Submission No.18

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[redacted]

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The Research Director
Transport, Housing and Local Government Committee
Parliament House
George Street
BRISBANE QLD 4000

By e-mail to: thlgc@parliament.qld.gov.au

Dear Sir/Madam,

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

I write in reply to the Committee's invitation for submissions on the *Building and Construction Industry Payments Amendment Bill* 2014 ("**Bill**").

I am a barrister, but I am also an experienced adjudicator, with over 10 years experience determining payment disputes in NSW, Victoria and Queensland. I made submissions to the "Wallace Inquiry" on the issue of adjudicator appointments and am one of two directors of Expert Adjudication, a recently registered authorised nominating authority in Queensland, which was established to address some of the issues concerning the appointment of adjudicators.

My submissions to the Committee are again primarily directed towards the system of appointing adjudicators. I would ordinarily also address a number of other significant matters, but I have had the advantage of reading Mr Phil Davenport's submissions and his submissions cover the issues I wished to raise, save for two points.

I note at the outset that I harbour significant reservations about the probity and quality of the Wallace Inquiry's recommendations as government inquiries are usually and quite appropriately headed by one or more eminent, independent persons, such as a senior judicial officer, retired senior judicial officer or senior barrister, and not by junior barristers, and especially not by junior barristers who have an economic or other stake in the outcome of the inquiry.

In this regard, I specifically note that Andrew Wallace, whose recommendations form the basis of the changes to be effected by the Bill,

was a junior barrister and adjudicator immediately prior to his appointment to review and report on submission made in response to the Minister's "Discussion Paper". If Mr Wallace determines adjudication applications that are referred to him by the registrar, under the new powers that Mr Wallace recommended be reposed in the registrar, which were in turn the result of an appointment that the registrar undoubtedly had a hand in, Mr Wallace stands to benefit financially from the reforms that he has recommended and can therefore hardly be considered independent.

In saying this, I do not mean to suggest that Mr Wallace actually had his own personal interests in mind in reaching the conclusions he did. I only suggest that his conclusions are necessarily tainted by his lack of independence, and lack of eminence in his profession, and should be treated with appropriate caution.

System of appointing adjudicators

The Bill proposes to abolish authorised nominating authorities ("ANAs") and to repose the functions previously carried out by ANAs in the Adjudication Registrar ("the registrar"). This change is problematic in its present form because:

1. it does not incorporate any effective mechanism for ensuring the appointment of the most well-qualified adjudicators;

2. it does not incorporate any effective mechanism for ensuring the reasonableness of adjudicator fees;

3. it does not incorporate any mechanism for ensuring balanced gender representation, an appropriate range of knowledge, expertise and experience or any other relevant social goals;

4. it empowers a single, non-legally qualified person to register, suspend and allocate work to adjudicators with very little or no legislative guidance; and

5. it provides no compensation, let alone any fair compensation, for ANAs which have been an integral part of the system for over 10 years.

Under the *Building & Construction Industry Payments Act* 2004 as it currently stands ("**the Act**"), the registrar is responsible for the registration of adjudicators. Although this power is expressed in permissive terms, which provide that the registrar "may grant" an application for registration "if the registrar is satisfied the applicant is a suitable person to be registered as an adjudicator", on a proper interpretation of the Act as a whole, the registrar is in effect obliged to register all suitable applicants as there is nothing in the Act which permits the registrar to refuse to register an otherwise suitable person on the grounds that he has already registered a sufficient number of adjudicators. Moreover, as the eligibility requirements are not especially demanding, this will almost certainly result in a large number of registered adjudicators, and this will be further compounded by the fact that prescribed

bodies will be free to train as many adjudicators as care to take up their courses because they will no longer be under any obligation, ethically or otherwise, to provide work to the people they train.

