

Article Information

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Merry SoPmas!

With the holidays upcoming, those in the construction industry will no doubt be congregating around the fireplace and at Christmas parties telling stories of Security of Payment (SoP) claims and tragically missed SoP deadlines (Christmas or otherwise). In the spirit of reflection and giving, it is also an apt time to ponder upon interesting questions of service, receipt, the calculation of time and inter state legislative differences.

In this spirit and tradition, we offer a SOPA Christmas Cracker riddle – if a payment claim is served by email on a public holiday or weekend, is the next business day counted as ‘day one’ or ‘day zero’ for the purpose of calculating the deadline for a payment schedule? This is a fun question that often draws an instinctive answer and seemingly, based on recent informal surveys, dividing the adjudication community equally between ‘Day Zeroes’ and ‘Day Ones’.

We also offer, for debate at Christmas lunch, a possible solution to this riddle by the curious case of *Demex*^[1] in which the Queensland Supreme Court, cross-vested with NSW jurisdiction^[2] tackled the question in the context of the NSW SoP legislation.

In *Demex* the Queensland Supreme Court held in the context of a payment claim for **\$5.4M** sent by email on Sunday, 26 September 2021 that was answered by a John Holland payment schedule on Tuesday 12 October 2021 (11 business days later, if Sunday was Day Zero) that

1. the “*the time of receipt of an email is not a matter that can simply be the subject of judicial notice*”;^[3]

2. as the claim was brought in Queensland not NSW, *Demex* (to its great misfortune) could not rely on the rebuttable presumption in s 161(1)(e) the *Evidence Act 1995* (NSW) which provides “*If a document purports to contain a record of an electronic communication ... it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication:*

(a) was sent or made in the form of electronic communication that appears from the document to have been the form by which it was sent or made; and

(b) was sent or made by or on behalf of the person by or on whose behalf it appears from the document to have been sent or made; and

(c) was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made; and

(d) was received at the destination to which it appears from the document to have been sent; and

(e) if it appears from the document that the sending of the communication concluded at a particular time—was received at that destination at that time.

3. the only definitive evidence that the Court could accept was that *Demex*’s payment claim^[4] was ‘received’, within the meaning of s13A of the *Electronic Transactions Act 2000* (NSW),^[5] on Monday 27 September 2021 when it was opened and read by its recipient, that evidence being provided by a representative of John Holland;

4. accordingly Monday 27 September 2021 was the date on which the payment claim was found to have been served, i.e. 'day 0' in the calculation of time for provision of a payment schedule;

5. the 10-business day period for a payment schedule was to be calculated from Tuesday 28 September 2021, expiring on Tuesday 12 October 2021 meaning that John Holland's payment schedule (which was served on Tuesday 12 October 2021) was within time and Demex was not entitled to judgment for the claimed amount under s 15(2)(a)(i) of the NSW SoP Act.

Bearing in mind the near impossible task faced by a claimant like Demex in challenging evidence from a respondent as to an email attaching a payment claim sent on a weekend or public holiday being read a day or more later than when it was sent, the frustration they would have felt on encountering the hard to spot detail that the rebuttable presumption in relation to email service existing in *Uniform Law* jurisdictions^[6] did not operate in Queensland (even under cross-vesting legislation) can't be understated. The result effectively allows the respondent to choose the time of service of a payment claim!

SoP holiday blackouts

Christmas curios aside, each Act makes its "blackout periods" relatively clear. To assist your adjudication navigations these holidays, we set these out below:

- **NSW and ACT:** a Saturday, Sunday or public holiday, or 27 - 31 December
- **VIC:** a Saturday, Sunday or public holiday (in whole/part)
- **QLD:** a Saturday, Sunday, public/bank/special holiday or 22 to 24 December; 27 to 31 December; or 2 to 10 January
- **SA:** a Saturday, Sunday or public holiday, 27 - 31 December or any other day on which there is a Statewide shut-down of the operations of the building and construction industry
- **WA:** a Saturday, Sunday or public holiday; or any 22 December to 10 January
- **TAS:** a Saturday or Sunday, 27 - 31 December or a day specified in (1) section 4 of the *Statutory Holidays Act 2000*; or (2) Part 1 of Schedule 1 to the *Statutory Holidays Act 2000*; or (3) a day specified in Part 1 or 2 of Schedule 2 to the *Statutory Holidays Act 2000*
- **NT:** a Saturday or a Sunday; or a public holiday (for the whole of the day); or 25 December to 7 January

Finally, please note if you are a claimant serving payment claims electronically on a weekend or during the festive season you should be careful to procure evidence of receipt, whereas if you are a respondent, please be careful when calculating their 10-business day allowance for a payment schedule. A jurisdictional bar is an unwanted Christmas present!

Merry Christmas!

^[1] *Demex Pty Ltd v John Holland Pty Ltd* [2022] QSC 259 (**Demex**).

^[2] Demex relying on the cross-vesting jurisdiction under s 9 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld) and section 4(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) applied to the Supreme Court of Queensland for judgment for the amount of a payment claim issued to John Holland under the NSW SoP Act (the *Building and Construction Industry Security of Payment Act 1999* (NSW)) in respect of construction work involving the demolition of a bridge in NSW.

^[3] *Demex* at [133], [137].

^[4] The Court accepted that the email had been *sent* at or about 2:06pm on Saturday 25 September 2021 but Demex lacked evidence of when the email was *received* by John Holland - at 476 [148] (2002) 12 QR 438, Crowley J stated "*However, I do not consider the date and time stamp that appears on a sent email is a matter that can, without more, be presumed to accurately prove the date and time the email was received...*"

^[5] Section 13A provides that electronic communication is received at the time when it becomes capable of retrieval.

^[6] NSW, Victoria, Tasmania, the ACT and Northern Territory all have Uniform Evidence Acts. See, [Evidence Act 1995 \(NSW\)](#), [Evidence Act 2008 \(Vic\)](#), [Evidence Act 2001 \(Tas\)](#), [Evidence Act 2011 \(ACT\)](#) and [Evidence \(National Uniform Legislation\) Act 2011 \(NT\)](#).