Submission No.7

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The Research Director
Transport, Housing and Local Government Committee

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

Dear Sir or Madam,

Building and Construction Industry Payments Amendment Bill 2014

There are some serious problems with the Bill that require addressing in order to avoid ambiguity and unfairness and ensure that the object of the Act is maintained. The main recommendations made in this submission are:

1. Abolish the artificial distinctions that the Bill creates between complex and standard payment claims and payment claims and claims for a final payment;
2. Allow parties to exclude complex payment claims.
3. Remove the right that the Bill creates for a respondent to revise its valuation of work so that the claimant and the respondent are treated equally as they were previously.
4. Give the Supreme Court powers but don't tell the Court what it must do;
5. Spell out when and how an adjudicator decides jurisdictional issues and what effect the decision will have;
6. Give parties the power to select a registered adjudicator and thereby increase competition between adjudicators.

Since the commencement of the *Building and Construction Industry Payments Act 2004 Qld* I have been a registered adjudicator under the Act. I advised the NSW Government on the establishment of the original security of payment scheme in 1999. I have 50 years experience as a lawyer in drafting construction contracts and legislation. Books I have written include *Adjudication in the Building Industry* 3rd edn, 2010 Federation Press. Although I am half owner and a director of an authorised nominating authority, I think the abolition of authorised nominating authorities is necessary to avoid abuses within the system.

The problems are addressed under the following headings:

1. Definition of complex payment claims
2. Allow parties to exclude complex claims
3. Telling the Supreme Court what it must do

4. Jurisdictional issues
5. Time requirements for payment claims
6. Adjudicator's fees when the adjudicator does not adjudicate the payment claim
7. Deemed withdrawal on payment
8. Agreement on the adjudicator
9. Providing a copy of the adjudicator's decision
10. Protection from liability of former authorised nominating authorities
11. Correction of an error in date for making a decision.

1. Definition of complex payment claim

The definition is:

> complex payment claim means a payment claim for any of the following-
> (a) any payment for an amount more that $750,000 or, if a greater amount is prescribed by regulation, the amount prescribed;
> (b) a latent condition under the relevant construction contract;
> (c) a time-related cost under the relevant contract.

Whoever drafted the definition is unfamiliar with construction contracts. The definition is misconceived and will create countless problems. The complexity of a payment claim has nothing to do with the amount claimed. The distinction between standard payment claims and complex payment claims should not be introduced.

<u>(a) A claim for more than $750,000</u>

An amount claimed may be $800,000 but the claimant may allow a retention of 10%. Is that a claim for in excess of $750,000? This ambiguity must be dealt with.

A claim may be for $800,000 and the scheduled amount may be $750,000 with the result that the amount in issue is only $50,000.

If there is to be a distinction between a standard payment claim and a complex payment claim, the amount for a complex claim should be the amount in issue in the adjudication, not the amount claimed. The amount in issue is not only the difference between the amount of the progress payment claimed and the amount that the respondent says that it will pay [the scheduled amount] but also the amount, if any, that the respondent claims to be entitled to set off against the payment claim.

It is not uncommon to see a payment claim for, say, $500,000 where the respondent claims to be entitled to a set off of, say, $750,000 for damages or 'backcharges'. The task of the adjudicator is to decide how much, if anything, the respondent is entitled to set off. Deciding the set off can be more complex than deciding the progress payment against which the set off is claimed. The claimant will not know the amount of the set off [or the grounds for the set off] until the claimant receives the payment schedule or, in the case of a complex payment claim, the adjudication response.

The complexity of deciding a payment claim has nothing whatsoever to do with the amount claimed. It depends upon the issues raised by the parties. If payment claims are to be separated into standard and complex, then payment schedules should be similarly separated. As hundreds of Supreme Court judgments attest, a payment claim must be adjudicated the same way no matter what is the amount claimed.

I recommend that there be no distinction between a complex payment claim and a standard payment claim and that all payment claims be treated equally. If the distinction between a complex payment claim and a standard payment claim is to be maintained and the distinction is to be based upon $750,000 then the following is a suggested definition:

> A complex payment claim one where the sum of:
> (a) the claimed amount less the scheduled amount, if any, and retention, if any, that the claimant allows against the claim; and
> (b) the amount, if any, that the respondent claims to be entitled to set off against the payment claim,
> exceeds $750,000.