Under the existing system, the number of adjudicators is constrained, and the quality of adjudicators maintained, by ANAs being under competitive pressure to appoint the best adjudicator possible. However, the registrar is not subject to the same competitive pressures and is not expressly or otherwise required to allocate work to the most well qualified adjudicators. Furthermore, even if the registrar were required to grade adjudicators (as the Wallace Inquiry recommended), or rank adjudicators or allocate work only to the most well-qualified adjudicators, or were to do so in the absence of an express requirement, the registrar's suitability to undertake this task must be assessed in the light of the minimum eligibility requirements of that office.

Pursuant to section 37 of the Act, the registrar is only required to have "particular knowledge and experience of public administration, and something else of substantial relevance to the functions of the registrar". Even if it is accepted that *particular* means exceptional or remarkable or outstanding, this requirement is insufficient because, if adjudicators are to be appointed by anyone other than the parties themselves, they should be appointed by, or in consultation with, someone who is legally qualified and has extensive experience in the administrative and construction law.

Although adjudication decisions are sometimes characterised as administrative, so that they might appropriately be contrasted with judicial decisions, adjudication decisions often involve complex factual, legal and jurisdictional issues, and sums which would otherwise fall within the monetary jurisdiction of the Supreme Court of Queensland and routinely have a very significant impact on the legal rights and liabilities of parties.

The unsatisfactory state of the system of appointing adjudicators set out in the Bill is demonstrated by comparison with the approach used, for example, in the Queensland Civil and Administrative Tribunal. The Tribunal's members are appointed by the Attorney-General only after being advertised and after consultation with the president of the Tribunal. The president of the Tribunal is in turn a Supreme Court judge and is also responsible for allocating matters to Tribunal members. Although the Tribunal's work is more varied than that of adjudicators, the nature of the work, and its importance to parties, is similar in many respects, save that the monetary value of an adjudicator's decisions will often be much greater than the monetary value of the Tribunal's decisions. Once the existing system of appointment is abolished, there is no reason to replace it with a system that is materially different and markedly inferior to the system used to appoint QCAT members or other persons holding public positions requiring extensive knowledge, expertise or experience.

Queenslanders would not accept hospital doctors being engaged by non-medically trained administrative staff, or judges being appointed by non-legally trained administrative staff, and should not be required to accept the appointment of adjudicators, whose decisions have the capacity to significantly effect the rights and liabilities of parties, by a non-legally qualified

public administrator, no matter how experienced that administrator is. It is, furthermore, not to the point to compare the registrar's qualifications with the qualifications of existing ANA staff because, whatever the deficiencies of the existing system, it relied, in theory at least, on a functioning, commercially competitive environment to deliver the appointment of the best qualified adjudicators, while the registrar will not be subject to any competitive pressures.

Although the Bill makes no express changes to the amount of adjudicator fees, and the Act therefore continues to prescribe that an adjudicator is only entitled to fees and expenses as agreed with the parties or that are reasonable having regard to the work done and expenses incurred, the abolition of ANAs nevertheless means that the Act no longer provides any effective mechanism for ensuring reasonable fees and expenses. This is because there is presently no scope under the Act for considering proposed fees as part of the assessment of applications for registration, applications for renewal, or the cancellation or suspension of registration and also presently no scope under the Act for dealing with fees by way of conditions upon registration.

As a matter of practice, an adjudicator will not generally issue his or her decision until his or her account has been paid and claimants usually pay on demand because they are usually keen to obtain their decision. The only way that a party can then recover excessive fees is to sue in a Court of competent jurisdiction. This, however, usually involves considerable time and money and a further degree of risk, all of which acts as deterrence in all but the most egregious instances of overcharging.

The Bill could, in theory, be amended to permit some further regulation of adjudicator fees but the regulation of prices is notoriously difficult to get right and is in fact no substitute for a competitive market place. Indeed, the most effective means of addressing the problems of quality and price associated with the abolition of ANAs would be to permit parties the option of agreeing upon their own adjudicator. This option was summarily rejected by the Wallace Inquiry - at [160] - on the grounds that it would only serve to replace "claimant-friendly" ANAs with "respondent-friendly" ANAs. However, this problem is easily overcome by permitting agreement only after a dispute has arisen. It is not necessary that appointment by agreement be adopted as the sole mechanism for the appointment of an adjudicator, as appointment by agreement could easily operate alongside appointment by the registrar and still effect considerable competitive pressures on both quality and price.

