Building and Construction Industry Payments Amendment Bill 2014

Report No. 52

Transport, Housing and Local Government Committee

September 2014

Transport, Housing and Local Government Committee

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Acknowledgements

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Abbreviations

ANAs	Authorised nominating authorities
BCIP Agency	Building and Construction Industry Payments Agency
CCC	Crime and Corruption Commission
CMC	Crime and Misconduct Commission
FLP	Fundamental Legislative Principles
HIA	Housing and Industry Association
OQPC	Office of the Queensland Parliamentary Counsel
PIA	Preliminary Impact Assessment
QBCC Act	*Queensland Building and Construction Commission Act 1991*
QBCC Act	*Queensland Building and Construction Commission Act 1991*
QBSA	Queensland Building Services Authority
QCA	Queensland Competition Authority
QCAT	Queensland Civil and Administrative Tribunal
The Act or BCIPA	*Building and Construction Industry Payments Act 2004*
The Bill or BCIPA Bill	Building and Construction Industry Payments Amendment Bill 2014
The Commission or QBCC	Queensland Building and Construction Commission
The Committee	Transport, Housing and Local Government Committee
The Committee	Transport, Housing and Local Government Committee
The Department or DHPW	Department of Housing and Public Works
The discussion paper	*Payment dispute resolution in the Queensland building and construction industry* released in December 2012
The Wallace report	*Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013 by Andrew Wallace

Chair's Foreword

This report presents a summary of the Committee's examination of the Building and Construction Industry Payments Amendment Bill 2014.

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, whether it has sufficient regard to rights and liberties of individuals and to the institution of Parliament.

The public examination process allows the Parliament to hear from members of the public and stakeholders they may not have otherwise heard from, which should make for better policy and legislation in Queensland.

On behalf of the Committee I thank those individuals and organisations who lodged written submissions on this Bill, and others who have informed the Committee's deliberations: the Committee's secretariat, officials from the Department of Housing and Public Works and the Technical Scrutiny of Legislation secretariat.

I commend the report to the House.

Mr Howard Hobbs MP
Chair

September 2014

Recommendations

Recommendation 1 **2**

The Committee recommends that the Building and Construction Industry Payments Amendment Bill 2014 be passed.

Recommendation 2 **7**

The Committee recommends the development and inclusion in the Bill of high-level guiding principles, including factors or criteria to guide the adjudicator appointment process, which the registrar and agency staff (to whom the appointment of adjudicators is delegated), must comply with in the appointment of adjudicators.

Recommendation 3 **9**

The Committee recommends that an alternative model for the appointment of adjudicators to matters where the Queensland Government is a party be developed and included in this Bill.

Recommendation 4 **10**

The Committee recommends that the Bill be amended in keeping with Recommendation 19 of the Wallace Report which recommends amendment of the *Building and Construction Industry Payments Act 2004* to ensure that adjudicators fall within the jurisdiction of the Crime and Corruption Commission.

Recommendation 5 **12**

The Committee recommends that the Minister make a statement during his second reading speech outlining the advice sought and received from the Queensland Competition Authority and addressing the perception that the amendments are anti-competitive.

Recommendation 6 **14**

The Committee recommends that the Minister specify in the Bill who will be responsible for the training and accreditation of adjudicators (currently a statutory function undertaken by only those ANAs prescribed under the Building and Construction Industry Payments Regulation 2004) once other statutory functions are transferred to the Registry.

Recommendation 7 **14**

The Committee recommends that the Bill be amended to include indemnity protection for Authorised Nominating Authorities to cover them for any existing function claims prior to the amendment of the legislation.

Recommendation 8 **19**

The Committee recommends that the Bill be amended to include a requirement that adjudicators engage independent agents.

Recommendation 9 **21**

The Committee recommends that the Bill be amended to remove the inclusion of both latent and time-related costs from the definition of complex claims.

Recommendation 10 **22**

If the Minister does not agree to Recommendation 9 (above) to remove 'latent' and 'time-related' from the definition of 'complex claim' in the Bill, then the Committee recommends that the Minister investigate and implement alternatives for the resolution of claims which have been incorrectly classified by the claimant as 'standard'.

Recommendation 11 **25**

The Committee recommends that the Minister implement Wallace's Recommendations 10-15 concerning the inclusion of retention monies and securities in payment claims, the establishment of a Construction Retention Bond Scheme, the introduction of penalties for contractors and the empowerment of adjudicators to direct the release of securities, through amendments to the *Building and Construction Industry Payments Act 2004* and the *Queensland Building and Construction Commission Act 1991*.

Recommendation 12 **27**

The Committee recommends that the Minister investigate ways to protect claimants against non-payment of outstanding amounts once a contract has been terminated.

Recommendation 13 **34**

The Committee recommends that the Bill be amended to provide for the regulation of all adjudication fees and costs including, but not limited to, the adjudication application, the adjudication fee and the adjudication certification process.

Recommendation 14 **35**

The Committee recommends that the Bill be amended to replace 'must' with 'may' in proposed section 100(4) to provide the Supreme Court with a discretion to enforce part of a payment rather than a direction to do so.

Recommendation 15 **36**

The Committee recommends that the Bill state clearly how claims, schedules and adjudication applications which have already commenced are to be treated under the amended Act.

Recommendation 16 **37**

The Committee recommends that the Bill be amended to address the drafting errors identified in submissions to this Bill inquiry.

Recommendation 17 **39**

The Committee recommends that the Bill be amended to ensure that section 20A is clarified, specifically:

- Delete sections 20A(1)(b) and 20A(4)(a)(ii) so that a claimant has an immediate right to start proceedings where a payment schedule has been given but the scheduled amount is unpaid
- Clarify section 20A so that, where a second chance payment schedule is given under section 20A, then section 19 does not apply and
- Clarify the interactions between new section 20A and provisions relating to lodging an adjudication application.

Recommendation 18 **39**

The Committee recommends that the Bill be amended to address the inconsistencies identified in submissions to this Bill inquiry.

1 Introduction

1.1 Role of the Committee

The Transport, Housing and Local Government Committee (the Committee) was established by resolution of the Queensland Legislative Assembly on 18 May 2012, consisting of government and non-government members.

Section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill
- the application of the fundamental legislative principles to the Bill.

The Building and Construction Industry Payments Bill 2014 (the Bill) was referred to the Committee on 21 May 2014. The Committee is required to report to the Legislative Assembly by 1 September 2014.

The Committee received fifty-seven submissions (see Appendix A for a list of submitters) and held a public briefing by the Department of Housing and Public Works (the Department), the Queensland Building and Construction Commission (the Commission or the QBCC) and Mr Andrew Wallace on 25 June 2014 (see Appendix B for a list of witnesses). The Committee also held a public hearing on the Bill on 21 July 2014 where it heard from 12 submitters as well as discussing the objectives of the Bill with Departmental witnesses, officers from the Commission, and Mr Andrew Wallace (see Appendix C for a list of witnesses).

Transcripts of the briefing and hearing and copies of the submissions are published on the Committee's website www.parliament.qld.gov.au/work-of-committees/committees/THLGC/inquiries/current-inquiries.

1.2 Policy objectives of the Building and Construction Industry Payments Amendment Bill 2014

The objective of the Bill is to amend the *Building and Construction Industry Payments Act 2004* (the Act or the BCIPA) to undertake reform in three main areas arising from the recommendations of the Wallace Report into payment dispute resolution in the Queensland building and construction industry.[1] The three main areas of reform reflect the issues raised by stakeholders from the building and construction industry:

- appointment of adjudicators and the adjudication process
- amendment of timeframes for claimants and respondents and to address complex claims
- provision of additional information in adjudication responses.

When introducing the Bill to the Parliament on 21 May 2014, the Hon. Tim Mander MP, Minister for Housing and Public Works, stated that:

> *…while the intent of the original Building and Construction Industry Payments Act 2004, the BCIPA Act, was sound and worthwhile there were some unintended consequences that undermined the industry's confidence in the Act. The intent is to ensure that a person is entitled to receive and is able to recover progress payments when they undertake construction work under a contract or to supply related goods and services under a construction contract. BCIPA establishes a system of rapid adjudication for the interim resolution of payment disputes*

[1] Explanatory Notes:1 and Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013

involving building and construction work contracts. It is an act where on one contract a person might be the claimant but on another they may become the respondent.

…

The reforms outlined in the Bill ensure a fairer and more equitable system for appointing adjudicators. The reforms will also provide a better balance between the interests of claimants and respondents and reduce the instance of late claims, which will ensure a fairer system for all parties. To ensure the reforms address the concerns expressed by all stakeholders, a review of the impacts will be undertaken 12 months after implementation of the reforms.[2]

Committee comment

The Committee supports the general objectives of the Bill and recommends that the Bill be passed. Our investigation of specific issues related to the Bill is detailed in the following sections of the Report along with a number of recommendations that the Bill be amended.

Given the significant concerns raised by stakeholders in submissions on the Bill, the Committee strongly supports the proposed 12-month review of the impacts of the revised legislation.

Recommendation 1

The Committee recommends that the Building and Construction Industry Payments Amendment Bill 2014 be passed.

[2] Minister for Housing and Public Works, Hansard Transcript, 21 May 2014:1681

2 Examination of the Building and Construction Industry Payments Amendment Bill 2014

2.1 Background

2.1.1 The Building and Construction Industry Payments Act 2004

The object of the BCIPA is to ensure that a person is entitled to receive and able to recover progress payments, if they undertake to carry out construction work, or supply related goods and services, under a construction contract.

> *The BCIPA operates to provide greater 'security of payment' for contractors in an industry that typically operates under a hierarchical chain of contracts with inherent imbalances in bargaining power.*
>
> *To achieve this objective, the BCIPA grants an entitlement to progress payments whether or not the relevant contract makes provision for progress payments, and also establishes a procedure for the making of, and responding to payment claims in set statutory timeframes and for the referral of disputed or undisputed claims to an adjudicator for a decision.*
>
> *An adjudicator's decision is legally enforceable and there are limited grounds for review. However, contractual rights of the parties are preserved, so that either party dissatisfied with an adjudication decision may take further action through the courts to enforce their contractual rights. The legislative scheme has been described as "pay now, argue later".*[3]

The Department advised the Committee that since the introduction of the Act in 2004, some building industry stakeholders have raised issues around its operation and in response the Minister for Housing and Public Works released a discussion paper in December 2012 entitled *Payment dispute resolution in the Queensland building and construction industry* (the discussion paper) to seek feedback on the operations of the Act.

> *Mr Wallace, a barrister experienced in the building and construction industry, was engaged to undertake an independent review of the submissions received in response to the discussion paper and to clarify and seek additional information from relevant stakeholders to provide the Minister with a report and recommendations for reform. Mr Wallace's report dated 24 May 2013 contains 49 recommendations. The Department of Housing and Public Works, with the assistance of two committees – which included representation from relevant government departments, the Australian Institute of Building and the former Queensland Building Services Authority – developed a submission to the Minister on recommendations proposed for implementation.*[4]

The Bill's proposed amendments to the BCIPA stem from this review and the recommendations contained in the Wallace Report.

2.1.2 Consultation

Mr Andrew Wallace undertook extensive consultation with industry stakeholders in the preparation of his final report, and additionally the Department carried out an extensive review of the 49 Wallace Report recommendations with the committees referred to above.

Further consultation was undertaken on the draft Bill. The Explanatory Notes state:

> *In April 2014 communication on the proposed amendments occurred with key industry stakeholders and the current authorised nominating authorities and the proposed reforms*

3 Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:6

4 Don Rivers, Hansard Transcript, 25 June 2014:2

> *were publicly announced more broadly to other industry stakeholders. All registered adjudicators were also invited to an information session to discuss the impacts of the reforms.* [5]

2.2 Policy issues

2.2.1 Appointment of Adjudicators

The Bill proposes the establishment of a single adjudication registry within the QBCC to monitor performance and appoint adjudicators based on skills, knowledge and experience. It is proposed that authorised nominating authorities no longer undertake this function to remove any perception of conflicts of interest and bias, which were raised in response to the discussion paper, in the appointment of adjudicators.[6]

These amendments to the BCIPA stem from the Wallace Report which recommended:

> <u>Recommendation 17</u>: *The current process of authorised nominating authorities appointing adjudicators is not appropriate and should be discontinued as soon as is practicable.*
>
> <u>Recommendation 18</u>: *The power to appoint adjudicators should be restricted to the Adjudication Registry.*[7]

At the public briefing on 25 June 2014, Mr Andrew Wallace stated:

> *I formed the view that the most appropriate way to ensure the independence of appointment was to bring it in house, to bring it within government. That might seem like an unusual approach for a conservative government to adopt but, at the end of the day, my view was that it is of such significant importance that it should be brought within house. If it is brought within house, if it is brought within an environment where there are no potential conflicts of interest, there are no commercial interests, that effectively a public servant who gets paid the same amount of money whether the claimant wins or loses makes the decision who the best adjudicator will be, my view is that that will remove the potential conflict of commerciality out of the current process.*[8]

Concerns were raised about the appropriateness of the Registrar to make decisions to appoint adjudicators with one submitter stating:

> *This change is problematic in its present form because… it empowers a single, non-legally qualified person to register, suspend and allocate work to adjudicators with very little or no legislative guidance… Pursuant to section 37 of the Act*[9]*, the registrar is only required to have "particular knowledge and experience of public administration, and something else of substantial relevance to the functions of the registrar". Even if it is accepted that particular means exceptional or remarkable or outstanding, this requirement is insufficient because, if adjudicators are to be appointed by anyone other than the parties themselves, they should be appointed by, or in consultation with, someone who is legally qualified and has extensive experience in the administrative and construction law.*[10]

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5 Explanatory Notes:3

6 DHPW, Summary Report, June 2014:3

7 Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:9

8 Andrew Wallace, Hansard Transcript, 25 June 2014:8

9 Section 37(1) states that: A person is eligible for appointment as the registrar only if the person has particular knowledge and experience of –
(a) Public administration; and
(b) something else of substantial relevance to the functions of the registrar.

