

13th June 2014

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

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

Dear Sir/Madam,

Building and Construction Industry Payments Act Amendment Bill 2014 – Committee Request for Submissions.

We refer to the above and make the following submissions:

Generally:

ABC DRS is an Authorised Nominating Authority (ANA) under the Building and Construction Industry Payments Act 2004 (the Act) and makes these submissions from an informed perspective, in that its staff have administered the adjudication process in all jurisdictions within Australia for ABC DRS for six months and for another ANA (RICS Dispute Resolution Service) for nine years until mid-2013.

ABC DRS notes that the committee did not specifically request ABC DRS to make submissions and it appears such requests by the committee were limited to some stakeholders only. ABC DRS submits that the wider industry community has not been made aware of its ability to make submissions to the committee regarding the proposed changes.

Security of payment legislation has been enacted throughout Australia resulting in eight disparate pieces of legislation. The single common factor in all legislation is that adjudicators are appointed by independent nominating bodies.

Whilst there are two distinct security of payment models in operation within Australia, the current legislation in Queensland, New South Wales, Tasmania, South Australia and the ACT are closely aligned. The proposed amendment will break the alignment with these jurisdictions thus creating even more confusion within the industry nationally.

ABC DRS submits that the proposed amendments do nothing to enhance the objects of the Act, rather they place claimants, particularly small to medium enterprises, at a considerable disadvantage.

ABC DRS submits that the proposed amendments to the Act, following the Wallace Report, lack appropriate consideration, due diligence and transparency and consequently should not be endorsed.

These submissions are restricted to the following issues only:

1. Appointment of adjudicators and the adjudication process

2. Standard and Complex claim classifications and corresponding time frames
3. New reasons for withholding payment in the Adjudication Response
4. Providing copies of submissions to the parties

Appointment of adjudicators and the adjudication process:

ABC DRS has written to the Minister regarding the proposal to abolish the ANAs. A copy of that letter is attached hereto for reference.

In essence, the Wallace Report did not recommend the abolishing of ANAs; rather recommendations 17 & 18 of the report are limited to removing the appointment of adjudicators from the ANAs in favour of the Adjudication Registry performing the function of appointing adjudicators. The Bill goes much further than the recommendations of the Wallace Report.

The Queensland government has not demonstrated that due diligence has been applied to the recommendations made in the Wallace Report, nor that all potential options have been considered in arriving at the proposals made in the Bill. We believe that the proposals in respect of abolishing the ANAs are ill considered and a knee jerk reaction to unsubstantiated criticism of the ANAs.

Removing the ANAs from the adjudication process removes the competitive element of ANA's and adjudicator's fees. It is worth noting that adjudication fees have remained almost static since inception of the Act in 2004. We submit that under the proposed amendments the cost of adjudication to the parties will increase for want of competition in the market, notwithstanding the increased adjudication time frames.

The proposed amendments to the Act envisage the Adjudication Registry, itself a government agency, performing the function of appointing adjudicators, notwithstanding that the Queensland government is a significant developer within the industry and accordingly susceptible to claims under the Act being made against it as 'the respondent' under construction contracts. Arguably this creates both a very real and perceived conflict of interest in the appointment of adjudicators to disputes involving the Queensland government.

ABC DRS submits that the committee should refrain from endorsing the abolition of the ANAs in favour of the current arrangement until such time as the Queensland government has undertaken a comprehensive open and transparent review of the alternative options.

Standard and Complex claim classifications and corresponding time frames:

The proposed amendments to the Act are, in our opinion, overly complicated, ill-considered and as a result will simply cause further confusion within what is an already confused marketplace. The Act is already extremely difficult to comprehend for a large portion of the industry, not necessarily restricted to the small subcontractor. The consequences of further complicating the legislation will inevitably lead to an increase in invalid adjudication applications, increased litigation, increased cost of adjudication and eventually a loss of confidence in the legislation by stakeholders.

We submit that the rationale behind the simple / complex classification and their corresponding time frames lack merit and is not adequately defined in the proposed amendments. The complexity of claims is not necessarily linked to either the value of the claim or the basis of the claim, as proposed by the amendments.

In our view, the necessity to categorise claims is unnecessary. The Act should be amended to allow the respondent a period of 10 business days in which it may make its adjudication response, which in our view, would be a sufficient period for most if not all respondents.

ABC DRS submits that the committee should refrain from endorsing the classification of claims and their corresponding time frames until a rational approach has been considered and established.

For clarification, ABC DRS supports the proposed increased period of 10 business days in which the respondent may make its adjudication response for 'standard' claims.

New reasons for withholding payment in the Adjudication Response:

The proposed amendments allow the respondent the opportunity to introduce new reasons for withholding payment for the first time in its adjudication response where the claim is a 'complex' claim.

This is the single most 'respondent friendly' of the proposed amendments, and closely follows the adjudication regime under the Victorian security of payment legislation where demonstrably it works against claimants.

The consequences of allowing this proposal to be implemented will result in increased adjudication time and costs and create an imbalance in favour of the respondent.

The Act works on a default mechanism, whereby if a party fails to do something within a prescribed time, it loses its entitlement. In our opinion, the object of the Act is not benefited by giving the respondent a second opportunity to provide reasons for withholding payment, albeit limited to 'complex' claims.

ABC DRS submits that there is no justification for the proposed amendment and the committee should refrain from endorsing the proposal.

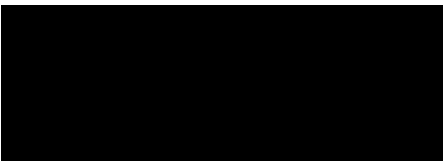
Providing copies of submissions to the parties:

The proposed amendments attempt to impose a maximum period by which one party must provide the other party with a copy of its submissions (S24A(8) & S24B(6)), however there is no remedy for a party's failure to adhere to these requirements.

In our opinion, the proposed clauses should be amended to provide that where a party fails to provide the other party with a copy of its submission within the prescribed time, the submission to the adjudicator is taken not to have been properly made and the adjudicator therefore cannot consider that submission.

We would welcome the opportunity to discuss this matter further.

Yours faithfully,



Russell Welsh : Director
Australian Building & Construction Dispute Resolution Service Pty Ltd.