

## Article Information

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# Head contractors and supporting statements under the Building and Construction Industry Security of Payment Act 1999 (NSW)

**Piper Alderman Partner, Robert Riddell discusses the roles of head constructors within the Building and Construction Industry Security of Payment Act.**

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### What does a head contractor have to do?

Under sections 13(7) & (8) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**), a head contractor must not serve a payment claim unless the claim is accompanied by a supporting statement in the form approved by the Secretary and it must not be false or misleading.

As of 1 March 2021, there are two forms, one for owner occupier construction contracts ([Owner Occupier Construction Contract form](#)), and one for all other construction contracts ([Construction Contract form](#)).

### Who is a “head contractor”?

A “head contractor” is someone who directly contracts with the principal (the person at the top of the contracting chain), but not when one has no subcontractors including where the principal has engaged all the subcontractors directly.

The definition of head contractor under the Act is broader than it is generally understood, so care needs to be taken. A head contractor under the Act may not have the management or control of the building site but, if they are “the entity that has a contractual relationship with the principal and engages another party or parties, to perform part of the work on that project”, they are a head contractor under the Act. This is intentional, so the Act “does not fashion a role for any participant, but rather sets obligations for parties when and where they exist in a construction contract”.<sup>[1]</sup>

### What are the consequences of not providing a supporting statement, or providing a false or misleading supporting statement?

<b>S 13(7) - not serving the accompanying supporting statement</b>	<b>S 13(8) - serving a false or misleading supporting statement</b>
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S 13(7) - max 1,000 penalty units (\$110K) in the case of a corporation

S 13(8) - max 1,000 penalty units (\$110K) in the case of a corporation

S 13(7) - max 200 penalty units (\$22K) in the case of an individual

S 13(8) - max 200 penalty units (\$22K) **or 3 months imprisonment (or both)** in the case of an individual

S 34D - max 200 penalty units (\$22K) for a director or a manager of the corporation if they are captured by the executive liability offence

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Supporting statements are intended to replace the usual contractual requirement for a statutory declaration that all subcontractors have been paid before the head contractor can secure a progress payment from the principal. Statutory

declarations were “often false, not enforced and frequently amended to convey the appearance that what was due and owing to a subcontractor was no longer an amount owed by the head contractor”.<sup>[2]</sup> Sections 13(7) & (8) allows the regulator (the Department of Finance, and Services and Innovation through Fair Trading) to investigate and prosecute head contractors who breached sections 13(7) & (8).<sup>[3]</sup> False supporting statements also present exposure to civil claims for damages for misleading and deceptive conduct.

Section 34D allows government regulators to pierce the corporate veil and pursue individual directors or senior managers (where they were in a position to influence whether sections 13(7) or (8) were breached) who knew of the breach or were recklessly indifferent, and failed to take reasonable steps to prevent or stop the breach.

The Court of Appeal has found that a non-compliant section 13(7) supporting statement given by a head contractor will not invalidate the payment claim itself.<sup>[4]</sup> If a non-compliant supporting statement is served by a head contractor, the principal must still provide the payment schedule within the prescribed 10 business days and, unless there are other contractual options, must rely on the relevant regulators to prosecute the head contractor for the breach of section 13(7).

This means that not providing a statutory declaration, or providing a false or misleading declaration that a head contractor has paid its subcontractors, exposes head contractors to regulatory investigation and prosecution of its company, directors and managers, but the underlying payment claim will stand.

<sup>[1]</sup> The Second Reading for the Building and Construction Industry Security of Payment Amendment Bill 2013 in the Senate by the Hon. Matthew Mason-Cox (Parliamentary Secretary) on 12 November 2013.

<sup>[2]</sup> The Second Reading for the *Building and Construction Industry Security of Payment Amendment Bill 2013* (NSW) in the Legislative Assembly by Mr Andrew Constance (Minister for Finance and Services) on 24 October 2013.

<sup>[3]</sup> The Second Reading for the *Building and Construction Industry Security of Payment Amendment Bill 2013* (NSW) in the Legislative Assembly by Mr Andrew Constance (Minister for Finance and Services) on 24 October 2013.

<sup>[4]</sup> *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93.