10 Helen Durham, submission 18:2-3

In regard to these concerns, the Department advised that it:

> *… considers that appropriate appointments made to the Office of the Registrar will be based on requirements for appropriate skills and experience and it is not necessary to specify in the legislation other than the broad description which exists in Section 37(1)(b).*[11]

A number of submitters also raised concerns about the process that will be used by the Registrar to make adjudicator appointments:

> *This change is problematic in its present form because… it does not incorporate any effective mechanism for ensuring the appointment of the most well-qualified adjudicators… Under the existing system, the number of adjudicators is constrained, and the quality of adjudicators maintained, by ANAs being under competitive pressure to appoint the best adjudicator possible. However, the registrar is not subject to the same competitive pressures and is not expressly or otherwise required to allocate work to the most well qualified adjudicators.*[12]

Master Builders also notes that the Registry will appoint adjudicators and offers the following caution:

> *… the appointment of a qualified adjudicator is not a "one size fits all" approach with individual adjudicators each having specialised skills and backgrounds that ought to be matched with the particulars and context of the disputed claim. Any new appointment process must be able to ensure appropriately trained and qualified adjudicators are appointed with the requisite background and experience to handle the particular matter. Master Builders would also like to know how the Registry intends to record the experience and qualifications of each adjudicator in order to properly match the adjudicator with the requirements of the dispute in question.*[13]

At the public briefing on 21 July 2014, Mr John Crittall of Master Builders also added:

> *There needs to be clear and transparent processes for the appointment of adjudicators. We agree that the registrar can match the skills and experience to the particulars of the claim providing they have that information. We encourage the registrar to put a system in place that will allow them to make good decisions and good appointments for relevant experience for adjudicators.*[14]

Of potentially further concern is the provision under section 39(1) of the current BCIPA which provides that:

> *The registrar may delegate the registrar's powers under this Act or another Act to an appropriately qualified member of the staff of the registry.*[15]

This delegation could presumably include the delegation of the appointment of adjudicators. Indeed, it would appear to be Wallace's intention that the function be delegated by the registrar to Building and Construction Industry Payments Agency (BCIP Agency) staff, stating in his final report:

> *I do not accept as has been submitted, that the registrar would have to perform all of the BCIP Agency's statutory functions. The appointment process of an adjudicator would be a*

11 DPHW, Response to issues raised in submissions, 14 July 2014:13
12 Helen Durham, submission 18:2-3
13 Master Builders, submission 39:2
14 John Crittall, Master Builders, Hansard Transcript, 21 July 2014:2
15 BCIPA, section 39(1)

> *delegable function able to be performed by an appropriately qualified member of the staff of the BCIP Agency.*[16]

Wallace also states that:

> *A public servant applying properly considered published procedures has no interest in the outcome of a payment dispute. It is suggested that a public servant deciding which adjudicator the matter should be referred to* ***may*** *[author's emphasis] take the following (non-exclusive) considerations into account:*
>
> - *The size of the claim;*
> - *The complexity and nature of the claim;*
> - *The location of the site the subject of the payment dispute;*
> - *Whether the issues to be considered are of a specialist nature, ie. legal, engineering, quantity surveying, architectural etc.;*
> - *The availability, experience, qualifications and geographical location of the adjudicators within the relevant grading class suitable for nomination;*
> - *Whether any conflicts of interest exist between a proposed adjudicator and the parties and/or their representatives, particularly if the representative is an "Active Adjudicator";*
> - *Any other factor the registrar considers relevant.*[17]

However, while Wallace outlines a wide range of factors which agency staff may have regard to in appointing an adjudicator, the Department advises that the registrar will have regard to only two factors when selecting an adjudicator:

> *The Registrar will have no regard to who a respondent is when selecting a suitable and available adjudicator to decide an adjudication application. The type (standard/complex) and nature of the dispute between the claimant and respondent will be the* ***only*** *[author's emphasis] factors the Registrar will have regard to in selecting an adjudicator. Appropriate policies and procedures will be followed in the selecting of adjudicators….*[18]

This framework of policies and procedures which will guide adjudicator appointments (referred to by the Department and also mentioned by Mr Michael Chesterman at the public briefing on 25 June 2014[19]) does not appear to have been included in the BCIPA consultation process and so it is unclear to stakeholders how adjudicators will be appointed.

Committee comment

The Committee notes that several alternative proposals for the appointment of adjudicators were made in submissions including a proposal that parties to the disputed matter agree on the adjudicator and a proposal that the Authorised Nominating Authorities recommend a number of adjudicators to the Commission Registry. The Committee believes that these alternate proposals, while having some merit, contain inherent weaknesses and is persuaded that the Wallace review considered these proposals and also dismissed them for good reason.

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16 Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:165

17 Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:164

18 DHPW, Response to issues raised in submissions, 14 July 2014:13-14

19 Michael Chesterman, Hansard Transcript, 25 June 2014:9

The Committee notes that the Wallace Report itself recommended this transfer (see Recommendations 17 and 18) and that many submitters support the transfer of the appointment of adjudicators to the Queensland Building and Construction Commission. The Committee was initially concerned about the involvement of government in what has hitherto been a private and commercial practice. However, the Committee noted that the Queensland Commission of Audit Final Report states that some services traditionally provided by government are better retained in the public sector such as those that involve the "application of law…"[20] and, in the end, agreed with Mr Wallace that the independence of the adjudicator appointment process was of such importance that it warranted such an unusual move.

The Committee formed the view that the transfer of the process of adjudicator appointment to the Adjudication Registry was appropriate and provided the best opportunity to address the perceived and/or real conflict of interest in the adjudicator appointment process.

The Committee notes that the Department has advised that appropriate policies and procedures will be followed in the selecting of adjudicators. However, for the benefit of transparency and to further remove any appearance of bias and conflict of interest, the Committee has formed the view that the Bill needs to go further to ensure that there is a clear and transparent process set down in law to be observed by the registrar and registry staff in the carrying out of these statutory functions.

Recommendation 2

The Committee recommends the development and inclusion in the Bill of high-level guiding principles, including factors or criteria to guide the adjudicator appointment process, which the registrar and agency staff (to whom the appointment of adjudicators is delegated), must comply with in the appointment of adjudicators.

<u>Conflict of interest in cases where government is a party</u>

A number of submitters expressed concerns about a government-appointed registrar appointing adjudicators to cases where the government is a party:

> *Many of our adjudicators and some industry associations have expressed concern that the Registrar will be conflicted when it comes to the appointment of adjudicators where the government or one of its agencies is respondent. Previously we have noted that the Department has an intense interest when it comes to defending its actions in withholding payments to sub-contractors in relation to building work under the Home Warranty scheme. We have also noted that the Registrar has NOT demonstrated independence from the Department. On at least two occasions, the Registrar (and / or his staff) has pressured Adjudicate Today not to pursue the Department in relation to fees owing to adjudicators under the Act.*[21]

> *The proposed amendments to the Act envisage the Adjudication Registry, itself a government agency, performing the function of appointing adjudicators, notwithstanding that the Queensland government is a significant developer within the industry and accordingly susceptible to claims under the Act being made against it as 'the respondent' under construction contracts. Arguably this creates both a very real and perceived conflict of interest in the appointment of adjudicators to disputes involving the Queensland government.*[22]

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[20] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:163

[21] Adjudicate Today, submission 47:13

[22] ABC Dispute Resolution, submission 4:2

> *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.*[23]

> *This process fails to consider inherent and/or perception of conflicts of interest which may arise in appointment of adjudicators by the QBCC as a Government Authority, for matters which may involve Government and/or public funds. The QBCC appointing an adjudicator for a matter which involves the Department of Housing and Public Works, or the QBCC insurance fund, furthers the argument of a 'perception of conflict of interest and bias in the appointment of adjudicators'.*[24]

In her submission, Ms Helen Durham suggests an alternate process for the appointment of all adjudicators which may assist as an alternate model for the appointment of adjudicators for government matters:

> *The unsatisfactory state of the system of appointing adjudicators set out in the Bill is demonstrated by comparison with the approach used, for example, in the Queensland Civil and Administrative Tribunal. The Tribunal's members are appointed by the Attorney-General only after being advertised and after consultation with the president of the Tribunal. The president of the Tribunal is in turn a Supreme Court judge and is also responsible for allocating matters to Tribunal members. Although the Tribunal's work is more varied than that of adjudicators, the nature of the work, and its importance to parties, is similar in many respects, save that the monetary value of an adjudicator's decisions will often be much greater than the monetary value of the Tribunal's decisions. Once the existing system of appointment is abolished, there is no reason to replace it with a system that is materially different and markedly inferior to the system used to appoint QCAT members or other persons holding public positions requiring extensive knowledge, expertise or experience.*[25]

In response to these concerns, the Department has advised that:

> *The Registrar will not be conflicted when it comes to the appointment of adjudicators where the Government is a respondent. The Registrar will have no regard to who a respondent is when selecting a suitable and available adjudicator to decide an adjudication application. The type (standard/complex) and nature of the dispute between the claimant and respondent will be the only factors the Registrar will have regard to in selecting an adjudicator.*[26]

Committee comment

The Committee notes the concerns raised by several submitters about the capacity for the registrar, appointed by government under the *Building and Construction Industry Payments Act 2004*, to make independent adjudicator appointments to cases involving the Queensland Government.

Further, the Committee is aware of a number of current and recent past adjudication matters involving the Queensland Government where the payment of due and potentially due amounts has been delayed, which has led to accusations of bias.

[23] John Murray, submission 37:1-2
[24] HIA, submission 46:2
[25] Helen Durham, submission 18:3
[26] DHPW, Response to issues raised in submissions, 14 July 2014:14

One of the main objectives of these current amendments to the BCIPA is to remove the potential for real or perceived conflict of interest. The Committee is of the view that the proposed amendments to the Act will unavoidably result in perceived, if not real, conflict of interest in regard to the appointment of adjudicators for government matters. Therefore, the Committee is recommending that an alternative model for the appointment of adjudicators be developed for cases where the Queensland Government is a party to the matter.

Recommendation 3

The Committee recommends that an alternative model for the appointment of adjudicators to matters where the Queensland Government is a party be developed and included in this Bill.

2.2.2 Crime and Corruption Commission oversight of adjudicators

In his final report, Wallace stated:

> *Whilst I accept that the registrar has power to suspend or cancel the registration of an ANA or adjudicator under s.77 of the BCIPA, the registrar does not in my view have sufficient power to investigate allegations of misconduct that may be levelled against an ANA or an adjudicator that would be available to the CMC if either held 'an appointment in a unit of public administration'. Equally, should Government accept Recommendation 18, it is more appropriate that if allegations of misconduct are made against an adjudicator, that they be dealt with by a completely independent investigative body such as the CMC rather than the registrar.*[27]

On this basis, Wallace went on to make Recommendation 19 that:

> *The BCIPA should be amended to ensure that adjudicators fall within the jurisdiction of the Crime and Misconduct Commission* (author's note: now the Crime and Corruption Commission).[28]

At the 25 June 2014 briefing, Mr Andrew Wallace stated that:

> *One of my recommendations in relation to the adjudicators was that adjudicators ought to be subject to the Crime and Misconduct Commission… That was not supported by government. So I cannot answer why that is the case…*[29].

Specifically in relation to its proposed sole ANA agency model, the Housing Industry Association (HIA) supports the inclusion of adjudicator appointments coming under the Crime and Corruption Commission (CCC) jurisdiction:

> *HIA would further support the need for the sole ANA to fall within the jurisdiction of the Crime and Misconduct Commission (CMC), to ensure that current perceived 'conflicts of interest and bias' are under the scrutiny of the CMC.*[30]

Through the course of the Committee's inquiry, the Department has not clarified why that particular Wallace recommendation has not been adopted in this Bill but did confirm that the Registrar, and all Registry staff, as public officials, will be subject to the CMC legislation.[31]

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[27] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:159

[28] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:9

[29] Andrew Wallace, Hansard Transcript, 25 June 2014:8

[30] HIA, submission 46:2

[31] DHPW, Response to issues raised in submissions, 14 July 2014:14

Committee comment

The Committee notes that the registrar and all registry staff, as public officials, will be subject to the Crime and Corruption legislation but understands that adjudicators will not be considered public servants for the purposes of that legislation.

The Committee believes that Recommendation 19 of the Wallace Report is critical to ensuring that there are accountability measures in place to hold adjudicators to account for their conduct and decisions and that inclusion of adjudicators within the Crime and Corruption Commission's jurisdiction is also critical to further facilitate transparency and accountability. The Committee therefore urges the Minister to reconsider implementing this recommendation.

Recommendation 4

The Committee recommends that the Bill be amended in keeping with Recommendation 19 of the Wallace Report which recommends amendment of the *Building and Construction Industry Payments Act 2004* to ensure that adjudicators fall within the jurisdiction of the Crime and Corruption Commission.

2.2.3 The Adjudication Process

Currently, BCIPA provides a number of statutory functions for authorised nominating authorities (ANAs) including that ANAs receive adjudication applications, appoint adjudicators to decide these applications, issue adjudication certificates (and associated certification work), and conduct training and issue qualifications.

In addition to transferring the appointment of adjudicators to the Registry, the Bill also provides that other statutory functions, such as receiving adjudication applications and issuing adjudication certificates, will be transferred to the Registry. These amendments, if the Bill is passed, will effectively remove all statutory functions from ANAs, leaving them with the other administrative functions that they currently carry out, such as proofing and spell-checking judgments and serving papers. The Bill proposes, at clause 26, to omit Part 4, Division 2 of the Act which pertains to the registration of authorised nominating authorities and all later references to the registration of ANAs.

