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NEWSLETTER

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This Edition

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WHAT SHOULD THE SUPPORTING STATEMENT CONTAIN AND DOES IT MATTER ANYMORE?

In the recent decision of Central Projects v Davidson the Supreme Court has clarified the requirements for a Supporting Statement under section 13(7) of the Building and Construction Industry Security of Payment Act, making observations about the consequences of a breach that depart from established authority

It didn't take long after the commencement of the amendments to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) inserting the requirement for a Supporting Statement in April 2014 for the operation of those provisions to be tested. In *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602 (5 November 2014, concerning events that took place in June 2014) McDougall J observed that section 13(7) is "prohibitory", going on to say that a payment claim not accompanied by a Supporting Statement is not properly served [36].

So for three and a half years most went about serving their payment claims accompanied by a Supporting Statement of some sort and getting most worked up when the Supporting Statement was wrongly omitted. In *Central Projects Pty Ltd v Davidson [2018] NSWSC 523* Ball J has clarified the requirements for a valid Supporting Statement and made some observations contrary to the long accepted position set out by the court in *Kitchen Xchange* regarding the impact of the omission of a Supporting Statement.

The Facts

Central Projects served a payment claim under the Act accompanied by a purported Supporting Statement. Davies failed to serve a payment schedule. Central Projects sought judgment under section 15 for $1,224,354.06. Davies, sought to resist judgment on the basis that a number of deficiencies in the Supporting Statement (including false information) meant that the payment claim had not been properly served under the Act.

Section 13(7) of the Act states: *A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.*

Section 13(8) of the Act states: *A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstance.*

Both sections prescribe a penalty for breach of the section.

The issues

The court was called upon to consider two issues:

(1) Whether the purported Supporting Statement met the requirements of the Act; and

(2) If it did not, whether the payment claim was validly served.

There was no dispute that the Supporting Statement in this case was broadly in the form prescribed by the Act and Regulation (albeit improperly completed in places). The criticism was that it omitted certain suppliers it should have contained. It was not determined however whether the omission was made knowingly.

The First Issue

Davies contended that Section 80 of the *Interpretation Act* requires the Supporting Statement to contain all the required information (thereby the omission of the suppliers being fatal). The Court disagreed with this contention finding that section 80 was not concerned with the accuracy of the contents of a form. Going on to say *"Forms are prescribed for a wide range of purposes and it would be unreasonable to expect those who rely on... forms to check the accuracy... before being entitled to proceed..."* [32].

WHAT SHOULD THE SUPPORTING STATEMENT CONTAIN AND DOES IT MATTER ANYMORE?

(CONTINUED)

Ball J agreed with Central Projects' Counsel's submission that a Supporting Statement need only be in the prescribed form and contain the required declaration. Further, that 13(8) *"assumes that a supporting statement may contain false or misleading information and provides a significant penalty where it is served knowing that it does so"* [28]. In other words the fact that a Supporting Statement contains false information or omits required information does not diminish the Supporting Statement for the purposes of section 13(7), as the Act provides other consequences for the false statement.

The second issue

While the court's decision on the first issue obviated the need for a determination of the second issue, Ball J went on to make observations contrary to McDougall J in *Kitchen Xchange* and Meagher JA in *Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016] NSWSC 334 and *Duffy Kennedy Pty Ltd v Lainson Holdings Pty Ltd* [2016] NSWSC 371.

In those cases the court found that "to hold that s13(7) did not intend to invalidate service of a payment claim unaccompanied by the requisite statement would set a nought the prohibition" McDougall J in *Kitchen Xchange* at [47]. Ball J disagreed with that conclusion on the basis that section 13(7) contained its own remedy for breach. Going on to conclude at [39] that the legislature did not intend other consequences, that is the invalidation of the service of the payment claim. Ball J cited three reasons for his conclusion:

(1) The language of section 13 (when considered in the context of the Act as whole and particularly section 31, concerning the requirements for services) does not "readily accommodate an additional consequence".

