Submission No.40

From: Michael Brand [redacted]
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To: Transport Housing and Local Government Committee
Subject: Submission re Hearings into Building and Construction industry Payments Bill 2014_MB

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

16th June 2014

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

Dear Research Officer

RE: Hearings into Building and Construction industry Payments Bill 2014

My name is Michael Brand and I am the Director of the Adjudication Research + Reporting Unit (ARRU). The ARRU is funded by the NSW Government (through the Office of Finance & Services). The ARRU is hosted by the University of New South Wales. More Information re the ARRU can be found at http://www.be.unsw.edu.au/programs/adjudication-research-reporting-unit/arru-home

I am also an adjudicator for Queensland. I have been an active adjudicator since 2004.

I support the Wallace Report recommendations generally to amend the Building and Construction Industry Payments Act 2004. However, I respectfully say to you that there are some very serious problems with the Bill that require addressing order to: (a) maintain fairness; (b) avoid ambiguity; and (c) ensure that the object of the Act is preserved.

1. **The Bill abolishes ANAs.**

The report prepared by Andrew Wallace was presented to adjudicators on 15 April 2014 by the Queensland Building and Construction Commission (QBCC) to adjudicators. At that time attendees were advised that ANAs were to be abolished. The advice appears to have been derived from the Wallace Report recommendations, which state, relevantly:

'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…'

The recommendation to abolish ANAs is made to overcome alleged perceived or actual apprehended bias in the process of nominating of adjudicators under the current ANA model.

Interesting, the Wallace Report does not point to any empirical evidence supporting the proposition of the perceived or actual apprehended bias in the process of appointing of adjudicators. I am not aware of any industry institute or association having publically called for the abolition of ANAs for this or any other reason. Nor I am I aware of any court decision in any jurisdiction where there has been a finding of apprehended bias on the part of an ANA with respect to the nomination of an adjudicator.

The Adjudication Registry now wants to abolish ANAs and so become the single point for adjudication application lodgement and adjudicator nomination. With respect, this proposed role of the Adjudication Registry goes far beyond the Wallace Report recommendations above. I think the Registry's interpretation of the Wallace Report recommendations in this regard is somewhat drastic, incorrect, and is replete with unpremeditated consequences.

By the Adjudication Registry's own account (made on 15 April 2014), the Registry will go no further than nominating adjudicators for appointment and provide the adjudicator with the adjudication application. In which case, the adjudicator will presumably be required to undertake all of the administrative functions in relation to each application (in addition to making the adjudication determination itself). Administrative functions may include: establishing an office and keeping it open at all business hours on all business days, accepting service of documents, serving documents, corresponding with parties, dealing with telephone calls from parties, invoicing, proof reading, keeping accounts, collecting adjudication fees, serving adjudication determinations, dealing with challenges to the determination and filing submitting appearances in the Supreme Court. In all cases, the adjudicator will charge for this time. This approach is unlikely to have the effect of reducing the cost of adjudication and may, in fact, have the reverse effect through reduced economies of scale.

The Minster has since stated 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 pertinent reference to ANAs from the Act?

Conversely, some ANAs offer adjudicators a service agreement. I operate as an adjudicator for Queensland (and other States) under such an agreement. This is an agreement under which the ANA takes over all the administrative functions for the adjudicator. The services offered are effectively the services that a court registry might provide for a judge or magistrate. These ANAs generally employ a considerable number of experienced staff to provide these administrative services. Under a service agreement, the adjudicator usually agrees to pay about one-third of the adjudicator's fees to the ANA. This usually covers all disbursements and funds the administrative functions undertaken by the ANA on behalf of the adjudicator. In passing, some of these ANAs devote considerable time and resources to promoting the legislation, including: providing speakers at university and industry courses, providing in-principle support for research in the field of adjudication supporting workshops for industry participants, and operating and maintaining dedicated websites. Importantly, these ANAs provide a point of separation between parties and adjudicators. My concern is that if ANAs lose their statutory role altogether, these services will cease to the detriment of the process of adjudication, the parties to adjudication and industry participants.

In sum, the proposal for the abolition of ANA's is, in my view, wholly regressive and unjustified.

If a response is deemed necessary to counter any perceived or actual apprehended bias in the process of nominating of adjudicators under the current ANA model, then I think a measured response is the best response. This is echoed in the Wallace Report recommendations themselves. I respectfully suggest that the recommendations with respect the nomination of adjudicators could be implemented to proper effect 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 submits the names of, say, at least three (3) suitably qualified and available adjudicators on its panel to the Registrar who then nominates an adjudicator to decide the adjudication application;
4. Once an adjudicator is nominated, the ANA completes the balance of the administrative functions that it currently carries out for the adjudicator; and
5. Once the adjudicator's decision is made, the adjudicator provides the decision to the ANA who then forwards it to the Registrar.

I respectfully submit that all industry participants are better served by the current ANA model continuing. The only difference I suggest being that the Registrar, rather ANAs, nominate the adjudicator via points 1-5 (inclusive) immediately above. This approach is consistent with Wallace Report recommendations above and I believe could be implemented without disrupting the long-standing and well-understood adjudication application process for industry-participants.

2. Adjudicator's fees when the adjudicator does not adjudicate the payment claim

There are three circumstances where the adjudicator should be entitled to a fee even though the adjudicator has made no decision on the payment claim. They are:

1. when the adjudication application is taken to have been withdrawn under the proposed s 35B;
2. when an adjudication application is taken to be withdrawn under the proposed s 25(7) because the adjudicator is of the opinion that a payment claim has been incorrectly identified as a standard payment claim;
3. when the adjudicator decides under the proposed s 25(3)(a) that he or she has no jurisdiction.
4. However, the only provision that entitles an adjudicator to be paid is in s 35(1). That provision entitles an adjudicator to be paid for adjudicating an adjudication application. There is nothing in the

Act or the Bill that would entitle the adjudicator to be paid for not adjudicating an adjudication application.

