# Subcontractors' Charges Act 1974 (Qld) - Update

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> *"The Subcontractors' Charges Act is a difficult Act to follow and apply, and various uncomplimentary remarks have been made about it and about its draftsmanship during the years during which it has been in force."* Matthews J, *Re Castley*, unreported, Supreme Court of Queensland, OS No.44 of 1980.

The construction industry in Queensland continues to be bedevilled by the operation of the *Subcontractors' Charges Act* 1974 (Qld) - ("the *Act*"). A recent decision of the Queensland Supreme Court has one again highlighted the difficulties associated with the interpretation of many of the *Act's* sections.

## Work/Supply

An issue which seems to have troubled the Queensland courts in recent years, are the circumstances in which the supply of materials by a subcontractor to a contractor will create a charge in favour of the subcontractor over money payable under the contract between the employer (or superior contractor) and contractor.

The answer would appear to hinge upon the interpretation of section 5(1) and 5(2) and the definition of "*work*" contained in section 3 of the *Act.*

> By section 5(1) it is provided:
> *"Where an employer contracts with a contractor for the performance of* ***work upon or in respect of land or a building, or other structure or permanent improvement upon land or a chattel*** [our emphasis] *every subcontractor of the contractor shall be entitled to a charge on the money payable to the contractor or superior contractor under the contractor's or superior contractor's contract or subcontract."*
>
> By section 5(2) it is provided:
> *"The charge of a subcontractor shall secure payment in accordance with the subcontract of all money that is payable or is to become payable* (thereby encompassing retentions) *to the subcontractor for* ***work*** *done by the subcontractor under the subcontract."* [our emphasis]

The definition of "*work*" contained in section 3 of the *Act* (which purports to be non-exhaustive - *ex parte Peter Fardoulys Pty Ltd* [1983] QdR 345, per Thomas J) includes work or labour:

> *"... done or commenced upon the land where the contract or subcontract is being performed ..."*
>
> It also includes 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."*

An exclusory provision makes it clear that the definition of work will not, however, extend to the mere delivery of goods sold by a vendor under a contract for the sale of goods to, at, or upon land.

## The Process and Judicial Interpretation

The first step in determining a subcontractors' entitlement to maintain a charge is to determine if the head contract is one to which such a charge can attach pursuant to section 5(1). The question is whether the head contract requires the performance (not necessarily by the contractor) of "*work*", as defined in section 3 of the *Act.* Having determined that the head contract meets the criteria, the next step is to look at the requirements of the subcontractor's contract.

The issue first arose for consideration in the case of *Dowstress Pty Ltd v The Mission Congregation Servants of the Holy Spirit* (1987) QdR 150 ("*Dowstress*").

In *Dowstress*, the subcontractor agreed to supply prestressed hollow floor beams to the contractor which was constructing extensions to the owner's hospital. The full court held that no valid charge existed.

Moynihan J (with whom Kelly AJC agreed) based his decision on the words in section 3 of the *Act* which

defined "*work in terms of what is done or commenced upon the land where the contract is being performed*".

Derrington J did not regard these words as being significant, pointing out that under section 5 the charge may attach whether the contract is in respect of land, buildings or chattels. He based his decision on the fact that a charge applies only in respect of "*work done under the subcontract*" so that a "*contract to supply goods on which work of manufacture is performed by a subcontractor is not a contract for work within the meaning of the Act*".

Derrington J's view found favour with both judiciary and commentators, and it had subsequently been thought that in respect of a subcontractor's contract, there was no need that there be any association with work upon land, only that it be a contract for the performance of work and that it not be within the exclusions contained in the definition of "*work*" in section 3 of the *Act*.

The Issue arose squarely for consideration recently in *In the matter of an application by Bulk Materials (Coal Handling) Pty Ltd (Administrator Appointed),* unreported, Supreme Court of Queensland, 7 February 1997, Demack J.

That case concerned the validity of the notice of charge served by Queensland Steel for $256,000 in respect of money owing pursuant to a contract under which Queensland Magnesia (Operations) Pty Ltd (Q-Mag) employed Bulk Materials (Coal Handling) Pty Ltd to construct an ore sorting magnesium plant at Queensland Magnesium Kunawarara Mine. Bulk Materials in turn had engaged Queensland Steel Products Pty Ltd to "*supply, fabricate, blast, clean, paint and deliver structural steel for Q-Mag Ore Sorting*".

Counsel for Bulk Materials submitted that the charge was not valid because the definition of "*work*" in section 3(1) of the *Act* refers to work upon the land where the contract or subcontract is being performed. Here, the work done by Queensland Steel was not performed on the mine site at Kunawarara.

Counsel for Queensland Steel submitted that while the contract between Q-Mag and Bulk Materials was required to be upon land, there was no requirement under the *Act* that the work done by a subcontractor had to be on the land at Kunawarara.

Demack J held that the full court decision in *Dowstress* was indistinguishable from the present set of facts and found that Queensland Steel had no valid charge.

It was unclear from the court transcript, whether His Honour relied upon the reasoning of Moynihan J and Kelly ACJ, or whether Derrington J's view found favour.

His Honour did indicate that the conclusion reached by Ryan J in *Re RA Story Pty Ltd* (1993) 2 QdR 355 (which relied upon the reasoning of Derrington J) was correct. In that case, it was held that where a subcontractor who was to fabricate and erect structural steel, engaged another subcontractor to perform work on the steel away from the land where the steel was to be erected, the second subcontractor had a valid charge.

His Honour concluded that this was not the case here, and that attempts by Queensland Steel to show that its "*work*" could be separated from the costs of materials did not alter the situation because:

> "*... entitlement to the charge arises from a contract to perform work alone, unless the subcontractor is performing work on the land the subject of the contract.*" ❑