



## JHK LEGAL

# Queensland's new subcontractors' charges legislation are you referring to the correct legislation when issuing a subcontractors' charge?

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On 17 December 2018, chapter 4 of *Building Industry Fairness (security of Payment) Act 2017* (Qld) (**BIF Act**) commenced, resulting in the *Subcontractors Charges Act 1974* (Qld) (**SC Act**) being repealed. With the new legislation has followed some changes that effect those both issuing and receiving notices of claim under the BIF Act.



### Change of definition of works

Under the SC Act, the right for subcontractors to issue a Notice of Claim of charge (**Notice of Claim**), had a specific limitation to the definition of “works”, with the insertion of the words **upon land**.

SC Act s3 read as follows:

“**Works**” 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;”*  
(emphasis added).

Section 105 of the BIF Act removes this limitation – potentially broadening the scope of works claimable:

“(1) **“Work”** for a contract—

- (a) *means labour, whether skilled or unskilled, carried out by a person in connection with—*
  - (i) *the construction, decoration, alteration or repair of a building or other structure; or*
  - (ii) *the development or working of a mine, quarry, sandpit, drain, embankment or other excavation in or on land; or*
  - (iii) *the placement, fixation or erection of materials, plant or machinery used or intended to be used for a purpose mentioned in subparagraph (i) or (ii) ; or*
  - (iv) *the alteration or improvement of a thing; or*
  - (v) *the demolition, removal or relocation of a building or other structure ...”*

### **Notice of Claim – new definitions and new forms**

Under section 122 of the BIF Act, similar to section 10 of the SC Act, a subcontractor intending to claim a charge must issue to the person liable to pay the contractor a Notice of Claim in the approved form<sup>1</sup> detailing the subcontractors’ intent to claim a charge over the monies payable to the contractor. A subcontractor must also provide the same Notice of Claim to the contractor, along with identifying and providing details of the persons served with the Notice of Claim.

The Notice of Claim must:

1. state the amount of the claim;
2. include details of the work performed by a qualified person; and
3. include any other information prescribed by the Regulations.

As with section 10 of the SC Act, the Notice of Claim can be issued prior to the completion of the works, and if the works are completed must be issued within 3 months of the date of completion.

The BIF Acts also separates and appears to simplify the steps needed to be taken by a subcontractor in issuing a Notice of Claim:

1. The contents of subsections 10 (1) (a) and 10(1) (aa) of the previous SC Act subcontractors' have been separated into sections 123 and 124 of the BIF Act.
2. Under section 123 of the BIF Act, the reference is no longer to the employer or superior subcontractor but rather "***a person obligated to pay money to a contractor under a contract***", the subtle changing of the words, but could cover a broader range of persons who can receive the Notice of Claim.
3. The form 1: Notice of Claim of Charge and form 2: Notice to Contractor of Charge Being Given have also been replaced with the one Form S122 Notice of Claim, which will be served on the contractor and the person liable to pay under the contract. A subcontractor is also no longer required to sign a statutory declaration in support of the claim. It must still be certified by a qualified person, though.

### **New Offence Created**

Under section 128 of the BIF Act there is now a requirement for a contractor in receipt of a Notice of Claim to respond in writing to both the person given the notice of claim and the subcontractor within 10 business days of being given the notice of claim as to whether they dispute or agree (in whole or part) with the claim. A failure to respond by a contractor within 10 business days is an offence and carries a maximum penalty of 20 penalty units.

### **Conclusion**

The process for a subcontractor claiming has been simplified, but largely remains the same.

The main differences are the expansion of the definition of works, the establishment a more onerous timeframe and requirement on contractors to respond to subcontractors' Notice of Claim or have them deemed to commit an offence under the BIF Act.

Proceedings to enforce a subcontractors' claim under s136 of the BIF Act remains in essence the same. The timeframes are as follows:

1. if the claim is for retention amount only, - 4 months after the balance of the retention amount is payable;
2. otherwise 1 month after the notice of claim given under section 122 of the BIF Act to the person by whom the money is payable.

If you need clarification on the changes and/or need assistance with making a claim under the BIF Act please contact Nathan Kuster or Michelle Kelly in the JHK Legal Brisbane office on 07 3859 4500.

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<sup>i</sup> Ibid s 122 (2).