Submission No.56

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[redacted]

27 June 2014

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

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

Dear Ms McGuckin,

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

I have previously made submissions on the *Building and Construction Industry Payments Amendment Bill* 2014 ("**Bill**") and I write now to address, by way of reply, the issue raised most frequently in the submissions made by others and to raise one new issue.

In taking this approach, I do not mean to suggest that the issue raised most frequently by others is the most significant issue in the Bill at all. It isn't. The most significant issues in the Bill are that the proposed changes are more likely to frustrate than further the objectives of the Act, that the proposed changes are likely to increase litigation involving the Act at a time when the many aspects of operation of the Act have only just become settled, the myriad of technical issues raised most comprehensively in the submissions of Davenport, but also by others, including the Queensland Law Society, and the problems in the manner in which the power to appoint adjudicators is proposed to be reposed in the registrar, which I addressed in my earlier submission.

'Abolition' of ANAs

The issue raised most frequently in the 52 non-confidential submissions made to the Committee concerns the 'abolition' of ANAs and the related question of appointment of adjudicators by the registrar. These two aspects of the Bill were specifically addressed in 47 of the 52 submissions made (with the exceptions being Davenport, Sullivan, Fall (Clayton Utz), the first Lowry submission and the Queensland Law Society).

It should be noted at the outset that although the proposal to 'abolish' ANAs attracted many submissions, support for the current system of appointing adjudicators was extremely limited indeed and was expressed in only 3 of the 47 submissions in which the appointment of adjudicators was addressed. One of those submissions was made by an adjudicator/party/preparer, who did not wish to be named. The other two were made respectively by Orca Installations & Solar Solutions Pty Ltd, which appears to have used the Act as a claimant, and John Murray, who describes himself as "Chief Adjudicator of Adjudicate Today".

The unnamed adjudicator/party/preparer submitted that the current system is "fair, transparent, honest and arms length" and that he/she "would not like to have to search out adjudicators or have one appointed by a registrar without regard to the suitability of the appointment, or by an outfit that does not know its adjudicators". Orca Installations & Solar Solutions Pty Ltd also submitted that the current system "is working quite well" and that the abolition of ANAs would "clog up the BCIPA process with delays" and increase the cost of adjudication. John Murray, on the other hand, pointed to a lack of evidence of any conduct justifying the abolition of ANAs and the conflict of interest involved in the Registrar appointing adjudicators to decide disputes involving any Queensland government department or authority.

It is respectfully submitted that the arguments offered in support of the existing system are easily dealt with, while those offered in respect of the new system embodied in the Bill generally raise substantive concerns that warrant further attention.

The main problem with the supportive view of any claimant, adjudicator or ANA is that they are invariably tainted with self-interest. It is, for example, hardly surprising that a claimant would express support for the current system because it is under that system that claimants alone choose ANAs, and that the commercial interests of ANAs (at least, in the short term) are invariably aligned with the interests of claimants. To put the matter more plainly, the happier claimants, individually and as a class, are with an ANA, the more likely they are to lodge their applications with that ANA. A claimant's happiness may well be the result of a well-priced, efficient, and courteous service or may be related to other more favourable treatment, real or imagined.

Mr Murray points out that there is no evidence of any actual bias on the part of ANAs or adjudicators. This is hardly surprising when actual bias is very difficult to establish, when no-one is asking the right questions, when no-one has been compelled to give evidence on the issue and when all those who are in a position to know what is going on, and could volunteer such evidence, stand to lose the most. The lack of evidence of actual bias fails to address the real issue, which is the question of perceived bias.

Quite apart from the very structure of the current system, there is enough conduct by at least one ANA to cast doubt over whether ANAs might not exercise their power to appoint adjudicators in a manner that is free from bias. Examples of this conduct include:

- the practice of allowing parties who are advised by an adjudicator to lodge applications with an ANA that refers matters to that adjudicator;

- 'rewarding' those adjudicators with extra nominations;

- when purportedly acting in their capacity as 'agent' for adjudicators, 'waiving' an adjudicator's contractual right to payment to 'build goodwill' with solicitors who are 'regular clients' of the ANA;

- initiating complaints about adjudicators to placate irate preparers;

- requesting and using the professional services of adjudicators on a substantial and on-going basis without paying for those services, except perhaps by referring additional matters to them;

- 'disciplining' adjudicators by declining to refer matters to them for extended periods, or at all, if they make decisions or pursue their own legitimate professional interests in a manner that is perceived to be contrary to the ANA's commercial interests; and

- keeping positions open for, or referring matters to, persons who are carrying out public duties or have just completed carrying out public duties.

This sort of activity will no doubt be music to the ears of organisations that prepare and submit applications to ANAs on a regular basis but it is quite improper. It could easily be addressed by ensuring that the process of nominating adjudicators is auditable or audited but this has not occurred and a highly discretionary approach to the appointment of adjudicators has been allowed under the guise of appointing the most 'suitable' adjudicator.

At least one ANA has also gone so far as to establish a 'compliance committee' to oversee the 'quality' of adjudicator decisions. While some adjudicators complained loudly about the effect this would have on their independence and the perception of their impartiality, others are on record as refusing to speak out lest they be disciplined in the manner described above. Under the original proposal, the ANA in question also wanted to be able to refer matters to the committee and sit on the committee. Members of the committee are not remunerated for their work, except perhaps in the usual way; that is to say, by having more matters referred to them. Furthermore, the existence of this committee has not been drawn to the attention of parties, is contrary to the ANA's stated complaints policy and is currently constituted by adjudicators, many, if not all, of whom assist parties who submit applications to the ANA in question.

