularly useful in large building projects involving multiple contractors, subcontractors, and sub-subcontractors.

Procedure

First, a charge to secure money payable (or money to be paid in the future to them) must be served by the subcontractor on the head contractor. The charge is given to the developer to redirect money otherwise payable to the head contractor to the subcontractor. Second, the charge can then be enforced in Court.

Generally the Act works as follows:



A subcontractor must give a notice of charge to the developer and head contractor. The notice must specify the amount claimed and the particulars of the claim in relation to the work. It must also be certified by a prescribed "qualified person" (defined in the Act to include a registered architect, registered professional engineer, and quantity surveyor who is a member of the Australian Institute of Quantity Surveyors) and supported by a statutory declaration by the subcontractor. That prescribed person cannot be someone who has an interest (or be related to) the matter being claimed.

It is important for subcontractors to realise that serving a notice of claim may require commencing court proceedings to enforce the charge if a developer or subcontractor disputes, or doesn't comply with the procedures and time limits under the Act

Money which has already been paid by a developer to a head contractor, or if the head contractor has been paid out completely, cannot be charged under the Act. The developer must still have the money and owe a debt to the head contractor.

Time limits

A notice of charge can be given at any stage during a subcontract but no later than:

- for money owed under a contract or subcontract – within 3 months after completion of the works; and
- for retention monies – within 3 months of the expiration of the maintenance period.

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Who can claim a charge?

Any licensed subcontractor who has been engaged to carry out work by a contractor can claim a charge over money payable to the head contractor by a developer or head contractor. Work, under the Act, covers almost all types of construction work including:

- unskilled labor;
- the placement, fixation or erection of materials, plant or equipment at a site; and
- manufacture or fabrication of project specific components (including if that manufacture or fabrication occurs offsite).

However, it doesn't include work which is:

- merely delivering materials, plant or equipment to a site;
- supplying materials, plant or equipment under a hire agreement;
- if the work is done by an employee under a service contract (as opposed to a contractor); or
- testing of materials or the taking of measurements or quantities.

Enforcing a notice of charge

Once a developer has received a notice of charge, the head contractor must give a "contractor's notice" to the developer within 14 days, either accepting liability to pay, disputing the claim or accept liability to pay another amount and otherwise dispute the claim.

When a head contractor provides notice accepting liability, the developer will pay the amount to the subcontractor.

If the head contractor does not accept liability, a subcontractor must commence court proceedings within one month to enforce the charge. In most cases, once a developer has received a notice of charge, they will not pay the head contractor (or may pay the money into court) or else they run the risk of having the Court order them to pay the subcontractor.

If the matter is litigated, other subcontractors may piggyback and join the proceedings even if the other subcontractors have not provided notice to the developer of their claims. This is because all subcontractors who are entitled to lodge a notice of charge and will share (usually on a pro-rata basis) the sums held by the developer.

Other Important points

BCIPA or the Act

A subcontractor who wishes to use the regime under the Act will be prevented from exercising their rights under BCIPA. This is to essentially avoid double-dipping against distressed developers. At the outset, it is important for subcontractors to decide whether they want to use the regime under the Act or BCIPA.

Other important considerations

Complex issues can arise in situations where there are subcontractors and sub-subcontractors which cannot be comprehensively covered here.

There are also other important considerations and which may apply in matters including when a head contractor is being liquidated, or being placed under administration by the court. This will affect the deadline by which a notice must be served, and proceedings instituted. The appointment of liquidators or administrators may tactically change how willing a head contractor may be to pay a subcontractor.

Given the complexity in these sorts of matters, minor non-compliance or other technicalities can lead to a claim of charge being held invalid. It is vital that a notice of charge is drafted properly and careful attention paid in following up the claim (including litigation). We strongly recommend that you contact a solicitor for advice if you wish to make a claim under the Act.

Further information

If you have any questions about subcontractors' charges, please contact Boss Lawyers on +61 7 3188 0200 or info@bosslawyers.com.au to speak with one of our expert lawyers.



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