The time for serving a payment schedule [s 18A] should be 10 business days for all payment claims. If a reason that the respondent has for withholding payment of any amount is that the respondent is entitled to a set off, the respondent should be required to state in the payment schedule what the set off is. When the claimant receives the payment schedule the claimant will then know whether the claim is a complex claim. The respondent should not be entitled to raise in the adjudication response a set off that the respondent has not made in the payment schedule. Anything else is quite unfair to the claimant and contrary to principles of natural justice.

As will be seen below, for complex claims, after the time limited for payment [15 business days, s 67W, or 25 business days, s 67U of *Queensland Building Services Authority Act 1991*] the respondent can even raise defects and a claim of set off that has not previously been made. The *Queensland Building Services Authority Act 1991* obviously contemplated that 15 or 25 business days was sufficient to raise any defects or set off. The Bill allows the respondent 41 business days. This period can even be extended. It is ridiculous that after the date for payment the respondent can still raise new reasons for withholding payment.

If the respondent's claims [in the payment schedule] are complex, the claimant should be allowed the same time for preparing a response in an adjudication application as the respondent has to prepare an adjudication response. Dealing with large claims of set off can be very complicated. If a respondent needs 15 business days to respond to a complex payment claim, the claimant ought to have the same time in which to prepare a response [in an adjudication application] to a complex payment schedule.

A payment claim and a payment schedule are, in essence, the same thing. One is the claimant's assessment of the progress payment due. The other is the respondent's assessment. The claimant says to the adjudicator, 'The progress payment should be

calculated as I have calculated it.' The respondent says to the adjudicator, 'The progress payment should be calculated as I have calculated it'.

It is the failure to appreciate this basic principle of construction contracts that has lead to the problem. It is important not to confuse a payment claim with a statement of claim in litigation and a payment schedule with a defence to a statement of claim. A payment schedule is not a defence. It is a progress valuation.

The complexity of the Bill could be greatly reduced by not providing different times and procedures for standard payment claims. The definition of complex payment claim should be omitted while maintaining the longer time periods for complex claims. The consequence would be that for standard payment claims the time between making the claim and the making of an adjudication decision would be extended but that would be outweighed by the fairness to both parties, natural justice and a reduction in arguments over jurisdictional issues.

At present for all payment claims, and under the Bill for standard payment claims, the respondent in the payment schedule must give all reasons for withholding payment. That means that the respondent in the payment schedule must state how the respondent says that the progress payment should be calculated. The respondent cannot revalue its assessment in the adjudication response and include any new reason in the adjudication response. This is reasonable. The claimant cannot in the adjudication application make a new payment claim. Similarly, the respondent in the adjudication response should not be able to, in effect, make a new payment schedule. This is a basic principle of natural justice. Each party must be treated equally.

It is the basic failure to understand that there are parallel assessments [by the claimant in the payment claim and by the respondent in the payment schedule] that leads to the confusion between the scheme under the Act and the new scheme contemplated by the Bill. In the payment schedule the respondent only has to give, as a reason for withholding payment, 'The progress payment, if any, to which the claimant is entitled is $.... calculated as shown in my payment schedule'.

That throws the onus on the claimant to try to show that the claimant's calculation is to be preferred. It allows the claimant to raise in the adjudication application reasons in support of the claimant's assessment and reasons why the respondent's assessment is flawed. In the adjudication response the respondent can respond to any of these reasons. A response to these reasons is not a new reason.

(b) A payment claim for a latent condition

A payment claim cannot be for a latent condition. A payment claim must be for an amount calculated under ss 13 and 14 of the Act. No construction contract allows a claimant to make a progress claim solely for a latent condition. No construction contract allows claim splitting and progress payments for separate heads of claim.

For example, a claimant cannot make a payment claim solely for extra on account of variations, a change in the law, a latent condition, disruption or time related costs. A payment claim can only be made on account of the total amount that the claimant claims to be due under the contract. To make a payment claim for those separate items would breach the principle of against claim splitting. The Act does not permit claim splitting. However, the definition of complex claim is based upon the assumption that claim splitting is allowed.

Perhaps whoever drafted the definition intended to say that a payment claim, no matter what the amount, is a complex payment claim if the amount claimed includes an amount allegedly arising from a latent condition. As it is, it is arguable that such a payment claim is not a complex claim because it is not a payment claim for a latent condition but a payment claim that includes an amount allegedly arising from a latent condition.

