

From: Vlad Vishney [REDACTED]
Sent: Sunday, 15 June 2014 1:55 PM
To: Transport Housing and Local Government Committee
Subject: Hearings into Building and Construction industry Payments Bill 2014 - URGENT SUBMISSION
Importance: High

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

15 June 2014

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

Dear Research Officer

Hearings into Building and Construction industry Payments Bill 2014;

I am an adjudicator with the Authorised Nominating Authority (**ANA**), Adjudicate Today but also an ex-builder of some twenty years' experience and a practicing construction lawyer. In my role as a lawyer I often act for client's in one of my areas of expertise, which is the Security of Payments Acts in the various Eastern States, including Queensland.

Whilst I see the benefit of most of the proposals in the Wallace Report, I believe that the proposal to abolish private ANA's is misconceived.

In short, it is my strong view that if the aim is to essentially 'kill' the security of payments process in Queensland, then no change that I can think of (short of repealing the Act) will do so quicker than the abolition of ANA's.

PRICING OUT THE SMALL CLAIMANT

The reason for that view is simply that in my experience it is the ANA's that keep the process functional and affordable - the very aim of the Act itself.

In the absence of ANA's, adjudicators the bulk of whom adjudicate part time (as I do), will simply be unable to efficiently carry out the administrative tasks currently undertaken by the ANA's on our behalf and will have to charge far more than we currently do.

Part-time adjudicators generally do not have the facilities and resources of a specialist ANA. Tasks undertaken by the ANA on my behalf by lower remunerated admin staff, will be far more time-consuming and expensive if undertaken by me personally, at a much higher rate of remuneration. If I will be required to manage the entire adjudication process such as communicating directly with the parties, informing them of the process, collecting payment, issuing adjudication certificates etc., not only will I be unable to meet the tight timeframes under the Act but more importantly, I will have to charge for all of that wasted time in dealing with these time-consuming matters.

Adjudication will in my opinion, become vastly more costly, slow and cumbersome. Claimant's will simply stop accessing adjudication as it will be cost prohibitive on all but the largest claims. The very people that the Act was designed to support, small subcontractors and contractors, will be priced out of the process.

Furthermore, having been an adjudicator with Adjudicate Today for approximately two years now, I have observed the important role this ANA plays in advising parties on the operation of the Act and what they need to do at various times.

Unless the Government properly resources an appropriate body to provide this function (meaning more tax-payers funds in the system), that role will fall on expensive lawyers such as myself to advise parties. Great for lawyers but not great for the tax payers and the parties to adjudication, who once again will be further 'priced out' of the system.

LEGAL PROBLEMS

On top of the commercial problems discussed above, there is another, even more dire consequence of having the parties deal directly with adjudicators without the ANA's to filter that communication.

The Courts have held for some time, that adjudication under the Act is a quasi-judicial process and that adjudicators must apply a certain standard of procedural fairness in their determinations, failing which the adjudication is susceptible to being quashed by the Courts (see for example *Brodyn Pty Ltd v Davenport* [2004] 61 NSWLR 421).

If adjudicator's are in constant contact with the parties, it is inevitable in my opinion, that those parties will be constantly concerned (and rightly so) that the adjudicator has said something to one party without advising the other, or given a party some advice about the Act which has been misunderstood and led to some harm to their case etc. It is well known that even a perception of bias (apprehended bias) is sufficient to invalidate a decision.

As a lawyer, it seems to me that the system will not just be inefficient, but legally unworkable.

DO NOT ABOLISH ANA'S

For those reasons, and many others that I am sure have been raised in other submissions, I am strongly against the proposal to abolish ANA's.

In my view this will have no less of an impact than essentially shutting down the security of payments process in Queensland.

If that is the objective then that objective should be made public and openly debated prior to any such action being taken.

Regards
Vlad Vishney
B. Build, J.D.