Submission No.17

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

[redacted]
12th June 2014

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

Dear Sir/Madam,

Building and Construction Industry Payments Act (BCIPA) Amendment Bill 2014 – Committee Request for Submissions from Stakeholders

A. 2012 Discussion Paper – Payment dispute resolution in the Queensland building and construction industry (the Wallace Report) dated May 2013
B. Minister for Housing and Public Works Media Release dated 9 April 2014
C. BCIPA Amendment Bill 2014 dated 21 May 2014
D. Standing order 131 of the Standing Rules and Orders of the Legislative Assembly referral to the Transport, Housing and Local Government Committee

Introduction

This correspondence is in reference to requirements of Reference D and the invitation by the Transport, Housing and Local Government Committee (THLCC) from any interested persons and organisations to make submissions on the Reference C (Amendment Bill).

Summary

I would courteously request that the committee make a detailed consideration to neither accept nor endorse the BCIPA 2014 Amendment Bill on the following points:

1. Abolishment of the Authorised Nominating Authority
2. Standard & Complex Claim Classification & Payment Schedule Timeframes
3. Adjudication Response Timeframes
4. Adjudication Response New Reasons
5. Complex Claims Definition
6. Service of Adjudication Process Documents,

1. Abolishment of the Authorised Nominating Authority

The Wallace Report has made recommendations which have been accepted by the government and regardless of what one thinks of those recommendations there was a process in place for the Wallace Report which appears to have been followed with due diligence.

However the same cannot be said for the strategy undertaken in developing the Amendment Bill provisions abolishing ANA's under the BCIP Act.

The Wallace Report did not recommend the abolishment of ANA's yet in implementing the recommendations government has made a critical service delivery decision on what they think is the best strategy to achieve the Wallace Report recommendations without apparently undertaking any further open and transparent type analysis to ascertain whether that decision was the best outcome available.

It is suggested it has not been demonstrated that due diligence has been followed or with any certainty that a full analysis by an independent expert of all the options available has been undertaken to achieve the best outcomes for the long-term wellbeing of the legislation and its impact on the QLD community.

The Amendment Bill indicates, on face value, to be a hasty decision making / procurement process to implement a strategy to meet the Wallace Report recommendations without undertaking a comprehensive, open and transparent analysis to identify and implement the most effective and efficient service delivery system to cater for the $875M, each year, of disputes under the legislation.

The QLD Government has provided a dispute resolution process under the legislation on behalf of the QLD community. It is therefore the government's responsibility to ensure that the procurement of the adjudication service delivery is undertaken in a procurement environment that fits the Queensland Procurement Policy to deliver benefits for government, suppliers and the community through the six principles of Government procurement.

It is requested that the QLD Government refrains from abolishing the Authorised Nominating Authority under the BCIP Amendment Bill 2014 and retains the current Authorised Nominating Authority system until a comprehensive, open and transparent review of the current adjudication service provision under the BCIP Act has been undertaken with the view to implement the most appropriate adjudication service delivery available to government.

2. Standard & Complex Claim Classification and Payment Schedule Timeframes

With due respect most subcontractors do not even understand the difference between a payment claim and a tax invoice. Subcontractors build things but are not accountants, legal practitioners nor even contract administrators. They just want to build things as specified and be paid for what they do.

So how are normal tradesmen and small builders going to understand the difference between a standard claim and a complex claim? This is not possible, yet the expectation within the Amendment Bill that claimants (and indeed respondents) will understand is a severe failure of the Amendment.

The way the Amendment Bill is drafted is that the claimant and the respondent have to understand at the time the payment claim is made what type of claim it is. It is important for the respondent because the timeframes are different and it is important for the claimant because they need to know when they can proceed to adjudication. If the claimant gets it wrong then the application is deemed null and void which must never be the intent of the Bill.

This is a recipe for failure of the adjudication process. It will lead to more invalid applications, more court cases, more delay in dispute resolution, more expense, more liquidations, more frustration, more animosity, less use of the legislation and a lose/lose for QLD.

The legislation must be simple to understand and use. The Amendment Bill it appears has taken a concept of natural justice and created a nightmare of twists and turns that will fail everyone.