The term 'latent condition under the relevant construction contract' is not defined. Some construction contracts include a definition of a latent condition. There are many different definitions. Where there is a definition, the contract usually provides that if the contractor finds a latent condition the contractor will be entitled:

(a) if the latent condition causes the work specified to be varied, extra for the variation; or
(b) if the latent condition does not cause the specified work to be varied, an extra amount.

In the case of (b) the contract will provide how the extra amount is to be calculated. Variations are valued under a variation clause not a latent condition clause.

A payment claim may claim a progress payment that includes in the claimed amount an amount on account of a variation. Is it intended by the definition that variations will be split into those that arise from a latent condition and those that don't? The Act should leave it to the parties to prescribe in the contract how a progress payment is to be calculated. That is what ss 13 and 14 prescribe.

If the construction contract does not provide for payment for extra costs arising from a latent condition then ss 13 and 14 of the Act do not allow the extra amount to be included in the calculation of the progress payment.

The definition opens the door to countless disputes. Deciding the amount that the contract allows to the claimant where there is a latent condition clause is no more difficult that deciding any other amount. Deciding whether a condition is a latent condition within the meaning of the contract is sometimes a difficult task.

If it is decided to retain a definition of a complex claim, then a complex claim could be defined to include a claim where an issue between the parties is whether a condition is a latent condition within the meaning of the relevant construction contract.

(c) A payment claim for a time related costs under the relevant construction contract

This creates similar problems to the latent condition provision. But it creates many more problems and will arise in many more adjudications.

A payment claim cannot be for a time related cost separate from the progress payment for other work. A claimant cannot engage in claim splitting and separately claim a progress payment for a time related cost.

Of course, from time to time claimants may argue that the definition of complex payment claim allows the claimant to engage in claim splitting and to make a payment claim solely for a latent condition or a time related cost.

A time related cost can be a component of the valuation of the work goods or services. For example, a construction contract may provide for milestone payments, day labour [on a daily basis] or for hire of materials or plant on a time basis. Scaffolding, carnage, dozers and other constructional plant is usually a time related cost. The contractual provision for variations may include and entitlement to costs related to the time it takes the contract to carry out the extra work. Insurance and overheads are time related costs.

On the other hand, a time related cost may be damages for breach of contract. Under the Act the claimant can only include damages in the calculation of the progress payment if the construction contract gives the claimant that right. See *Coordinated Construction v Climatech* [2005] NSWSCA 229.

It is not clear what was intended by 'time related costs under the construction contract' but a claim for a time related cost as damages for breach of contract would not be a claim 'under the construction contract'. It would be what is commonly described as 'an ex-contractual claim' because it is not made under the contract but for breach of contract.

It seems that those who drafted the definition may have intended to make claims for time related costs that are claimed as damages complex payment claims, but the definition achieves the opposite.

2. Allow parties to exclude complex claims

Adjudication was intended to be a quick assessment, on an interim basis, of the progress value of work. It was never intended to be the forum for disputing complex claims. It is time to get back to basics.

When the *Building and Construction Industry Security of Payment Act 1999* NSW was introduced, I drafted for the NSW Department of Public Works a condition along the lines:

> The progress payment to which the contractor is entitled is an instalment of the adjusted contract price. At any time the sum of progress payments cannot exceed the adjusted contract price.
>
> The contract price can be adjusted by agreement between the parties and will be adjusted by any amount which an expert in expert determination decides should be added to or deducted from the contract price.
>
> Where the contractor claims an adjustment to the contract price on account of a variation, a latent condition, delay or disruption, breach of contract or any other reason, and the principal disputes the claim, the claimed amount cannot be included in the calculation of a progress payment. Only the amount, if any, determined in expert adjudication can be included.

However, McDougall J in *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 held that the provision was void. His decision was affirmed in *Minister for Commerce v Contrax Plumbing* [2005] NSWCA 142. That decision opened the floodgates to ambush claims.

The peculiar situation now exists that a respondent is better advised not to include in the construction contract any provision for valuation of progress payments. Then disputed variation claims and other disputed claims for extra cannot be included in the calculation of the progress payment. See ss 13 and 14 of the Act.

