



QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION

Please address all correspondence to GPO Box 5099, Brisbane Qld 4001

T 139 333 **F** 07 3225 2999 **W** www.qbcc.qld.gov.au

Contact: **Michael Chesterman**
Office: **Brisbane**
Telephone:
Fax:

Your Ref:
Our Ref:

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Senate Economics Reference Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Dr Kathleen Dermody

Inquiry into Insolvency in the Australian Construction Industry: Submission from Mr Bob Gaussen

Thank you for your letter of 17 September 2015. I welcome the opportunity to respond to the submission from Mr Bob Gaussen of Adjudicate Today to the *Inquiry into Insolvency in the Australian Construction Industry*.

I am the Registrar appointed under the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA). The Adjudication Registry (Registry) is established under the BCIPA and operates from within the Queensland Building and Construction Commission (QBCC).

Mr Gaussen has made a number of allegations which are not supported by evidence, as well as making a number of emotional grievances. I will not be responding to any of these issues other than to state for the record that I have always discharged my responsibilities in a most professional manner and always acted in good faith.

I would like to bring to the Committee's attention how different Authorised Nominating Authorities (ANAs) operate in other States and Territories apart from Queensland. As Mr Gaussen has stated, he is the owner of Adjudicate Today Pty Ltd, an ANA that operates in a number of Australian States and the ACT. ANAs are either commercial "for profit" or membership organisations such as the Resolution Institute (formerly known as LEADR & IAMA). ANAs receive financial benefit from taking a proportion of an adjudicator's fee. According to retired District Court Judge Alan Moss, this proportion is "usually 40% of the adjudicator's fee".¹ For the 2014/2015 year, in Queensland alone, adjudicators charged \$3,270,175.

¹ See paragraph 22 of Mr Moss' report on the *Review of Building and Construction Industry Security of Payments Act 2009* (SA) at http://www.sasbc.sa.gov.au/files/334_review_of_building_and_construction_industry_security_of_payments_act_2009_prepared_by_alan_moss_a601338.pdf?v=236.

The remainder of my response is restricted to matters of fact that can be supported by evidence. In this regard I will be relying on information published in QBCC 2014/2015 Annual Report (Annual Report) (pages 56-59) and the detailed statistics at <http://www.qbcc.qld.gov.au/adjudication-monthly-statistical-reports>. A copy of the Annual Report can be accessed at [https://www.qbcc.qld.gov.au/sites/default/files/QBCC Annual Report - 1 July 2014 to 30 June 2015.pdf](https://www.qbcc.qld.gov.au/sites/default/files/QBCC%20Annual%20Report%20-%201%20July%202014%20to%2030%20June%202015.pdf).

In response to a number of comments made by Mr Gaussen in relation to my evidence at the committee hearing on 31 August 2015 (page 43 of the transcript), I repeat and rely on this evidence as depicting an accurate synopsis of the changes following the 2014 amendments to the BCIPA.

Furthermore I wish to draw to the Committees attention the following information.

Information and assistance provided by the QBCC

The QBCC provides a wide range of free advice to claimants and respondents, including the following:

- A. a 24 hour, seven day a week contact centre that can assist with adjudication related enquiries pertaining to the BCIPA.
- B. a section on the QBCC website dedicated to assisting contractors involved in payment disputes understand how they can resolve their disputes via the adjudication process under the BCIPA.²
- C. an interactive flow chart which provides a quick step-by-step guide to help contractors recover their progress payments.³ Included in the guide are a number of useful features such as a business day calculator so that contractors know exactly when to send notices as well as some handy links to the relevant documents they may need to serve.
- D. assistance with issues in adjudication applications that may affect the validity of an application. The registry does a basic validity check on adjudication applications with respect to:
 - a. requirements for a payment claim under section 17 of the BCIPA;
 - b. time requirements for payment claims under section 17A of the BCIPA;
 - c. notice requirements under section 20A of the BCIPA; and
 - d. requirements for an adjudication application under section 21 of the BCIPA.

If a validity issue is identified, the registry contacts the claimant to alert them of the potential invalidity in addition to notifying of the ability to withdraw under section 35B of the BCIPA. The result of this process is that claimants have the ability to withdraw their application, address any potential invalidities and re-lodge an application at the next reference date.

² See <http://www.qbcc.qld.gov.au/get-help-getting-paid-bcipa/overview>.