Submission – To avoid confusion it is suggested the following simplified provisions should be considered:

1. The payment schedule timeframe should remain a unilateral 10 business days regardless of the type of claim it is.
2. The default classification of the payment claim is "standard" unless the respondent (not the claimant) classifies the payment claim as a "complex" claim within a payment schedule.
3. If the claimant disagrees with the respondent's "complex" claim classification the claimant may submit a counter argument in the adjudication application as to why the payment claim is not a complex claim.
4. If a claimant classifies the claim as "complex" in the application then the adjudicator is bound to decide the claim as "complex".
5. The decision on the classification of the payment claim (classification decision) resides with the adjudicator and this decision is advised within the adjudicator's acceptance notice to the parties.
6. Once the classification decision is made then the parties know the timeframe for the response allowed by the adjudicator
7. Delete Amendment Bill s25(6) & s25(7)
8. The respondent may list (indicate) reasons for withholding payment in the payment schedule which can be expanded on in the adjudication response. In doing so the respondent must specify the form that evidence will take such as expert reports etc.

3. Adjudication Response Timeframes

In trying to accommodate the inappropriate and ill-defined "standard" and "complex" claims the Amendment Bill has introduced an unwieldy maze of scenarios which will not only result in an unnecessary prolongation of the dispute resolution but also create more opportunities for the legal fraternity to find ways to make adjudication applications "invalid".

The legislation is about quick resolution of disputes to enable cash flow and allow projects to be completed in a timely fashion. The timeframes are inappropriate and contrary to the intent of the legislation and contrary to providing a dispute resolution process which is beneficial for the QLD community.

To bring in provisions that effectively increase the adjudication time from 5 weeks to more than 10 weeks is no one's interest and indeed contrary to the intent of the legislation.

The Amendment Bill allows the Respondent the later of 10 business days to provide an adjudication response after receiving the adjudication application or 7 business days after receiving the adjudicator's acceptance. This is a 100% increase on the current provisions. For "complex" claims the timeframe is extended to the later of 15 business days to provide an adjudication response after receiving the adjudication application or 13 business days after receiving the adjudicator acceptance.

On face value this does appear to be suitable provisions to address the Wallace Report considerations except that this system is supposed to be a quick "interim" decision making process for the benefit of the QLD community. The provisions to allow additional time for adjudication responses should not be allowed.

Submission – It is suggested:

1. There be no provision allowing the respondent an opportunity to seek extension of time to submit an adjudication response.
2. The claimant has a right to reply to an adjudication response , regardless of what claim classification is decided by the adjudicator, within 5 business days after the adjudication response has been received by the claimant.
3. The respondent may list (indicate) reasons for withholding payment in the payment schedule and specify that further evidence will be provided in the adjudication response and in doing so specify the form that evidence will take such as expert reports etc.
4. The adjudicator must make his/her decision within 10 business days after the claimant's right to reply.

5. Adjudication Response New Reasons

The Amendment Bill allows the respondent to raise new reasons within the adjudication response that were not provided in the payment schedule. The Amendment Bill therefore attempts to overcome potential "natural justice" issues by allowing the claimant this right to reply to the adjudication response new reasons.

The Wallace Report spends a lot of time on the "burden" on respondents to manage payment claims under the Act for reasons that they do not know which claim may eventuate in an adjudication application and/or they are still gathering information from experts or other matters to qualify the reasons. The respondent however is given 10 business days (that is 2 weeks) to provide reasons for non-payment in the payment schedule.

It is suggested elsewhere in this correspondence that the respondent can list the reasons in the payment schedule and it is also suggested in doing so they can advise and specify to the claimant in payment schedule that further evidence will be provided in the response. This would then alert the claimant that additional evidence will be provided so allowing the claimant to prepare for its right to reply and natural justice achieved.

It is noted that the Amendment Bill restricts the timelines for the claimant to make payment claims while the courts have made clarifications which further hamper the claimant's opportunity to claim. The potential for purported "ambush" claims has therefore been significantly reduced and so there is no justifiable reason to give the respondent a second opportunity to provide new reasons as the respondent is always sufficiently close, in time, to the works to understand the basis of all claims. This would otherwise provide opportunities for the respondent to purposely delay the time for payment.

