

Article Information

Authors: Ted Williams, Andrew MacGillivray, Denise Burloff
Service: Projects & Construction
Sector: Infrastructure

Answer The Question! This Is Not A Second Bite At The Cherry

Under Australia's various security of payment legislation (SOP Act), an adjudicator is permitted to request further written submissions from either party on specific issues or questions of law, to which each party must be given an opportunity to respond.

Adjudicator's are only permitted to consider written submissions that have been 'duly made' by the parties in support of their payment claim or payment schedule, and to consider submissions not 'duly made' could lead their decision into reviewable error.

What are 'duly made' submissions?

In *John Holland Pty Limited v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19 at [31], Hodgson JA observed that submissions are not 'duly made' (for the purposes of the NSW SOP Act):

1. in an adjudication response, where the reasons for withholding payment were not included in the payment schedule (contrary to s 20(2B) of the NSW SOP Act); and
2. otherwise, where submissions are not made in response to a request by the adjudicator (under s 21(4)(a) of the NSW Act), or a conference called (under s 21(4)(c) of the NSW Act).

In *Broad Construction Services (NSW) Pty Ltd v Vadasz* [2008] NSWSC 1057 at [44], the Court indicated that if an adjudicator considers a submission that is not 'duly made', it could result in a denial of natural justice, thereby making the decision voidable.

Therefore, it is essential that a party's submissions are 'duly made', namely:

1. for a claimant, it's their Payment Claim, Adjudication Application and only submissions made in response to an adjudicator's written request (in QLD this includes a reply under s24B of the Act); and
2. for a respondent, it's their Payment Schedule, Adjudication Response and only submissions made in response to an adjudicator's written request.

Recent application

A similar situation was considered in the recent Victorian decision of *Minesco Pty Ltd v Anderson Sunvast Hong Kong Ltd* [2017] VSC 299.

In *Minesco*, an adjudicator requested further written submissions from the claimant on issues raised by the respondent for the first time in its adjudication response. The claimant provided its written submissions on those two specific issues, but also made submissions on three unrelated issues.

The respondent wrote to the adjudicator requesting it not consider the additional submissions as they were outside the scope of the adjudicator's request (i.e. they were not "duly made"). The adjudicator did not respond to the respondent's request.

The adjudicator found in favour of the claimant and the respondent sought to review the decision on the grounds that it

had been denied natural justice.

Despite Vickery J not being satisfied that the adjudicator had actually taken into account the claimant's unwarranted submissions, his Honour found that nonetheless a breach of natural justice had occurred because there was an *'appearance of justice not being done'*.

Vickery J remarked that a breach of natural justice could have been avoided if the adjudicator had requested further submissions from the respondent or alternatively, advised the parties of its position on the additional submissions.

Failure to do so resulted in the respondent being unsure of whether the adjudicator had read/taken the additional submissions into account or completely disregarded them. As a result, his Honour quashed the decision.

Practical tips

When a request for further submissions is made, both parties should ensure that they only respond to the specific issues within the scope of the adjudicator's request.

Prior to submitting, each party should ensure that their submissions are within the scope of the questions asked by the adjudicator, nothing more and nothing less. Claimants and respondents should not see this as a further opportunity to put their case forward on areas that may have missed or overlooked.

For respondents, this highlights the importance to include all reasons for withholding payment in their payment schedules, as this will significantly reduce the need for further submissions.