However, if the respondent includes in the construction contract a provision for calculation of the progress payment, the respondent opens the floodgates.

It is time to allow respondents to prescribe how progress payments are to be calculated on the basis of the adjusted contract price not including claims for disputed extras. In other words the floodgates opened by *Contrax Plumbing* should be closed. Then there would be no need to separate standard payment claims from complex payment claims. All progress payments would be valued on the adjusted contract price without disputes over extras. Those disputes would be decided separately in expert determination, arbitration or court.

3. Telling the Supreme Court what it must do

The proposed s 100(4) tells the Supreme Court what it must do, namely, allow part of a decision not affected by error. The provision is void. It is very naïve to think that Parliament can tell the Supreme Court what it must do. Courts are very protective of their powers. A provision that would permit the Supreme Court to allow a claimant to enforce payment of part of the adjudicated amount but not the whole would be valid.

If the Court does not have the power to allow part of an adjudication decision, Parliament can give the Court that power but Parliament cannot tell the Court how it must decide the matter.

What would be additional useful provisions are:

(a) allowing the Court to refer the adjudication decision back to the adjudicator to decide again bearing in mind the finding of the Court;
(b) allowing the Court to substitute its decision for that of the adjudicator;
(c) allowing the Court to disregard a failure by a party to comply with a time prescribed in the Act or another requirement of the Act if the Court is satisfied that the failure has not caused any material detriment to the other party.

Many adjudication determinations have been set aside on account of the failure of a party to strictly comply with a time prescribed in the Act or another requirement of the Act. Most judges are under the impression that the time requirements of the Act must be enforced no matter how minor the breach and that the failure has caused no detriment to the other party. The result has been a proliferation of Supreme Court cases where the issue has nothing to do with merit but a mere technicality.

4. Jurisdictional issues

The most interesting and intriguing aspect of the proposed amendments is the proposed section 25(3)(a). It could change nothing or it could profoundly change the jurisdiction of adjudicators.

Section 25(3)(a), introduced by clause 15 of the Bill, requires an adjudicator to decide whether he or she has jurisdiction.

Before embarking on an adjudication and in the course of an adjudication an adjudicator always has to decide for himself or herself whether he or she has jurisdiction. If the adjudicator decides that he or she lacks jurisdiction then, the adjudicator must withdraw from the adjudication.

Applications to the Supreme Court to set aside adjudication decisions are usually made on one or more of three grounds, namely:

(a) the adjudicator lacked jurisdiction because of the failure of a party to comply with a condition precedent such as a time prescribed in the Act, or a particular requirement for a valid payment claim, payment schedule, adjudication application or adjudication response;
(b) the adjudicator failed to accord natural justice to a party; or
(c) the adjudicator failed to consider the matters prescribed in s 26(2) of the Act.

It is (a) only that is presently relevant. There are hundreds of judgments of the Supreme Court of Queensland and other jurisdictions where the judges have considered what jurisdictional issues an adjudicator can decide and what jurisdictional issues only the Court can decide. Some judges have found that the adjudicator has power to decide a particular jurisdictional issue. Other judges have come to the opposite conclusion and decided that only the Supreme Court has that power. Jurisdictional issues in category (a) that have come before the courts in Queensland or in other jurisdictions under corresponding legislation] include:

(1) Is the claimant a party to a construction contract?
(2) Is the contract under which the claim is made a construction contract within the meaning of the Act?
(3) The extent to which a construction contract is not a construction within the meaning of the Act [section 3 of the Act].
(4) Is a party to the construction contract a resident owner within the definition in s 3(5) of the Act?
(5) Is a particular person a resident owner who resides or intends to reside in the building or part of the building and, if it is part, what the part of building?
(6) Whether the work for which the payment is claim is domestic building work?
(7) Is the payment claim for an amount calculated under s 13 or s 14 of the Act?
(8) Is the subject of the claim construction work or related goods and services or both?
(9) Has the claimant engaged in claim splitting?
(10) Is the claim made from a reference date?
(11) If so, what is the reference date?
(12) Has the claimant made more than one payment claim in respect of the reference date for the subject claim?
(13) Does the payment claim satisfy the requirements of s13(1) of the Act?
(14) Is the payment claim for a final payment?
(15) Was service validly effected?
(16) When was the payment claim served on the respondent?
(17) When was the payment claim received by the respondent?
(18) What documents constitute the payment claim?
(19) What documents constitute the payment schedule?
(20) Is a statement in the adjudication response a new reason?

