

Mr Stuart J Wood



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The Research Director
Transport, Housing and Local Government Committee
Parliament House
George Street
Brisbane Qld 4000

By email: thlgc@parliament.qld.gov.au

**Subject: Call for Submissions - Building and Construction Industry
Payments Bill 2014**

The purpose of this letter is to express my concern at the adoption by the Queensland Government of certain of the recommendations made by Mr Andrew Wallace in his discussion paper; "Payment Dispute Resolution in the Queensland Building and Construction Industry".

I am an adjudicator registered under the Building and Construction Industry Payments Act 2004 (Qld) and am accredited as an adjudicator in New South Wales and the Australian Capital Territory. I am also a former senior public servant. I have over thirty six years experience in the building and construction industry having worked for years as a civil engineer and project manager at the coal-face of major government infrastructure projects, then later in the provision of procurement systems, the development of government legislation, policy and practice requirements for the industry, and commercial dispute resolution including for security of payment.

You would be aware that over ten years ago, the NSW Government took the crucial step of introducing and implementing security of payment legislation. This was carried out in an effort to change the culture of the building and construction industry, particularly regarding payment for work completed. All other States of Australia, including Queensland, have since followed by implementing similar legislation.

It was a proven fact that there was a great imbalance in the power of the contracting parties in the building and construction industry, particularly when it came to the resolution of disputed payment claims. The power lay with the head contractor to the detriment of their subcontractors and suppliers. These subcontractors and suppliers are usually small enterprises, heavily reliant on the certainty of prompt payment for work carried out. In the 1990's and before, there was a high level of contractual disputation in the industry and, accompanied by the cash flow problem, a relatively high rate of subcontractor and supplier insolvency in the industry nationally. This imbalance has been addressed to a significant extent by way of the implementation of security of payment legislation.

While I support the Queensland Government's decision to accept the majority of recommendations made in Mr Wallace's report, to continue to improve security of payment and address the contractor/subcontractor imbalance, there are two areas of concern to me.

My first concern is with the proposal to allow, under certain circumstances, for extended times for a Respondent to respond to a payment claim and to respond to an

adjudication application, and for a Respondent to include in an adjudication response new reasons for not paying. Other than a passing reference to “industry concerns”, I am unable to find where Mr Wallace provides substantial substantiated objective evidence to support the need for these proposed changes. I believe that the changes will impact on the balance needed in the arrangements between the contracting parties mentioned above. Furthermore, it is apparent that by extending the times for the Respondent’s submissions, and allowing for the adjudication response to be grossly amplified, I believe that the direct costs of the adjudication process are likely to increase by between 10% and 25%.

My second and greatest concern is however with certain of the recommendations made regarding the Authorised Nominating Authorities (the “ANA’s”). It is my opinion that these recommendations are not based on objective evidence derived from sufficient whole of industry research and/or careful and systematic analysis. For these reasons, I believe that certain of the conclusions and recommendations are flawed.

A review of Mr Wallace’s paper reveals that the review is not based on an appraisal of accurate data and statistics available from the Registrar (or from other State Governments) in order to reach the conclusions and recommendations made regarding the ANA’s. Furthermore, the conclusions and recommendations were apparently not tested in a systematic, open or transparent manner before the report was published. It should also be noted that Mr Wallace did not actually recommend the abolition of ANA’s. This is apparently a conclusion reached by the Adjudication Registrar. It is not apparent to me that there is any clear, substantiated basis for such a conclusion. The result of adopting the recommendations is that the Bill now before Parliament abolishes Authorised Nominating Authorities (ANA’s) and empowers the Adjudication Registrar to appoint adjudicators.

Contrary to the above mentioned recommendations, I believe that fundamental to the success of correcting the imbalance in the building and construction industry payment regime are the functions and services provided to the industry by the ANA’s. In my experience, the ANA’s provide many valuable services in addition to the legislated duty of appointing adjudicators. Interestingly, Mr Wallace identified some of these additional services or “duties” at page 129 of his report where he said: “Other ANA duties include:

1. Accept adjudication applications from Claimants;
2. Provide advice and assistance to parties regarding the adjudication process;
3. Issue Adjudication Certificates to Claimants upon request; and
4. Where approved to do so by the Adjudication Registrar, conduct courses for adjudicators in the prescribed adjudication qualification and upon successful completion, issue a Certificate in Adjudication to the adjudicator.”

In addition to the above, most ANA’s provide website and other information to industry participants which promote the legislation and also provide extensive administrative resources to adjudicators including:

1. Acting as an effective interface between adjudicators and parties;
2. Providing a Queensland address for service of documents;
3. Responding to party queries re the process and what they need to do next;
4. Communicate with parties any adjudicator requests e.g. requests for further submissions;
5. Arrange conferences, if required;
6. Receive adjudicator decisions;
7. Collect the fees;
8. Provide the parties with the decision;
9. Forward decision to Registrar; and

10. Provide adjudicator with slip rule requests.

Beyond these functions and services, some of the ANA's also promote the principles and practices of security of payment by providing forums for discussion, conferences, publications, encouraging research, and making submissions to government for improved legislation, based on their day to day contact and experience with the industry, government and real time operation of the legislation.

Governments generally recognise that there are many functions best carried out by the private sector for reasons of efficiency and effectiveness. While governments may provide a framework within which the industry is to operate, including appropriate legislation, policies, procurement systems and even the provision of management services, it is the private sector that largely does the work of designing, building and constructing buildings and infrastructure in Australia. It was with this in mind that the ANA's were established under legislation to enable the above mentioned functions and services to be provided by the private sector (the ANA's), largely for the private sector, and funded by the users of the legislation.

I agree that for security of payment legislation to succeed there must be a governance structure, an operating framework and requisite standards for ANA's and adjudicators developed, maintained and regularly reviewed and improved by government. I believe the governance structure, operating framework and standards are all essential to ensure that the highest appropriate standards are established, properly monitored and met, the highest ethical principles are adopted, and the system is fair and transparent. However, the system for security of payment in the building and construction industry in Australia was originally meant to be, and should continue to be, provided within the above mentioned framework without adding an additional financial burden on the tax paying community at large. It is extremely difficult to see how this key objective can be achieved without the ANA's.

I therefore request that the Queensland Government please reconsider its decision to abolish the ANA's. As pointed out above, the ANA's fulfil many valuable functions for industry participants and adjudicators. I also ask that the Government please reconsider the changes being made that are likely to favour Respondents in the making of submissions.

I look forward to receiving your Committee's consideration of the above proposal. Should you wish to discuss anything in this letter please do not hesitate to contact me

Yours sincerely


Stuart J Wood
