

SECURITY OF PAYMENT ALERT

What you need to know about Supporting Statements



Introduction

A central issue for some head contractors and subcontractors in the construction industry is whether a payment claim made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('SOP Act') is drafted and served correctly.

Form of Supporting Statements

Since 2014, the SOP Act has required payment claims to contain a supporting statement in the form provided by regulations **that is not false or misleading**. Some courts have suggested that a failure to properly prepare a supporting statement could invalidate service of a payment claim.

Until now, the courts of New South Wales have expressed differing views as to whether a failure to correctly provide a supporting statement in a payment claim will invalidate the payment claim or cause the payment claim to be improperly served. This issue has now been settled by the recent Court of Appeal decision of *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93 (**TFM v Decon**).

In short, *TFM v Decon* has confirmed that a failure to provide a supporting statement in compliance with the SOP Act will not invalidate a payment claim or service of the payment claim.

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TFM v Decon

Before the decision in *TFM v Decon*, it was unclear whether a failure to provide an adequate supporting statement would invalidate a payment claim.

In 2014, the Court in *Kitchen Xchange Pty Ltd v Formacon Building Services Pty Ltd* [2014] NSWSC 1602 (**Kitchen Xchange**), held that a non-compliant supporting statement would invalidate a payment claim. Some four years later, in 2018, the Court in *Central Projects v Davidson* [2018] NSWSC 523 (**Central Projects**) said that *Kitchen Xchange* was not correct. These two decisions have led to much confusion, that is, until now as a result of the TFM decision.

TFM v Decon concerned a disputed payment claim between a builder, Decon Australia Pty Ltd (**Builder**) and principal, TFM Epping and Katoomba Residence Investments Pty Ltd (**Principal**). The Builder issued a payment claim for \$6.4 million. The Principal did not respond until after the strict 10 business day timeframe required under the Act. The Builder commenced proceedings to recover payment by way of “summary judgment” and the Principal challenged this decision. The Principal argued that the payment claim was not valid because:

1. the supporting statement that was attached to the claim was not compliant with the Act because it stated that suppliers and subcontractors had only been paid for one week (as opposed to payment for all work performed)
2. there were amounts claimed which accrued after the “reference date” on which the claim is based.

The Court of Appeal determined that the *Central Projects* decision was the correct approach to follow, i.e. even if the Builder had not provided a supporting statement, the payment claim was still itself valid, and validly served.

On the second ground, the Court of Appeal concluded that works performed after the reference date could be included in the amount claimed so long as the payment claim was “referrable to that reference date”. Note the issue of reference dates no longer applies to all contracts entered after 20 October 2019.

Key Takeaways and Practical Recommendations

While the decision of *TFM v Decon* is positive news for head contractors, we still advise all contractors to exercise caution and care when preparing supporting statements because lodging them with a payment claim is still required by section 13(7) of the Act. In this regard, please be aware that:

1. A payment claim will not be invalid, or its service invalid, if a supporting statement is not provided alongside it pursuant to sections 13(7) – 13(9) of the SOP Act.
2. A payment claim may include some amounts for work undertaken after the reference date of the payment claim, so long as the payment claim is “referable to that reference date”.
3. Although an improper supporting statement will not invalidate a payment claim, this should not be construed to mean that parties no longer need to attach complaint supporting statements at all.
 - o Firstly section 13(7) of the SOP Act still imposes a significant fine for failure to attach a supporting statement to a payment claim.
 - o Secondly, deliberately failing to attach a supporting statement is likely to lead to unnecessary dispute and litigation with principals who may not be aware of this recent legal development.
4. Parties should review their procedure for calculating amounts contained in assessment claims; it is not the case that amounts claimed must strictly reflect work performed before the reference date contained in a payment claim.

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