Ms Helen Durham points out in her submission:

> *… 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.*[32]

The Master Builders appears to concur stating that:

> *While Master Builders supports this proposal there are a number of functions performed by ANA's that will need to be adopted by the Registry to ensure the adjudication process runs effectively.*[33]

A number of submitters raised concerns about the removal of ANAs from the legislation citing a range of reasons which the Committee has endeavoured to address throughout this report. In particular, numerous submitters have stated that Wallace did not recommend this particular remedy

[32] Helen Durham, submission 56:4-5
[33] Master Builders, submission 39:1

in his final BCIPA report[34] and that the current Bill "goes much further than the recommendations of the Wallace Report"[35]:

> *It should also be noted that Mr Wallace did not actually recommend the abolition of ANAs. This is apparently a conclusion reached by the adjudication Registrar. It is not apparent to me that there is any clear, substantiated basis for such a conclusion.*[36]
>
> *… the objects of the report prepared by Mr Wallace can be met by the Building and construction Industry Payment Amendments Bill 2014, without that Bill also abolishing Authorised Nominating Authorities…*[37]

Not all submitters supported this view however, with one submitter, Mr Philip Davenport, stating:

> *Although I am half owner and a director of an authorised nominating authority, I think the abolition of authorised nominating authorities is necessary to avoid abuses within the system.*[38]

The Department advised that:

> *ANAs are not being 'abolished'. The amendments remove the registration of ANAs and their role of receiving adjudication applications and appointing adjudicators.*[39]

However, Wallace himself states in his final report that "*if the decision is made by Government to assume the function of the nomination process, it would be difficult to justify maintaining ANAs*"[40]

<u>Claim that proposed legislation is "anti-competitive"</u>

Mr Jonathan Sive, in a late submission to the Committee's inquiry, stated that:

> *The proposed removal (of) authorisation (sic) nominating authorities from the marketplace and the complete centralisation of the administration of the adjudication process within the Building and Construction Payments Agency is anti-competitive. The proposed amendments are giving complete control of the administration of Division 2 (Adjudication of disputes) Part 3 (Procedure for recovering progress payments) of the Building and Construction Payments Act 2004 to a State Agency, and the State of Queensland in proposing this monopoly has not complied with its obligations under the Competition Principles Agreement, the Conduct Code Agreement and the Implementation Agreement to which the State of Queensland is a signatory. The State of Queensland has not obtained "docking privilege" within the "safe harbour" exemption under section 51(1) of the Competition and Consumer Act (Cth), and the Committee should not recommend passage of the bill in its current form.*[41]

The Committee sought advice on this matter from the Department and was advised that:

> *The department prepared a Preliminary Impact Assessment (PIA) under the Regulatory Impact Statement System Guidelines, which requires consideration of competition impacts arising from the regulatory proposal. This included establishing a single adjudication registry within the Queensland Building and Construction Commission to monitor and*

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34 Cited in subs 1,2,3,4,5,6,8,9,12,13,14,15,16,17,19,20,21,22,23,24,25,26,27,28,29,30,31,32,33,36,40,44,45,47,49

35 ABC Dispute Resolution, submission 4:2

36 Stuart Wood, submission 1:2

37 M+K Dobson Mitchell Allport, submission 2:2

38 Philip Davenport, submission 7:1

39 DHPW, Response to issues raised in submissions, 14 July 2014:1

40 Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:161

41 Jonathan Sive, correspondence,18 August 2014:1

appoint adjudicators and removing the provisions for registration of authorised nominating authorities and their role under the Building and Construction Industry Payments Act 2004.

The PIA was considered by the Queensland Competition Authority (QCA) which advised that ***the proposed amendments were not likely to result in significant adverse impacts*** *[author's emphasis] and therefore a Regulatory Impact Statement was not required. It is considered that the discussion paper issued by the Minister for Housing and Public Works and review of the Act and consultation conducted by Mr Andrew Wallace, together with* ***the advice from the QCA are sufficient compliance with Queensland Government policy on competition issues*** *[author's emphasis].*[42]

Committee comment

The Committee notes that the Queensland Competition Authority, in considering the Preliminary Impact Assessment (PIA) on the proposed amendments, advised the Department that the proposed amendments were "not likely to result in significant adverse impacts" and did not require a Regulatory Impact Statement to be developed. The Committee is satisfied that the proposed legislation will not act in a way that would breach Queensland's compliance with anti-competitive agreements to which it is a signatory.

However, the Committee is aware that the Bill's proposal to transfer all statutory functions from ANAs to the QBCC in effect, transfers the market (which the ANAs are currently meeting) 'in-house'. Therefore, the Committee considers it advisable that the Minister make a public statement addressing the perception that this reform is anti-competitive.

Recommendation 5

The Committee recommends that the Minister make a statement during his second reading speech outlining the advice sought and received from the Queensland Competition Authority and addressing the perception that the amendments are anti-competitive.

Training and qualification of adjudicators

In regards to the training and grading of adjudicators, BCIPA currently provides that:

- ANAs must state in their registration application the ongoing training and support they will make available to adjudicators (section 43(h))
- adjudicators must state in their registration application their experience and qualifications (section 57(c)) and
- a person is not a suitable person to be registered as an adjudicator unless the person holds an adjudication qualification or another qualification that the registrar considers to be equivalent to an adjudication qualification (section 60(1)).

The current Act further provides that a regulation may prescribe the name of the qualification, the bodies that may issue the qualification, the name of the adjudication competency to be achieved to gain the qualification and the elements that must be successfully completed to achieve the competency. An adjudication qualification is defined in the Act as "*a certificate issued by a body prescribed under a regulation to an individual stating that the individual has achieved an adjudication competency standard prescribed under a regulation*".[43]

[42] DHPW, Request for additional information, 21 August 2014:2
[43] BCIPA, Schedule 2, Dictionary

The Building and Construction Industry Payments Regulation 2004 currently prescribes the following:

> *For section 111(2)(b) of the Act, the following are prescribed for an adjudication qualification—*
> *(a) the name of the qualification is Certificate in Adjudication;*
> *(b) a body mentioned in schedule 1, part 1 may issue the qualification;*
> *(c) the name of the adjudication competency to be achieved is Building and Construction Industry Payments Adjudication;*
> *(d) the elements that must be successfully completed are the elements mentioned in schedule 1, part 2.*[44]

The bodies mentioned in schedule 1, part 1 which may issue an adjudication qualification are:

> *1 Adjudicate Today Pty Limited ACN 109 605 021*
> *2 Australian Solutions Centre Pty Ltd ACN 085 917 219*
> *3 The Institute of Arbitrators & Mediators Australia ACN 008 520 045*
> *4 LEADR ACN 008 651 232*
> *5 Queensland Law Society ABN 33 423 389 441*
> *6 RICS Australasia Pty Ltd ACN 089 873 067*
> *7 Able Adjudication Pty Ltd ACN 134 663.*[45]

It is clear therefore that, under current arrangements, ANAs are responsible for the training and accreditation of adjudicators. The Bill is silent on training and qualifications however, the Department advises that:

> *… Additionally there will be training for all adjudicators to transition to the new arrangement which will involve processes on how to deal with inappropriate contact by a party*[46]
>
> *The QBCC will be providing support services including guidance notes, an adjudicator on-line forum, peer review etc. to meet the mentoring requirements of adjudicators*[47] and
>
> *The QBCC has commenced the process of training and grading adjudicators and will link with CPD into the future.*[48]

Committee comment

The Committee notes the Department's advice on training and accreditation of adjudicators however, it is not clear who will be responsible for adjudicator training and qualification should this Bill pass, and how that training and qualification will occur. While the Department advised that the QBCC is preparing to provide 'transitional' training and to 'grade' adjudicators, the Committee has also heard that it may be a service offered by independent parties or agents (including existing ANAs). The Committee notes that the BCIPA Bill 2014 is silent on the matter of training and qualifications and believes that this is a critical matter that should be clarified in the Bill.

44 BCIP Regulation 2004, section 3 - Adjudication qualification—Act, s 111
45 BCIP Regulation 2004, schedule 1, part 1
46 DHPW, Response to issues raised in submissions, 14 July 2014:7
47 DHPW, Response to issues raised in submissions, 14 July 2014:8
48 DHPW, Response to issues raised in submissions, 14 July 2014:22

Recommendation 6

The Committee recommends that the Minister specify in the Bill who will be responsible for the training and accreditation of adjudicators (currently a statutory function undertaken by only those ANAs prescribed under the Building and Construction Industry Payments Regulation 2004) once other statutory functions are transferred to the Registry.

2.2.4 Removal of indemnity protection for Authorised Nominating Authorities

A number of submitters raised concerns about the removal of protections provided to ANAs under the current Act (section 107(2)). Specifically, the submissions called for retrospective protections to prevent ANAs being exposed to 'pre' amendment functions claims ie. actions stemming from functions carried out by ANAs prior to the amendments to the Act.

Mr Philip Davenport states that:

> *From the commencement of the amended Act, a person can make a claim against a company [or an employee or agent] that until then was an authorised nominating authority… Such a claim could be made within 6 years after the act or omission the subject of the claim. The protection provided by s 107(2) of the Act as it exists before amendment should continue so that companies that were previously authorised nominating authorities are not suddenly exposed to claims from which they were previously exempt. This is also important for professional indemnity insurance.*[49]

Ms Helen Durham concurs, stating:

> *For the reasons given above, I urge the Committee to… abandon the proposed retrospective removal of ANAs' protection from liability…*[50]

The Department has advised that it "*will consider whether an amendment is necessary to preserve the protection of former ANAs in respect of their 'pre' amendment functions for which a party may seek to take action against them after the amendments take effect*."[51]

Committee comment

The Committee was concerned at the proposed removal of the indemnity protection for Authorised Nominating Authorities (current section 107(2)) and formed the view that this protection should be retained for ANAs so that they are not exposed to 'pre' amendment function claims. The Committee notes the Department's advice that it will consider making an amendment to preserve the protection of former ANAs from action against them after the amendments take effect and urges the Minister to make this amendment.

Recommendation 7

The Committee recommends that the Bill be amended to include indemnity protection for Authorised Nominating Authorities to cover them for any existing function claims prior to the amendment of the legislation.

<u>Indemnity protection for agency functions</u>

While the statutory functions may be transferred from ANAs to the Adjudication Registry, it is clear that there will remain significant administrative functions to be carried out i.e. an agency function

49 Philip Davenport, submission 7:14
50 Helen Durham, submission 18:8
51 DHPW, Response to issues raised in submissions, 14 July 2014:10-11

which will need to be performed in support of the work of the adjudicators such as managing documents and correspondence, sending invoices and proofreading decisions.

Adjudication Forum, in its submission, provides the following list of additional activities currently carried out by ANAs:

> *In addition to the statutory functions that ANAs are required to carry out ANAs also:*
> *1) Provide comprehensive information to parties regarding the Building and Construction Industry Payments Act 2004 (the Act) usually in well maintained websites which allow parties to become familiar with aspects of the Act and its operation.*
> *2) Provide skilled staff to advise and assist claimants and respondents in real time regarding the adjudication process.*
> *3) Select suitable adjudicators based on the issues to be decided.*
> *4) Have a variable fee structure under which the determination of smaller claims are subsidised.*
> *5) Provide a point of contact between the parties and an adjudicator to ensure communications are kept at 'arm's length'. Ensuring that there can be no inappropriate communications between an Adjudicator and a party to an adjudication application leading to claims of bias.*
> *6) Maintain physical and electronic addresses for receipt of adjudication applications, responses and further written submissions. This includes facilities for receipt after hours in hard copy, by fax, by email and large electronic files.*
> *7) Formally record the date of receipt of all submissions.*
> *8) Provide on-going professional development for adjudicators.*
> *9) Monitors skills, knowledge and competencies of registered adjudicators so that adjudication applications can be referred to the most appropriate person.*
> *10) Provide additional information the Register as required.*
> *11) Provide representation for adjudicators should their decision be challenged in the Supreme Court.*[52]

Adjudicate Today has provided its own list of additional services currently performed by ANAs:

> *These services include:*
> *1. Publish and update a comprehensive website containing information on the Act, making and responding to adjudication applications, interactive process flowcharts, and templates. Refer www.adjudicate.com.au. Over 10 years, Adjudicate Today has invested in excess of $300,000 in developing this website.*
> *2. Deliver seminars on the adjudication process to universities and industry based organisations.*
> *3. Provide an address for service for adjudication applications, responses, further submissions and court documents either electronically or at any of our seven offices.*
> *4. Receive and register all documents served by parties by email, lockbox, hand delivery, fax and post.*
> *5. Request hard copy documentation from parties and follow up when necessary.*
> *6. Forward documentation to the adjudicator in a timely manner.*
> *7. Undertake general checks of time compliance and report to relevant adjudicator.*
> *8. Follow up regarding further submissions from parties if no reply received.*
> *9. Request further submissions from parties on behalf of adjudicators.*
> *10. Receive adjudicator's decisions – upload to Commission web-site.*
> *11. Receive adjudicators' invoices.*
> *12. Release decisions to parties upon payment of adjudication fees.*

52 Adjudication Forum, submission 27:6

> *13. Provide decision to Registrar following payment.*
> *14. Provide adjudicator with any slip rule requests.*
> *15. Release slip rule amendments to parties.*
> *16. Invoice parties on behalf of adjudicators.*
> *17. Answer enquiries regarding fees charged.*
> *18. Represent the adjudicator in any Supreme Court (High Court) proceedings.*
>
> *In addition, and most importantly, ANAs provide two further essential and time consuming functions.*
> *1. Act as a buffer between adjudicators and parties…*
> *2. Proofread decisions for typographical errors…* [53]

At the public hearing on 21 July 2014, Mr Michael Chesterman advised:

> *The point that we have made is that, in relation to all the other services that they* (ANAs) *have traditionally provided adjudicators and parties, there is no reason why they cannot continue to offer those service agent arrangements or document receipt agents community-type arrangements.*[54]

Mr Andrew Wallace further advised that:

> *The government has made a decision not to enter that space—not to be the buffer, if you like, between the parties and the adjudicator… The concept of ANAs acting as a service agent is just one way to buffer the parties and the adjudicator, a system which I am in full agreement with.*[55]

However, without licensing and indemnity protection under the Act for the agency work, some submitters have suggested that ANAs will simply 'close shop' if they are only able to offer agency support work because their businesses will no longer be viable.

