

SECURITY OF PAYMENT: SERVICE OF NOTICES

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The service of notices under security of payment legislation is critical. Issues relating to the service of documents have already proven to be a hot spot of contention and controversy. Strict compliance with the time provisions for serving notices (including payment claims and schedules) is essential and parties should be acutely aware that if they are to take advantage of the legislation or properly defend claims, strict proof of service is required.

In this edition, we address:

- How notices may be served.
- When notices are deemed to be served.
- Who may serve and be served with notices.

HOW MAY A NOTICE BE SERVED?

Under the NSW, Victorian and Queensland SOP legislation, notices may be served in the following ways:

- by delivery to the person, personally;
- by lodging during normal office hours at the person's ordinary place of business;
- by post or fax addressed to the person's ordinary place of business; and
- according to a method outlined in the construction contract (part of the proposed amendments to Victorian SOP legislation).

WHEN IS A NOTICE SERVED?

Served When Received

Although some differences exist between the states with respect to service by post or fax, in most instances, a notice will be served, when it is 'received' by the person or entity.

A notice is received when it comes into the hand or possession of, or is delivered or brought to,

the corporation: *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors* [2005] NSWSC 378.

Therefore, where a notice is delivered to a person personally, it will be received when it is handed over to that person.

Likewise, where it is delivered to the ordinary place of business, it will be received, when, for example, it is handed over to the receptionist. There is no requirement that the notice must come to the attention of a particular person within a corporation before it can be received, unless there is a contractual stipulation to the contrary: *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors* [2005] NSWSC 378.

Post or Fax

Victoria

If sent by post, two business days after posting.

If sent by fax, when the fax is received, except where it is received after 4:00pm where it will be considered received on the next business day.

New South Wales

A notice sent by post or fax to the person's ordinary place of business is effectively served when it is received at that place.

Queensland

Service by post is deemed at the time at which the letter would be delivered in the ordinary course of post, unless the contrary can be proven.

Notice Being Served

Victoria

Victoria has specific provisions about service outside of business hours.

New South Wales

Under the New South Wales Act, the recipient does not actually

have to be aware of the fact that it has 'received' a notice.

For example, where a fax arrives outside of business hours, it is deemed to be received on the day it arrives, despite the recipient not seeing it immediately: *Taylor Projects Group Pty Limited v Brick Dept Pty Limited & Ors* [2005] NSWSC 439.

Queensland

In a recent Queensland adjudication, the adjudicator determined that service of a notice by fax occurs only when the document is brought to the attention of the person to whom it is addressed: *G & T Snow Pty Ltd and Gainhall Pty Ltd* [17 June 2005] Application No. 1057859_8.

This decision is in direct conflict with *Taylor*, which the adjudicator does not appear to have taken into account.

Although *Taylor* is not binding in Queensland or Victoria it is highly persuasive. The preferred approach is to assume that actual knowledge of the existence of the notice by the intended recipient is not required before service can be effected.

WHO MAY RECEIVE A NOTICE?

Claimant and Respondent

The NSW, Victorian and Queensland Acts state that a claimant may serve a payment claim on the person who, under the construction contract, is liable to make payment. This person, the respondent, may then serve a payment schedule on the claimant.

Likewise, notices with respect to applications for adjudication and adjudication responses must also be served on the respondent and claimant respectively.

Solicitors

In NSW, the courts have construed strictly the requirement that only the claimant and respondent may serve and be served with notices. Therefore, service by, or on the

solicitors of the claimant or respondent, will be invalid: *Taylor Projects Group Pty Limited v Brick Dept Pty Limited & Ors* [2005] NSWSC 439 and *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903.

However, this narrow approach was distinguished in a recent Queensland adjudication; *Malay Industries Pty Ltd and Appliqué Clothing Alterations* [23 May 2005] Application No. 1057859_4. The adjudicator referred to both *Taylor* and *Emag* in dealing with the service of a payment claim by a solicitor on the claimant and stated that although documents must be served on the actual party to the contract, it was a practical necessity to allow solicitors to serve documents.

Our view is that parties must ensure that they themselves serve notices rather than utilising solicitors.

Superintendents

The relevant Acts state that the contract may provide for a 'way' or 'manner' in which the service of notices may be effected. This appears to refer to the method of service rather than the party who may serve or receive notices.

It is not uncommon for construction contracts to state that the superintendent or administrator may serve or receive notices such as payment claims or payment schedules. The issue is whether this obviates the need to serve documents on the actual parties to the contract.

Although there has been limited judicial discussion of this issue, the cases of *Taylor* and *Emag* suggest that the general principles of agency yield to the strict requirements of service

under the Acts. Therefore, we strongly recommend that prudent parties should ensure that claims/applications are served on the party liable to make payment.

CONCLUSION

- Strict compliance with time and service requirements of the legislation is essential. Effective service is vital for an adjudicator to have jurisdiction to determine any payment claim.
- Proving compliance with time and service requirements means that parties should be vigilant in keeping records of service.
- The preferred method of service (if available) is by way of personal service or by way of fax. However, the fax transmission sheet is only proof of transmission, not of receipt. Ideally, parties should fax and ring to confirm receipt.
- Documents can be deemed served even though the intended recipient is not aware of service. Good administration processes therefore are needed to quickly identify and respond to notices.
- To avoid doubt, parties should ensure that notices under SOP legislation are issued personally rather than through agents such as solicitors or superintendents.