

How to:

BUILD A SOPA CLAIM AND A RESPONSE TO ONE

Practising in building and construction law, lawyers need to be well versed in the numerous courts and tribunals. Each of those venues have characteristics which require the lawyer to adjust their approach to suit the forum. To give their client the best chance of success, lawyers should present their client's case in a manner best suited to the decision-maker who will determine the matter. This is particularly the case in construction law disputes where arbitrators, while having some legal training, are not lawyers. As explained below, for the claimant in particular, there is really no ability to prepare a claim in a manner best suited to a particular decision-maker under the SOPA rapid adjudication process.

SOPA and Alternative Dispute Resolution

When SOPA legislation found its way to Australia in the 1990s, it became a new forum that lawyers had to adjust to. Arguably, there is no single feature of SOPA that is unique. Rather, it is the combination of features that make it unique. For example, through experience of bespoke contractual ADR processes (particularly expert determination), construction lawyers should have been used to the concept of binding or non-binding rapid dispute determination when SOPA was introduced. Of course, rapid non-binding adjudication is a hallmark of SOPA.



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Non-Lawyer Decision Makers

Similarly, it is commonplace in contractual ADR to have non-lawyers as the decision-makers as many (in fact most) adjudicators are not lawyers as is often the case under SOPA regimes. However, well drafted ADR clauses in building and construction contracts (as well as other contracts like leases and business sale agreements) commonly prescribe the qualification(s) required for decision-makers for certain types of disputes. Furthermore, most ADR processes and all court processes provide for face-to-face communication with the decision-maker – while Australian SOPA laws do not.

Knowing your adjudicators

The ability to interact with a decision-maker allows the parties to gauge how their claim or response ought to be tailored for the particular decision-maker – especially if neither the party or their lawyer has dealt with the decision-maker before. Indeed, in most State Supreme Courts and the Federal Court, a docket judge is normally appointed who will manage the dispute through to trial and ultimately hear the matter.

Through this process, lawyers should (to the extent that they are not familiar with the Judge beforehand) get an understanding of how to present their case tailored to that Judge. However, the design of the SOPA laws is such that, for the claimant, you will not know who the adjudicator is until after the claim is filed.

So, no matter how well you know the adjudicator ultimately appointed (or the body of registered adjudicators generally),

there is no opportunity to adapt your claim to suit that adjudicator. For example, while appointers try to allocate adjudicators best capable of determining the relevant dispute, their capacity to do so can be limited by adjudicator availability, especially at peak times such as the holiday period (although, following amendments to the Act to facilitate public holidays, this is less prevalent in Western Australia now than it was when the Act was first introduced). Therefore, for example, you might end up with an architect dealing with a variation claim arising from the disputed moisture content of earthworks associated with rail roadworks.



The fact that adjudications are determined in a short time frame should guide the style and structure of applications and replies.

Developing a claim

So how do you develop a claim in these circumstances?

Our approach to is to:

- make all claims as clear as possible;
- focus on the end-user by putting yourself in their position and, as you prepare the claim, think how easy it is to read;
- use every aid possible, including drawings, photographs, etc.;



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- have the claim professionally printed, paginated and tabulated (if possible and financially viable); and
- remember that fine details are important.

It is also important to remember that most adjudicators have other jobs so, even if they come from the relevant area of the building and construction industry, they may have no more than 5 to 10 hours to read your claim. Therefore, make your claim clear, concise and compelling to dramatically improve your chances of success.



Adjudicators are often pressed for time so make their life easier.

The respondent, on the other hand, gets the slight advantage of knowing who the adjudicator is – so, if the respondent is familiar with the adjudicator, they can respond in a way that gives them the best chance of success. Even if they do not know the adjudicator, they will at least know what qualifications and experience the adjudicator has and can

again craft their response accordingly. Of course, they have less time to prepare their response than the claimant does for the initial claim – but going second remains a slight advantage for the respondent. Other than that advantage, respondents should follow the same rules in preparing their response: make it clear, concise and compelling. However, in addition to this, because there is limited time available to the respondent, prepare the response early and fully resource the team preparing it.

Simplicity is key

The idea of simplicity should flow to every aspect of the response. Documents should be carefully organised. Again, put yourself in the position of the adjudicator and imagine how he or she might read the claim documents and set about writing their determination.

There are many nuances in the SOPA process and if you need help to get you through the process – whether you seek limited legal or strategic advice or alternatively seek experienced lawyers to prepare your whole claim or response, please contact David Marsh at dmarsh@solbros.com.au.

Examples of the matters we have been involved in include the first case in Western Australia in which a determination was successfully challenged, Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd [2014] WASC 40, and for enforcement of determinations NRW Pty Ltd v Samsung C & T Corporation [2015] WASC 369.



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SPEAK WITH OUR TEAM OF EXPERTS



David Marsh

Partner Litigation

dmarsh@solbros.com.au



Jim Zeakis

Associate

jzeakis@solbros.com.au



Aleksandar Vuksic

Solicitor

avuksic@solbros.com.au



Maha Abweh

Solicitor

mabweh@solbros.com.au

CONTACT US

 (618) 9282 5888

 contact@solbros.com.au

 Monday - Friday 8:30am to 5:00pm

 Level 15, 197 St Georges Terrace, Perth, WA 6000