(2) Subsection (7) which has a prescribed consequence for breach (a penalty) should be contrasted with subsection (5) (the prohibition on service of more than one payment claim in respect of a reference date): subsection (5) not having any other consequence.

(3) The reasons for insertion into the Act the requirement for the Supporting Statement, did not mandate the invalidation of the payment claim as a consequence of a deficient or false statement. Instead, the intention was to address inconsistencies in the provision of this sort information to principals and the widespread practice of provision of false information.

Ball J (possibly to his relief) did not have to decide whether he was required to follow the decisions of McDougall J and Meagher JA in light of his conclusions.

Where to from here?

On the one hand, it is clear that a Supporting Statement with false information or that omits required information may be sufficient for the purposes of section 13(7) (providing it is in the required form). However *Central Projects* throws a potential life line to those having to defend a payment claim accompanied by a Supporting Statement that is not in the prescribed form or contain the required declaration. The issue will likely be tested again. To avoid being the test subject those preparing Supporting Statements should take due care to ensure that they conform in every respect with the requirements of the Act and that the information provided is full and accurate.

Helena Golovanoff | *Partner*
Holding Redlich

MINIMUM LOT SIZES FOR STRATA SUBDIVISIONS, NO MORE

On 20 April 2018 the *Standard Instrument (Local Environmental Plans) Amendment (Minimum Subdivision Lot Size) Order 2018* (**Order**) came into effect.

The Order amends the *Standard Instrument – Principle Local Environmental Plan* (**Standard Instrument**) so that the minimum subdivision lot size in clause 4.1 of the Standard Instrument does not apply in *relation to the subdivision of any land:*

> *(a) by the registration of a strata plan or strata plan of subdivision under the Strata Schemes Development Act 2015; or*
>
> *(b) by any kind of subdivision under the Community Land Development Act 1989.*

All local environmental plans that include a declaration adopting the provision of the Standard Instrument will immediately be amended to incorporate the above amendment to clause 4.1.

Prior to the Order coming into effect, clause 4.1 was drafted in such a way that the minimum subdivision lot size stipulated in a local environmental plan applied to all subdivisions including strata subdivisions and subdivisions under the *Community Land Development Act 1989* which had the effect of significantly restricting development of land. For example, in the case of *DM & Longbow Pty Ltd v Willoughby City Council* [2017] NSWLEC 1358 (**Longbow**) Court held that the only interpretation of clause 4.1 could be that the minimum lot size only did not apply if there was an **existing** strata plan in respect of the land or subdivision under the Community Land Development Act 1989. Where a new subdivision was proposed, the minimum lot size stipulated in clause 4.1 of the relevant local environmental plan applied. Therefore in that case the strata subdivision of a proposed dual occupancy was refused by the Court because the minimum lot size stipulated by the relevant local environmental plan was 650m2 and each lot was proposed to be 300m2 falling well under the minimum lot size.

Since the Longbow case there has been widespread criticism that whilst the strict interpretation of the previously drafted clause 4.1 may lead to such a result, the planning outcome cannot have been the intent of the legislature.

In response to these concerns the Order was enacted so that the minimum lot size development standard in the Standard Instrument (and all local environmental plans adopting the Standard Instrument) will not apply to a proposed strata plan, strata plan of subdivision under the *Strata Schemes Development Act 2015* or any kind of subdivision under the *Community Land Development Act 1989*. This is a welcomed amendment particularly for developers in industrial zones where the minimum lot size can be as great as 10,000m2 meaning that under the previously drafted clause 4.1 a development of a strata subdivided industrial warehouse would be extremely difficult to obtain approval for.

It is important to note that the amendment does not apply to development applications lodged but not determined before commencement of the Order (20 April 2018). Therefore any development applications lodged before this date that seek approval of a strata subdivision or subdivision under the *Community Land Development Act* must comply with the relevant minimum lot size development standard.

Patrick Holland | *Partner*
Enviromental Planning Law
McCullough Robertson

Lawyers | McCullough Robertson

NEGOTIATING CONTRACTS IN THE CONSTRUCTION INDUSTRY

Dear construction industry, we need to talk about how we are negotiating our contracts. Construction is complex, and so our contracts are too, and yet we're neglecting them. For an industry that is so reliant on the administration of contracts, our approach to contract negotiation is largely unsophisticated.