The list could continue. The point is, should these matters be decided by the adjudicator or the Supreme Court. It seems ridiculously expensive for the parties and the Government to have the time of the Supreme Court engaged such jurisdictional issues no matter how small is the amount in issue. There is no other Act of Parliament that gives rise to some many applications to the Supreme Court over such trivial issues. It must be remembered the progress payment is only a payment on account and, in other proceedings, a court can always order its repayment.

There are a number of ways in which the requirement in the proposed s 25(1)(a) that the adjudicator must decide whether he or she has jurisdiction can be interpreted, for example:

(a) the requirement only reflects what an adjudicator always had to do and does not impose any additional obligations on an adjudicator and does not give an adjudicator additional powers;
(b) the adjudicator is to police the Act and check every for any possible jurisdictional short coming [presumably, if the adjudicator finds that there is a jurisdictional flaw the adjudicator would have to withdraw even though neither party has requested the adjudicator to withdraw];
(c) the adjudicator is required only to decide jurisdictional issues that a party raises.

Interpretation (b) would be extraordinary. A party does not have to raise a jurisdictional issue. The parties can waive possible jurisdictional issues. If the payment schedule was served a day late the claimant may decide not to raise the issue. Why should the adjudicator do so? In similar circumstances a tribunal, a court or an arbitrator would not do so. An adjudicator should not intervene in the proceedings and assist one party by finding a jurisdictional issue that the party has not raised.

Assuming that the interpretation is (c), that raises the question of what 'decide' means. Does it mean the same as 'decide' in s 26(1)? The adjudicator's decision under s 26(1) on the adjudicated amount, due date for payment and the rate of interest is binding on the parties.

Is the adjudicator's decision under the proposed s 25(1)(a) to have the same effect as the adjudicator's decision under s 35 on the apportionment of costs?

Can the adjudicator publish a decision on jurisdiction alone? For example, if the adjudicator makes a decision that the adjudication application is invalid, is that binding on the parties? If it is binding then the applicant may be able to make a fresh adjudication application on the same payment claim. If it is not binding then what purpose is it intended to serve?

If an adjudicator decides that he or she does not have jurisdiction to decide the adjudication application does the adjudicator nevertheless have jurisdiction to make a binding decision on jurisdiction alone. For example, if a party in litigation claims that the court does not have jurisdiction the court nevertheless has power to give a judgment to that effect and decide costs. It is important that the Act be amended to clarify whether the adjudicator has a similar power.

If the proposed s 25(3)(a) is intended to expand the jurisdiction of an adjudicator so that an adjudicator can make a decision on a jurisdictional issue and the parties are to be bound by that decision just as they are bound by a decision under s 26(1) and s 35, then this should be made clear in the Act. It would be the most important change that the new Act would make. It would reduce vastly the opportunity for a party to have a decision set

aside and it would result in a saving in the time of the Supreme Court. Many of the trivial issues that now are decided by the Court would be decided by the adjudicator. It would also be a most important matter to be included in the Minister's second reading speech on the Bill.

The new s 25A prescribes the period in which an adjudicator must decide an adjudication application. The Bill does not prescribe any time for making a decision on jurisdiction. The Bill does not take into account that a decision on jurisdiction is different to deciding the adjudication application. The adjudicator should be empowered to make a separate decision on jurisdiction any time after the issue is raised but not later than the date when the adjudicator decides the adjudication application.

Similar problems exist if an adjudicator under the proposed s 25(7) decides that the payment claim has been incorrectly identified as a standard payment claim. When can that decision be made? How is it made?

5. Time requirements for payment claims

The Queensland Supreme Court has held that the Act ceases to apply when the construction contract is terminated. Respondents are unfairly using this to avoid making payments on account. Often the termination is under a termination for convenience clause.

The new clause 17A ignores the instance where a construction contract is terminated before the completion of all construction work to be carried out under the contract or complete supply of related goods and services to be supplied under the contact.
The amending Act should make it clear that notwithstanding termination of the contract the claimant's entitlement to a progress payment on account under the Act for construction work and goods and services carried out or supplied before termination will continue to exist as it would have existed but for the termination.