As Adjudicate Today states:

> *With adjudicators holding a statutory indemnity but not their agents, every dissatisfied litigant will chase the ANA for their costs and losses. Professional indemnity insurance for ANAs will be impossibly high (if available at all) and should businesses, formally known as ANAs, seek to continue to provide services they will be quickly bankrupted by legal costs….All work of adjudicator agents must be indemnified, otherwise the cost of professional indemnity insurance will be prohibitive and destroy the scheme.*[56]

Mr Bob Gaussen from Adjudicate Today has also stated:

> *The Act, by removing the statutory indemnity for existing agents (ANAs), would expose potential agents to massive damage claims initiated either by the parties or adjudicators seeking to defend their reputation.*[57]

Mr Max Tonkin has advised:

> *I understand the Registrar does not intend to provide the services currently provided by ANAs. I am concerned that if ANAs lose their statutory role, these valuable services will cease altogether and this will be to the detriment of the building and construction industry.*[58]

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[53] Adjudicate Today, submission 47:6-7
[54] Michael Chesterman, Hansard Transcript, 21 July 2014:23
[55] Andrew Wallace, Hansard Transcript, 21 July 2014:31
[56] Adjudicate Today, Response to Department written advice, 21 July 2014:2,15
[57] Adjudicate Today, submission 47:1-2
[58] Max Tonkin, submission 3:2

However, as Ms Helen Durham states in her submission:

> *… 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…*[59]

At the public hearing, Mr Andrew Wallace advised that:

> *I think it is wrong to suggest that ANAs will shut down their business and that they will be out of business as of 1 September. As an adjudicator—not that I am actively working as an adjudicator these days, funnily enough—I receive emails from various ANAs. Some ANAs have sent out emails to adjudicators saying, 'We will be your service agent. So we will be the buffer between the parties and you.' I think that is a good thing. They are trying to negotiate on a fee basis how much they will be able to charge for that. So whilst they will not be doing the appointment process, they can still act in that capacity and come to whatever commercial arrangement that they like with adjudicators. I do not know what that will end up being, but they will need to make the decision as to whether that is worth their while or not. But the point is that, if adjudication fees are scheduled in the regulations, then the adjudicators can go back out to the market. They will know what grade they are. They will know whether they are a level 1 or whatever it might be. They will know roughly what they can charge per hour and then they can go and negotiate with ANAs as to what they are prepared to pay that ANA to be their service agent… So it is not the case that they will be out of business on 1 September. Their business model may have changed, but they are not going to be begging on George Street for your money.*[60]

In regard to this matter, the Department has advised that:

> *In order to create a 'buffer' between adjudicators and other parties therefore, a condition will be imposed on the registration of adjudicators that they will be required to either engage a totally independent agent acting on their behalf (which could be an existing ANA) or nominate a suitably trained employee to act as their agent... The full suite of functions currently undertaken by the ANAs will continue to be provided, either through the Adjudication Registry in respect of some functions, or for others, through an independent agent engaged by the adjudicator or performed by a suitably trained employee.*[61]

In later advice, the Department was able to further clarify that:

> *Adjudicators will have the capacity to appoint an agent to act on their behalf for activities such as serving papers, receiving documents, proof reading judgements etc, however the arrangements will be directly with the individual adjudicators on a commercial basis. The agents will not have statutory functions included in the legislation.*
>
> *It is not necessary for the functions of an agent, whether they are organisations or individuals, to be included as a requirement in the legislation as each agent's Professional*

[59] Helen Durham, submission 56:4
[60] Andrew Wallace, Hansard Transcript, 21 July 2014:31
[61] DHPW, Response to issues raised in submissions, 14 July 2014:7

Indemnity Insurance would cover for claims arising from allegations that their services or advice caused financial loss to their customers/clients.

It would be up to each organisation or individual acting as an agent to take out their own Professional Indemnity Insurance to meet their own requirements, and should not be included in legislation.

As an example, building certifiers who have statutory functions under the Building Act 1975 do not have the benefit of any statutory indemnity, and when considering the range and complexity of functions building certifiers perform in comparison to the relatively limited responsibility of being an adjudicator's agent, it would not be logical to include a statutory indemnity for an agent in the legislation.[62]

Committee comment

The Committee notes that other statutory functions currently performed by ANAs (such as receiving adjudication applications and issuing adjudication certificates) will transfer to the Adjudication Registry along with the function of appointing adjudicators. The transfer of this suite of functions is wholly logical to the Committee and therefore, the Committee is supportive of the proposed transfer of these remaining adjudication functions to the Registry.

The Committee notes the Department's advice that agents can be protected by the agent taking out individual professional indemnity insurance for agency functions.

2.2.5 'Buffer' between adjudicators, agents and preparers

Several submitters have raised concerns about the need for separation between adjudicators, agents and preparers and the potential for significant conflict of interest:

The Registrar has said he will encourage adjudicators to engage "agents" so that adjudicators don't deal directly with parties to disputes. However it would be a shocking outcome, replete with many conflicts of interest, if preparers could also act as "agents" for adjudicators. Already some preparers are positioning themselves for such a role. There are dishonest preparers operating in the industry. Agents for adjudicators should be licenced by government otherwise unqualified, unsuitable, incompetent and possibly dishonest persons may establish themselves as agents… [63]

Importantly, ANAs provide a point of separation between parties and adjudicators. I am most concerned that parties will ring me to make submissions without the other side's knowledge and capacity to respond. I understand that the Registrar is thinking of ensuring adjudicators appoint agents to prevent this happening. However, unless these agents are licenced there will be no constraint on adjudicators appointing whoever they choose e.g. preparers of adjudication applications, colleague adjudicators, family member, staff in their own business etc.[64]

I understand that the Registrar is "thinking" of ensuring adjudicators appoint agents to prevent this happening, however, unless these agents are licenced there will be no constraint on adjudicators appointing whoever they choose e.g. preparers of adjudication applications (a huge concern), colleague adjudicators, family member, staff in their own business etc.[65]

62 DHPW, Request for additional information, 21 August 2014:1
63 Bob Gaussen, submission 47:1
64 Ian Wright, submission 12:2
65 Michael Terry-Whitall, submission 14:2

However, as Ms Helen Durham stated (above):

> *… 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.*[66]

Committee comment

The Committee notes the Department's advice (above) that adjudicators will be required to engage an independent agent acting on their behalf or nominate an employee to act as their agent as a pre-condition of their registration. The Committee further recognises that the adjudicator will necessarily take full responsibility for his or her appointment of an agent and how that agency work is undertaken.

However, given the central purpose of the BCIPA Bill 2014 is to address the widespread perceptions of conflict of interest and bias in the current process, the Committee believes it is an oversight of the Bill to NOT specifically require, in legislation, the separation of partisan interests in the appointment of agents. Therefore, the Committee is recommending that the Bill be amended to require that adjudicators engage independent agents.

Recommendation 8

The Committee recommends that the Bill be amended to include a requirement that adjudicators engage independent agents.

2.2.6 Definition of complex claim in the proposed dual model claims regime

The Wallace report recommends (in Recommendation 23) the introduction of a composite claims scheme which would treat claims for a sum greater than $750,000, or a latent condition, or a time related cost, differently.

Consequently, the Bill introduces a dual model regime to seek to ensure a fairer system to address complex claims. For complex claims, where the claim is for more than $750,000 (or a greater amount prescribed by regulation) or is for a latent condition or a time related cost, the timeframes for a respondent to provide a payment schedule and to provide an adjudication response will be extended.

66 Helen Durham, submission 56:4

Several submissions[67] raised concerns about the lack of clarity in the definition of complex claims and the complexity of distinguishing between complex and standard claims on the basis of latent condition and time-related cost:

> *With due respect most subcontractors do not even understand the difference between a payment claim and a tax invoice. Subcontractors build things but are not accountants, legal practitioners nor even contract administrators. They just want to build things as specified and be paid for what they do. So how are normal tradesmen and small builders going to understand the difference between a standard claim and a complex claim? This is not possible, yet the expectation within the Amendment Bill that claimants (and indeed respondents) will understand is a severe failure of the Amendment.*[68]

> *Some of the obvious issues are:*
> *1. The inclusion of the term 'a time-related cost' without any definition of meaning will render many simple claims complex. By way of example all claims based on time sheet day works; hire of equipment; or simple time sheet service work are to be classified as "complex" under the Act. A provision for interest under contract, triggered by an amount due and not being paid, will render a claim complex.*
> *2. The inclusion of the term 'a latent condition' without any definition of meaning will also render many simple claims complex. If a contract has provision for a party to have an entitlement if a latent condition is encountered (e.g. the discovery of hard rock during excavation not known before work commenced), it should be a simple matter for an adjudicator to decide on the value of any entitlement to payment.*[69]

> *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).*[70]

> *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.*[71]

The Department has advised that it proposes to amend the definition to remove both latent and time-related factors from the definition of complex claims:

> *Following feedback from submitters and further consideration by the Department regarding the issues which could arise from the current definition of complex claims, the Department proposes to amend the definition so that complex claims are restricted to claims for more than $750,000, or a greater amount prescribed by regulation, removing the complexity around what constitutes latent conditions and time related claims.*[72]

[67] See submissions 7,15,17,18,27,36,37,39,40,46,47,51
[68] Robert Couper, submission 17:2
[69] Adjudication Forum, submission 27:4
[70] John Murray, submission 37:2
[71] Adjudication Research + Reporting Unit, submission 40:3-4
[72] DHPW, Response to issues raised in submissions, 14 July 2014:4

Committee comment

The Committee notes that the Department has undertaken to remove both 'latent' and 'time-related' costs from the definition of complex claims in response to the concerns raised in submissions and is in agreement with this proposal. The Committee therefore urges the Minister to amend the definition of complex claims in this Bill.

Recommendation 9

The Committee recommends that the Bill be amended to remove the inclusion of both latent and time-related costs from the definition of complex claims.

Incorrectly identified claims

Currently, BCIPA provides (under section 17) that the claimant may serve a payment claim.

The Bill will require (under Clause 5) the claimant to identify in their payment claim whether the claim is a standard payment claim or a complex payment claim.

Clause 15 of the Bill introduces new section 25(7) which states that:

> *If an adjudicator decides the payment claim for the adjudication application has been incorrectly identified as a standard payment claim, the adjudication application is taken to be withdrawn.*[73]

Section 32 of the current Act provides that claimants may make a new application only in circumstances where the claimant does not receive an adjudicator's notice of acceptance of an application within four business days after the application is made or where an adjudicator who accepts an application does not decide the application within the time allowed in the Act.[74]

Therefore, under the proposed regime, if an application is taken to be withdrawn because it is a complex application which has been incorrectly classified as 'standard', there will be no opportunity for the claimant to make a new application. Given that complex claims must, by definition, be for a sum greater than $750,000, a claimant has much to lose in this process.

Able Adjudication states in its submission:

> *This is a penalty provision which penalises a claimant for incorrectly identifying the type of application. Most subcontractors don't even understand the difference between a payment claim and a tax invoice. Most are not legal practitioners, project managers or contract administrators and they just want to build things and get paid for what they do. They won't be able to understand the difference between a standard claim and a complex claim so the expectation within the Amendment Bill that claimants (and indeed respondents) will understand is not agreed… it is suggested … Amendment Bill Clause 15 s25(7) should be deleted.*[75]

The Department has advised that it:

> *… proposes to amend the complex claim definition so that complex claims will be defined as claims for over $750,000, or a greater amount prescribed by regulation, but will not include the requirement for costs associated with latent conditions or time related costs. If this amendment is made, the requirement to identify whether a claim is standard or complex under section 17(2)(d), and thus the adjudicator's ability to deem an application to be withdrawn under section 25(7), will* ***fall away*** *[author's emphasis]. … without the need for*

73 BCIPA Bill 2014, clause 15
74 BCIPA, section 32
75 Able Adjudication, submission 36:2

identification, there will be no circumstance where a respondent is prejudiced by incorrect identification of a payment claim and thus no causes for an adjudicator to deem the withdrawal of claim. The Department also proposes to omit sections 17(2)(d) and 25(6) and (7) (and any other sections that fall away as a result of the change to the definition) from the Bill because the simplified definition appears to make them unnecessary.[76]

Committee comment

The Committee notes the Department's advice that the definition of 'complex' claim in the Bill is proposed to be modified to remove 'latent' and 'time-related' and that, if this amendment is made, claimants will not be required to classify their claim as either 'standard' or 'complex' and adjudicators will not be able to deem an application 'withdrawn'.

Recommendation 10

If the Minister does not agree to Recommendation 9 (above) to remove 'latent' and 'time-related' from the definition of 'complex claim' in the Bill, then the Committee recommends that the Minister investigate and implement alternatives for the resolution of claims which have been incorrectly classified by the claimant as 'standard'.

2.2.7 Release of securities and retention monies

The Wallace review sought submissions on the matter of adjudicators directing payment of a security (such as a bank guarantee) [Question 6] and the matter of retention monies [Question 12].

