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SECURITY OF PAYMENT: UPDATE ON SUPPORTING STATEMENTS

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It has been conventional wisdom that a head contractor's payment claim in NSW is invalid unless it is accompanied by a supporting statement. Those statements list all subcontractors on the project and confirms that each has been paid. However, some of NSW's most senior judges, in a case called *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd*, have recently said that a head contractor's payment claim is valid without a supporting statement.

In this case, Decon contracted to construct a multi-unit residential building at Epping in Sydney. It issued a progress claim for \$6.4m for variations under the contract. No supporting statement was attached. As TFM Epping did not respond with a payment schedule within 10 business days, Decon was entitled to the full amount of the payment claim.

The legislation says that "A head contractor must not serve a payment claim on the principal unless the claim is by a supporting statement that indicates that it relates to that payment claim. Maximum penalty: 200 penalty units".

First, according to the judges, the legislation identifies its own consequence. Contravention attracts a penalty. The legislation does not explicitly say that a contravention invalidates a progress claim. Nor does it say that a payment claim is not properly served if it is not accompanied by a supporting statement.

Second, there is nothing to show that Parliament intended that noncompliance should invalidate a payment claim or service of an otherwise valid claim. A statute may impose a substantial penalty on contraventions without making the thing done a nullity.

CONTACT US

If you would like assistance or further information regarding security of payment claims, please do not hesitate to contact Kreisson on (02) 82396500 or at excellence@kreisson.com.au.

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