Resolution Institute

Resolution Institute

Response to *Building and Construction Industry Security of Payment Act 1999* Discussion Paper December 2015

Contents

Preamble 3

The Act generally and powers of adjudicators 4

Definitions/terms used 7

Adjudicators and Fees 12

ANA’s and Adjudicators – bias and impartiality 14

Alternative Models 16

Conclusion 17

Preamble

Resolution Institute is pleased to be given the opportunity to respond to the *Building and Construction Industry Security of Payments Act 1999 Discussion Paper – December 2015.*

Resolution Institute is a recognised Authorised Nominating Authority ("ANA") for the building and construction security of payment legislation in New South Wales, ACT, Victoria and Tasmania. Resolution Institute is an authorised CPD provider in Queensland, recognised by the Queensland Building and Construction Commission. The Institute of Arbitrators and Mediators Australia ("IAMA"), whose functions are now performed by Resolution Institute, is recognised as an ANA in South Australia, Western Australia and Northern Territory.

Being an ANA is an important aspect of Resolution Institute's work as a not-for-profit membership organisation that promotes and facilitates the development and use of dispute resolution. As a registered charity, Resolution Institute is uniquely positioned amongst other commercially operated ANAs to provide non-biased and independent support as an ANA.

Resolution Institute welcomes the Department of Fair Trading's initiatives to improve the effectiveness of the *Building and Construction Industry Security of Payments Act 1999 ("BCISOPA")* and ensure that it is achieving its objectives.

To consider the issues addressed in the *Discussion Paper*, Resolution Institute sought comment from our member adjudicators. Resolution Institute is grateful to our member adjudicators and acknowledges their comments which have helped to inform this *Response*. We have attempted to extract some dominant themes coming from the comments of our member adjudicators rather than simply relaying their individual responses to you. We understand many of our member adjudicators are submitting individual responses to the *Discussion Paper*.

Resolution Institute has not addressed all of the issues raised in the *Discussion Paper* as there are certain topics best addressed by industry participants or other interests. Resolution Institute has directed comment to matters specifically relating to matters relevant to our role as an ANA.

The Act generally and powers of adjudicators

General issues

The *Discussion Paper* raised the following questions, regarding the BCISOPA generally and the power of Adjudicators.

- Is the Act generally effective in furthering its purposes and meeting its objectives?
- Is the current adjudication process appropriate and effective?
- Should the Act be broadened to capture parties other than head contractors and their employees?

Jurisdiction and effectiveness - comment

Resolution Institute believes that the jurisdiction of the BCISOPA should not be reduced for reasons of inclusivity, certainty and consistency.

Resolution Institute believes that an inclusive approach is preferable as it allows a broader cross-section of the community to benefit from the BCISOPA, specifically to obtain progress payments in a timely manner. The BCISOPA currently provides certainty for those entering into construction contracts. If some payment claims are excluded, issues will arise for parties in relation to knowing whether they are above or below the threshold and whether part or all of the work and/or supply of related goods and services under the contract are excluded.

Resolution Institute is concerned about the seemingly increasing disparities between state building and construction security of payment schemes. To maintain and extend a broadly consistent approach across States is desirable for parties, particularly in the way that it supports business efficiency. Resolution Institute supports national consistency.

The majority of our member adjudicators thought the BSISOPA was generally effective in furthering its purposes. A theme which arose when responding to the above issues is that the Act should be as inclusive and transparent as possible, and empower the parties. It follows that to further these objectives, the Act should be broadened to capture parties other than head contractors and their employees.

Adjudicator's powers

The *Discussion Paper* asked:

- Should Adjudicators have the power to extend time frames without the agreement of the parties?
- Should an adjudicator be able to take other matters into consideration when reaching a determination?
- Should Claimants be able to withdraw applications at any time and for any reason?

The majority of adjudicators advised us they were very satisfied with current adjudicators' powers.

To ensure consistency and party empowerment, the majority of our adjudicator members thought adjudicators should not have the power to extend time frames without the agreement of parties and should not be able to take other matters into consideration when reaching a determination.

As an ANA we often spend considerable time and effort trying to secure agreement to an extension by both claimant and respondent. Our experience is that generally both are accepting of an extension, but it is not high priority for either to respond to phone or email messages about this. We have found the Victorian approach of only needing agreement by the claimant expedites this process and have not found objections by either claimants or respondents being raised. We encourage the NSW Government to consider whether two parties agreeing an extension of time is necessary or if one agreeing, would be sufficient.

One adjudicator noted the system under the Act is similar to an administrative tribunal with a specialist skill set and concluded adjudicators should not consider matters outside the bounds of section 22(2). The concern expressed is that the error count, court challenges and general injustice will rise dramatically if other factors are taken into account without statutory regulation. This will result in inconsistency. Resolution Institute agrees that these are undesirable outcomes for participants.

The majority also thought claimants should be able to withdraw applications at any time and for any reason. This will avoid unnecessary adjudications proceeding. One adjudicator noted that a withdrawal should attach a liability for costs, unless agreed by the parties. If claimants withdraw before a determination, Respondents will have expended resources responding and the adjudicator may have incurred time (costs) in considering the application.