Point 3 is self-explanatory and the only point that remains to be made is that the lack of legislative guidance on these points ought to be contrasted with, for example, section 183(6) of the *QCAT Act*, many provisions of the *Public Service Act*, and other legislation, all of which seek to appropriately define the power of government officials in appointing or employing other people.

I have dealt with some aspects of Point 4, which concerns both the eligibility requirements of the registrar and the concentration of power in the registrar, above. Although it is not uncommon for the head of a Tribunal or Court to

have some say in appointments and also to allocate the work of the Tribunal or Court, it is highly unusual, and perhaps even unprecedented, for a single, non-legally qualified administrator to have such power at all, let alone to have that power without any direct political oversight and without any substantive legislative guidance. In addition to allowing parties the option of agreeing upon their own adjudicator, the requirements for eligibility for the office of registrar should be greatly enhanced and the registrar's power to appoint adjudicator's should also be appropriately circumscribed, for example, by imposing an obligation to appoint the most experienced available adjudicator.

In raising Point 5, I do not mean to suggest that the abolition of authorised nominating authorities constitutes the compulsory acquisition of property. However, contrary to the approach taken in the Wallace Inquiry, some consideration ought to be given to the fairness or otherwise of the abolition of ANAs after 10 years, without any evidence of wrongdoing on their part and on less than six months notice and contrary to the approach taken in many other jurisdictions, and the effect that might have on the willingness of other businesses to take on statutory functions in Queensland in future. Had the Wallace Inquiry been constituted differently, witnesses might have been subpoenaed and evidence obtained. However, this did not occur and no action, other than the proposed legislative changes, appears to have been taken in respect of any of the unsubstantiated allegations and innuendo detailed in Mr Wallace's report. This is despite the fact that the registrar has, and always has had, the power to suspend or cancel an ANAs registration on appropriate grounds. It should also be noted that the Wallace Inquiry did not consider the full range of alternative ways of achieving a better appointment process because it conspicuously failed to consider any further regulation of ANAs. This leaves the distinct impression that the Wallace Inquiry was engaged, at least in some regards, in titling at windmills and that some of the proposed changes do little more than reflect the whimsical preferences of Mr Wallace and the registrar, and do so at the expense of fairness, consistency, incremental change and current trends in public policy.

I wish to note, as a final point, that I do not share any concern about adjudicators operating independently of ANAs. Although the agency function of ANAs has been described by some as 'crucial', it does not presently form, and has never formed, part of the statutory regime. ANAs have taken the agency role upon themselves in order to justify the cut they take out adjudicators' fees. To the best of my knowledge, no ANA other than Expert Adjudication will refer a matter to an adjudicator who does not agree to engage the ANA as their agent in return for significant proportion of the adjudicator's professional fees. This approach has a decided anti-competitive flavour and, in the absence of appropriate regulation, as is currently the case, exposes the whole system to the sorts of criticisms that are detailed in the Wallace Report. It is, furthermore, a mistake to assume that a communication with an adjudicator's agent is not a communication with the adjudicator as that depends on whether the communication is passed from the agent to adjudicator, which they routinely are. Unilateral communications between parties and any decision-maker, including ANAs, is highly improper. It is not

difficult to develop systems to manage attempts at unilateral communication and any sufficiently competent adjudicator will already have these in place.

Other issues

I have already noted that I have had the advantage of reading Mr Phil Davenport's submissions and that his submissions cover the remaining significant issues I wish to raise, save for two points. The two points I wish to address concern the second limb of the time allowed for lodging adjudication responses and the effect of incorrectly identifying a payment claim as a standard payment claim.

