

## **Metacorp Australia v. Andeco Construction Group [2010] VSC 199**

*This case concerned a construction contract entered into on 30 May 2008 between the developer plaintiff and the defendant builder. An adjudication determination was made on 7 January 2010, which the plaintiff claimed was void. The plaintiff relied on 4 grounds:*

1. the payment claim was served prematurely, leading to a failure to comply with a “basic and essential requirement of the Act”;
2. service of the payment claim was defective because it was served upon the Superintendent (not the Principal) and served by email;
3. that there had been no failure under Section 18(1)(a)(ii) of the Act because Metacorp had not failed to make a payment by the “due date for payment under the contract”; and
4. there had been a failure to afford procedural fairness (natural justice).

Mr Justice Vickery made the following key findings:

1. Time does not begin to run against a respondent for the purposes of s.15(4) of the Act from the date when a payment claim is physically delivered to it, if it occurs prior to the relevant reference date. Rights under the Act only become enlivened upon the arrival of the relevant reference date, and a payment claim served prior to a reference date is not invalid.
2. S. 14(1) of the Act - that a payment claim is to be served “on the person who, under the construction contract concerned, is or may be liable to make the payment” - is not to operate in a commercial vacuum but needs to be read in practical context of the building industry. The payment claim may be served upon any person who has the actual or ostensible authority of the person (liable to make the payment) and who is to accept service. The terms of the (amended AS2124-1992) contract in this case contemplated that:
  - a. the Superintendent was authorised, not only to issue payment schedules to the builder as agent of the developer (pursuant to cl 42.2), but to receive payment claims delivered by the builder pursuant to cl 42.1, prior to assessing the claims; and
  - b. importantly, pursuant to cl 23 of the contract, the Superintendent was empowered to “give directions and carry out all its other functions under the contract on behalf of and as agent of the Principal and not as independent certifier, assessor or valuer”.
3. The Superintendent was acting as the agent of the developer when he received the payment claim, having its actual or ostensible authority to do so.
4. Clause 7 of the contract did not override the requirement for service of a payment claim as required by Section 14(1) of the Act, when it was read in context of the common law of agency.
5. As to service by email, s. 50 of the Act is facultative, and not mandatory, i.e. “may be given or served”. Accordingly, service provisions under s. 50 are in

addition to and do not limit or exclude the common law or the provisions of any other applicable legislation with respect to service of notices. S. 50 of the Act does not prohibit service by email.

6. The service provisions in cl 7 of the contract were also facultative and not mandatory, i.e. “any notice required to be given to or served upon a party under the contract may be given to or served ...”. In the light of the words of s. 50(1)(e), providing that service may be effected in “any other manner specified in the relevant construction contract”, clause 42.1 was wide enough to allow the builder to deliver to the Superintendent a payment claim by email, in line with common commercial practice as was illustrated on this project: where 14 prior payment claims were served by email on the Superintendent (and were received and assessed).
7. The adjudication was made pursuant on the basis that the developer had failed to pay the whole or any part of the scheduled amount by the due date for payment of the amount (i.e. under s.18(1)(a)(ii) of the Act). Whilst the due date for payment had not, at the time of the adjudication application, been reached the adjudicator nevertheless had jurisdiction conferred upon him by s.18(a)(i) (i.e. the scheduled amount indicated in the payment schedule to be less than the claimed amount indicated in the payment claim). This was sufficient to dispose of this ground. Had the foundation for the jurisdiction of the adjudication sprung from s.18(1)(a)(ii), the developer failed to discharge the evidentiary burden to establish that the pre-condition to payment provided by cl 43(b) of the contract was not satisfied.
8. It was clear that matters raised in the builder’s further submissions to the adjudication response had not appeared in any earlier material supplied to the adjudicator. The developer requested permission to submit a further response in response to the further submissions in received from the builder. The adjudicator did not reply to the request in the developer’s letter and instead proceeded to make his adjudication determination. His Honour held that:
  - a. the issue of agency of the Superintendent was clearly a new issue which had not been previously canvassed in any of the submissions between the parties, and involved new questions and law;
  - b. the issue of agency was relevant to findings made by the adjudicator and germane to his decision;
  - c. the adjudicator’s approach to the request for the opportunity to deliver a further response was misconceived, as it put to one side the rules of procedural fairness which the adjudicator was bound to apply; and
  - d. there was a breach of the rules of procedural fairness.

### **Key Issues**

- A payment claim served before the contract reference date is not invalid. Time runs under the Act from the contract reference date, and not an earlier date if it’s received earlier.
- Service on a party on behalf of the person liable to make a payment under the construction contract may be sufficient service under the Act, as that person may have actual or ostensible authority.
- Email service may be good service, even if the contract does not strictly provide for it.
- Always respond, or make clear your right to respond, to any new issue arising in an adjudication.

**For more information**

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