

THE NSW SUPPORTING STATEMENT

A footnote to *Adjudication – recent changes to the NSW Act*, a paper for 6 May 2014 meeting of the Adjudication Forum.

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Section 13(7) of the *Building and Construction Industry Security of Payment Act 1999* NSW provides that a *head contractor* must not serve a *payment claim* on the *principal* unless the claim is accompanied by a *supporting statement* that indicates that it relates to that *payment claim*.

Section 13(9) states:

a *supporting statement* means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned [emphasis added].

There are two requirements for a supporting statement. The first is that it is in the prescribed form. The second is that, without limitation, it includes the prescribed declaration.

The *Building and Construction Industry Security of Payment Regulation 2008* NSW was amended on 21 April 2014 to include clause 4A and Schedule 1 which contains the prescribed form. The form is reproduced below.

Clause 4A and Schedule 1 of the regulation have been ineptly drafted. They are not consistent with sections 13(7) and 13(9) of the Act. The words in s 13(9), 'without limitation', 'all subcontractors' and 'all amounts that have become due and payable in relation to the construction work concerned' have been ignored. Strictly speaking, no statement in the form in Schedule 1 that includes a list of unpaid subcontractors in the second schedule in the form would satisfy the requirements of s 13(7).

A *head contractor* who wants to ensure that the supporting statement accompanying the *head contractor's* payment claim is a valid *supporting statement* would be well advised to omit from the declaration [in the supporting statement] the words 'not including any amount identified in the attachment as an amount in dispute'.

Section 80(1) of the *Interpretation Act 1987* NSW provides:

If a form is prescribed by, or approved under, an Act or statutory rule, strict compliance with the form is not necessary but substantial compliance is sufficient.

To satisfy the requirements of ss 13(7) and 13(9) the head contractor's declaration must state that all subcontractors have been paid all amounts that have become due and payable in relation to the construction work concerned. A

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declaration that excludes some amounts that have become due and payable [namely, amounts in dispute], would not satisfy the requirements of ss 13(7) and 13(9).

Clause 4A provides that a reference in the *supporting statement* to an amount due and payable does not include an amount that is in dispute between the *head contractor* and a *subcontractor*.

An amount is either due and payable in relation to certain construction work or it is not. Section 13(9) of the Act does not empower the Governor to regulate the meaning of 'due and payable' to exclude amounts that are due and payable but 'in dispute'.

What does 'in dispute' mean? The Act and Regulation provide no guidance. If a subcontractor claims \$10,000 for certain work and the head contractor rejects the claim, \$10,000 is in dispute. If the head contractor claims that the work is worth only \$7,000 and the subcontractor disputes this, is \$10,000, \$7,000 or \$3,000 in dispute? The amount that is in dispute is the amount payable for the work. The supporting statement does not require that the disputed amount be identified.

If the head contractor does not reject the claim but simply does not pay it or does not provide a payment schedule, is the amount in dispute? Presumably it is in dispute unless the subcontractor waives the claim.

The important point is that ss 13(7) and 13(9) do not allow the respondent to make a qualified declaration, ie a declaration that not all amounts due and payable to subcontractors have been paid because some of those amounts are in dispute.

In *Construction Claims*, 3rd edn, 2013, Davenport & Durham, Federation Press, Chapter 12.11 *Abatement and set-off*, there is a discussion of abatement, set-off and cross-claims. The distinction between abatement, set off and cross-claim is most important. An amount may be due and payable to a *subcontractor* in relation to construction work but the *head contractor* may refuse to pay because the head contractor has a cross-claim.

There may be no dispute that an amount [say \$10,000] is due and payable by the *head contractor* to the *subcontractor* in respect of construction work but the *head contractor's* reason for withholding payment may be that the *head contractor* claims that under a separate contract or in tort or for other reasons the claimant is indebted to the head contractor for an amount equal to or greater than \$10,000. In those circumstances is the amount due and payable 'in dispute'?

It appears that despite the cross-claim the amount is 'due and payable in relation to construction work' within the meaning of s 13(9) of the Act. It seems that the Parliament did not intend that a valid payment claim could be made under the Act unless the *head contractor* makes a declaration that all *subcontractors* have been paid all amounts due and payable in relation to the construction work concerned.

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Clause 4A(3) of the regulation provides that a reference to an amount due and payable in a supporting statement includes a reference to a retention amount due and payable.

A retention amount only becomes due and payable when the head contractor no longer has a right to retain the retention amount. If regulations are ever made under s 12A of the Act and the head contractor is required to pay retention moneys into a trust account, there is an ambiguity. Clause 4A(3) refers to an amount due and payable but does not distinguish between due and payable to a trustee [for the retention trust account] or due and payable by the trustee to the subcontractor.

Clause 4A(4) of the regulation provides that the supporting statement under s 13(7) of the Act relates only to *subcontractors* or suppliers directly engaged by the *head contractor*. The regulating power in s 13(9) of the Act does not authorise a regulation changing the meaning of s 13(7).

Clause 4A(4) is inconsistent with section 13(9) of the Act. *Subcontractor* is defined in s 4 of the Act to mean a person who is to carry out construction work or supply related goods and services under a construction contract otherwise than as *head contractor*. Sub-subcontractors are *subcontractors* within the meaning of the Act.

