

## Supporting Statements: A fork in the road?

1. On 30 April 2018 Justice Ball handed down his decision in *Central Projects Pty Ltd v Davidson* [2018] NSWSC 523. The case dealt with the requirements of sections 13(7) and (8) of the *Building and Construction Industry Security of Payment Act (NSW) 1999* relating to supporting statements.
2. Sections 13(7) to (9) were introduced to the Act by the 2013 amending Act and apply to Construction Contracts entered into after 21 April 2014. The effect of the amendment was to require head contractors to accompany all payment claims with a *supporting statement* in the prescribed form.
3. The decision in *Central Projects* is important for two reasons. First, it confirmed an obiter view expressed by McDougall J in *Kitchen Xchange Pty Ltd v Formacon Building Services Pty Ltd* [2014] NSWSC 1602 regarding compliance with s.13(7). Second, it represents a divergence of views between two Judges of the Technology and Construction List on an important issue.
4. As to the first reason, in *Kitchen Xchange*, McDougall J said at [45] *it is easy to see whether the requirement of subs (7) has been met, because it is easy to see whether the accompanying statement meets the requirements set out in subs (9), incorporating as it does the relevant clause and form set out in the Regulation.*
5. Meagher JA implicitly followed that approach in *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334 when dealing with a claim that the supporting statement did not include all the relevant subcontractors. His Honour found that the contractor's explanation was sufficient to avoid a breach of s.13(8) but had compliance with s.13(7) required an examination of the accuracy and completeness of the supporting statement there would have been no need to consider the explanation for the purposes of s. 13(8).
6. Ball J in *Central Projects* accepted *that in order to be a "supporting statement", a document must meet two requirements. First, it must be in the prescribed form. Second, it must contain a declaration of the type set out in s 13(9).*<sup>1</sup>
7. If satisfaction of s.13(7) required an investigation into the accuracy and completeness of the contents of the supporting statement, it could not be said that *it would be easy to see*

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<sup>1</sup> at [26]

*whether the requirement of subs (7).*<sup>2</sup> Further, if an incomplete but otherwise compliant supporting statement were rendered void by s.13(7), there would be no supporting statement capable of offending s.13(8) and so that subsection would have no work to do.<sup>3</sup>

8. The result is that a supporting statement satisfies s.13(7) if it meets the two requirements in s.13(9), namely, that it is in the prescribed form and contains the necessary declaration.
9. The second reason why the decision is important relates to the effect on the payment claim of noncompliance with s.13(7). It is important because there is now a divergence of views about the matter.
10. In *Kitchen Xchange*, McDougall J said at [46] that a failure to comply with s.13(7) will mean there will be no valid service of a payment claim under the Act. Service of a payment claim is one of the *basic and essential requirements* referred to by Hodgson JA in *Brodyn*<sup>4</sup> which can be equated to a fact necessary for jurisdiction in the post *Chase Oyster Bar*<sup>5</sup> world.
11. In *Central Projects* Ball J said he would have reached the opposite view had there been no authority on the point. His Honour gave three broad reasons for that conclusion.
12. First, his Honour thought the language used in s.13(7) did not readily accommodate the consequence of noncompliance in addition to the offence that is committed by noncompliance. S.13(2) sets out what is required for a payment claim and s.31 provides how it is served. A conclusion that noncompliance invalidates the payment claim or its service is inconsistent with those sections.<sup>6</sup>
13. Second, his Honour considered that language used in s.13(7) was relevantly different to that used in s.13(5) which provides that there could only be one payment claim served in respect of each reference date. S.13(5) provides that *a claimant cannot serve more than one payment claim ...* indicating what is possible under the Act. Anything beyond that one payment claim is not a payment claim under the Act. S.13(7) provides a prohibition from doing something that is otherwise possible by providing that *a Head Contractor must not serve ...*<sup>7</sup>

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<sup>2</sup> at [27]

<sup>3</sup> at [28]

<sup>4</sup> *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [53]

<sup>5</sup> *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [148]

<sup>6</sup> at [40]

<sup>7</sup> at [41]

14. Third, the extrinsic material showed that the purpose for introducing ss.13(7), (8) and (9) was not to affect the validity of payment claims but to put in place a mechanism to better police and prosecute false declarations. The sections were introduced following the recommendations of the Independent Inquiry into Construction Industry Insolvency. The Inquiry referred to the previous practice of head contractors of swearing statutory declarations pursuant to an obligation imposed on them by the contract. The Inquiry said that there was evidence of a practice of head contractors swearing false statutory declarations with little if any prospect of police prosecuting them under the *Oaths Act* 1900 (NSW). It recommended that the obligation previously imposed by contract should be imposed by law and that prosecutions should be brought under the umbrella of the NSW Department of Finance and Services which administers the Act.<sup>8</sup>
15. In each case the outcome was decided on a different issue and so the statements and conclusions about the effect of noncompliance with s.13(7) in each of the decisions were obiter. However, the divergence of views reflects some uncertainty for the profession and the industry. Although, given the sheer volume of litigation that the Act seems to generate, the issue will no doubt to be resolved by the Court in the not too distant future.

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<sup>8</sup> at [42]