Let's take a look at the process that is generally the norm in our industry: a consultant or contractor responds to a request for proposal with a number of proposed contract amendments, the principal responds, and responses go back and forth until the parties either reach an agreement or decide to give up. If this is the process that you follow, the below extract from a contract negotiation table probably looks dauntingly familiar.

Clause	33
Contactor's Comments 10/01/08	Definition of Qualifying Cause of Delay to be amended to include Inclement Weather
Principal's Response 23/01/08	Not accepted. Inclement Weather is the Contractor's risk as outlined in the Contract that was provided with the EOI.
Contactor's Response 10/02/18	Not accepted. It is impossible to know how much Inclement Weather will be incurred.

But is this the right process to follow? Given how devastating the consequences of getting it wrong can be, doesn't it make sense to find out? In order to find out, let's check this process against a few of the key concepts of contract negotiation:

Interests: ask don't assume

Negotiation is all about the parties' interests, and the best way to find out what someone's interests truly are is to ask, rather than assume. There's an old anecdote that explains this best: a mother is settling a quarrel between her two daughters. Each daughter needs to use the last orange in the house. It is absolutely unacceptable to either daughter to halve the orange, and so they have reached an impasse. With the wisdom that only a mother can provide, the mother asks the daughters *why* they need the orange, and as it turns out one daughter is making cake and needs the peel, whilst the other is making a fruit salad and needs the orange itself. The lesson: it is far better to ask the other party what their interests are rather than assuming.

Negotiating through a contract negotiation table is of course a terrible way to do this. Using the above example, an open discussion as to why each party is so unwilling to take on the risk of inclement weather is likely to have yielded a far better result. The contractor may have assumed that the principal does not want to take on the risk of inclement weather because they are unwilling to extend the program beyond its current completion date. In reality, the constraint that the client is dealing with could be that it needs to provide purchasers with a settlement date with three months' notice, and is actually quite open to extending the program provided that it can achieve a level of certainty around the completion date. Now that the parties understand each other's interests, a multitude of options for a win-win outcome come to mind: the contractor may feel protected with a sufficient inclement weather allowance in the program, or perhaps the principal may be willing to take on the risk of weather up until the point when it is required to provide purchasers with a settlement date, by which time the building will be watertight anyway.

The most effective way to find out what someone else's interests really are is to ask them in person. A face-to-face meeting provides invaluable benefits in terms of transparency and trust that are not achieved through other methods of communication. Of course, this is not always practical, particularly in the case of consultancy agreements.

In these instances, consider whether a conference call may be a more effective and time-efficient method of negotiation compared to a protracted email chain.

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NEGOTIATING CONTRACTS IN THE CONSTRUCTION INDUSTRY

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The right decisions require the right people

Another key concept of negotiation is that the negotiation should be undertaken by the people who are best placed to impact the outcome. When holding a negotiation meeting, it is best to have the people that are empowered to make the decisions in the room, otherwise agreements need to be deferred while higher approval is sought, which tends to disrupt the flow of negotiation.

Often, contract negotiation is farmed out to legal consultants. Whilst it is very important to seek legal advice throughout the negotiation process, 'lawyers at 10 paces' tend not to be very effective in reaching an agreement. When using a lawyer to complete contract negotiations for you, consider whether you have given them the full picture required to completely understand the unique drivers and constraints of your project. Do the lawyers on either end of the computer know, for example, how likely you are to find latent conditions on your site; the risk appetite of your organisation; or whether time, cost or quality is most important to you in this particular instance?