I turn now to the submissions that expressed concern about the impact, or some other aspect, of the proposed system for appointing adjudicators.

A detailed analysis of the relevant submissions shows that, with few exceptions, they fall into three distinct categories: those expressing concerns about aspects of the process which resulted in the Bill coming before the

parliament, those expressing concern about some or other aspect of the appointment of adjudicators by the registrar and those expressing concern about the prospect that ANAs will no longer provide administrative and other services to adjudicators, including acting as a 'buffer' between parties and adjudicators.

The latter concern is wholly misconceived because the Bill does nothing to prevent organisations and firms that presently operate as ANAs from continuing to offer their administrative and other services to adjudicators who want them. Those bodies will, however, be forced to operate in a more competitive environment because the proposed changes will effectively open the opportunity to provide administrative and other services (including training and professional development) to adjudicators to all-comers and do away with the unnecessary and excessive market power currently vested in ANAs through their power to refer matters to adjudicators. It might be difficult to accurately predict the effect that competition will have on this aspect of adjudication costs but it can hardly be denied that the usual effect of competition is to improve the range of services offered and to decrease rather than increase prices and I can think of no reason why that should not happen here.

Mr Gaussen (Adjudicate Today) seemed to go further than anyone else by suggesting that some 'buffer' between parties and adjudicators is necessary and that providers of administrative services to adjudicators should be licensed. In my view, both suggestions are unwarranted. There is a right way and a wrong way for parties and adjudicators to go about contacting each other directly but there is nothing improper about it *per se*. It is up to adjudicators to decide whether they can or want to manage without any buffer and many may well choose to do so. If an adjudicator does choose to engage someone – including a spouse, friend or, for that matter, someone who acts as a preparer - to manage documents and correspondence, send invoices and proofread decisions, they will, of course, be responsible for how that person carries out their duties. But the risk and consequences of a person acting in an administrative capacity failing to pass on a document is no greater than the risk and consequences of an adjudicator failing to find that it has been served within time and there are numerous instances of the latter occurring over the years. Such mistakes are always most regrettable but the risk of them occurring does not justify the licensing of administrative help.

The two most common concerns about the process that resulted in the Bill coming before the parliament is that the abolition of ANAs was not recommended by Mr Wallace or "goes much further than the recommendations of the Wallace Report", and was not based upon any evidence of actual bias. The former complaint was made, on my count, by 31 people, 28 of whom are adjudicators associated with Adjudicate Today who chose to put their name to the *pro forma* submission (or some version of it) circulated by the Managing Director of Adjudicate Today. This submission has no merit because the primary statutory function of ANAs is to refer matters to adjudicators, and all other statutory functions (of which there are only really two) are entirely ancillary. Thus although Mr Wallace may, strictly speaking,

only be said to have recommended that ANAs no longer be permitted to refer matters to adjudicators, it clearly makes no sense at all and would be very poor policy for ANAs to retain the statutory functions that are ancillary to this task, and there could not have been any reasonable expectation that this would occur. It is unfortunate that ANAs were referred to in the First Reading of the Bill but that would appear to amount to no more than a drafting error.

I have addressed the flaws in the 'no evidence' argument above.

The only remaining issue therefore involves the concerns raised about the registrar taking on the nomination of adjudicators. Broadly speaking, and not including the issues I raised in my earlier submission, these include concerns about:

1. the effect on the quality or suitability of adjudicators being nominated (Private, Terry-Whital, Martin, Warren, Atkin, Tonkin, Master Builders and Sive);

2. the effect on the cost of adjudication (ABCDRS, Vishney, and Master Builders);

3. the conflict of interest involved in the registrar appointing adjudicators to disputes involving Queensland government departments, agencies and authorities (ABCDRS, Murray, HIA and Gaussen (Adjudicate Today)); and

4. the cost to the people of Queensland (Sive);

5. the readiness and suitability of the registrar and his office (Sive);

6. the lack of legislative control over the registrar's powers (Sive); and

7. whether the registrar will accept electronic lodgement of documents (Tonkin).

While all these issues must be considered, none of them justify adopting the most commonly suggested alternative solution, namely, that ANAs be retained to supply a short list of adjudicators to the registrar with the registrar making the final nomination. This solution completely fails to break the web of ancillary relationships between adjudicators and ANAs that contributes to the perception of bias that all, bar one, of proposers of the short-list solution readily accept exists. To make matters worse, the short-list proposal gives the appearance that the registrar is nominating adjudicators while denying him any real choice. This would leave him with all the responsibility for those decisions but no power to improve things in any regard.

Adjudication qualifications

The new issue I wish to raise concerns the way in which the power to issue adjudication qualifications is administered. Under the Act as it currently stands, the Governor in Council makes regulations prescribing bodies that may issue a qualification. However, once prescribed those bodies retain the right to issue qualifications even though, for example, the basis on which they

became prescribed no longer exists. In this way, a prescribed body can, for example, issue adjudication qualifications upon completion of a course where not a single instructor is a legal practitioner. If adjudication qualifications are to be retained at all (and the Bill contains no changes to this aspect of the Act), it is more appropriate for qualifying bodies to be licensed for fixed periods, and subject to relevant conditions, including the obligation to report any material changes to their program, training personnel etc.

Yours sincerely,

HELEN DURHAM