The distinction in the new s 17A between a payment claim which is not for a final payment and a payment claim for a final payment creates ambiguity and will lead to many disputes. The definition of final payment does not make sense. A claimant's final payment claim will be the last that the claimant makes but a claimant will not know whether a particular payment claim will be the claimant's last payment claim until the claimant has been paid. There is nothing to stop a claimant from making more than one payment claim for a final payment.

Most peculiar is the difference in terminology in the new clause 17A(2)(b), namely,

> the period of 6 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied

and the terminology in s 17A(3)(c), namely,

6 months after the later of-

(i) completion of all work to be carried out under the relevant construction contract; or
(ii) complete supply of related goods and services to be supplied under the relevant construction contract

It seems to be contemplated that a claimant could be barred from making a progress claim but not barred from making a claim for a final payment. The claimant can make more than one claim for a final payment.

There is simply no need for s 17A(2) and no need to distinguish a claim that relates to a final payment.

6. Adjudicator's fees when the adjudicator does not adjudicate the payment claim

There are three circumstances where the adjudicator should be entitled to a fee even though the adjudicator has made no decision on the payment claim. They are:

(a) when the adjudication application is taken to have been withdrawn under the proposed s 35B;
(b) when an adjudication application is taken to be withdrawn under the proposed s 25(7) because the adjudicator is of the opinion that a payment claim has been incorrectly identified as a standard payment claim;
(c) when the adjudicator decides under the proposed s 25(3)(a) that he or she has no jurisdiction.

However, the only provision that entitles an adjudicator to be paid is in s 35(1). That provision entitles an adjudicator to be paid for adjudicating an adjudication application. There is nothing in the Act or the Bill that would entitle the adjudicator to be paid for not adjudicating an adjudication application.

The proposed ss 35(5) and 35(6) do not solve the problem. They only qualify s 35(4). That section does not give the adjudicator the right to claim a fee. It merely prescribes a circumstance where the adjudicator is not entitled to a fee. The proposed section 35(6) only applies where a court finds the adjudicator's decision void.

For the protection of adjudicators what is required is the omission from s 35(1) of the words, 'for adjudicating the adjudication application'. Then the adjudicator would be entitled to the agreed fee or fees and expenses that are reasonable having regard to the work done and expenses incurred by the adjudicator.

7. Deemed withdrawal on payment

The proposed s 35B(b) provides that if a respondent has paid the claimant claimed amount, the adjudication application is taken to have been withdrawn. This provision should be deleted. It discriminates against claimants.

If the claimant is paid the claimed amount after commencement of the adjudication, the claimant should still be entitled to an adjudication decision. Even though the respondent concedes liability there is still the question of the due date for payment and interest. At the time the respondent makes the payment the claimant may be entitled to a substantial amount for interest under the Act. The effect of section 35(B)(b) would be to deprive the claimant of the interest. Section 35B(b) unfairly advantages the respondent.

There may be other reasons why a claimant would want and be entitled to a decision even after payment has been made. If the claimant does not want a decision the claimant can withdraw the adjudication application. A decision would establish the value of work at the reference date for the payment claim and in a subsequent adjudication it would prevent the respondent from contending that the work did not have that value [s 27 of the Act]. There may be issues between the parties on, for example, whether an item in the claim, say $10,000 for a variation, is an item which the claimant is entitled to include in the payment claim. If the respondent merely pays the amount of the claim, that is in itself no admission that the work is a variation or worth $10,000. When the claimant makes the next payment claim the respondent may withhold payment of $10,000 and force the claimant to go to adjudication again.

The issue should be decided in the adjudication application that s 35B(b) would unfairly treat as withdrawn. Section 35B(b) should be deleted.

8. Agreement on the adjudicator

Parties to an adjudication would sometimes prefer to select their own adjudicator. So that one party cannot force a particular adjudicator on the other party, it is important that any agreement on who should be adjudicator can only be made after the respondent receives the payment claim.

Rather than have foisted upon them an adjudicator chosen by the registrar, the parties may prefer to have an adjudicator with particular qualifications and experience. They may prefer a freelance adjudicator rather than one who has contracted to pay one third or some other proportion of his or her fees to a third party. Rather than having no say in the adjudicator's fees, they may prefer to negotiate a fee with an adjudicator before he or she is appointed. Some adjudicators may advertise better hourly rates or fixed fees.