Always be able to walk away

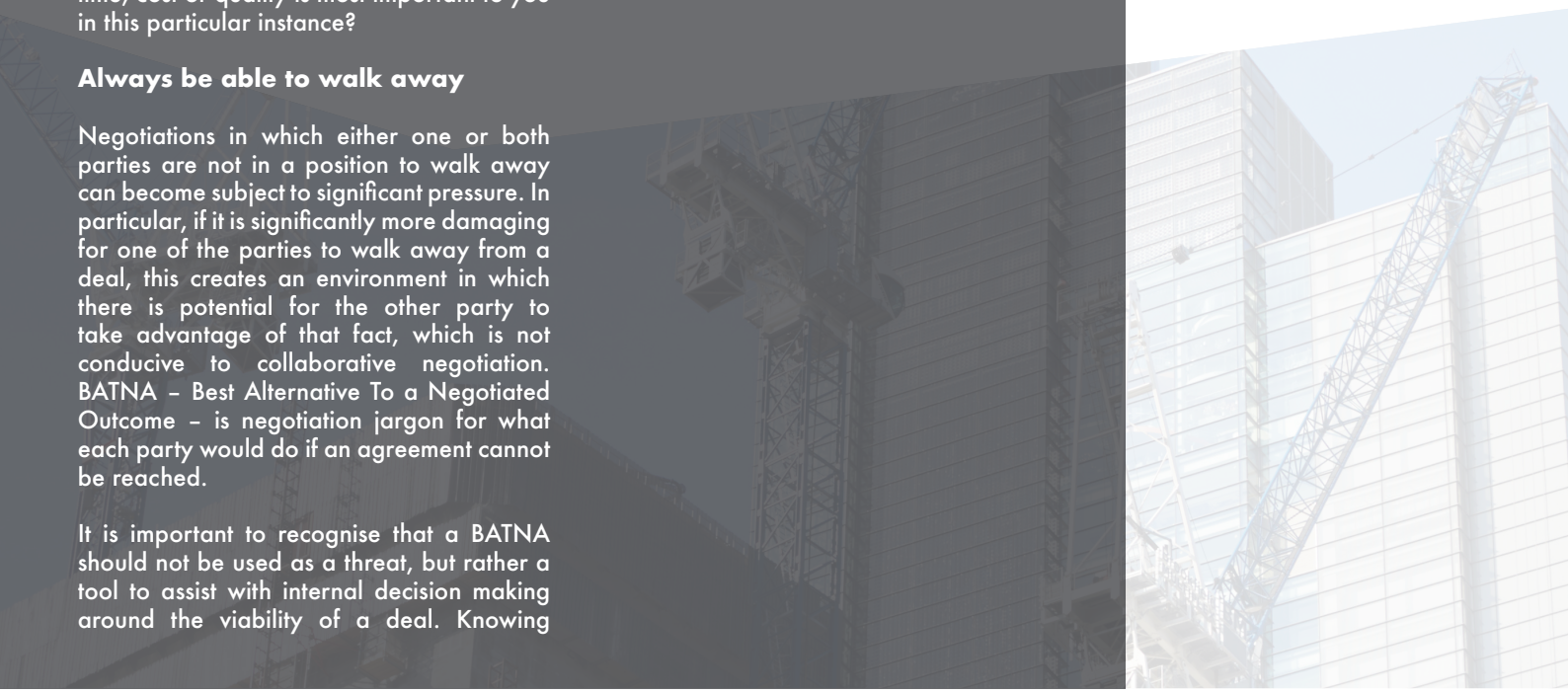
Negotiations in which either one or both parties are not in a position to walk away can become subject to significant pressure. In particular, if it is significantly more damaging for one of the parties to walk away from a deal, this creates an environment in which there is potential for the other party to take advantage of that fact, which is not conducive to collaborative negotiation. BATNA – Best Alternative To a Negotiated Outcome – is negotiation jargon for what each party would do if an agreement cannot be reached.

It is important to recognise that a BATNA should not be used as a threat, but rather a tool to assist with internal decision making around the viability of a deal. Knowing your BATNA is both useful and liberating as it allows you to measure the benchmark against which you may decide whether the deal is still worth pursuing.

All too often in the construction industry, contract negotiation is left until a point in time where it would be extremely damaging for at least one of the parties to walk away from the deal. It is beneficial for both parties to conduct the contract negotiations as early as possible. Recognising that it is not always practical to conduct upfront contract negotiations, the next best option is to structure the procurement process in a manner that allows the parties to walk away from a deal with as little damage as possible, and of course, always be aware of what your BATNA is.

