



What Is the process of issuing a notice under the Subcontractors' Charges Act 1974 (Qld)?

May 15, 2017

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A Form 1 Notice of Claim of Charge and Form 2 Notice to Contractor of Claim of Charge Being Given (“the **Notices**”) are often issued in circumstances where the contractor is experiencing financial difficulties. The construction industry is the second highest industry in number of external administrations between December 2015 and September 2016, at 1530 companies.



The Notices are an effective tool which allows a subcontractor to essentially leapfrog the contractor and seek to recover outstanding funds from the principal/developer/owner (“the **Principal**”). This includes retention monies and any security monies held by the Principal.

Who can issue the Notices?

A subcontractor who has been engaged to undertake work by a contractor is entitled to claim a charge over money payable to the contractor by the Principal, provided the work undertaken by the subcontractor is within the meaning of *work* under *Subcontractors' Charges Act 1974 (Qld)* (“**the Act**”) and the funds have not yet been paid to the contractor by the Principal.

Pursuant to section 3 of the Act, the definition of 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) the construction, decoration, alteration or repair of a building or other structure upon land; or*
 - (b) the development or working of a mine, quarry, sandpit, drain, embankment or other excavation in or upon land; or*
 - (c) the placement, fixation or erection of materials, plant or machinery used or intended to be used for a purpose specified in paragraph (a) or (b); or*
 - (d) the alteration or improvement of a chattel;*
- and includes also the supply of materials used or brought on premises to be used by a subcontractor in connection with other work the subject of a contract or subcontract but does not include—*

(e) the mere delivery of goods sold by a vendor under a contract for the sale of goods, to at or upon land; or
(f) work or labour done or commenced by a person—
(i) under a contract of service; or
(ii) in connection with the testing of materials or the taking of measurements or quantities;
or
(g) the supply under a contract of hire of materials, plant or machinery not intended to be incorporated in the work.”

How are the Notices issued?

The Notices may be downloaded from the Queensland Building and Construction Commission website.

In order to complete the Notices, a subcontractor must know:

1. The name and registered office of the Principal;
2. The name and registered office of the contractor;
3. The specifications of the contract. E.g. reference numbers or the date it commenced.
4. The address the works are being carried out;
5. The amount being claimed (including GST);
6. The particulars of the claim. E.g. the details of the work undertaken; and
7. The dates between which the work was undertaken.

Pursuant to section 10A of the Act, the claim must be certified by a qualified person who is:

- (a) “an architect registered in accordance with the Architects Act 2002;
- (b) a registered professional engineer under the Professional Engineers Act 2002; or
- (c) a person licensed under the Queensland Building and Construction Commission Act 1991 to carry out or supervise work of the type to which the claim relates; or
- (d) a quantity surveyor who is a member of the Australian Institute of Quantity Surveyors; or
- (e) a person having expert knowledge of the work to which the claim relates who is accepted in a particular case as a qualified person by the contractor and subcontractor.”

The qualified person must not have a direct or indirect specific interest in the work.

A Notice of Claim of Charge must also be supported by a statutory declaration of the subcontractor about the correctness of the claim and the amount claimed. Pursuant to section 10(9) of the Act, an 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.

Once the Notices have been completed, service is effected by serving the Notices pursuant to section 109X of the *Corporations Act 2001 (Cth)*. We often recommend that the Notices are also emailed to the contractor and the Principal.

When should the Notices be issued?

Pursuant to section 10(2), the Notices may be issued although the work is not completed or the time for payment of the money has not arrived, but if the work is completed, the Notices must be issued within three months after such completion.

Notices in respect of retention money only may be given at any time while work under the subcontract is being performed, but must be given within three months after the expiration of the period of maintenance provided for by the subcontract and no later.

What are the consequences of issuing the Notices?

Pursuant to section 11 of the Act, once the Notices are issued, the Principal must retain, until the court in which the claim is heard directs to whom and in what manner the funds is to be paid. A Principal who fails to retain that amount is personally liable to pay to the subcontractor the amount of the claim not exceeding the amount that the person is required by this section to retain.

What are the steps of enforcing the Notices?

Pursuant to section 15 of the Act, proceedings in respect of a charge under the Act must be commenced within four months after such retention money or the balance thereof is payable or within one month after the Notices have been issued.

It is critical that a subcontractor commences proceedings within the relevant timeframes *“as every charge is deemed to be extinguished unless the subcontractor duly commences a proceeding ... to enforce it.”*

The Act is very technical and great attention to detail is required when drafting the Notices to ensure that the Notices have been correctly issued and are able to be enforced.