Based on the submissions he received, Wallace stated in his report that "*in my view, the abuse of retentions appears to border on that of being systemic. It should not be permitted to continue unchecked... I consider it to be of such significant importance that Government must act to protect the financial interests of subcontractors*".[77]

Wallace made a number of recommendations (Recommendations 10-15) concerning these matters:

> ***10.*** *Part 4A of the QBSA Act should be amended to make it an offence for a contracting party not to advise a contracted party in writing upon the reaching of the contract milestone being, when the contracted party is entitled to claim for the release of retention/security.*
> ***11.*** *Monies held on retention and other forms of security, should be held under a Construction Retention Bond Scheme.*
> ***12.*** *The BCIPA should be amended to permit a payment claim to include a claim for the release of security.*
> ***13.*** *The BCIPA should be amended to empower an adjudicator to direct the release of security.*
> ***14.*** *In the event that the Government does not implement the Construction Retention Bond Scheme, the BCIPA should be amended to make it an offence for a contracting party who fails to return a security held under a construction contract, as directed by an adjudicator; and which will also result in the allocation of demerit points against their licence.*
>
> ***15.*** *The BCIPA should be amended to expressly provide that a payment claim may include a claim for retention and that such retention is recoverable under the Act.*[78]

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[76] DHPW, Response to FLP issues, 31 July 2014:4
[77] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:105
[78] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:9

How securities and retention monies should be treated

Wallace Recommendations 11, 14 and 10 recommend, in short, that:

- a Construction Retention Bond Scheme should be created to independently hold securities and monies held on retention
- if the Bond Scheme recommendation is not accepted, that BCIPA should be amended to make it an offence for a contracting party to fail to return security, as directed by an adjudicator and
- an additional offence be created where a contracting party does not advise a contracted party in writing upon reaching the contract milestone where the contracted party is entitled to claim for the release of retention monies/security.

See Appendix D for an extract from Wallace's final report which outlines how the Construction Retention Bond Scheme would operate, as envisaged by Mr Wallace.

Wallace received numerous submissions on these issues as did the Committee in its current inquiry. As Mr Jonathan Sive states:

> *The New South Wales Government has enacted the concept of the statutory construction trust in relation to retention money.*[79] *The important consideration not to be overlooked by the Committee is that the statutory construction trust account does not add, take away or freeze moneys. No amount is payable into the construction trust unless the amount is certified, agreed or determined as owing to subcontractors, which is a state of affairs under the construction contract that underscores the need for amendments to be made to Part4A of the QBCC Act 1991.*[80]

Mr John Lowry, in his original submission to the December 2012 BCIPA Discussion Paper, recommended:

> *5) Retentions (Q.12):*
> *Item 1: Introduce a default provision providing for a definition and trigger, upon the supplier's application, for the granting of a date of substantial completion.*
> *Item 2: Limit the time that retentions may be held for each subcontract.*
> *Item 3: Implement a secure repository to hold and distribute cash retention funds.*
> *Item 4: Void any provision that prevents a supplier from offering a bank guarantee or similar surety as an alternative to cash retention…*[81]

The bricklayers, Yellow Block Road also advised that:

> *We commend the recommendations regarding retention monies held by builders, particularly the recommendation that retention monies be held under a Construction Retention Bond Scheme. (Recommendation 11.) Recommendation 10 regarding the written notification of when retention monies become available will also be beneficial to subcontractors.*
>
> *Our own personal experience with retention monies varies. In some instances we are never notified by the builder about the availability of retention monies and therefore, it can be something that is and has been, overlooked. Other instances see retention money sit with builders, for a number of reasons for up to two or three years after we have completed works on site. For most subcontractors I have spoken to, this is a common theme.*

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[79] See for example, s12A of the NSW Building and Construction Industry Security of Payment Act 1999 (Trust account requirements for retention money)

[80] Jonathan Sive, submission 41:5

[81] John Lowry, submission 43:5-6

> *Something else that needs to be considered is that for most subcontractors, retention usually consists of the profits made on a project. Our company at times has had up to $90000 held in retention, which has a significant impact on cash flow. Again from our own experience, we are aware that [redacted] was relying on retention monies belonging to subcontractors to stay afloat. We lost approximately $28 000 in retention money with the collapse of [redacted]. From this experience alone it is enough for us to support any recommendation which would ultimately see our retention monies protected.*[82]

Claims and directions for the release of securities/retentions

Wallace Recommendations 12, 13 and 15 recommend that:

- BCIPA be amended to permit payment claims to include claims for the release of securities and the release of retention monies and
- BCIPA should be amended to empower adjudicators to direct the release of securities.

The Committee also received submissions regarding these matters. Mr Paul Hick asked:

> *… does the term 'final payment' include a claim for retention. If it does not then it should. With retention, the work may not have been carried out for 12 months but the retention is to be claimed in the final claim. The return of security is often all that is left to be claimed in the final claim. This should be clarified in the definition of final payment. Further, if the definition of final payment does include a claim for retention, can this include return of security (bank guarantee) as well or only cash retentions.*[83]

Mr John Lowry made the following recommendation:

> *9) Empower adjudicators to release performance securities including retentions and guarantees. (Q.6).*[84]

Of these issues, the Department only responded to the matter of claims for retentions being included in claim for final payment, as raised by Mr Paul Hick (above), advising that:

> *It is not proposed at this point in time to address this issue through legislative amendment. This issue is not contained in the scope of the Bill. The Department does not consider any amendment is necessary. No amendment is proposed.*[85]

Committee comment

The Committee notes the Department's response regarding claims for retention monies but it is not clear to the Committee if future amendment to address these matters may be under consideration by the Minister.

The Committee believes that amendments to the *Building and Construction Industry Payment Act 2004* need to be made in order to secure these assets (retentions or securities) in safe keeping, to ensure they are not being improperly used by contracting parties and to ensure their timely release. The Committee also supports the creation of offences (and associated penalties) for contractors who abuse the retentions and securities they hold in trust. The Committee notes that both the West Australian and Northern Territory legislation allow for an adjudicator in those jurisdictions to direct the return of security and that the NSW government has supported similar changes (enabling an adjudicator to decide disputes concerning both securities and retentions) in principle.

[82] Yellow Block Road, submission 41:1
[83] Paul Hicks, submission 51:2
[84] John Lowry, submission 43:5-6
[85] DHPW, Response to issues raised in submissions, 14 July 2014:27

The Committee agrees with Mr Wallace that his Recommendations 10, 11, 12, 13, 14 and 15 should be adopted, if not in this Bill, then in future amendments to the *Building and Construction Industry Payment Act 2004.*

Recommendation 11

The Committee recommends that the Minister implement the Wallace Report Recommendations 10-15 concerning the inclusion of retention monies and securities in payment claims, the establishment of a Construction Retention Bond Scheme, the introduction of penalties for contractors and the empowerment of adjudicators to direct the release of securities, through amendments to the *Building and Construction Industry Payments Act 2004* and the *Queensland Building and Construction Commission Act 1991*.

2.2.8 Reduction in time to lodge a payment claim

Proposed section 17A (2) will require a payment claim (other than one related to a final payment) to be served on a respondent within the later of –the period, if any, worked out under the relevant construction contract, or, the period of six months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

Similarly, for payment claims related to a final payment, the claim will need to be served (under proposed section 17A(3)) within the later of –the period (if any) worked out under the relevant construction contract; 28 days after the end of the last defects liability period, if any, worked out under the relevant construction contract; or six months after the later of completion of all construction work due to be carried out under the relevant construction contract or complete supply of all related goods and services to be supplied under the relevant construction contract.

Under the current Act, a claim can be served up to 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

The rationale for these amendments can be found in Andrew Wallace's final report, at Recommendation 22, where he recommends:

> *The BCIPA timeframes should be amended along the following lines for ALL payment claims and adjudication applications:*
>
> - *Unless the contract provides a longer period, restricting the time in which a claim can be made to 6 months after the construction work was last carried out or the related goods and services were supplied.*
> - *If the payment claim is in relation to the recovery of a final progress payment including for the recovery of retention and/or the return of security, a final payment claim may be served within the period worked out under the contract or if the contract does not provide, the period of 28 days after the expiry of the defects liability period, whichever is the later.*[86]

The Department advised that these recommendations were based on submissions made to Wallace during the review as follows:

> *Allowing a claimant to bring a payment claim up to 12 months after the work has been performed was inconsistent with the objects of the Act – The submission by one contractor*

[86] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:10

> *was: "this is a gross lack of procedural fairness which seriously disadvantages Respondents.* ***Industry practice is that most accounts are finalised within 3 months of completing the works*** *and accordingly the rights to submit a claim under the Act should extinguish at this time."*
>
> *The submission from the HIA stated: "Allowing such a lengthy time frame for commencement of a claim* ***does not support the view that the BCIP Act aids in assisting efficient cash flow****. HIA is of the opinion that the Act should be amended to reflect six months rather than twelve months, as it is arguable that if a claimant can wait up to twelve months for a claim then such proceedings should be commenced in a tribunal or court."*[87]

Wallace further states in his final report that the reduced timeframe of six months:

> *(a) Provides the claimant with an incentive to "get its house in order" as quickly as possible, thereby resulting in fewer insolvency incidents in the building and construction industry;*
> *(b) Promotes diligent contract management and bookkeeping practices;*
> *(c) Promotes early conflict resolution;*
> *(d) Discourages claimants from serving "ambush claims", by allowing respondents greater time to respond to such claims;*
> *(e) Addresses the current inequitable timeframes afforded to a respondent to provide a payment schedule; and*
> *(f) In providing only two alternate periods, there is a greater degree of simplicity for the parties rather than a multi-tiered process, which is likely to lead to confusion.*[88]

Committee comment

The Committee notes the advice of the Department and the rationale provided by Mr Andrew Wallace in his final report regarding the shortened timeframes for claimants to lodge a payment claim. The Committee agrees that the timeframes are reasonable and will have the positive effect of improving claimants' contract and cashflow management.

2.2.9 Right to payment after termination of contract

Mr Philip Davenport in his submission states that:

> *The Queensland Supreme Court has held that the (BCIPA) Act ceases to apply when the construction contract is terminated. Respondents are unfairly using this to avoid making payments on account. Often the termination is under a termination for convenience clause. The new clause 17A ignores the instance where a construction contract is terminated before the completion of all construction work to be carried out under the contract or complete supply of related goods and services to be supplied under the contact. The amending Act should make it clear that notwithstanding termination of the contract the claimant's entitlement to a progress payment on account under the Act for construction work and goods and services carried out or supplied before termination will continue to exist as it would have existed but for the termination.*[89]

87 DHPW, Response to FLP issues, 31 July 2014:2
88 Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:195
89 Philip Davenport, submission 7:11

The Department advises that:

> *It is not proposed at this point in time to address this issue through a legislative amendment. The Queensland Supreme Court has determined that claimants are not entitled to serve a BCIPA payment claim post termination of the contract.*[90]

Committee comment

The Committee notes the Department's advice about the Queensland Supreme Court determination but believes that the matter needs to be remedied. The Committee is therefore recommending that, notwithstanding the Supreme Court's ruling on this matter, the Minister investigate ways to protect claimants against non-payment of outstanding amounts once a contract has been terminated.

Recommendation 12

The Committee recommends that the Minister investigate ways to protect claimants against non-payment of outstanding amounts once a contract has been terminated.

2.2.10 New timeframes provided for in the Bill

The *Building and Construction Industry Payments Act 2004* was created to provide an alternative to the court system and is intended to be a quick and easy cost-effective solution to resolving payment disputes.[91]

The BCIPA Bill provides, in new sections 18A, 24A, 24B and 25A(2), extended timeframes for the serving of payment schedules, adjudication responses, claimants' replies (where applicable) and adjudicators' decisions.

New section 18A provides that, for a complex claim, a respondent must serve a payment schedule on the claimant either by the time required by the relevant construction contract or either 15 business days after the claim is served (if the claim was served on the respondent 90 days or less after the reference date to which the claim relates) or 30 business days after the claim is served (if the claim was served on the respondent more than 90 days after the reference date to which the claim relates). [Note: No change is proposed to the timeframes for a payment schedule for a standard payment claim.]

The Wallace Report states that:

> *To those who would argue that the timeframes set out … simply "extend the pain" endured by an unpaid claimant, I would suggest that these timeframes empower the claimant to be master of its own destiny. It has the choice of keeping the respondent "on a tight leash" by serving a payment claim within 90 calendar days after the reference date but conversely, if it does not do so, the respondent is afforded an appropriately extended period in which to provide its payment schedule.*[92]

New section 24A provides that, for a standard payment claim, a respondent must give an adjudicator the adjudication response within the later of the following to end within 10 business days after receiving a copy of the adjudication or 7 business days after receiving notice of the adjudicator's acceptance of the adjudication application [currently 5 business days and 2 business days respectively]. For a complex payment claim, a respondent must give an adjudicator the adjudication response within the later of the following to end within 15 business days after receiving a copy of the

[90] DHPW, Response to issues raised in submissions, 14 July 2014:18

[91] http://www.bcipa.qld.gov.au/Pages/Home.aspx; accessed 23 August 2014

[92] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:195

adjudication or 12 business days after receiving notice of the adjudicator's acceptance of the adjudication application. However, for complex claims, the respondent may apply to the adjudicator for an extension of time, of up to 15 additional business days, to give the adjudication response.

The Wallace Report states:

> *It is immediately clear that there is a significant imbalance in the period allowed to the Respondent to provide an adjudication response, compared with the time permitted for the claimant to prepare an adjudication application. Generally speaking, there appears to be very broad support for amending the time in which a respondent may serve an adjudication response from 5 business days to 10 business days after receiving a copy of the adjudication application.*[93]

New section 24(5) enables a respondent, for a complex claim, to provide new reasons for withholding payment, even if those reasons were not stated in the payment schedule. Under new section 24B, the claimant may give the adjudicator a reply to these new reasons within 15 business days after receiving a copy of the adjudication response. However, the claimant may apply to the adjudicator for an extension of time, of up to 15 additional business days, to give the claimant's reply if, because of the complexity or volume of the new reasons, an extension of time is required to adequately prepare the claimant's reply.

In his final report, Wallace states:

> *There will be instances where the "one size fits all" approach of even 10 business days to respond to an adjudication application would be inadequate and in a small number of matters, manifestly so. Given the likelihood of complexity of payment claims that fall within the "composite scheme", I am of the view that it is appropriate to set a slightly longer default period than that proposed under the existing scheme in which a respondent may serve an adjudication response… after considering all of the various and competing submissions before me, I am of the view that allowing a respondent the opportunity to apply to the adjudicator for an extension of time where a payment claim falls within the "composite scheme" is a more equitable way of dealing with the issue of ensuring the respondent has a reasonable time to respond to the adjudication application.*[94]

Under new s25A(3), an adjudicator must decide an adjudication application relating to a complex claim within 15 business days after receiving the adjudication response (or the day on which the adjudication response was due) or the date on which the adjudicator receives the claimant's reply (if one is submitted). [Note: No change is proposed to the timeframes for an adjudication decision for a standard payment claim.]

