Joram (John) Murray AM; [redacted]

Submission No.37

The Research Director

Transport, Housing and Local Government Committee

Parliament House

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I am an adjudicator registered under the Building and Construction Industry Payments Act 2004 ("the Act") and am on the panel of various Authorised Nominating Authorities ('ANAs").

I am Chief Adjudicator of Adjudicate Today (which is the ANA that has the largest market share) and I have made more than 300 adjudication decisions and determinations. I also have extensive experience in the building and construction industry, being the former CEO of Master Builders Australia. I have also practised as a construction lawyer with a large Brisbane based law firm.

I have a number of concerns with the current Bill which purports to implement the recommendations of the Wallace Report.

Firstly, I consider that the proposal to abolish the current statutory function of the ANA's to be both misconceived and flawed. There is no evidence that the conduct of any ANAs has been such as to justify the Act being amended so as to remove the ANAs performing any of their existing statutory functions. There has been no court decision criticising the conduct of any ANA nor is there any tangible reference within the Wallace Report that identifies any improper or inappropriate conduct. The only reason Wallace puts forward for recommending that the function of the appointment of adjudicators be transferred from the ANA's to the Registrar, is that there is a *"perception"* that ANA's have adopted *"a claimant friendly"* approach. Leaving aside that the Registrar's own statistical data does not support such a conclusion (and that Wallace chose not to refer to such data when addressing this issue, preferring instead to rely on the unspecified and undetailed comments made by unidentified individuals) the effect of the Government accepting such recommendations will be to create its own (unfortunate) set of "perception" issues. How can the Registrar be regarded as being at arm's length when appointing an adjudicator on the many disputes that involve a Queensland Government department or authority (e.g. local council)? In such circumstances the appearance or "perception" will be very much a case of Caesar judging Caesar. This part of the Wallace recommendation and its

implementation within the Bill fly in the face of the most basic principle of good governance and the traditional concept of the separation of powers.

That such an outcome should be produced in circumstances where there had not been one industry body that had urged for such change is most surprising. That such an outcome should result in the transfer of a function from the private sector the public sector is equally surprising, especially given the current Government's espoused philosophy of championing the interests of the private sector.

If it is accepted that the ANAs provide a valuable service to the industry (and currently at no cost to the taxpayer) and if the proposal to transfer the appointment of adjudicators to the Registrar may create its own set of perception issues (as outlined above), then the Bill should be amended so that ANAs should continue all of their statutory functions. If there should however remain concerns with the "perception" issues associated with ANAs appointing adjudicators (even though there is no factual basis for such perception), then consideration should be given to establishing a process whereby all perception issues can be properly addressed. I would suggest that a proposal whereby the ANAs continue to receive adjudication applications but, instead of appointing adjudicators to specific matters (as they do now), they should be required to provide the details of such application to the Registrar, together with a recommended list of adjudicators with appropriate skills, experience and specific knowledge. The Registrar would then appoint an adjudicator from such list. Such a proposal will go a long way in not only addressing the various perception issues but also ensuring that the adjudicator that is ultimately appointed is the most suitable person to deal with the specific matter in dispute. It will also have the advantage of allowing the ANAs to continue to provide industry with the suite of services.

Secondly, insofar as the object of the Bill is to protect respondents from being "ambushed" from large claims then the proposed changes will, in all likelihood, result in a range of perverse and unintended consequences. It must be remembered that the whole purpose of the legislation is to promote a contractor's cash flow and to establish a mechanism whereby a contractor can receive prompt payment for work carried out (refer to section 7 and 8 of the Act). However, a careful consideration of the definition of a *"complex payment claim"* (clause 45) of the Bill) discloses that many payment claims (even those involving claims significantly less than $750,000) will now be considered to be a complex claim, with the inevitable consequence that it will significantly delay the period from when a claimant may expect to receive an adjudication decision (from 5 weeks after lodgement of application to 16 weeks). Further, by providing more time for the parties to prepare more detailed submissions, will inevitably result in the adjudication process becoming a more expensive exercise. One is therefore left to wonder whether the current statutory process, (which was established to provide a mechanism for the rapid determination of disputes for progress payments) will continue to be viable. Why would a party refer its entitlement to a progress payment to adjudication if the process is now no longer rapid and inexpensive, and then only to end up with an interim decision (that may then also be

the subject of a judicial challenge). The current adjudication process has been described as a process underpinned by the philosophy of *"pay now, argue later"*. If the Bill proceeds in its current form then adjudication in Queensland may well come to be characterised as *"argue now, pay later"*. In my view the Bill has introduced unnecessary layers of complexity in a system that was intended to provide interim relief to contractors so as to preserve their cash flow.

My strong recommendation is that rather than rush the current Bill through Parliament, it would be more prudent if more time should be given to reconsider key aspects of the proposed legislation. It would be a shame if a system that is not broke should be so comprehensively overhauled without due consideration to the consequences it may cause to both industry and government.

I would be pleased to meet with the committee to expand on the viewpoints expressed above.

Yours faithfully

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John (Joram) Murray AM
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