Allowing parties to choose their own adjudicator would open up competition between adjudicators. Nothing is more likely to reduce the cost of adjudication than allowing competition between adjudicators. If the parties are unable to have any say in who will be the adjudicator, there is no point in an adjudicator advertising his or her expertise and fees.

If after the payment claim is served, the parties agree on who they would like to be the adjudicator [the person must be a registered adjudicator] the registrar should appoint that person. To ensure this, there should be a new s 21(7) along the lines:

> If before the registrar refers the adjudication application to an adjudicator the claimant and the respondent satisfy the registrar that after the payment claim that is submitted to adjudication was served on the respondent, the respondent and the claimant agreed upon who should be adjudicator and that that person is willing to accept the adjudication application, the registrar must refer the adjudication application to that adjudicator.

9. Providing copy of adjudicator's decision

Under the new s 102(a) an adjudicator must give the registrar a copy of the adjudicator's decision at the time specified by the registrar. There should be added to s 102 a qualification along the lines:

> An adjudicator will not be required to provide a copy of his or her decision to the registrar earlier than the date that the adjudicator provides a copy of the decision or should provide a copy of the decision to the claimant and the respondent.

An adjudicator is not bound to provide his or her decision to the parties earlier than the date that adjudicator is paid. If the adjudicator could be required to provide a copy of the decision to the registrar earlier than that date it is possible that the adjudicator's findings or one or more of them may be discovered by a party and the adjudicator will not get paid.

10. Protection from liability of former authorised nominating authorities

From the commencement of the amended Act, a person can make a claim against a company [or an employee or agent] that until then was an authorised nominating authority. See clause 41 of the bill. Such a claim could be made within 6 years after the act or omission the subject of the claim.

The protection provided by s 107(2) of the Act as it exists before amendment should continue so that companies that were previously authorised nominating authorities are not suddenly exposed to claims from which they were previously exempt. This is also important for professional indemnity insurance. What is required is a provision along the lines:

> Notwithstanding the repeal of s 107(2), a person who prior to the repeal was entitled to the protection provided by s 107(2) will not lose that protection.

11. Correction of error in dates

There is an error in the new s 25A. Under s 25A(1) an adjudicator must not decide an adjudication application within the period within which the claimant may give a

claimant's reply. However, before this period expires, s 25A(2) requires the adjudicator to make a decision on the adjudication application with 15 business days. The two sections are inconsistent.

For a complex payment claim the timetable [in business days] is:

Day 1 - payment claim served
Day 16 - payment schedule served [15 days]
Day 27 – adjudication application lodged [10 days]
Day 42 – adjudication response served on adjudicator [with new reasons, 15 days – may be extended by 15 days]
Day 44 – adjudication response received by claimant [2 days]
Day 57 – Time limit for adjudicator's decision [15 days from receipt of response]
Day 59 – Time limit for claimant's reply.
Day 74 – This should be the time limit for the adjudicator to make a decision when the claimant is entitled to make a reply to the adjudication response.

If, to make a decision, an adjudicator needs 15 business days after receipt of the adjudication response, the adjudicator should have 15 business days after receipt of the claimant's reply.

Since the maximum time after receipt of a payment claim for making payment is 15 business days in the case of a commercial building contract [*Queensland Building Services Authority Act 1991* s 67W] and 25 business days in the case of a trade contract or subcontract [s 67U], it seems strange that the respondent requires 41 days [which may be extended to 56 days] to provide reasons for withholding payment after receipt of a payment claim.

Under the traditional construction contract, after receipt of a progress claim, the superintendent had 10 business days in which to do an assessment of the value of work and issue a progress payment certificate. If the superintendent can do that in 10 business days, why does the respondent require 41 of more days?

It seems that those drafting the legislation may be confusing a progress claim with a statement of claim in litigation. A progress claim is quite different. Each party makes their own assessment of the progress payment due. There is no reason whatsoever why a respondent should be able to change the respondent's assessment [except to make some concession to the claimant] after the payment schedule is served.

The times allowed for a complex payment claim are extraordinary. They would be abbreviated by eliminating the capacity for respondent to raise new reasons in the adjudication response. Natural justice dictates that if the respondent is entitled to raise new claims in the adjudication response, the claimant should be entitled to raise new claims in the adjudication application.

Yours sincerely,

Philip Davenport