The Wallace report states that:

> *In my view and in my own experience as an adjudicator, the bulk of adjudication decisions can be adequately dealt with in 10 business days after the adjudicator has or should have been provided with a copy of the adjudication response…However, I am of the view that in many complex adjudication applications, 10 business days is simply insufficient for an adjudicator to adequately appraise him or herself of the competing submissions and material and provide a coherent and sound decision… On balance, I consider it appropriate where a payment claim falls within the "composite scheme" to allow adjudicators a default*

93 Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:192

94 Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:195-196

period of 15 business days to decide the adjudication application with an opportunity to seek further extensions of time.[95]

Numerous submitters have raised concerns about some or all of these extended timeframes:

> *The payment schedule timeframe should remain a unilateral 10 business days regardless of the type of claim it is.*[96]
>
> *The Amendment Bill allows the Respondent the later of 10 business days to provide an adjudication response after receiving the adjudication application or 7 business days after receiving the adjudicator's acceptance. This is a 100% increase on the current provisions. For "complex" claims the timeframe is extended to the later of 15 business days to provide an adjudication response after receiving the adjudication application or 13 (sic) business days after receiving the adjudicator acceptance. On face value this does appear to be suitable provisions to address the Wallace Report considerations except that this system is supposed to be a quick "interim" decision making process for the benefit of the QLD community. The provisions to allow additional time for adjudication responses should not be allowed.*
>
> *Submission – It is suggested:*
> *1. There be no provision allowing the respondent an opportunity to seek extension of time to submit an adjudication response.*
> *2. The claimant has a right to reply to an adjudication response, regardless of what claim classification is decided by the adjudicator, within 5 business days after the adjudication response has been received by the claimant.*
> *3. The respondent may list (indicate) reasons for withholding payment in the payment schedule and specify that further evidence will be provided in the adjudication response and in doing so specify the form that evidence will take such as expert reports etc.*
> *4. The adjudicator must make his/her decision within 10 business days after the claimant's right to reply.*[97]
>
> *Currently, where there is a s18 payment schedule, the maximum timeframe for completion of an adjudication decision is 35 business days (7 weeks) from the date the payment claim is received. Under the Amendment Bill, where there is a s18 payment schedule, the maximum timeframe for completion of a standard adjudication decision is 40 business days (8 weeks) and appears to be 105 business days (21 weeks) for a complex adjudication decision. It is suggested that the additional 70 business days (16 weeks) for the complex adjudications is disappointing and unnecessary.*[98]
>
> *To bring in provisions that effectively increase the adjudication time from 5 weeks to more than 10 weeks is no one's interest and indeed contrary to the intent of the legislation.*[99]

The Department has advised that:

> *This change is restricted to only complex claims, which is expected to impact approximately 10% of all adjudication applications if the proposed new definition of complex claims is adopted. An extension of time may be necessary for significantly complex claims which have a large amount of issues/materials to consider. This reform is only applicable to complex claims and allows for extensions in legitimate circumstances. No amendment is proposed.*[100]

95 Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:203-204
96 Robert Couper, submission 17:2
97 Robert Couper, submission 17:3
98 Able Adjudication, submission 36:4
99 Philip Davenport, submission 7:3
100 DHPW, Response to issues raised in submissions, 14 July 2014:13

Committee comment

The Committee notes the Department's response regarding the proposed new timeframes for complex claims but understands from the Bill that the extensions relate not only to the new, complex claims category but, in the case of adjudication responses, to the standard claims category.

The Committee notes that the purpose of BCIPA is to provide a "quick and easy cost-effective solution to resolving payment disputes" and has some concerns that the extension of timeframes generally provided for in this Bill are counter to these foundational objectives of the Act. However, these amendments follow the recommendations made by Wallace in his final report.

The Committee agrees that, for a standard claim, there is a significant imbalance currently between the time a claimant has to prepare an adjudication application and that allowed a respondent to prepare an adjudication response. The Committee is of the view that these extended timeframes for an adjudication response in the case of standard claims is appropriate and proportional.

The Bill proposes the introduction of the "composite scheme" as recommended by Wallace, hence the introduction of 'complex claims'. The Bill proposes extended timeframes for all parts of the adjudication process (ie. payment schedules, adjudication responses, claimants' replies and adjudication decisions) where complex claims are concerned. The Committee has considered Wallace's rationale for recommending these extended timeframes and is persuaded that they afford natural justice to both parties, enable considered adjudication decisions and are both appropriate and proportional, given that the matters being adjudicated will be complex in nature.

2.2.11 New reasons for withholding payment

Clause 14 replaces current section 24 with new section 24, 24A and 24B. New section 24(5) provides that:

> *If the adjudication application is about a complex payment claim, the adjudication response may include any reasons for withholding payment whether or not those reasons were included in the payment schedule when served on the claimant. Under new section 24B, the claimant may give the adjudicator a reply to these new reasons within 15 business days after receiving a copy of the adjudication response.*[101]

Several submitters have raised concerns about the right of respondents to introduce new reasons for withholding payment, even if those reasons were not detailed in the payment schedule:

> *Through the payment schedule issued under s 18 of the Act, the intent of the legislation is to assure the claimant complete disclosure as to the reasons why the respondent is withholding payment from the claimant when the respondent's scheduled amount is less than the claimant's claimed amount. The disclosure requirements under s 18(3) are clear: if the scheduled amount is less because the respondent is withholding payment for any reason, the respondent must state the reasons for withholding payment… It would be entirely inimical to the quick and efficient adjudication of disputes which the regime of the Act envisages if, as being suggested by the proposed in the amendments, a respondent were able to reject a payment claim by serving a payment schedule which said nothing except that the claim was rejected, and then "ambush" the claimant by disclosing for the first time in its adjudication response that were founded upon issues that the claimant has had no prior opportunity of checking or disputing.*[102]
>
> *… It is noted that the Amendment Bill restricts the timelines for the claimant to make payment claims while the courts have made clarifications which further hamper the*

[101] BCIPA Bill, clause 14, new section 24(5)
[102] Jonathan Sive, submission 41:8

> *claimant's opportunity to claim. The potential for purported "ambush" claims has therefore been significantly reduced and so there is no justifiable reason to give the respondent a second opportunity to provide new reasons as the respondent is always sufficiently close, in time, to the works to understand the basis of all claims. This would otherwise provide opportunities for the respondent to purposely delay the time for payment. Submission – It is suggested:*
> *1. No new reasons be allowed in the adjudication response...* [103]

In its submission, Able Adjudication recommends an alternative model which would require the following amendments to the Act:

> *2. Where the payment schedule was served under s18 of the legislation the respondent may introduce new material in the adjudication response in support of a reason for withholding payment* ***where in the s18 payment schedule the respondent had stated the form and type of new material that the respondent intended introducing in the adjudication response*** *[author's emphasis]*
> *3. No new material is allowed to be introduced where the respondent did not state in the s18 payment schedule the form and type of new material that the respondent intended introducing in the adjudication response*
> *4. No new material is allowed if that material does not specifically relate to a reason for withholding payment expressed in the payment schedule*
> *5. No new material is allowed where the payment schedule was served under s20 or s21 of the legislation.*[104]

By way of rationale, in his final report, Wallace questions:

> *… is it reasonable that a respondent should be put to the costs associated with obtaining expert evidence from a quantity surveyor or engineer and provide that expert report in a payment schedule every time it disagrees with a payment claim? Yet, if it does not do so, s.24(4) of the BCIPA suggests that it cannot raise or rely upon that expert evidence in the adjudication response. This requirement in my view places an intolerable cost and inconvenience on a respondent, when they do not even know whether the referencing of the Act is a genuine prelude to an adjudication application or whether it is simply company policy of the claimant. I am therefore of the view that in circumstances where a payment claim falls within the "composite scheme" there should be some form of legislative intervention similar to that provided in s.21(2B) of the Amended Victorian Act, albeit with some amendments. To ensure that a claimant is afforded procedural fairness, the claimant must be permitted a reasonable time to reply to those reasons in the adjudication response that were not previously ventilated in the payment schedule.*[105]

The Department has advised that:

> *The claimant has the ability to respond to any new issues raised in the adjudication response, and can apply for an extension of time if they consider they have been ambushed in the adjudication response. The entitlement for a respondent to raise new issues in their adjudication response, which were not outlined in their earlier payment schedule, is only applicable to complex claims (estimated to be approximately 10% of all applications if the proposed new definition of a complex claim is adopted)… No amendment is proposed.*[106]

[103] Robert Couper, submission 17:3-4
[104] Able Adjudication, submission 36:5
[105] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:201
[106] DHPW, Response to issues raised in submissions, 14 July 2014:16

Committee comment

The Committee notes the concerns raised by submitters about the right of respondents to raise new reasons for withholding payment in an adjudication response which have not formerly been raised in the payment schedule but agrees with Wallace that a respondent cannot possibly determine which claim matters may progress to adjudication or not. The Committee further notes that it is proposed that section 18(3) of the Act will remain, namely, that if the scheduled amount is less than the claimed amount, the schedule must state why the schedule amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.

Therefore, the Committee is supportive of the new provision.

2.2.12 Costs associated with new system

In his final report, Wallace recommends (at Recommendation 42) that:

> *In the event the Government elects to accept Recommendations 17 and 18 [pertaining to the appointment of adjudicators], all adjudication fees and costs should be regulated and published.*[107]

Numerous submitters have raised concerns that the new system (of appointing adjudicators and the adjudication process) will raise the costs association with adjudication:

> *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* [108]

> *An important consideration, if not a determinative factor, when abolishing the current ANA structure that has shown to be effective in implementing the current object of the regime, is to outline the cost impacts and the allocation of resources for the administrative activity to be undertaken by both the QBCC and Agency… gives good cause or substantial justification for delaying the enactment of proposed amendments until the Minister is able to show how in fact the Agency and QBCC clarify the operational concern of workload, staffing, licensing requirements, and the budgetary costs with the new administrative activities to be undertaken by both the QBCC and the Agency...*[109]

> *In HIA's response to the Discussion paper, it was noted that a complaint often made by industry is that the Act adjudication process is costly, with the cost of the application and adjudication fees often being disproportionate to the monies claimed. Accordingly HIA recommended that an upfront assessment of adjudication costs should be provided to applicants for a well-informed commercial decision.*
>
> *In addressing this concern, it is noted in the Final Report of the Review of the Discussion Paper, Recommendation 42 states that in the event 'the Government elects to accept Recommendations 17 and 18, all adjudication fees and costs should be regulated and published'. HIA accordingly supports this recommendation.*

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[107] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:12

[108] Orca Installations and Solar Solutions Pty Ltd, submission 35:3

[109] Jonathan Sive, submission 41:10-11

As the discontinuance of current ANA processes for appointing adjudicators, and the movement towards the adjudication registry solely appointing adjudicators (recommendations 17 and 18 of the Final Report) has been adopted, HIA would strongly encourage the Government to reconsider their position on the publishing of adjudication fees through a grading type system.

It is noted that the Bill Explanatory notes suggest the discontinuance of ANA's appointing adjudicators 'should result in the reduction of adjudication fees'. HIA however has concerns that this is not the case.

While the Bill establishes the regulation of an application fee, the Bill does not go far enough to address cost related concerns. A grading system will not only give an applicant an idea of the costs associated with the application, it will ensure that the lack of market competition as a result of a sole authority allocating adjudicators is addressed. Without the availability of regulated adjudication fees, HIA has concerns that adjudication matters could become more costly, resulting in a cost- prohibitive process.[110]

However, the Department advises that the establishment of a single adjudication registry in the QBCC:

… will result in adjudication fees being driven by more competitive market forces. Businesses formerly registered as ANAs will continue to be able to provide commercial services to adjudicators.[111]

The Department further advises that:

The direct cost of the adjudication process will be limited to application fees charged by the Adjudication Registry and the fees charged by adjudicators. Both of these are costs that apply under the current regime. If a claimant needs to enforce an adjudication decision, the Adjudication Registry will impose a fee for issuing an adjudication certificate for the claimant to present to a court of competent jurisdiction. This is also a cost that applies under the current regime.

The Adjudication Registry will be closely monitoring the fees charged by adjudicators and expect the overall fees for adjudication will decrease for standard matters (estimated to be approximately 90% of all applications if the proposed new definition of a complex claim is adopted.) This is because adjudicators will be in a position to reduce costs between them and the parties through implementing suitable arrangements. The parties and the adjudicator will be able to negotiate such costs purely on a commercial basis as the nomination process will be entirely separate.[112]

At the public briefing, Mr Steve Griffin and Mr Michael Chesterman advised that:

Mr Griffin: The funding for the actual registry service that Mr Chesterman will be the registrar for will be funded by an additional fee. That fee is very transparently and openly set upfront. It is completely distinct whatever outcomes from the adjudication process itself. It has nothing to do with it. It is set at a 0.07 per cent of the adjudication amount and that is fully upfront and transparent. It does not matter what the outcome is in terms of the adjudication itself; it is just purely an administration fee. From the analysis we have done, it is just simply a cost recovery, that process of the registry.

Mr Chesterman: Can I just add to that. That fee issue will be dealt with by way of a separate regulation that will run the normal scrutiny issues associated with the introduction of

[110] HIA, submission 46:3
[111] DHPW, Summary Report, June 2014:3
[112] DHPW, Response to issues raised in submissions, 14 July 2014:14-15

> *legislation. So that will be all articulated and outlined in a regulation and we will commence running through the process in the next few weeks where the adjudication application fee will be set out in detail.*[113]

The Department further advised that:

> *The QBCC will establish internal processes to ensure information is available about costs of adjudication relevant to different categories of adjudication applications. The Department does not consider this appropriate for legislation. The QBCC will publish bands of fees…* and
>
> *The Government will work towards ensuring the adjudication process is economical, efficient and fairly balances the interests of claimants and respondents… The QBCC is establishing a transparent fee basis for the services the Adjudication Registry will provide.*[114]

Committee comment

The Committee notes that the Department has advised that adjudication application and adjudication certification fees will be published. However, the Committee supports Wallace's recommendations that the "all adjudication fees and costs" for adjudication (including application fees, adjudication fees and adjudication certificates) should not only be published, but also regulated.

