



ADJUDICATION FORUM

Inc 9890562

PO Box 38, Caringbah, NSW, 1495

Ph: [REDACTED]

m: [REDACTED]

email: [REDACTED]

Submission No.27

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

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

Dear Research Officer

Subject – Proposed Changes to the *Building and Construction Industry Payments Act 2004 (the Act)*

This submission is provided in response to the call for submissions regarding the Building and Construction Industry Payments Amendment Bill 2014 by the Transport, Housing and Local Government Committee. This is provided by the Adjudication Forum Incorporated – Inc 9890562 (**the Forum**).

The Forum is a representative association that promotes adjudication as a means of rapidly and cost effectively valuing, on an interim basis, progress claims in Australia by:

- Providing a forum for discussion;
- Hosting conferences and seminars;
- Writing articles for publications;
- Encouraging research; and
- Making suggestions for legislation and submissions to government.

The members of the Forum consist of adjudicators, adjudication submission consultants, lawyers and industry representatives.

The Forum meets regularly and holds seminars in which a wide variety of issues associated with adjudication are discussed and information is exchanged.

The following response was prepared with input from the Forum's members.

The Forum's two (2) main areas of concern are the abolition of Authorised Nominating Authorities (ANAs) and lack of certainty over what constitutes complex payment claims.

1. **The abolition of ANAs**

The Forum is of the opinion that the abolition of ANAs is a regressive step, will not have any positive effects and will lead to a series of unintended consequences which may see the Act become unworkable or at least ineffective.

The abolition of the ANAs arises from the method of implementation of two scarcely related recommendations to permit the Adjudication Registrar to appoint adjudicators contained in a report prepared by Andrew Wallace (the **discussion paper**).

The discussion paper was presented to adjudicators on 15 April 2014 by the Queensland Building and Construction Commission (**QBCC**) to adjudicators (the **presentation**) where at that time attendees were advised that ANAs were to be abolished. This is not mentioned in the discussion paper which reads in part as follows:

'Q8 – Recommendations

- 17. The current process of authorised nominating authorities appointing an adjudicator is not appropriate and should be discontinued as soon as is practical.*
- 18. The power to appoint adjudicators should be restricted to the Adjudication Registry'*

Apparently this recommendation is to overcome any 'apprehended bias' or 'perceived apprehended bias' issues. We do not accept there is apprehended bias in the system. It has never been demonstrated to any Australian court. The term is the mantra of those whose interest is to oppose the effective working of the Act. However we accept there is a 'perceived apprehended bias' which should be dealt with.

We note that no industry association has publicly called for the abolition of ANAs. There has been no consultation on this issue. The announcement is a complete surprise.

While not considered in the discussion paper, it has become apparent that if the ANAs were abolished adjudicators would be required to communicate directly with both claimants and respondents to adjudication applications.

Since the presentation, ‘adjudicators’ agents’ have been mentioned as a way for adjudicators to communicate with claimants and respondents reducing any (new) ‘apprehended bias’ or ‘perceived apprehended bias’ issues. It has been suggested that ANAs and others could become ‘adjudicators’ agents’.

The Minister states in the first reading speech that: “ANAs will continue to offer their services as a document service agent”. However, how can that be the case when the Bill removes all references to ANAs from the Act? ANAs will have no standing in Queensland.

The following is apparent:

- Adjudicators should not communicate directly with claimants and respondents or their representatives;
- Some type of ‘agent’ is required to stand between the adjudicator and parties;
- The law of agency in Australia is complex. However it is common that agents should have specific obligations defined by the relevant legislation and not be conflicted in the performance of their duties;
- The discussion paper did not recommend that ANAs be abolished only recommending that the Registrar appoint adjudicators; and
- ANAs have provided a service to the Queensland Government, claimants, respondents and adjudicators and while doing this have gained significant skills that all industry stakeholders have benefited from.