If you have a contract that you are struggling to negotiate, please contact epm Projects for assistance.

Ryan Mooney
Group Executive
epm Projects Pty Ltd



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DAs REMAIN A RISKY PLANNING PATHWAY

One of the clients of EPM Projects ('EPM') has recently been involved in a court case which illustrates the risks to time and costing outcomes inherent in the DA process.

The client, a private school located in a predominantly residential area, lodged a DA with Council for approval to construct a new electricity substation and switchboard, all contained within a modestly sized kiosk-style structure. The substation was to be located near a residential boundary, but the school obtained a report from a consultant confirming that the electro-magnetic radiation field produced by the substation was well within international safety standards and that there would be no adverse health impacts for neighbours.

The site of the substation was one of seven possible sites considered by the school. The other six possible sites presented difficulties of various kinds, which made the other sites unsuitable.

The DA was lodged in October 2016. There were four objections, which raised a number of issues, including the health impacts of the substation on neighbours. Council's planners supported the DA and the matter went before Council's planning committee in May 2017 for determination. At the Council committee meeting, the matter was deferred and the school was ordered to provide a technical assessment of each of the other six possible substations locations and provide alternative location options for the proposed substation.

The school subsequently obtain legal advice that an appeal was likely to succeed. An appeal against a deemed refusal was subsequently lodged with the Land and Environment Court ('LEC') and the LEC eventually made a determination of the matter in January 2018. The LEC found in favour of the school.

This project was of a very modest scale, was quite simple and all the advice received indicated that it met the relevant planning and technical standards. While the school was able eventually to obtain approval for the project, nonetheless, that approval took approximately 18 months, after considerable expenditure of funds.

This case is a good example of the risks of works that are in close proximity to residents in high density areas. In this context, even simple works attract attention.

This case also illustrates the influence of objectors, particularly in applications assessed by Councillors, regardless of the actual technical or other merits of the proposal. For that reason, a DA remains an unpredictable and potentially timely and costly pathway for gaining planning approval. For that reason, EPM always looks for alternatives to the DA planning pathway. EPM has been able to achieve approval for some very significant projects without a DA.

Mark Bolduan
Manager, Urban Planning Group
epm Projects Pty Ltd

epm planning

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Contact Us

www.epmprojects.com.au

PO Box 1034
North Sydney NSW 2059
Level 2, 146 Arthur Street North Sydney
NSW 2060
Ph: (612) 9452 8300
Fax: (612) 9452 8388

Key Contacts

Andrew Graham
CEO
Mobile: 0419 732 021
Email: agraham@epmprojects.com.au

Johan O'Brien
COO
Mobile: 0414 917 904
Email: jobrien@epmprojects.com.au

Stephen Welsh
Group Executive
Mobile: 0417 307 860
Email: swelsh@epmprojects.com.au

Mark Blizard
Group Executive
Mobile: 0438 126 778
Email: mblizard@epmprojects.com.au

Ryan Mooney
Group Executive
Mobile: 0423 835 253
Email: rmooney@epmprojects.com.au

Acknowledgements

The following organisations regularly partner with EPM and contributed to the content of this newsletter.

Lawyers | McCullough Robertson

Patrick Holland - Partner
Environmental Planning Law
McCullough Robertson
Level 16, 55 Hunter Street Sydney NSW 2000
Ph: (02) 9270 8610 **Fax:** (02) 9270 8699
E PHolland@mccullough.com.au
www.mccullough.com.au

HOLDING REDLICH

Helena Golovanoff - Partner
Lawyers
Holding Redlich
Level 65, MLC Centre, 19 Martin Place
Sydney NSW 2000
Ph: (02) 8083 0410 **Fax:** (02) 8083 0399
E helena.golovanoff@holdingredlich.com
www.holdingredlich.com

epm planning

Mark Bolduan
Manager, Urban Planning Group
EPM Planning
Ph: (02) 9452 8300
www.epmprojects.com.au

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