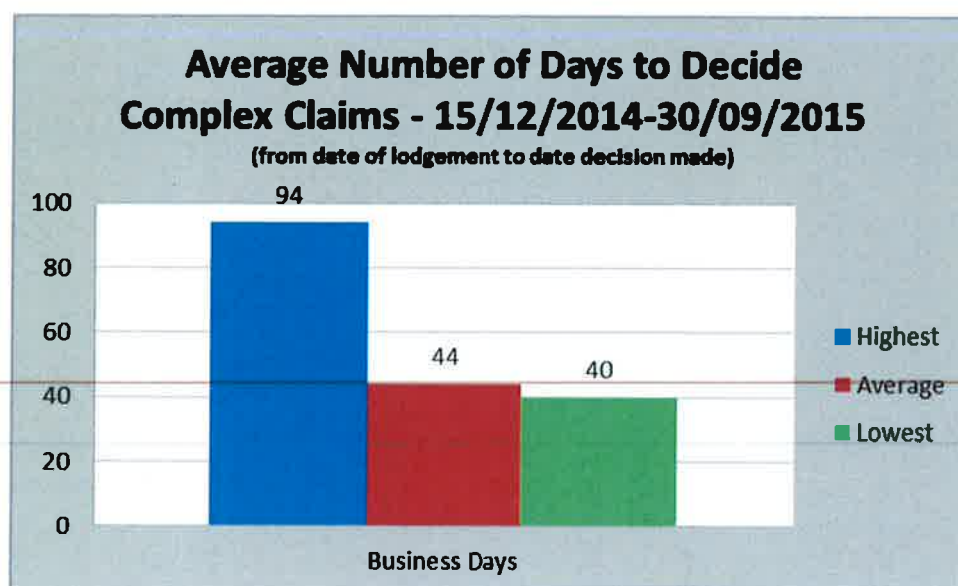
³ The guide is available at <http://www.qbcc.qld.gov.au/get-help-getting-paid-bcipa/quick-step-step-guide-help-you-recover-your-progress-payments-under>.

In addition to the above advice, the QBCC provides a range of services that result in a simplification of the adjudication process. This includes providing claimants with a one-stop shop whereby claimants no longer have to choose between different ANAs with differing fees and they can lodge adjudication applications in various ways, including physical lodgement at any of the nine QBCC offices, by post, fax and via the QBCC website.

Time frames for the determination of payment claims for \$750,000 or more (complex claims)

Mr Gaussen asserts that “no responsible lawyer should recommend adjudication for complex claims when the receipt of the decision can be delayed for 6 months and the decision is entirely interim in nature”. As demonstrated in the below graph, since the amendments commenced on 15 December 2014, the longest timeframe for a decision on a complex claim has been 94 business days. In the process of deciding the application, five extensions of time were granted – two by the adjudicator for the adjudication response and the claimant’s reply and three granted by the parties for the adjudicator to make his decision. As demonstrated in the graph below, this is an anomaly.

The graph below reveals that the average time for complex claims to be decided (being those claims above \$750,000 exclusive of GST) since 15 December 2014 is 44 business days from the date of lodgement.



Enhancement of the position of respondents

On page 2 of Mr Gaussen’s submission, Mr Gaussen alleges that “the amendments greatly enhance the position of respondents in their dealing with claimants who make, or propose to make, adjudication applications”.

As demonstrated in the report by Andrew Wallace titled *Final Report of the Review of the Discussion Paper – Payment dispute resolution in the Queensland building and construction industry* (Report), issues were identified with the “untimely and unfair” timeframes for persons who served large and complex payment claims under the BCIPA

(refer page 168). For full details regarding the concerns with timeframes, see pages 172 to 181 of the Report.

The Report concluded that a “one size fits all approach’... has the potential to result in significant injustice, particularly to contracting parties in complex matters” (refer page 182). He recommended two separate types of schemes, one to deal with complex payment claims and the other with standard payment claims.

The majority of the 2014 BCIPA amendments relating to procedures for recovering progress payments (Part 3 of the Act) relate to complex payment claims. The only changes to procedures that impact on standard payment claims are:

1. reducing the timeframe for a claimant to make a payment claim from 12 months to six months after the construction work was last carried out, or goods or services provided; and
2. allowing the respondent an extra five business days in which to provide an adjudication response.

Publication of Statistics

Mr Gaussen alleges that on 10 September 2014, the former Minister Mander “undertook to Parliament that statistics published by the Adjudication Registrar on the BCIPA website would be updated on a daily basis”. He then goes on to allege that “current published statistics are incomplete dating back to April 2015 and May 2015” and that the June 2015 statistics contained “a major numeric error”.

A review of the Building and Construction Industry Payments Amendments Bill Second Reading Speech, dated 10 September 2014 indicates that former Minister Mander undertook to publish the appointment of adjudicators and adjudication decisions.⁴ Such information is published on the QBCC website and is up to date.⁵ The error Mr Gaussen refers to with respect to the June 2015 outcomes, which includes April and May statistics, was corrected some time ago.

