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The Research Director  
Transport, Housing and Local Government Committee  
Parliament House  
George Street  
Brisbane QLD 4000  
Email: [thlgc@parliament.qld.gov.au](mailto:thlgc@parliament.qld.gov.au)

SYDNEY / TASMANIA / CANBERRA / SOUTH  
AUSTRALIA  
PO Box 764  
Sutherland NSW 1499

BRISBANE QLD  
PO Box 1843  
Milton QLD 4064

MELBOURNE VIC  
Asian Pacific Business Centre  
Level 1, 1 Queens Road  
Melbourne VIC 3004

Phone: 1300 722 624

Fax: 1300 722 924

Email: [REDACTED]

Email: [REDACTED]

Website: [www.solutionscentre.com.au](http://www.solutionscentre.com.au)

**RE: Building & Construction Industry Payments Amendment Bill 2014**

Submission of Robyn Hillman – Director, Australian Solutions Centre Pty Ltd

The Committee Inquiry Overview addresses the following terms of reference:

- Appointment of Adjudicators and the Adjudication Process – establishes a single adjudication registry within the Queensland Building and Construction Commission to monitor performance and appoint adjudicators based on skills, knowledge and experience.
- Amendment of Timeframes for Claimants and Respondents – introduces a dual model regime to ensure a fairer system to address complex claims.
- Provision of Additional Information – for complex claims, the respondent will be able to include in its adjudication response all relevant reasons for withholding payment, whether or not these matters were raised in the payment schedule.

Our submission is in reply to the first term of reference, the Appointment of Adjudicators and the Adjudication process.

**Facts**

In establishing a single adjudication registry within the QBCC, authorized nominating authorities (ANAs) will be abolished.

ANAs were invited to attend a meeting with Michael Chesterman (Adjudication Registrar) and Steve Griffin (QBCC Commissioner) 8<sup>th</sup> April 2014. At that meeting the ANAs were told, amongst other things:

*'The reforms will be outlined in this discussion and the official announcement will be made tomorrow;*

*There are 2 issues that will be discussed today and the first is that the appointment process of adjudicators will become within the QBCC from 1<sup>st</sup> September 2014, **therefore there will be no ANAs in Queensland after 1<sup>st</sup> September 2014;***

*Every adjudicator will still be registered on 1<sup>st</sup> September;*

*The adjudicator will have the opportunity to be directly served with documents or appoint a commercial service agent to do what the ANAs will no longer be doing for them.'*

This is in complete contradiction to the first reading of the Bill (extract as follows):

*'The bill changes the role of ANAs, which will no longer appoint adjudicators. This removes the perception of conflicts of interest in the appointment process raised in response to the discussion paper. **ANAs will continue to offer their services as a document service agent.'***

The Final Report to the Discussion Paper – Payment dispute resolution in the Queensland building and construction industry by Andrew Wallace did not recommend the abolishment of ANAs. The recommendations made are:

17. The current process of authorized nominating authorities appointing adjudicators is not appropriate and should be discontinued as soon as is practicable;
18. The power to appoint adjudicators should be restricted to the Adjudication Registry.

Government has thus made the decision that the best way to implement the recommendations is to abolish ANAs. On what basis has Government decided that this is the best outcome available? It appears Government has not considered its accountability if the Amendment Bill is passed.

## Opinions

There are other avenues to comply with the Wallace recommendations 17 and 18 above as follows.

- Undertake a thorough review of the current system of appointing adjudicators. If there are occurrences happening of 'adjudicator shopping', 'claimant friendly ANAs', coercion between ANAs and adjudicators and coercion between adjudicators to amend decisions the Registrar can invoke the 'Show Cause' option. Section 78 of the Act provides the following:
  - (1) The Registrar must give the registrant a notice under this section (a **show cause notice**).
  - (2) The show cause notice must state –
    - (a) The action (the **proposed action**) the registrar proposes taking under this division; and
    - (b) The grounds for the proposed action; and
    - (c) An outline of the facts and circumstances forming the basis for the grounds; and
    - (d) If the proposed action is suspension of the registration – the proposed suspension period; and
    - (e) An invitation to the registrant to show within a stated period (the **show cause period**) why the proposed action should not be taken.
- Ascertain the strengths and weaknesses, including potential liability by abolishing the ANAs. ANAs are registered for a period of three (3) years and it is my understanding that most ANAs are registered until August 2016.
- Review the submissions made in the final report and ascertain the strengths and weaknesses for maintaining the status quo or deciding a 'best practice' alternative. A 'best practice' alternative is the ANAs will continue to receive applications as they do now, however the Registrar would be responsible for nominating the adjudicator. Such as, once an ANA receives an application a form is completed stating the parties, brief details of the dispute and any other matters as required by the Registrar. The form together with details of 3 suitable adjudicators would be submitted to the Registrar and the Registrar would nominate the adjudicator.

ANAs, apart from appointing adjudicators, provide the industry with a wealth of information and assistance. Once the ANAs cease who will provide these services?

### **Arguments**

The reforms are based solely on the Final Report. In this context, the Government is relying on one persons' perspective. I draw this conclusion based on the following statements made by Mr. Wallace:

- *'The submissions are untested, unsubstantiated assertions that are largely based on hearsay evidence;*
- *The review did not receive evidence under other;*
- *The review does not have any powers of compulsion nor were the providers of evidence thoroughly tested,*
- *The information provided remains nothing more than untested allegations;*
- *It would be inappropriate of me to make any adverse comments or findings against a party without them having had the opportunity to be heard;*
- *Without the benefit of evidence received under oath or the benefit of considering the credit of witnesses, the untested allegations remain just that;*
- *Putting aside the untested allegations a lay observer might reasonably apprehend that an adjudicator might not bring an impartial and unprejudiced mind to the resolution of questions they are called upon to decide.'*

During the ANA meeting with the Adjudication Registrar and the QBCC Commissioner they were unable to cite any incidences whereby an ANA had acted inappropriately.

Four months prior to the Ministers media release and the ANA meeting another organisation (ABC DRS) received authorization to be an ANA, on this basis one would deduce the current system of ANAs appointing adjudicators appropriate.

I have spoken with various industry stakeholders and associations and the majority of them are not aware that the Amendment Bill will abolish the ANAs, only the appointment process will be undertaken by the Adjudication Registrar.

In those same discussions with the industry associations I was asked who will be providing the industry with the information on process and interpretation of the Act once the ANAs are abolished.

ANAs have a 'panel' of adjudicators and for the most of those ANAs provide a post box service for the adjudicator upon nomination to an adjudication application. The post box service keeps the adjudicator at arm's length to the parties thus avoiding becoming connected or contacted by the parties. The Amendment Bill will place the adjudicators in a higher risk situation whereby they will have to arrange and receive service of documents upon appointment and will be exposed to the parties to a much greater degree. The Adjudication Registrar will have no involvement in the adjudication process once the adjudicator is nominated, other than issuing adjudication certificates.

#### **Recommendations for Action**

There has been limited analysis of the Amendment Bill by the industry as a whole. To alleviate the perception that Government is acting 'deviously' in order to have the Amendment Bill passed, it is prudent that open and transparent due diligence is undertaken. A thorough review of the current adjudication service needs to be assumed in order to implement the most appropriate service which is cost-effective and in the best interests of Government, the industry and stakeholders.

I do not believe the Minister, Registrar and Commissioner fully comprehend the work involved in the current mandated role. Without a full appreciation the Amendment Bill, if passed, is likely to suffer significant implementation issues with the potential to embarrass Government.

Yours sincerely



Robyn Hillman

Director