Recommendation 13

The Committee recommends that the Bill be amended to provide for the regulation of all adjudication fees and costs including, but not limited to, the adjudication application, the adjudication fee and the adjudication certification process.

2.2.13 Court to sever 'infected' part of decision

Clause 37 amends section 100 of the Act to provide:

> *(4) If, any proceedings before a court in relation to any matter arising under a construction contract, the court finds that only a part of an adjudicator's decision under part 3 is affected by jurisdictional error, the court* ***must [author's emphasis]*** *–*
>
> *(a) Identify the part affected by the error; and*
>
> *(b) Allow the part of the decision not affected by the error to remain binding on the parties to the proceeding.*[115]

The Queensland Law Society has raised concerns that this provision will likely introduce a new wave of argument and litigation, stating:

> *It will be difficult for a reviewing court to accurately identify the parts of the decision influenced by the error. Furthermore, this amendment is inconsistent with a large body of administrative law precedence and put further distance between Queensland and the other security of payment regimes.*[116]

Mr Philip Davenport states:

> *The proposed s 100(4) tells the Supreme Court what it must do, namely, allow part of a decision not affected by error. The provision is void. It is very naïve to think that Parliament*

[113] Steve Griffin and Michael Chesterman, Hansard Transcript, 25 June 2014:9
[114] DHPW, Response to issues raised in submissions, 14 July 2014:26-27
[115] BCIPA Bill 2014, clause 37
[116] Queensland Law Society, submission 52:5-6

> *can tell the Supreme Court what it must do. Courts are very protective of their powers. A provision that would permit the Supreme Court to allow a claimant to enforce payment of part of the adjudicated amount but not the whole would be valid.* [117]

The Department advises that it is proposing to amend the clause to change "must" to "may" thereby confirming that the Court has discretion to sever and will consult with the Department of Justice and Attorney General on this clause.[118]

Committee comment

The Committee notes the Department's proposal to amend new section 100(4) to change 'must' to 'may' to give the Supreme Court discretion to sever part of an adjudicated amount and supports the proposed amendment.

Recommendation 14

The Committee recommends that the Bill be amended to replace 'must' with 'may' in proposed section 100(4) to provide the Supreme Court with a discretion to enforce part of a payment rather than a direction to do so.

2.2.14 Transitional provisions

Clause 44 inserts transitional provisions which provide that adjudication applications already made to ANAs are to be decided under the terms of the existing Act upon commencement of the amended Act. However, the Bill is silent on how payment claims made before the Bill commences (but not yet progressed to payment schedules or adjudication applications) are to be treated. In its submission, Clayton Utz states:

> *The Bill is silent as to what is to happen in such cases, e.g. the Bill does not deal with:*
>
> *(a) the status of such a payment claim, where the claimant has not specified whether it is a standard or a complex claim; nor*
>
> *(b) the timing regime that is to apply to the subsequent procedures under the Act.*
>
> *… the Bill could be amended to include express transitional provisions in respect of payment claims delivered before the Bill commences where the adjudication application can be made after the Bill commences.* [119]

The Queensland Law Society also raises the matter of transitional provisions stating that:

> *In announcements made in march and April 2013, the Queensland Government indicated that the amendments to the Building and Construction Industry payment Acts (the Act) would only apply to construction contracts entered into after 1 September 2014…As currently drafted, the amendments would apply to all construction contracts, not just those entered into after 1 September 2014… transitional provisions need to be added to the Bill so as to provide that the amendments will only apply to construction contracts entered into after the commencement date of the amendments.*[120]

[117] Philip Davenport, submission 7:7
[118] DHPW, Response to issues raised in submissions, 14 July 2014:17
[119] Clayton Utz, submission 50:1
[120] Queensland Law Society, submission 52:2

The Department has advised that:

> *… transitional provisions need to be added to the Bill to provide that the amendments will apply to construction contracts entered into after the commencement date. The Department will consider amendments to address this issue.*[121]

Committee comment

The Committee notes that the transitional provisions of the Bill are not clear enough about how claims and applications, at the various stages of adjudication, are to be treated under the amended Act. The Committee considers it critical that the Bill state clearly how claims, schedules and adjudication applications which have already commenced are to be treated under the amended Act.

Recommendation 15

The Committee recommends that the Bill state clearly how claims, schedules and adjudication applications which have already commenced are to be treated under the amended Act.

2.2.15 Possible drafting errors

Mr Paul Hick has alerted the Committee to a number of possible drafting errors including:

- Clause 15, new section 25A(3) should say 15 business days after 'the earlier of' to align with the similar provision at section 25A(2)
- Clarify the intent of Clause 11, section 20A(1) to state that it applies where a claimant intends to recover an amount as a debt, rather than where a claimant may recover an amount as a debt
- Clause 6, new section 17A(4) the definition of defects liability period needs to be clearer and should also include a definition of practical completion (to mark the commencement of the defects liability period)
- Clause 9, new section 19(2) and (3) – consider the consistency of the phrase 'the respondent becomes liable to pay the claimed amount on the due date for payment' (how can the respondent become liable on the due date?)
- Clause 11, new section 20A(4)(a)(i) and (ii) refers to sections 19(1) and 20(1) as the conditions which must satisfy a court in proceedings to recover unpaid amounts. In fact, the conditions which a court must be satisfied exist are found at new sections 20A(2) and (3)[122] and
- Clarification of section 20A that the claimant can upon receipt of a payment schedule in response to a notice under section 20A, elect to proceed to adjudication.[123]

Committee comment

The Committee notes the suggestions detailed above and also notes that the Department has indicated it will consider amendments to address these issues. The Committee considers that clarity about these issues is critical for the interpretation of the legislation and for the protection of claimants, respondents and adjudicators.

[121] DHPW, Response to issues raised in submissions (attachment 2), 14 July 2014:1
[122] Paul Hick, submission 51:3
[123] Queensland Law Society, submission 52:3-4

> **Recommendation 16**
>
> The Committee recommends that the Bill be amended to address the drafting errors identified in submissions to this Bill inquiry.

2.2.16 Possible drafting inconsistencies

The 'washing machine' effect[124]

Several submitters have raised the potentially 'circular' effect of new section 20A of the Bill.

In effect, where full payment of a payment claim has not been made (whether or not a payment schedule was provided to the claimant), before a claimant can commence court proceedings, new section 20A requires that three conditions must be met:

1. A notice must be given to the respondent from the claimant within 20 business days of the payment due date; AND
2. The respondent has 5 business days to submit a payment schedule to the claimant (in effect, a 'second chance' at submitting a payment schedule); AND
3. **The respondent does NOT submit a payment schedule under this provision [author's emphasis]**.

Therefore, in order for a claimant to proceed to court, the respondent must NOT provide a payment schedule. If the respondent provides a payment schedule and then fails to pay the full amount, the claimant can't proceed to court because it is a condition of commencing court proceedings that the respondent NOT submit a payment schedule.

> *The provision does not account for a situation where a respondent does serve a valid payment schedule (whether initially, or following a notice under either the new s20A or the current s21(2)), but fails to pay the whole or any part of the Scheduled Amount. In such a case, s20A(2)(c) will preclude a claimant from starting proceedings to recover an unpaid Scheduled Amount.*[125]

This new provision raises a number of issues, as raised by the Queensland Law Society:

> *What happens if the respondent provides a second payment schedule but sill fails to pay the whole or any part of the scheduled amount by the due date? Does that prevent the claimant from starting proceedings to recover the scheduled amount of the first payment schedule? If so, what would happen if the respondent does not pay the scheduled amount of the second payment schedule? Presumably the provisions under s20A are not intended to apply because the provisions in s 20(1) appear to be relevant to the first payment schedule, not the second payment schedule, so s 20(2) may not apply. If this is the case, then it appears the claimant cannot recover the unpaid scheduled amount of the second payment schedule via court proceedings.*
>
> *On the other hand, if the provisions of s 20(1) apply to a second payment schedule (given the changes to s20(1)(b)), then arguably the claimant would have to go through the same process under s 20A before commencing proceedings if the respondent did not pay the scheduled amount of the second payment schedule. That means the respondent could issue a third payment schedule after receiving notice from the claimant of its intention to commence proceedings in relation to the second payment schedule, which would again prevent the claimant starting proceedings.*

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[124] Robert Sundercombe, correspondence, 30 July 2014:1-2

[125] Queensland Law Society, submission 52:3-4

> *If a respondent provided a second payment schedule, what happens if that payment schedule does not mirror the first payment schedule or has a different schedule amount? Does the second payment schedule supersede the first payment schedule?*[126]

The Queensland Law Society also raised further concerns about the implications of this new provision:

> *If a notice is delivered by a claimant under s20A(2) and a respondent then delivers a payment schedule (within the requisite 5 business days), there is not a definitive statement that a claimant (having given the notice to elect to go to court) can then elect to change course and proceed to adjudication. If a claimant cannot change course and proceed to adjudication, the claimant has no route to follow under the BCIPA because it has received a payment schedule.*
>
> *Section 19 provides: "(1) This section applies if a respondent served with a payment claim does not serve a payment schedule on the claimant within the time that the respondent may serve the schedule on the claimant. (2) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates." There is some ambiguity between section 19 and section 20A in the situation where no payment schedule is given under section 18, but a second chance payment is given under section 20A. In particular, it is not clear whether the deeming provision in section 19(2) applies notwithstanding that a second chance payment schedule is given under section 20A.*[127]

The Department has advised that it will consider amendments to address these issues.[128]

Committee comment

The Committee notes, with some concern, the inconsistencies in the Bill in relation to the proposed new section 20A which were raised by submitters including the Queensland Law Society. These inconsistencies have the potential to cause confusion and the possibly serious, unintended consequences of the 'washing machine' effect and the interrelationships between the proposed new section 20A and other, related provisions and processes. For example, a claimant who, having gone through the legislated process to achieve payment, may be prevented from commencing proceedings in a relevant court as outlined above.

The Committee notes that the Department has indicated it will consider amendments to address these issues.

The Committee believes that it is critical to address the issues arising from new section 20A including its interaction with other relevant provisions (such as sections 18, new 19 and 20) and its interaction with requirements and processes for lodging an adjudication application.

[126] Queensland Law Society, submission 52:4
[127] Queensland Law Society, submission 52:5
[128] DHPW, Response to issues raised in submissions (attachment 2), 14 July 2014:1-2

Recommendation 17

The Committee recommends that the Bill be amended to ensure that section 20A is clarified, specifically:

- Delete sections 20A(1)(b) and 20A(4)(a)(ii) so that a claimant has an immediate right to start proceedings where a payment schedule has been given but the scheduled amount is unpaid
- Clarify section 20A so that, where a second chance payment schedule is given under section 20A, then section 19 does not apply and
- Clarify the interactions between new section 20A and provisions relating to lodging an adjudication application.

<u>Other drafting inconsistencies</u>

Several submissions also raised other possible inconsistencies between proposed provisions including:

- There is inconsistency with the terms “relevant construction contract” and “the contract” as they appear to be used interchangeably[129] and
- New section 25A(1)(b) provides that an adjudicator must not decide an adjudication application within the period within which the claimant may give a claimant’s reply and yet new section 25A(3) requires an adjudicator to make a decision on the adjudication application within 15 business days, before the claimant’s time to make a claimant’s reply has expired. [130]

Committee comment

The Committee notes these inconsistencies detailed above and also notes that the Department has indicated it will consider amendments to address these issues. The Committee considers that clarity about these issues is critical for the interpretation of the legislation and for the protection of claimants, respondents and adjudicators.

Recommendation 18

The Committee recommends that the Bill be amended to address the inconsistencies identified in submissions to this Bill inquiry.

[129] Paul Hick, submission 51:3
[130] Philip Davenport, submission 7:14-15 and Helen Durham, submission 18:8

3 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of parliament.

3.1 Rights and liberties of individuals

3.1.1 New time limits for making payment claims

Clause 6 inserts new section 17A into the *Building and Construction Industry Payments Act 2004* to set new time limits for the making of payment claims.

Proposed section 17A (2) will require a payment claim (other than one related to a final payment) to be served on a respondent within the later of –the period, if any, worked out under the relevant construction contract, or, the period of six months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied. Similarly, for payment claims related to a final payment, the claim will need to be served (under proposed section 17A(3)) within the later of –the period (if any) worked out under the relevant construction contract; 28 days after the end of the last defects liability period, if any, worked out under the relevant construction contract; or six months after the later of completion of all construction work due to be carried out under the relevant construction contract or complete supply of all related goods and services to be supplied under the relevant construction contract.