New sections 24A(2)(b) and 4(b) in essence provide the respondent additional time to lodge an adjudication response if there is any delay in appointing an adjudicator. This alternative is required because adjudication responses are to be provided to the adjudicator and this cannot be done if the respondent doesn't know the identity or address of the adjudicator. Under the Act, the second limb of section 24(1) allowed an additional 2 days, presumably because this was assessed to be sufficient time for the respondent to get an adjudication response to an adjudicator after receiving notice of adjudicator's identity. Under the bill, this time period has been extended to 7 business days in the case of responses to applications in respect of standard payment claims and 12 business days in the case of responses to applications in respect of complex payment claims.

In his report, Mr Wallace says that he received "very few submissions on extending the timeframe" in question but he nevertheless recommended that it be extended "to ensure that the adjudication application [sic] is made to the BCIP Agency, so that the respondent is not expected to respond to a purported adjudication application which is nothing more than a threatening action of the claimant" – at [192].

Doing the best that I can, I think Mr Wallace is thereby attempting to deal with the situation where a claimant serves an adjudication application on a respondent but fails to lodge it with an ANA (under the Act) or the registrar (under the Bill). However, this problem would be more appropriately dealt with by amending section 21(5) to limit the time within which an application must be served on the respondent and maintaining a fixed two day period in the second limb of new section 24A(2).

The second limb of new section 24A(4) is, of course, affected by different factors, as allowance must there be made for the receipt and processing of requests for extension of time. The most important point to be made in respect of that amendment has already been made by Mr Davenport and it is that serious consideration should be given to abandoning the proposed distinction between standard and complex claims because the appropriate distinction cannot be properly drawn and the proposed distinction is poorly drafted and entirely unwieldy and, with its associated measures, will only serve to increase the scope for adjudicator error and decrease the effectiveness of the Act

The second issue concerns new section 25(7), which provides that an adjudication application based on a payment claim that has been incorrectly identified as a standard payment claim is taken to have been withdrawn. Although section 32 of the Act provides that a claimant can make a new application in certain circumstances, it does not allow a new application to be made when an application is taken to have been withdrawn under new section 25(7) so that the incorrect identification of a payment claim as a standard payment claim would appear to be fatal for a claimant. This seems excessively harsh and contrary to the objectives of the Act. It will also encourage the identification of payment claims as complex, even when they are not, simply to avoid the harsh implications of getting it wrong. Thus if the distinction between standard and complex payment claims is to be maintained, section 32(1) of the Act should be amended to correct this situation.

Summary

For the reasons given above, I urge the Committee to:

- give very careful consideration to all aspects of the Bill with a view to not adversely affecting an important piece of legislation that has, on the whole, operated very fairly and effectively;
- greatly enhance the proposed changes by allowing parties the option of agreeing (after a dispute has arisen) upon their own adjudicator;
- greatly enhance the eligibility requirements of the office of the registrar so that they match the new powers reposed in that office;
- impose appropriate legislative guidelines and reporting requirements on the registrar's power to appoint adjudicators;
- be wary of equating the time within which a payment claim may be served with the time taken to prepare a payment claim;
- abandon the distinction between standard and complex claims and all amendments consequent upon that distinction;
- abandon the proposal to allow respondent to introduce new reasons in the adjudication response;
- abandon the new section 17A(2);
- carefully consider what is intended by the new section 25(3)(a) and how it is to be given practical effect;
- carefully consider the effects of the new section 25(7) and how it is to be given practical effect;
- amend section 32(1) to include withdrawals under the new section 25(7);

- amend section 35 to take account of all situations in which an adjudicator is entitled to a fee even though he or she has not decided the payment claim;
- abandon the proposed deemed withdrawal on payment;
- qualify the proposed obligation to provide a copy of decisions to the registrar to prevent disclosure before payment;
- abandon the proposed retrospective removal of ANAs' protection from liability;
- rectify the inconsistent timeframes in the proposed section 25A; and
- consider the effect that the abolition of ANAs might have on the willingness of other businesses to take on statutory functions in Queensland in future.

Yours sincerely,

Helen Durham