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To: Committee Secretary
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**A recommendation for amendment of the BIF (Security of Payment) Act 2017 –
Section 97**

S.97 of the Building Industry Fairness (Security of Payment) Act 2017 (“the Act”) governs the circumstances under which an adjudication may lawfully be withdrawn. The section is as follows:

- (1) *An adjudication application –*
- (a) *Is withdrawn if the claimant has given written notice of discontinuation to the adjudicator and respondent; or*
 - (b) *Is taken to have been withdrawn if the respondent has, before an adjudicator has decided the application, paid the claimant the amount stated in the payment claim the subject of the adjudication application.*
Note: Despite the withdrawal of an adjudication application an adjudicator is still entitled to be paid fees for considering the application, see section 95.
- (2) *If subsection 1(b) applies, the claimant must as soon as practicable inform the adjudicator that the adjudication application has been withdrawn because of payment.*

I refer to specifically to s.97(1)(b) & s.97(2) as the *Taken to Have Been Withdrawn Provision*. In my view, this provision is misconceived and would benefit from amendment.

Under s.97(1) a claimant may withdraw its application for its own reasons. In this case, it is reasonable that the claimant is responsible for 100% of the adjudication fees. In this circumstance, it is not necessary for the adjudicator to decide the application and the Claimant simply becomes liable for the fees.

The *Taken to Have Been Withdrawn Provision* relates to where the respondent decides to pay the full claimed amount after the claimant has applied for adjudication. The act of payment in this instance is an implicit admission of liability by the Respondent. In this instance it would seem reasonable for the respondent to be liable for 100% of the adjudication fees. However, under s.97(1)(b), if a respondent pays in full, this triggers automatic withdrawal of the adjudication.

Note that this is enabled by the current wording of the Act: “An adjudication application is taken to be withdrawn if the respondent has [...] paid the claimant the amount stated in the payment claim [...]” (s.97(1)(b)). The word “withdrawn” places an implicit onus on the claimant, since only the claimant holds the power to submit and withdraw an adjudication application under the Act.

Accordingly, under s.97 in its present form, the Claimant becomes liable for the adjudication fees in the circumstance that the Respondent pays the full claimed amount. In my view this is not appropriate and s.97(1)(b) and its supplementary provision s.97(2) should be deleted.

Last year I adjudicated an application where the Respondent paid in full sometime after I had been appointed. This caused an intense dispute between the parties. The Claimant considered it unjust that it had been denied payment in the first place, that it had to bear the costs of preparing an application and that it then was required to bear my fees.

Sometimes when the Respondent pays in full, I understand that adjudicators apportion the fees to the Respondent. While understandable, this practice is at odds with the requirements of s.97(1)(b) of the Act.

In substance, there are only three possible options for the status of an adjudication: - withdrawn (by the claimant), invalid or valid. Any decision that an adjudicator may make as to fees is in this context. If a Claimant withdraws its application, then this relieves the need for an adjudicator to make a decision. Under the other two scenarios the adjudicator basically needs to fully decide the application to apportion the fees.

First the adjudicator needs to decide whether she or he has jurisdiction to properly decide the apportionment of fees. To do this, the adjudicator must assess whether the claimant has applied for adjudication within the times allowed by the Act. This, in turn, often means that the adjudicator is required to decide the due date for payment.¹ Additionally, to properly apportion the fees, the adjudicator then needs to decide the extent to which the respondent should have paid the amount of the progress payment. Finally, if the payment by the respondent was after the due date for payment, an adjudicator could reasonably decide the rate of interest on overdue payments.

As such, if an adjudicator sets out to apportion the adjudication fees, then the process becomes one of deciding the adjudication as though s.97(1)(b) did not exist.

In summary, if an adjudicator construes s.97(1) according to its words, then the effect of the payment by the Respondent is the Claimant bears the adjudication fees which is unfair. If an adjudicator sets out to apportion the fees, then s.97(1) becomes redundant and a source of confusion.

Note that if a Respondent realises its reasons for withholding are untenable, and pays in full, it still stands to gain a significant benefit. Paying in full has the natural effect of reducing the work to adjudicate and thereby lowering the fees. If a Respondent pays in full, then the adjudicator can reasonably (and quickly) find that

¹ See s.79(2)(b).

the progress payment is the full amount claimed and allocate 100% of the fees to the Respondent.

Other states

The SOP Acts of Vic & ACT do not contain any provisions that permit a party to withdraw the adjudication application. The SOP Acts of NSW, Tasmania and South Australia, permit the Claimant to withdraw its application by giving written notice, the equivalent to s.97(1)(a). However, these Acts do not contain any equivalent to the *Taken to Have Been Withdrawn Provision*.²

Wallace report

The Taken to have been Withdrawn Provision was introduced into the BCIPA Act in 2014.³ The amendments of 2014 were largely driven by the Wallace Report⁴. I note that this report only recommends a provision that allows Claimant's to withdraw an adjudication application⁵. However, the report does not mention any provision that deems the application as withdrawn upon full payment. As such, the *Taken to Have Been Withdrawn Provision* seems to be without clear basis.

Recommendation

In conclusion, I recommend that the s.97(1)(b) & s.97(2) of the Act be removed from the Act. Notwithstanding, the note that preserves the adjudicator's entitlement to fees should remain. This note provides a useful clarification in the circumstance that the claimant withdraws its application.

Susan Leech

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² See s.17A of the NSW SOP Act, s.21(8) of the Tasmanian SOP Act and s.27 of the SA SOP Act.

³ The Building and Construction Industry Payments Act 2004 (Qld), the "BCIPA Act" was the major source of Chapter 3 of the Building Industry Fairness (Security of Payment) Act 2017.

⁴ Final report of the review of the discussion paper – Payment dispute resolution in the building and construction industry by Andrew Wallace on 24 May 2013.

⁵ See Question 14 of Final report of the review of the discussion paper – Payment dispute resolution in the building and construction industry by Andrew Wallace on 24 May 2013.