Submission – It is suggested:

1. No new reasons be allowed in the adjudication response.
2. The respondent may list (indicate) reasons for withholding payment in the payment schedule and specify that further evidence will be provided in the adjudication response and in doing so specify the form that evidence will take such as expert reports etc.

6. Complex Claims Definition

The Amendment Bill provides for a classification regime on a distinction between a "standard" claim and a "complex" claim which states that anything not classified as a "complex" claim is a "standard" claim.

A complex claim is defined as:

(a) A payment for an amount more than $750,000.00 or a greater amount if it is prescribed by regulation.

(b) A latent condition under the relevant construction contract.

(c) A time related cost under the relevant construction contract.

Issues for consideration questions

- Is $750,000.00 an appropriate threshold for complex claims?
- Latent conditions and should they be included?
- Time-related conditions and should they be included?

Is $750,000 an appropriate threshold for complex claims?

It is apparent the arbitrary figure of $750,000.00 is linked to the Supreme Court threshold and the comment that this may increase under regulation will allow the Government to link the threshold to the Supreme Court.

Is it the most appropriate threshold? The answer is probably no when considered along with the other potential conditions classifying a complex claim. It is an arbitrary figure with no basis with reality while claims over $100K appear more likely to be defined as "complex" in the Wallace Report.

Latent condition claims and should they be included?

Latent Conditions have been described as *"A latent condition arises when the physical conditions of the site are materially different to the conditions which could reasonably have been expected by the contractor when the contract was executed".*[1]

Most subcontractors would not know or understand what defines a latent condition is even if latent conditions were provided in the construction contract. If the intent is to make it fairer for the respondent to put its case where there are latent conditions then it must also include the subcontractor.

Time-related claims and should they be included?

Time related claims in general mean, to the construction law fraternity, claims based on delay claims related to Extension of Time claims and these potentially relate to a myriad of scenarios.

Again most subcontractors do not know or understand what a time-related claim is even if they are specified under the construction contract. If the intent is to make it fairer for the respondent to put its case where there are time related claims then it must also include the subcontractor.

The lowly subcontractor who has been engaged on an hourly rate (time related) or has an entitlement to can claim interest on delinquent claims (time related) will be affected. Is this the intent of these Amendment Bill provisions? It is hoped not as these are not complex claims. Also it appears from experience there are a vast number of payment claims under the $750,000.00 threshold, and indeed under the $10,000.00 threshold, that will be negatively impacted by this amendment provision.

[1] Earthmover and Civil Contractor Article Dec 2010 – Matt Bradbury 07 3233 8972 McCullough Robertson Lawyers

Therefore a majority of claims, regardless of size, will be captured as “complex” claims because of this unfortunate definition.

Submission – It is suggested:

1. Complex claims be defined as a claim greater than $100K **and** include either:
    - a latent condition claim, **or**
    - a time related claim.
2. Latent conditions must be specified more precisely to afford correct guidance to industry participants.
3. Time related claims must also be specified more precisely to afford correct guidance to industry participants but must also include an exemption to exclude claims relating to time related rates, interest and retentions. It may be pertinent to place the definitions and exemptions into the regulations to enable the government to always be current with contract law developments.

7. Service of Adjudication Process Documents

The draft bill provides that documents during the adjudication phase of the legislation are to be served within specific timeframes.

However there is no assignment of cause and effect which will give industry participants and the courts guidance on what practical processes can be undertaken to ensure the legislation’s intention to provide robust processes to facilitate the dispute resolution process.

It is important to the adjudicator, from a jurisdictional view point, that all documents are served correctly as required by the legislation. The Amendment Bill falls short on this point in that it specifies timeframes but does not allocate responsibility and an alternative in the event that a non-compliance occurs.

Submission – It is suggested:

1. To state that if an adjudication application, adjudication response, right to reply or Request for Further Submissions has not been served onto a party within the time specified under the legislation then the adjudicator may serve the document received by the adjudicator onto the party without time restrictions and that service will satisfy the service provisions under the legislation.

We trust that this submission is able to clarify the reasons for the suggested changes which substantially equalise the benefits to all parties and QLD.

Yours faithfully

R. D. Couper [redacted]

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