

# Construction Case note

19 April 2011

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## Where should claims be served under Security for Payment legislation?

**The recent New South Wales Court of Appeal decision in *Downer EDI Works Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2011] NSWCA 78 demonstrates how large organisations with multiple offices should be ever diligent about claims served under the *Building and Construction Industry Security of Payment Act 1999 (NSW) (Act)* because payment claims may validly be served on any one of their offices and not necessarily to the principal place of business or a site office.**

Downer EDI Works Pty Ltd (**Downer**) and Parsons Brinckerhoff Australia Pty Ltd (**Parsons**) were parties to a construction contract in respect of works performed by Parsons at a site in Glendale, New South Wales.

Parsons served Downer with a payment claim by post and by fax. The claim was served at two locations: at Downer's registered office in Melbourne and at Downer's site office in Broadmeadow. Parsons did not serve the payment claim at the Downer site office in Glendale, from which Downer administered the contract on a day to day basis.

Downer failed to lodge a payment schedule in time. Parsons commenced court proceedings seeking judgment in the amount of the payment claim. It was successful.

On appeal, Downer argued that service pursuant to section 31 of the Act was not effected as its Melbourne and Broadmeadow offices were not "ordinary places of business" within the meaning of the Act.

### What the Act says

Section 31 of the Act stipulates that the service of a notice, including a payment claim, occurs in the following ways:

- by delivering it to the person personally, or
- by lodging it during normal office hours at the person's ordinary place of business, or
- by sending it by post or facsimile addressed to the person's ordinary place of business, or
- in such other manner as may be prescribed by the regulations for the purposes of this section, or
- in such other manner as may be provided under the construction contract concerned.

## Ordinary place of business

Parsons had been interacting with the Melbourne and Broadmeadow offices throughout the course of the contract and because much of the correspondence between Parsons and Downer had taken place via email, no facsimile number or physical address had been used.

Downer argued that "ordinary place of business" should be construed as meaning the place of business having the "closest connection to the works the subject of the relevant construction contract" and if the party had multiple offices, s 31(1)(c) should be read down to that effect.

Because Parsons did not serve the payment claim on the Downer site office at Glendale, it argued, the payment claim had not been served in accordance with the Act and was invalid.

Downer's argument was rejected. The Court of Appeal (Giles JA, with whom Hodgson JA and Sackville AJA, agreed) upheld the decision of the trial judge that Parsons' payment claim was served in accordance with s 31 of the Act.

The Court held that s 31 did not confine a person's "ordinary place of business" to the address of the place of business with the closest connection with the relevant works and that to introduce a "closest connection" test would bring greater uncertainty to the regime.

It considered that the concept of "ordinary place of business" was widely used and should not be given a more narrow meaning except in very limited circumstances, such as where, for example, a company operated a construction business and a retail clothing business from separate offices. Giles JA reasoned that in such a case, it may be that service on the office responsible for the clothing business would not satisfy s 31 of the Act. However, his Honour was not required to decide that point for the purposes of this case and expressly refused to do so.

## Remember

Companies with multiple offices should have systems in place to channel communications wherever they may be received, to the correct office and employee in a timely manner.

This decision should not operate to make claimants careless about the address for service of payment claims. To obtain certainty, payment claims should be lodged at the address specified in the relevant contract. Where the contract does not specify a location, the payment claim should at least be served on the "principal place of business" of the other party, as identified through an ASIC search.

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