The management of adjudication

Mr Gaussen alleges that “the statistics demonstrate a major breakdown in the management of adjudication”. He claims “in excess of 75% of adjudications [that] have not proceeded to decision” and that “more than three out of every four adjudication applications made since the December 2014 amendments are not proceeding to adjudication or ‘falling over””.

In response to this allegation I wish to make the following points.

For the period 1 January 2015 to 30 September 2015, a total of 299 adjudication decisions have been released. For the same period the previous year (1 January 2014 to 30 September 2014), when ANAs were solely responsible for receiving adjudication applications and appointing adjudicators, a total of 341 adjudication decisions were

⁴ See Building and Construction Industry Payments Amendment Bill Second Reading Speech, 10 September 2014 at page 3176.

⁵ See <http://www.qbcc.qld.gov.au/decision-search>.

released. This minor decrease in the number of released decisions is within the normal range of variations since the commencement of BCIPA in 2004.

Although adjudication applications may be withdrawn this is not evidence of applications or the process "falling over". Adjudication applications are either decided by an adjudicator or withdrawn. There are two reasons for applications to be withdrawn:

1. under section 35B of the BCIPA an application is taken to have been withdrawn if the claimant serves a notice of discontinuation or the respondent has paid the amount sought by the claimant. The vast majority of these types of withdrawals are due to the matter being settled to the satisfaction of the claimant;
2. applications may also be withdrawn by the claimant **before** they are referred to an adjudicator if Registry staff has identified potential jurisdictional issues. This proactive policy adopted by the Registry enables most claimants the opportunity to rectify the issue(s) and recommence the process at a later date.

The QBCC publishes every adjudication decision in its entirety on its website to enable information to be verified and to promote transparency and accountability. The QBCC now also publishes new and enhanced statistics on its website in recognition of the fact that the 2015/16 financial year will be the first full year of operations under the amended Act. Information concerning applications withdrawn and a host of other information is published on a monthly basis on the QBCC's website at <http://www.qbcc.qld.gov.au/adjudication-monthly-statistical-reports>.

Other Issues

Grading of adjudicators and referral of adjudication applications.

The grading of adjudicators and all referrals of applications to adjudicators are carried out in a transparent and appropriate manner in accordance with the QBC Board's Adjudicator Grading and Referral Policy 2015. This policy is available on the QBCC website at: [http://www.qbcc.qld.gov.au/sites/default/files/Adjudicator Grading and Referral Policy 2015.pdf](http://www.qbcc.qld.gov.au/sites/default/files/Adjudicator%20Grading%20and%20Referral%20Policy%202015.pdf).

This policy does not have any regard to the identity of the parties (including government organisations) to adjudication and, accordingly, the identity of the parties is not a consideration taken by the Registry in referring adjudication applications.

The Registry's application of the Board's Policy is consistent with the Explanatory Notes for the Amendments which state that:

Under the Bill the Adjudication Registrar will have the power to appoint adjudicators. To ensure transparency and confidence in the Registrar's power to nominate adjudicators it is proposed that the Queensland Building and Construction Board (QBC Board) will publish a board paper which sets out the selection criteria that is to be followed by the registrar, and any appropriately qualified registry staff as delegated by the registrar, in the nomination of adjudicators. It is intended that the implementation of a QBC Board policy of this nature will allay concerns raised by the Committee surrounding the discretionary power of the registrar to determine which adjudicator receives which adjudication application.

CPD

The selection of approved CPD providers followed deliberations and consultations conducted by myself and the Deputy Registrar. The CPD scheme requires accrual of a minimum of 10 CPD points each year for adjudicators to maintain their registration under the BCIPA. Each year, an adjudicator must accrue a minimum of one CPD point for each of the four mandatory core areas – Judicial Conduct and Natural Justice; Substantive Legal; Legislative Developments and Technical. There are eight approved providers under the CPD scheme. The HIA and the QMBA were selected on the basis that they would provide CPD training events to adjudicators relevant to the Technical core area. The HIA and the QMBA have no involvement in training adjudicators on legal or contractual matters. However the HIA and the QMBA are the most appropriate organisations to deliver training relevant to the technical core area on the basis that they have the skill and experience in delivering high quality technical training to contractors.

Review of Registry decisions

Administrative decisions made by the Registry in relation to the BCIPA are subject to review in the Queensland Civil and Administrative Tribunal (QCAT). The QBCC and Registry respects the right of persons affected by its decisions to apply for an external review of administrative decisions. It is not appropriate for the QBCC or Registry to comment on a specific review proceedings. QCAT review decisions are subject to publication. However, I can indicate that all registered adjudicators are expected to satisfactorily complete mandatory transitional training. Mr Gaussen's allegation that I have made untruthful statements to adjudicators is strongly denied.

I trust that the above information is of assistance to the Committee.

Yours faithfully

Michael Chesterman
Adjudication Registrar