



# Building and Construction Industry Security of Payment Act NSW – 2013 Amendment

July 2014

The NSW Building and Construction Industry Security of Payment Act was again amended in 2013, and the Supporting Statement Regulation was published on 11<sup>th</sup> April 2014. The amending Act commenced on 21<sup>st</sup> April 2014.

## The effects of the Amendment and Supporting Statement Regulation are as follows

Note that this is a brief summary, and readers should refer to the Amendment Act for full details.

- There is now no requirement to endorse a progress claim as being made under the SOP Act.
- A progress payment to be made by a principal under a construction contract becomes due and payable 15 business days after the claim is made.
- A progress payment to be made to a subcontractor under a construction contract becomes due and payable 30 business days after the claim is made.
- Head contract progress claims must be submitted with a Supporting Statement (see below)
- The regulator may investigate compliance with the Supporting Statement requirements.
- Penalties up to \$22,000 for not supplying a supporting statement, and \$22,000 and/or 3 months in prison for supplying a knowingly false or misleading statement.
- The amendment does not apply to contracts (and presumably subcontracts) entered into prior to 21<sup>st</sup> April 2014

## The Supporting Statement

The intent of the Supporting Statement is to declare all that is due and payable, **and has been paid**. Note that there is no intention to 'bring forward' payments from months prior to the month of the head contract claim. That is, report payments made in the month of the head contract claim.

The Supporting Statement regulation commences with an **Explanatory Note** which contains the sentence "The prescribed form requires all '**relevant**' contracts between head contractors and subcontractors to be listed and identified as either paid or in dispute".

Unfortunately, the term '**relevant**' is not defined, but is said to refer to any payment made to a subcontractor in the month relating to the head contract claim (see diagram over page).

**The content of the Supporting Statement**

Most of the above amendments are self-explanatory, however the Supporting Statement requires some explanation.

Clause 4A (4) mentions subcontractors and ‘suppliers’. As far as can be determined, there is no intention to include supplier payments on the Supporting Statement. The word ‘suppliers’ is not mentioned anywhere else in the amendment or the regulation.

The Supporting Statement commences with a paragraph “This statement applies for work between [start date] and [end date] inclusive (the construction work concerned), subject of the payment claim dated [date]”. These dates clearly refer to the month of the head contract claim, from the previous reference date to the current claim reference date. This is indeed unfortunate as the listing of the paid subcontractors claims relate to several periods prior.

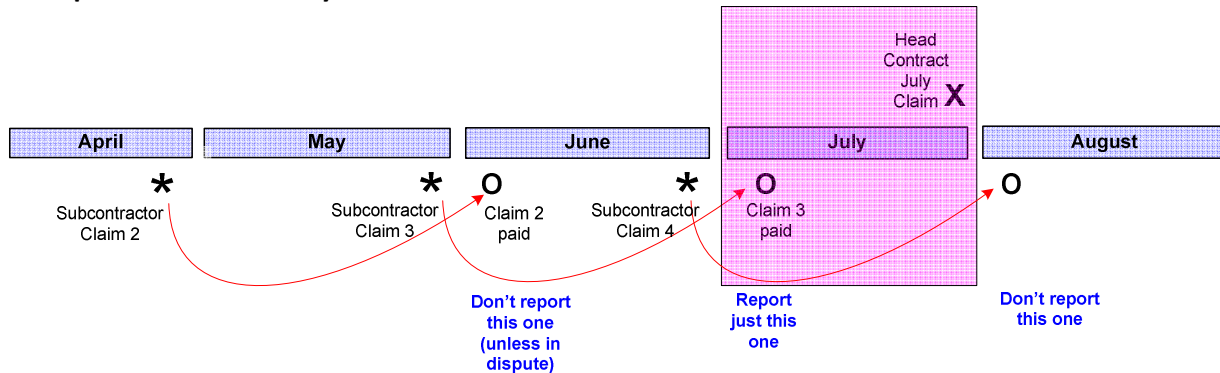
The next statement certifies that all amounts due and payable to subcontractors have been paid (except amounts in dispute).

This is then followed by two tables –

**1. Schedule of Subcontractors paid all amounts due and payable.**

This table is intended to list all subcontractors that have been paid in the month of the head contract claim. In the diagram below relating to the July head contract claim, this will be the subcontractor’s claim 3 dated May. The May claim will have been paid in early July (30 business days) and so it is reportable in the July head contract claim supporting statement.

**Supporting Statement Example for Month of July**



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

This table is intended to list all subcontractors that have not been paid due to a dispute. Note that any claims not yet paid due to the subcontractor not complying with any subcontract terms for conditions precedent to payment, are not in dispute and are not listed here.

I note that head contractors assess a subcontractor claim, and respond with a payment schedule. So when is a claim in dispute? If a contractor assesses a lower value than that claimed, does that mean it is in dispute? There is no guidance in the legislation as to what defines a dispute. However, my answer is no! I believe a claim is classified as ‘in dispute’ once the subcontractor has indicated an intention to take the claim to adjudication.

## 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 meaning given in section 4 of the *Building and Construction Industry Security of Payment Act 1999*.

Head Contractor: **Northern Beaches Constructions Pty Ltd**

ABN: **12 345 678 910** has entered into a contract with the subcontractors listed below.

This statement applies for work between **30 JUN 14** and **31 JUL 14** inclusive (the construction work concerned), subject of the payment claim dated **31 JUL 14**

I, Graeme Bottrill, being the head contractor, a director of the head contractor or a person authorized 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:		Date:	31 JUL 14
Full Name:	Graeme Bottrill	Position/Title:	General Manager

### Schedule of subcontractors paid all amounts due and payable.

<i>Subcontractor</i>	<i>ABN</i>	<i>Contract Identifier</i>	<i>Date of Works (period)</i>	<i>Date of payment claim (head contractor claim)</i>
Great Designs Architecture	11 222 333 444	02	30 APR 14 – 29 MAY 14	30 MAY 14
Blast Demolitions Pty Ltd	22 333 444 555	06	28 APR 14 – 30 MAY 14	30 MAY 14
Digger and Sons (NSW)	33 446 789 012	07	27 APR 14 – 28 MAY 14	30 MAY 14
Northern Beaches Concrete	45 678 910 123	08	30 APR 14 – 29 MAY 14	30 MAY 14
Bricky Bob	56 789 012 345	09	01 JUN 14 – 28 JUN 14	30 JUN 14

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

<i>Subcontractor</i>	<i>ABN</i>	<i>Contract Identifier</i>	<i>Date of Works (period)</i>	<i>Date of payment claim (head contractor claim)</i>
Best Plumbing Pty Ltd	66 777 888 999	11	01 APR 14 - 28 APR 14	29 APR 14