

The Research Director
Transport, Housing & Local Government Committee
Parliament House
George Street
Brisbane QLD 4000

Building & Construction Industry Payments Bill 2014

I am writing this submission in response to the proposed changes to the current ACT and wish to submit information opposing the proposed changes to the authorised nominating authority with respect to Q 8.

The current legislation has been in operation for some time and from our perspective as a small electrical and civil contractor, is one of the best pieces of legislation that the government has ever enacted. The process, once understood, is straight forward and the timelines are practicable.

The intent of the legislation was to enable businesses like ours to obtain payments from larger organisations or individuals that were acting unconscionably in withholding payment, usually for spurious or unsupported reasons, i.e. because they can. This process does work quite well and in our experience, there is no need to change these aspects. You can understand that the payment for work is usually received some time after the work has been completed and this cash-flow is vital to the ongoing operation of the business, and in reality, all businesses are the same in this respect.

We have used the process to obtain payment over the last three years with outstanding success, almost 100% strike rate in obtaining our payments for work that we have completed. The reasons that some of the respondents used to delay payment included

- Spurious quality claims that did not exist
- Denial of any liability for work completed
- Fraudulent counter claims
- Extortion to obtain a discount on the total works
- Many other issues

Other remedies that exist to obtain payment from customers who do not pay include QCAT and the judicial court system. These require increasing levels of fees, legal resources and considerable time including delays and response timelines that can be quite extended. In one case that we still have running MCD02549 (QCAT) related to work completed in 2011 and was taken to QCAT after numerous attempts to obtain payment were frustrated, a number of contested hearings were completed and this concluded in August 2013. It took QCAT until May of 2014 to finally issue a ruling and only after weekly contact to complain about the delay. Consequently the ruling was adverse (as most QCAT rulings tend to be) and we are now appealing this decision (3 years later). The point is we have now invested hundreds of hours of time and thousands of dollars in the QCAT process and we are still owed the money that we have not been paid. If this is the model that the government is proposing then it will not work and small contractor businesses will not survive.

The judicial approach through either the Magistrate or District courts is also more costly and time consuming. In addition, it is not always apparent that the judicial officer is experienced in BICPA type matters and may default to standard legal processes that can be bewildering to most observers. In a recent matter, we have had to self represent in the Supreme Court to obtain an outcome. This is a daunting prospect for most people and may deter most from attempting it. Otherwise you are looking at the services of Barristers who may run at thousands of dollars per day with no guarantee of payment or a decision being arrived at that ensures that you are paid. One hopes that the fees involved do not consume the eventual payment that may /may not be received.

Let us contrast this with the current BICPA process. Provided that the event that instigates the claim is within 12 months of starting the process, you can apply for adjudication. A dispute or non-payment arises, the 10 day claim and 5 day claims are submitted to the responding party. (no cost other than email / fax and or postage). The respondent (the party who owes the payment) must respond to the claims with a payment schedule – an outline of what they propose to pay (including \$0) and the reasons for non-payment. The applicant can then submit a claim to the Adjudicator for an independent arbitration and review of the matter (still no cost incurred).

The adjudicator reviews all of the information supplied by both parties and establishes the matter:-

- Scope of works and works completed
- Existence of a contract
- Reasons for non-payment
- Determines the adjudicated outcome.

Both parties are advised that the adjudication is complete and either party may pay for the decision which is then supplied in writing. The report and adjudication are well written and set out the reasons for the decision and what is to be paid / by whom. The adjudication process is then able to be linked directly into the judicial system if the respondent refuses to pay the adjudicated decision. In our experience, we have been able to obtain a resolution to ongoing non-payment situations in less than 30 days.

We have utilised this process in a number of instances and have been successful in obtaining payment. Some of these claims have been for substantial amounts in excess of \$200,000.00 involving large contractors, large sporting associations, individuals and other small contractors like ourselves. This legislation has enabled our business to survive and maintain our employment of staff as we have been able to obtain payment of our invoices from those that choose not to pay.

Integral to this process is the availability of persons who are skilled in the adjudication process, who have through experience developed knowledge of the various stances and misleading approaches that some “actors” attempt to utilise to avoid payment. Likewise, where the applicant does not have a basis for making a claim, it is also uncovered and dismissed. The adjudicators apply the rules and regulatory requirements for the BICPA without favour and provide an excellent service.

The adjudicators are appointed from a pool of persons who have a wealth of industry knowledge and have developed clear cut expertise in the Building and Construction payments / industry processes. We believe through our own experience that the process of using an authorised

nominating authority, in our case ASC, has worked extremely well and is quite efficient as an adjudicator is appointed within 1-2 days of submitting the claim. We have experienced a range of adjudicators and each has their consistent BICPA approach to the information and how it is processed. We would state quite clearly that the current system for civil and electrical contractors is working very well and does not need to change. The use of independent adjudicators who may reside inside or outside of QLD does not disparage their technical ability to provide a service; that is a very narrow and parochial view (smacking of vested interests) that is supposed to have disappeared in the 21st century. Are we looking backwards to the past instead of the future?

The suggestion of placing it under a government umbrella, namely the Crime and Misconduct Commission will effectively kill the system. It will become a QCAT type of system which we have outlined previously, is flawed in respect of BICPA issues and the timelines and goal posts will move into a process that will cause grief and hardship to small businesses due to the lengthy times required to obtain an outcome.

The Crime and Misconduct commission portrays the issues as “criminal” in that a non-payment has occurred whereas it is a commercial dispute rather than a criminal matter. Two sides have different perspectives on that same matter and somewhere in between is the truth of the matter. From our experience, the reallocation to the Crime and Misconduct commission, whilst obviously intended to provide the perception of “teeth” in the legal process, may in fact deter small contracting businesses from initiating any such processes due to the apparent taint of the jurisdiction involved – Crime and Misconduct.

The use of an adjudication registry to review, vet and appoint adjudicators in all likelihood is a well meaning attempt to improve the “quality” of adjudicators. Over the years I have seen capable people locked out of providing services due to the imposition of spurious qualifications or experience that can only be satisfied by a small percentage of the current pool. What is mooted to improve the process will only in fact reduce the number of authorised persons who can act as adjudicators and clog up the BICPA process with delays due to the non-availability of persons. Based on experience, the fee structure will have to increase to address the following costs that will be incurred:

- Adjudication registry – resources to receive, vet and approve applicants to become or maintain their adjudicator status
- Crime & Misconduct Commission – oversight and regulatory resource to cope with the additional functions (i.e. QCAT) and activities (State budget costs increasing)
- Public servants to resource and facilitate the processes

If an adjudicator is appointed and the decision making process under BICPA is poor, either party to the adjudication could then go to either QCAT or the judicial system to appeal or test the matter further. These processes exist now and do not need to be amended. The process as it stands currently is working quite well and as a constituent voice, politely request that the adjudication appointment process is not amended and that external organisations can provide well regarded resources at an inexpensive rate, without additional interference from the state in a commercial dispute process.

These resources are sometimes retired judicial officers, legal officers and experienced industry veterans who have a depth of experience that the Crime and Misconduct Commission and the QLD Adjudication Registrar (another cost to the budget) can not emulate with these changes. To deplete these ranks of experience adjudicators for classification of “active “ or “non-active” will impact on the efficiency of the system. Can the government guarantee that the decision making process will be low cost, efficient and work for the industry and not the legal fraternity? If not, then do not implement these changes.

Yours Sincerely,

Craig Popplestone
General Manager

Colin Twilley
Director

Orca Installations & Solar Solutions Pty Ltd

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