Another way the actual recommendation of the discussion paper with respect the appointment of adjudicators could be implemented is as follows:

1. ANAs remain in place as the licenced agents for adjudicators;
2. Claimants make their adjudication applications to the ANA of their choice;
3. The ANA selects three (3) suitable adjudicators and provides these to the Registrar who appoints an adjudicator to decide the adjudication application;
4. The adjudicator provides his or her decision to the ANA who forwards it to the Registrar; and
5. The ANA completes the balance of the functions that it currently carries out.

Prior to carrying out the radical changes proposed (noting that at the presentation we were told that the Act is not ‘broken’) the Forum is of the opinion that the committee should decide if the construction industry is better served by:

1. Licensed ANAs providing a full service (which is listed in the Appendix); or

2. A government body carrying out a few functions, with unlicensed agents carrying out other crucial functions without any statutory oversight?

The Forum respectfully submits that all industry participants are better served by ANAs continuing, particularly taking into consideration the skills and resources that have been gained working with the Act and other similar Acts in Australia.

2. Complex Payment Claims

The Forum submits that this provision needs much more consideration and the unintended consequences of this change could also make the Act unworkable.

Some of the obvious issues are:

1. The inclusion of the term ‘a time-related cost’ without any definition of meaning will render many simple claims complex. By way of example all claims based on time sheet day works; hire of equipment; or simple time sheet service work are to be classified as “complex” under the Act. A provision for interest under contract, triggered by an amount due and not being paid, will render a claim complex.
2. The inclusion of the term ‘a latent condition’ without any definition of meaning will also render many simple claims complex. If a contract has provision for a party to have an entitlement if a latent condition is encountered (e.g. the discovery of hard rock during excavation not known before work commenced), it should be a simple matter for an adjudicator to decide on the value of any entitlement to payment.

Given the Bill defines a simple payment claim as not a complex payment claim and there are no definitions of the terms used in identifying complex payment claims, the majority of all payment claims under the Act are likely to be held by adjudicators to be complex. This becomes most serious as a claimant who identifies its claim as simple when it is complex is deemed to have had the adjudication application withdrawn (Clause 15 of the Bill).

The Forum considers that given time there are many other issues which need detailed consideration. We simply have not had the time to properly assess the implications of all the amendments introduced by the Bill. We therefore strongly urge the Committee to recommend to the Parliament that the time for consultation over the Bill be extended for a minimum period of three (3) months.

Should you require further information please do not hesitate to contact me by [REDACTED]
[REDACTED] or by email to [REDACTED]

Yours sincerely

Robert Sundercombe

President

Appendix to Submission by the Adjudication Forum

Services Provided By Authorised Nominating Authorities

Authorised Nominating Authorities (ANAs) provide the Queensland Government with a regulated, licensed and entitled entity to undertake the administrative functions of the Act in cost effective manner.

In addition to the statutory functions that ANAs are required to carry out ANAs also:

- 1) Provide comprehensive information to parties regarding the *Building and Construction Industry Payments Act* 2004 (the Act) usually in well maintained websites which allow parties to become familiar with aspects of the Act and its operation.
- 2) Provide skilled staff to advise and assist claimants and respondents in real time regarding the adjudication process.
- 3) Select suitable adjudicators based on the issues to be decided.
- 4) Have a variable fee structure under which the determination of smaller claims are subsidised.
- 5) Provide a point of contact between the parties and an adjudicator to ensure communications are kept at 'arm's length'. Ensuring that there can be no inappropriate communications between an Adjudicator and a party to an adjudication application leading to claims of bias.
- 6) Maintain physical and electronic addresses for receipt of adjudication applications, responses and further written submissions. This includes facilities for receipt after hours in hard copy, by fax, by email and large electronic files.
- 7) Formally record the date of receipt of all submissions.
- 8) Provide on-going professional development for adjudicators.
- 9) Monitors skills, knowledge and competencies of registered adjudicators so that adjudication applications can be referred to the most appropriate person.
- 10) Provide additional information the Register as required.
- 11) Provide representation for adjudicators should their decision be challenged in the Supreme Court.