The proposed ss 35(5) and 35(6) do not solve the problem. They only qualify s 35(4). That section does not give the adjudicator the right to claim a fee. It merely prescribes a circumstance where the adjudicator is not entitled to a fee. The proposed section 35(6) only applies where a court finds the adjudicator's decision void.

For the protection of adjudicators what is required is the omission from s 35(1) of the words, 'for adjudicating the adjudication application'. Then the adjudicator would be entitled to the agreed fee or fees and expenses that are reasonable having regard to the work done and expenses incurred by the adjudicator.

3. Deemed withdrawal on payment

The proposed s 35B(b) provides that if a respondent has paid the claimant claimed amount, the adjudication application is taken to have been withdrawn. This provision should be deleted. It discriminates against claimants.

If the claimant is paid the claimed amount after commencement of the adjudication, the claimant should still be entitled to an adjudication decision. Even though the respondent concedes liability there is still the question of the due date for payment and interest. At the time the respondent makes the payment the claimant may be entitled to a substantial amount for interest under the Act. The effect of section 35(B)(b) would be to deprive the claimant of the interest. Section 35B(b) unfairly advantages the respondent.

There may be other reasons why a claimant would want and be entitled to a decision even after payment has been made. If the claimant does not want a decision the claimant can withdraw the adjudication application. A decision would establish the value of work at the reference date for the payment claim and in a subsequent adjudication it would prevent the respondent from contending that the work did not have that value [s 27 of the Act]. There may be issues between the parties on, for example, whether an item in the claim, say $10,000 for a variation, is an item which the claimant is entitled to include in the payment claim. If the respondent merely pays the amount of the claim, that is in itself no admission that the work is a variation or worth $10,000. When the claimant makes the next payment claim the respondent may withhold payment of $10,000 and force the claimant to go to adjudication again.

The issue should be decided in the adjudication application that s 35B(b) would unfairly treat as withdrawn. Section 35B(b) should be deleted.

4. Definition of complex payment claim

The definition is:

'Complex payment claim means a payment claim for any of the following-

a. any payment for an amount more than $750,000 or, if a greater amount is prescribed by regulation, the amount prescribed;
b. a latent condition under the relevant construction contract;
c. a time-related cost under the relevant contract'.

I respectfully submit that the distinction between 'standard' payment claims and 'complex' payment claims should not be introduced. I recommend that there be no distinction between a complex payment claim and a standard payment claim and that all payment claims be treated equally.

a. <u>A claim for more than $750,000</u>

I respectfully suggest that the definition is misconceived. There is an assumption made that the 'complexity' of a payment claim corresponds with the amount claimed. This is not a correct assumption. The complexity of deciding a payment claim has nothing to do with the amount claimed. The 'complexity' of a claim depends upon the issues raised only.

If payment claims are to be separated into standard and complex, then payment schedules should be similarly separated.

A payment claim must be adjudicated the same way no matter what is the amount claimed.

A payment claim cannot be for a latent condition. A payment claim must be for an amount calculated under ss.13 and 14 of the Act. No construction contract allows a claimant to make a progress claim solely for a latent condition. No construction contract allows claim-splitting and progress payments for separate heads of claim. For example, a claimant cannot make a payment claim solely for extra on account of variations, a change in the law, a latent condition, disruption or time related costs. A payment claim can only be made on account of the total amount that the claimant claims to be due under the contract. To make a payment claim for those separate items would breach the principle of against claim-splitting. The Act does not permit claim-splitting. However, the definition of complex claim is based upon the assumption that claim-splitting is allowed.

b. Latent condition

The term 'latent condition under the relevant construction contract' is not defined. Some construction contracts include a definition of a latent condition. There are many different definitions. Where there is a definition, the contract usually provides that if the contractor finds a latent condition the contractor will be entitled:

(a) if the latent condition causes the work specified to be varied, extra for the variation; or
(b) if the latent condition does not cause the specified work to be varied, an extra amount.

In the case of (b) the contract will provide how the extra amount is to be calculated. Variations are valued under a variation clause, not a latent condition clause.

A payment claim may claim a progress payment that includes in the claimed amount an amount on account of a variation. Is it intended by the definition that variations will be split into those that arise from a latent condition and those that don't?

The Act should leave it to the parties to prescribe in the contract how a progress payment is to be calculated. That is what ss.13 and 14 prescribe.

If the construction contract does not provide for payment for extra costs arising from a latent condition then ss.13 and 14 of the Act do not allow the extra amount to be included in the calculation of the progress payment.

Deciding the amount that the contract allows to the claimant where there is a latent condition clause is no more difficult that deciding any other amount. Deciding whether a condition is a latent condition within the meaning of the contract is sometimes a difficult task.

c. Time related costs

A payment claim cannot be for a time related cost separate from the progress payment for other work. A claimant cannot engage in claim-splitting and separately claim a progress payment for a time related cost.

It is not clear what was intended by 'time related costs under the construction contract' but a claim for a time related cost as damages for breach of contract would not be a claim 'under the construction contract'. It would be what is commonly described as 'an ex-contractual claim' because it is not made under the contract but for breach of contract.

Please contact me if I can be of further assistance.

Yours sincerely

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