The prescribed form states that for the purposes of the statement in the form, the terms “principal” and “subcontractor” have the meaning given in section 4 of the Act. But that is inconsistent with clause 4A(4) of the regulation.

Section 13(9) of the Act permits the making of a regulation prescribing the form of a supporting statement that ‘includes a declaration to the effect that all *subcontractors*, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned’. Section 13(9) does not empower the making of a regulation excluding from the form of the declaration amounts due and payable to some *subcontractors*, for example, sub-subcontractors.

Sections 13(7) and 13(9) require the *head contractor* to be satisfied that sub-subcontractors and suppliers have been paid ‘all amounts that have become due and payable in relation to the construction work concerned’. The construction work concerned must mean the construction work for which the head contractor is claiming a progress payment.

Section 13 of the Act imposes an obligation on the *head contractor* to enquire into whether all persons who have carried out construction work or supplied related goods and services in relation to the construction work [the subject of the *head contractor’s* payment claim] have been paid all amounts that have become payable by the *head contractor’s subcontractors* and their sub-subcontractors.

This is onerous but it is what Parliament requires. It is not open to the Governor [on the advice of the Minister] to ameliorate the requirements of Parliament. If

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the Minister considers that s 13 of the Act is too onerous then it is up to the Minister to go back to Parliament and ask for an amendment.

The Act does not require the *head contractor* to pay all amounts due and payable to *subcontractors*. Only a court can require that. Unless a claimant *subcontractor* has given the *principal* a *payment withholding request* under s 26A of the Act, the *principal* has no authority to withhold from payment to the *head contractor* an amount due and payable to a *subcontractor*.

Nevertheless, clause 4A(5) of the regulation provides:

Any payments referred to in a supporting statement that are due and payable and not in dispute must be paid in full before any declaration in the prescribed form is signed.

The Act provides no authority for such a regulation. However, nothing turns on that. It is simply otiose. No amounts are to be included to in the supporting statement. It would be impossible for a *head contractor* to honestly declare that all amounts due and payable to subcontractors [and not in dispute] have been paid if before signing the declaration the amounts have not been paid.

A *head contractor* may, without any fault on the part of the *head contractor*, be unable to pay subcontractors until the *principal* pays the *head contractor*. However, the section 13(7) of the Act fails to take this into account. Section 13(7) does not even allow [as do many standard forms of construction contract] the *head contractor* to give a direction to the *principal* to pay [out of moneys due to the *head contractor*] moneys due to a *subcontractor*.

A situation may arise where an amount is due and payable by a *head contractor* to a *subcontractor* but if the *head contractor* made the payment, it could give the *subcontractor* a preference over other creditors of the *head contractor*. There will be circumstances where, even though an amount is due and payable to a *subcontractor*, payment would be rendered void by Commonwealth insolvency laws.

Of course, the elephant in the room is the recommendation of the Collins Inquiry that payments by the principal to the head contractor on account of construction work carried out by subcontractors should be received in trust by the head contractor until the head contractor has paid the subcontractors for their construction work or related goods and services.

As the Collins Inquiry points out, no amount of amendment of the Act [except enactment of the trust recommended by the Collins Inquiry] will provide protection to subcontractors in the event of insolvency of the head contractor.

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[The following is the prescribed form of *supporting statement* under s 13(7) of the *Building and Construction Industry Security of Payment Act 1999* NSW. This note is not part of the form. In the tables, the 'start date' for construction work is presumably the date of making of the construction contract. The construction work is the *head contractor's* work. The 'end date' is presumably the *reference date* for the payment claim. The 'date of works (period)' in the tables does not make sense. Presumably 'see above' would cover this item. Similarly, 'Date of payment claim (head contractor claim)' in the tables does not make sense. Presumably there can only be one date and it has to be the same date as the payment claim that accompanies the supporting statement. The date of the payment claim must be stated in the body of the supporting statement. Consequently, for 'Date of payment claim (head contractor claim)' in the schedules the head contractor must insert that date or 'see above'. Note that there are no amounts in the tables. This is despite the fact that the statement refers to 'an amount in dispute'. The amounts in dispute do not have to be disclosed.]

(Clause 4A(1))

Supporting Statement by head contractor regarding payment to subcontractors

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this statement, the terms "principal", "head contractor", "subcontractor", and "construction contract" have the meanings given in section 4 of the *Building and Construction Industry Security of Payment Act 1999*.

Head contractor: [*business name of head contractor*]

ABN: [*ABN*]

* 1. has entered into a contract with: [*business name of subcontractor*]

ABN: [*ABN*]

Contract number/identifier: [*contract number/identifier*]

OR

* 2. has entered into a contract with the subcontractors listed in the attachment to this statement.

* [*Delete whichever of the above does not apply*]

This statement applies for work between [*start date*] and [*end date*] *inclusive (the construction work concerned)*, subject of the payment claim dated [*date*].

I, [full name], being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature:

Full name:

Date:

Position/Title:

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Attachment

Schedule of subcontractors paid all amounts due and payable

Subcontractor	ABN	Contract number/identifier	Date of works (period)	Date of payment claim (head contractor claim)

Schedule of subcontractors for which an amount is in dispute and has not been paid

Subcontractor	ABN	Contract number/identifier	Date of works (Period)	Date of payment claim (head contractor claim)