Article Information

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Delivery of a USB is not valid service under SOP

The New South Wales Supreme Court recently decided that delivery alone of an adjudication application by a USB stick is not valid service under the Building and Construction Industry Security of Payment Act 1999 (NSW) (Act). Andrew MacGillivray, Senior Associate discusses the case and the key lessons.

Facts

The parties entered into a contract, which resulted in a claimant (**Total**) performing work and seeking payment from the respondent (**Parkview**) for that work, through the provision of a payment claim under the Act. The respondent provided a payment schedule within time, and disputed the full amount of the payment claim. Total then proceeded to adjudication under the Act.

Steps to Adjudication

Total took the following (albeit flawed) steps to adjudication, it:

1. Uploaded a copy of its application (with supporting materials) onto an internet based data storage provider called Hightail, and provided the Authorised Nominating Authority (ANA) with a link to the uploaded documents;
2. Realised that the uploaded material did not contain the correct version of their submissions, and (in an attempt to remedy this) separately uploaded the revised submissions to Hightail later on the same day;
3. Copied the application onto a USB, together with a covering letter and posted it to Parkview; and
4. Sent a hardcopy of its adjudication application by courier to Parkview the following day.

On 9 November 2016, the USB was delivered to Parkview's post box. On 10 November 2016, Parkview received the hardcopy adjudication application. Pursuant to s20(1)(a) of the Act, Parkview had 5 business days in which to provide its adjudication response.

This is where the issue arises:

1. If the USB was valid service under the Act then Parkview's adjudication response would have fallen due no later than 16 November 2016; and
2. If the USB was not valid service, as Parkview received a hardcopy of the application on 10 November 2016, then its response would fall due on 17 November 2016 (being 5 business days from 10 November 2016).

Parkview took the position that Total's adjudication application was served on 10 November 2016 (when it received the hardcopy by courier), and therefore it served its adjudication response (on the ANA and Total) on **17 November 2016.**

The adjudicator then called for the parties to provide written submissions on when the adjudication application was in fact served.

Adjudicator's Decision

The adjudicator determined that Parkview's adjudication response was served out of time. The adjudicator disregarded the entirety of the adjudication response, and awarded to Total approximately 80% of its payment claim value. Parkview filed a summons in the NSW Supreme Court seeking a review of the decision.

Review Decision

The primary consideration of the Court was whether the adjudicator was correct in disregarding Parkview's adjudication response, or whether the adjudicator had fallen into jurisdictional error by failing to have regard to it. Section 17(5) of the Act explicitly provides:

"A copy of an adjudication application must be served on the respondent concerned"

(emphasised added)

The Court determined that the language used in section 17(5), through the words:

1. "**must**" means that service is mandatory, and such service triggers the time limit for a respondent to serve an adjudication response;
2. "**copy**" means that the written words (being the adjudication application) must be communicated to the respondent; and
3. "**an**" (in conjunction with the use of the word "**the**" in section 19(1) of Act, being the adjudication application served on the ANA) means that the written words must be communicated by the claimant to the respondent.

In making its decision, the Court considered section 21 of the *Interpretations Act 1987* (NSW), which states that in any act or instrument "writing" includes a number of visual forms of representing or reproducing words. The Court also applied the well know principle from *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1Qd R 265 being that where documents are uploaded to a site (or through an electronic means that requires a party to take steps to access them), it cannot be said that they have been served until they have been accessed.

Therefore, the Court determined:

"In my opinion, service (that is, delivery) of the USB stick is not to be equated with service of writing stored on it. Additionally, whatever it is that was served by its delivery, it was not in writing within the meaning of s17(5), as affected by s21(1) of the Interpretations Act…delivery of a USB stick will not suffice"

The Court considered that service of a USB requires someone to have compatible software to allow access to the documents contained within. Even with modern day technologies, this cannot be expected that a party will have the software to read the material contained therein.

Lessons learned

The key lesson for claimants and respondents is that delivery alone of a USB stick is not service of a copy in writing for the purposes of section 17(5) of the Act.

This decision also sets out key considerations for claimants, namely:

1. Take care in preparing your adjudication material for service to the ANA (or in QLD to the QBCC);
2. Where achievable, always serve adjudication material in hardcopy; and
3. Take time in serving your application on respondents, through taking an extra day to ensure the material is correct (and identical to what was given to the ANA or QBCC) and can be served in hardcopy, is preferred when compared to the alternative.