

Max Tonkin

11 June 2014

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

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

Dear Research Director

**Call for submissions - Building and Construction Industry Payments Amendment Bill 2014**

I am an adjudicator registered under the Building and Construction Industry Payments Act 2004 ("the Act"). I have completed many adjudication applications under the Act including claims up to \$75 million.

I support the government's decision to accept most of the recommendations made in the "Discussion Paper – Payment dispute resolution in the Queensland building and construction industry" by Andrew Wallace ("the Wallace report"). In particular, I support the elements of the Building and Construction Industry Payments Amendment Bill 2014 ("the Bill") that is now before Parliament relating to complex claims. These will result in positive benefits for the building and construction industry overall.

The Bill also gives the Adjudication Registrar power to appoint adjudicators, a function presently provided by Authorised Nominating Authorities (ANAs). This is consistent with recommendations 17 and 18 in the Wallace report. However the Bill goes much further than recommendations 17 and 18. The Bill removes all references to ANAs. The Wallace report does not recommend this.

At page 129, the Wallace report identifies a number of valuable statutory functions that ANAs currently provide in addition to the appointment of adjudicators. Adjudicate Today, which is the ANA I have been associated with since commencement of the Act in 2004, has developed systems and expertise to provide many more services than those identified in the Wallace report. Adjudicate Today:

- a. Maintains an interactive website which provides comprehensive information about the Act as well as process flow charts and templates.
- b. Provides skilled staff to advise and assist claimants and respondents in real time regarding the adjudication process.
- c. Provides a point of contact between the parties and an adjudicator to ensure communications are kept at "arms length".
- d. Maintains physical and electronic addresses for receipt of applications, responses and further written submissions, including receipt after hours in hard copy, by fax, by email and by lockbox for large electronic files.

- e. Formally records the date of receipt of applications, responses and further submissions.
- f. Ensures adjudicators review real and perceived conflicts of interest before appointment.
- g. Refers applications involving small claims to adjudicators on a fixed fee basis resulting in significant savings to the parties involved.
- h. Prepares and issues Adjudication Certificates if requested.
- i. Provides on-going professional development for adjudicators.
- j. Facilitates a collegiate system in which senior adjudicators provide on-going advice and guidance to less experienced adjudicators where required.
- k. After decisions have been released, facilitates peer review of adjudication decisions by members of the competency panel, independently of the ANA, to continuously improve adjudicators' skills and competencies.
- l. Monitors skills, knowledge and competencies of registered adjudicators so that adjudication applications can be referred to the most appropriate person.
- m. Addresses complaints made against an adjudicator and advises the Registrar of the following:
  - i. how the complaint will be investigated;
  - ii. the findings of the investigation; and
  - iii. any outcomes or actions from the findings of the investigation.
- n. Notifies the Register of any court proceedings such seeking to quash an adjudication application.
- o. Upon release of an adjudication decision to the parties, provides a copy to the Registrar to be uploaded to the Commission web site.
- p. Undertakes industry seminars to inform industry participants about the Act.

I understand the Registrar does not intend to provide the services currently provided by ANAs. I am concerned that if ANAs lose their statutory role, these valuable services will cease altogether and this will be to the detriment of the building and construction industry.

The Bill provides for the Registrar to receive adjudication applications and appoint adjudicators. To do this, I understand the Registrar will establish a panel of active adjudicators with details, provided by individual adjudicators, of each adjudicator's skills, knowledge and experience. However, this approach means the Registrar will not have the benefit of ten years of experience and data currently held by ANAs about individual adjudicators. There will be a real risk of adjudicators being appointed without the necessary skills, knowledge and experience to deal with the issues involved in particular matters.

The Bill provides for the Registrar to receive adjudication applications. This is an administrative function presently performed by ANAs, including receipt in hard copy and after hours. I understand the Registrar intends to only receive applications in electronic form by fax or email. Limiting applications in this way will be detrimental to contractors and subcontractors who have difficulty providing submissions electronically. It will also create problems for claimants with complex matters, where applications include extremely large files. Claimants will have to convert these large files to an electronic form and the Registrar will have to develop and manage a reliable electronic system capable of receiving such files and recording time of receipt.

The Bill provides for the Registrar to issue Adjudication Certificates if requested. This is a purely administrative role that is presently being performed by ANAs. There seems to be no benefit to industry to transfer this function to government.

If ANAs cease to operate, and if the Registrar intends only to provide a very limited range of services, adjudicators will be obliged to communicate directly with the parties. Communication will no longer be kept at "arms length". Individual adjudicators will have to develop their own systems for document receipt and handling. Services provided to industry will be variable at best. The approach will lead to increased levels of complaints, which will be directed, not to ANAs, but to the Registrar and/or the Commission and/or the Minister.

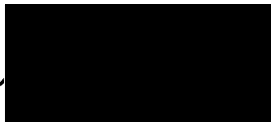
There is no need to introduce such drastic and detrimental changes to the operation of the Act. Recommendations 17 and 18 of the Wallace report are to discontinue the appointment of adjudicators by ANAs and to hand this function only over to the Registrar. Recommendations 17 and 18 can be implemented without losing the very real benefit that the industry receives from the services currently provided by ANAs.

The Bill can, and I submit should, be amended so that ANAs continue all of their statutory functions except appointment of adjudicators to specific matters. ANAs should retain the administrative role of receiving applications. Instead of appointing adjudicators to specific matters as they do now, ANAs can provide details of the application to the Registrar together with a list of available, active adjudicators with appropriate skills, knowledge and experience and with no conflict of interest. The Registrar can then select an adjudicator from the list provided. The Registrar should be empowered to specify a minimum number of adjudicators to be included in a list.

This approach, it is submitted, would be entirely in keeping with recommendations 17 and 18 in the Wallace report. It has the advantage of maintaining the very valuable services provided to the building and construction industry by ANAs.

Please do not hesitate to get in touch with the undersigned if any further information is required.

Yours faithfully



Max Tonkin