Currently, under section 17(4)(b) a claim can be served up to 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

Wallace in his final report, at Recommendation 22, recommended:

> *The BCIPA timeframes should be amended along the following lines for ALL payment claims and adjudication applications:*
>
> - *Unless the contract provides a longer period, restricting the time in which a claim can be made to 6 months after the construction work was last carried out or the related goods and services were supplied.*
> - *If the payment claim is in relation to the recovery of a final progress payment including for the recovery of retention and/or the return of security, a final payment claim may be served within the period worked out under the contract or if the contract does not provide, the period of 28 days after the expiry of the defects liability period, whichever is the later..*

The Department advised that these recommendations were based on submissions made to Mr Andrew Wallace during the review as follows:

> *Allowing a claimant to bring a payment claim up to 12 months after the work has been performed was inconsistent with the objects of the Act – The submission by one contractor was: "this is a gross lack of procedural fairness which seriously disadvantages Respondents.* ***Industry practice is that most accounts are finalised within 3 months of completing the works*** *and accordingly the rights to submit a claim under the Act should extinguish at this time."*
>
> *The submission from the HIA stated: "Allowing such a lengthy time frame for commencement of a claim* ***does not support the view that the BCIP Act aids in assisting***

> ***efficient cash flow**. HIA is of the opinion that the Act should be amended to reflect six months rather than twelve months, as it is arguable that if a claimant can wait up to twelve months for a claim then such proceedings should be commenced in a tribunal or court."*

Wallace further states in his final report that the reduced timeframe of six months:

> *(a) Provide the claimant with an incentive to "get its house in order" as quickly as possible, thereby resulting in fewer insolvency incidents in the building and construction industry;*
> *(b) Promotes diligent contract management and bookkeeping practices;*
> *(c) Promotes early conflict resolution;*
> *(d) Discourages claimants from serving "ambush claims", by allowing respondents greater time to respond to such claims;*
> *(e) Addresses the current inequitable timeframes afforded to a respondent to provide a payment schedule; and*
> *(f) In providing only two alternate periods, there is a greater degree of simplicity for the parties rather than a multi-tiered process, which is likely to lead to confusion.*[131]

Committee comment

The Committee notes the advice of the Department and the rationale provided by Mr Andrew Wallace in his final report regarding the shortened timeframes for claimants to make payment claims. The Committee agrees that the timeframes are reasonable and will have the positive effect of improving claimants' contract and cashflow management.

3.1.2 Administrative power

Clause 22(1) amends section 38(2)(a) to insert a new function/power for a registrar, being to 'refer adjudication applications to adjudicators'.

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined. The Office of the Queensland Parliamentary Counsel (OQPC) Notebook states, *"Depending on the seriousness of a decision made in the exercise of administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in legislation without providing criteria for making the decision*".[132]

This matter was also raised in section 2.2.1 *Appointment of Adjudicators*.

The Department has advised that:

> *It is important to note that the Registrar will be selecting adjudicators based on a Board approved policy all while under the watch and investigation powers of both the Crime and Corruption Commission and the Ombudsman. It is also worth noting that under the current legislation Authorised Nominating Authorities operate outside this framework… The department proposes to insert a new provision in the Act… which allows policies to be made about the appointment process… It is proposed that comprehensive selection criteria for the appointment of adjudicators will be developed into a policy before the BCIPA amendments commence. The QBCC intends to seek Board approval for such a policy at the Board's upcoming meeting on 15 August 2014. The policy is still being drafted but it is proposed that it will, subject to consultation, contain details as set out below… While the Bill itself does not set specific criteria for the selection of adjudicators, the Registrar will select and appoint adjudicators based on an analysis of each application and marry that analysis with a*

[131] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:195

[132] Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook:*15

suitably ranked adjudicator. In summary, the Registrar will take into account the following criteria when ranking adjudicators:

1. *relevant experience with respect to type of claims, number and dollar value of decisions made;*
2. *qualifications, which will be assessed against the issues in dispute to determine which qualification (e.g. legal, quantity surveying, engineering) would best be suited to decide the application; and*
3. *the skill of the adjudicator, which will include consideration of results of transitionary training and compliance with the proposed mandatory CPD program and other training and mentoring opportunities.*

Committee comment

The Committee made numerous remarks about the proposed new method for the appointment of adjudicators in a previous section of this Report but will add the following comments.

The Committee notes the Department's advice that ANAs, in appointing adjudicators, are currently operating outside of a framework which prescribes how adjudicators are to be appointed and which is scrutinised by the Crime and Corruption Commission. However, it is the Committee's view that these are the very conditions of adjudicator appointment which have led to the allegations of bias and conflict of interest and that this Bill must, above all else, ensure that the appointment of adjudicators is above reproach. Therefore, the Committee reiterates its earlier recommendation that guidelines, to guide the adjudicator appointment process, should be enshrined in this Bill, not just in policy (refer Recommendation 2).

3.1.3 Clear and precise

Two issues concerning 'clear and precise' provisions arose in the Bill. Both have been considered by the Committee in previous sections (2.2.14 *Transitional provisions* and 2.2.16 *Possible drafting inconsistencies*).

The first is the possible conflict between new section 25A(1)(b) which provides that an adjudicator must not decide an adjudication application within the period within which the claimant may give a claimant's reply, and new section 25A(3) which requires an adjudicator to make a decision on the adjudication application within 15 business days, before the claimant's time to make a claimant's reply has expired.

The Department advises that:

> *An issue with s25A is that an adjudicator will not know if there is to be a (claimant's) reply until it is served and this may lead to some uncertainty as to when decisions have to be made. The department considers section 25A could be slightly amended to address this issue which may impact upon the timeframe within which the adjudicator has to make his or her decision.*[133]

The second matter concerns the lack of clarity in the transitional provisions about how payment claims and adjudication applications (at various stages of proceedings) are to be treated at the time of commencement of the new amendments proposed in this Bill. As the Queensland Law Society stated:

> *In announcements made in March and April 2013, the Queensland Government indicated that the amendments to the Building and Construction Industry payment Acts (the Act) would only apply to construction contracts entered into after 1 September 2014…As*

[133] DHPW, Response to FLP issues, 31 July 2014:9

currently drafted, the amendments would apply to all construction contracts, not just those entered into after 1 September 2014…[134]

With regard to the transitional provisions, the Department has advise that it:

… proposes to amend the section to make it clear that:

- *where an adjudication application was made before commencement it will be decided and dealt with under the unamended Act;*
- *from the commencement of the amendments the new provisions for appointment of adjudicators will apply and appointments will be made under the amended Act;*
- *otherwise the amendments will only apply to contracts entered into after commencement of the amendments.*[135]

Committee comment

The Committee has made comments regarding both of these matters in previous sections of this Report and refers readers to Recommendations 15 and 18 of this Report.

3.2 Explanatory Notes

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins. However, the Notes identified only the Henry VIII clause as containing a potential breach of fundamental legislative principles.

[134] Queensland Law Society, submission 52:2
[135] DHPW, Response to FLP issues, 31 July 2014:9

Appendices

Appendix A – List of Submissions

Sub #	Submitter
1	Mr Stuart J Wood
2	M+K Dobson Mitchell Allport Lawyers
3	Mr Max Tonkin
4	ABC Dispute Resolution
6	Australian Solutions Centre
7	Philip Davenport
8	Robert Sundercombe
9	Thomas Uher
10	Tim Sullivan
11	Vlad Vishney
12	Ian Wright
13	Private
14	Terry Whitehall & Associates
15	Philip Martin
16	Dr Clive Warren
17	Robert Couper
18	Helen Durham
19	Sam Wilson
20	Richard Atkin
21	Integrated Engineering Systems
22	Australian Mediation Association
23	Gadens Lawyers
24	Samo Lawyers
25	Carlo Garofali
26	Gobraiel and Associates
27	Adjudication Forum
28	Thomas Jones
29	Tom Silk
30	Terry Simmons
31	Graham Rattue
32	National Precast Concrete Association Australia
33	Steven Macdessi
34	King Lawyers Australia
35	Orca Installations and Solar Solutions Pty Ltd
36	Able Adjudication
37	John (Joram) Murray
38	Australian Institute of Building
39	Master Builders
40	Australian Research and Reporting Unit
41	Jonathan Sive
42	Lowry Consulting
43	Lowry Consulting
44	Brett Wilson
45	Dr Jinu Kim

46	Housing Industry Association
47	Adjudicate Today
48	Yellow Block Road Pty Ltd
49	Geoffrey Douglas
50	Clayton Utz
51	Paul Hick
52	Queensland Law Society
53	Confidential
54	Property Council of Australia
55	Lowry Consulting Pty Ltd
56	Helen Durham
57	Juanita Gibson

Appendix B – Witnesses at public briefing held on 25 June 2014 in Brisbane

Witnesses
Mr Boyd Backhouse, Executive Director, Legal Services, Department of Housing and Public Works
Mr Michael Chesterman, Adjudicator, Registrar and Executive Manager, Contractual Development, Queensland Building and Construction Commission
Mr Steve Griffin, Commissioner, Queensland Building and Construction Commission
Mr Don Rivers, Assistant Director-General, Building Industry and Policy, Department of Housing and Public Works
Mr Andrew Wallace, Author of final report *Payment dispute resolution in the Qld building and constructions industry* (May 2013)

Appendix C– Witnesses at public hearing held on 21 July 2014 in Brisbane

Witnesses
Mr John Crittall, Director, Construction Policy, Master Builders
Mr Jeff Poultney, Manager, Legal and Contracts, Master Builders
Ms Laura Regan, Workplace Services Manager, Housing Industry Association
Mr Warwick Temby, Executive Director, Housing Industry Association
Mr Philip Davenport, Director, Expert Adjudication
Mr Robert Gaussen, Managing Director, Adjudicate Today
Mr Robert Sundercombe, President, Adjudication Forum
Mr Russel Welsh, Director, Australian Building and Construction Dispute Resolution Service
Mr Michael Brand, Director, Adjudication Research and Reporting Unit, University of New South Wales
Mr Jeremy Chenoweth, Chair, Mining, Energy and Resources Committee, Queensland Law Society, and Partner at Ashurst
Mr Matthew Dunn, Principal Policy Solicitor, Queensland Law Society
Mr Jonathan Sive, Barrister-at-Law and Registered Adjudicator
Mr Michael Chesterman, Adjudicator, Registrar and Executive Manager, Contractual Development, Queensland Building and Construction Commission
Mr Steve Griffin, Commissioner, Queensland Building and Construction Commission
Mr Brian Kelleher, Assistant Director, Legal Services, Department of Housing and Public Works
Mr Don Rivers, Assistant Director-General, Building and Industry Policy, Department of Housing and Public Works
Mr Andrew Wallace, Author of final report *Payment dispute resolution in the Qld building and constructions industry* (May 2013)

Appendix D – Extract from Wallace Final BCIPA Review Report[136]

The *Construction Retention Bond Scheme* would:

(a) apply to all domestic, commercial, civil and engineering contracts in circumstances where the contract sum is $100,000 or greater. Given the legislated maximum value able to be retained under Part 4A of the QBSA Act, this threshold would safeguard retentions exceeding $5,000 up to practical completion and from $2,500 post practical completion until the expiry of the defects liability period;

(b) be administered by the Queensland Building Services Authority;

(c) be self-funded by the interest earned off monies held on trust for the benefit of contracted parties;

(d) allow for the payment of monies or the release of security held by it:

- (i) by agreement of the parties;
- (ii) by Order of a Court or QCAT;
- (iii) by an award of an arbitrator, or by expert determination;
- (iv) at the direction of an adjudicator under the BCIPA;
- (v) at the direction of a domestic adjudicator under the proposed *Rapid Domestic Adjudication* Scheme;
- (vi) if the contracted party is an individual and he or she dies, disappears or takes advantage of the laws of bankruptcy, or in the case of a company, has a provisional liquidator, liquidator, administrator or controller appointed, or is wound up or is ordered to be wound up:
  - (A) the contracting party may make written application to the QBSA for the release of the retention and/or security;
  - (B) the contracting party shall provide with the application an accompanying statutory declaration detailing the reasons for the application;
  - (C) if satisfied that the contracting party has complied with the terms of this provision, the QBSA shall notify the parties in writing accordingly within 5 business days of the making of the application and shall release the retention and/or security to the contracting party within 10 business days of the making of the application;
  - (D) if the QBSA is not so satisfied, it shall notify the parties of its decision within 5 business days of the making of the application.
  - (E) a decision whether or not to release the retention and/or security would be a 'reviewable decision' upon application by either party to QCAT or a Court of competent jurisdiction;
  - (F) Significant penalties should apply for false or misleading statements made to the QBSA seeking release of retention/security. A contracting party found to have made false or misleading statements for the purposes of obtaining the release of retention/security should have their licence cancelled. Such conduct may also constitute fraud under s.408C of the *Queensland Criminal Code*.

[136] Wallace, Andrew *Final Report – Payment dispute resolution in the Queensland building and construction industry*, 24 May 2013:106

Statements of Reservation

DESLEY SCOTT MP
SHADOW MINISTER FOR COMMUNITY SERVICES AND CHILD SAFETY
SHADOW MINISTER FOR MENTAL HEALTH
SHADOW MINISTER FOR WOMEN AND SENIORS
SHADOW MINISTER FOR MULTICULTURAL AFFAIRS
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Mr Howard Hobbs
Chair
Transport, Housing and Local Government Committee
Parliament House
George St
Brisbane QLD 4000

Dear Chair

Statement of Reservation – *Building and Construction Industry Payments Amendment Bill 2014*

I wish to notify the Transport, Housing and Local Government Committee that the Queensland Opposition has reservations about aspects of Report No. 52 of the Transport, Housing and Local Government Committee into the *Building and Construction Industry Payments Amendment Bill 2014*.

The Opposition notes the large number of recommendations made by the Committee. It is apparent that notwithstanding the additional time given to the Committee to investigate and report on the Bill, there is still significant concern in the industry with certain aspects of the Bill.

It is also apparent that there are deficiencies in the proposed legislation, as evidenced by the number of recommendations that have been made that attempt to remedy issues that the Committee has uncovered during its deliberations.

The Opposition will detail further reasons for its concerns during the parliamentary debate on the Bill.

Yours sincerely

Desley C. Scott

Desley Scott MP
Member for Woodridge

QUEENSLAND PARLIAMENT

Carl Judge MP
State Member for Yeerongpilly

29 August 2014

Howard Hobbs MP
Chair of the Transport, Housing and Local Government Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Hobbs,

Statement of Reservation re Building and Construction Industry Payments Amendment Bill 2014

Please be advised that I do not support the Committee's recommendation that the Building and Construction Industry Payments Amendment Bill 2014 be passed.

I intend to detail my reservations upon resumption of the second reading debate.

Yours sincerely,

Carl Judge

Carl Judge MP
Member for Yeerongpilly

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