Resolution Institute agrees and it has observed this as a problem currently. When applications for adjudication are withdrawn at any time either before or after the adjudication has been accepted the adjudication for determination, it is often difficult to secure payment for costs incurred. Occasionally, an Adjudicator will decline to accept a matter for determination due to a statutory non-compliance. The adjudicator will already have spent time considering often voluminous documents to reach this conclusion and cannot charge the parties for the time incurred as no determination will be released. Our adjudicator members generally accept this as "a cost of doing the business". Resolution Institute suggests that this is an area for further consideration.

Conclusion - We agree that a broad, consistent and regulated approach is preferred across areas of jurisdiction and the exercise of discretion/adjudicators powers. Expedition and efficiency of process should also be paramount.

Definitions/terms used

The *Discussion Paper* asked about satisfaction with current definitions and specific terms used in the Act. A broad range of views were expressed by our member adjudicators.

Exempt contracts

The *Discussion Paper* asked about satisfaction with the current exemptions. Although most adjudicators indicated they were satisfied with current exemptions, there was some of disagreement surrounding certain aspects.

One adjudicator thought the exemption for owner/occupiers and projects worth over $1 million should be removed, so that they are covered by the Act. Another thought that home owners should definitely not be included.

One adjudicator noted that there is no reason to deny access to the Act or to change the structure of the Act based on a monetary limit.

Resolution Institute believes that these are policy questions for government and reiterates it supports that the Act be as broad and inclusive in coverage as possible.

If government decides to allow different types of policy claims, for example, to include claims by purchasers and claims for damages by respondents, as an ANA, Resolution Institute has the capacity to administer this expansion. Feedback from adjudicators indicates they also have the capacity to adjudicate such claims.

Conclusion – Resolution Institute supports a broad and inclusive Act furthering its objective of promoting non-litigious dispute resolution.

Clarification of terms

The *Discussion Paper* raised the issue of whether certain terms used in the Act are clear and adequate, specifically:

- “reference date”
- The rights to payment claims
- The provisions about valuation of work, and goods and services
- Due dates considering the Christmas/New Year period
- “business days”

Most adjudicators agreed that these terms were suitable and appropriate, and do not require amendment. One adjudicator noted that they are anticipating the High Court of Australia's clarification of the term "reference date" in the Lewence Constructions Pty Ltd v Southern Han Breakfast Point Pty Ltd matter. One adjudicator felt particularly strongly that the term "business days" should be not be replaced by calendar days as it would lead to manipulation of time frames and response times, with holidays and the ability to serve on non-business days leading to unfair advantages.

Resolution Institute believes that it would be helpful to make it explicit that submitting papers by email or other on-line facility is an appropriate means of service.

Resolution Institute also observes that there is some confusion amongst claimants regarding acceptable mode of service of adjudication applications on respondents. The Act would benefit from clarification regarding evidence of service.

Time limits

The *Discussion Paper* also asked about the current time limits in the BCISOPA, specifically:

- 12 month limit for serving claims
- Deadline for providing a payment schedule
- Due dates for payment
- Time frames for complex claims

Adjudicators were mostly satisfied with the time limits with one notable exception. The question of whether there should be a separate category for complex claims and suitable time frames for such claims was subject to much disagreement amongst our adjudicator members (please see detailed discussion following under a separate heading). The majority of adjudicators were not satisfied with the time frames for complex claims.

Resolution Institute's experience suggests that the 12 month timeframe for making a claim is appropriate – we have not received statements of concern or complaint to suggest otherwise, although we acknowledge that such concerns are raised elsewhere. To reduce this timeframe may detract from claimants' ability to prepare the claim and mitigate the possibility of a negotiated settlement.

Specifically, some further comments we received regarding other time limits in the Act are:

- Due date for payment of subcontractors in s.11(1B) should be changed to 20 business days (commonly agreed amongst our adjudicator members)
- Notices given under s.17(2) should be given prior to going to adjudication even if the payment schedule was provided.
- Time for determination in s.21(3)(a) should be extended to 10 business days after the date the adjudication response is received by the adjudicator.

We are aware of concerns that where there is a very large claim, or multiple claims pooled together, the respondent may not have time to prepare a response in the current 10 day timeframe. It is also argued a respondent is likely to have been able to anticipate a very large claim, so should be able to respond fairly quickly. These different perspectives provide grounds for some extension of the response time, so long as the overall intention of providing a prompt and cost effective mechanism for resolving building and construction payment disputes is not unreasonably compromised.

Resolution Institute's experience is that the provisions for Christmas and Easter are adequate. Not counting the business days between Christmas and New Year and during Easter may result in financial hardship for parties to disputes experiencing delay. Resolution Institute is able to continue its support functions as an ANA during these periods, and maintains a list of available adjudicators.

Conclusion – Resolution Institute acknowledges the need to balance the needs of the parties in accessing fast and effective dispute resolution along with according fairness to both parties. Overall, we are content with current time frames. We would support the extension of response times for large claims. We also support as much notice as possible being given before disputes proceed to adjudication to afford every opportunity for parties to resolve their dispute.

Complex claims

The discussion paper asked whether:

- The NSW Act should introduce different processes for different sized claims.
- Claims above a certain threshold should be removed from the Act and dealt with solely by the court system.

The majority of our adjudicator members expressed a view that all claims should follow the same process. They strongly disagreed that the BCISOPA should introduce different processes for different sized claims. They also strongly disagreed that claims above a certain threshold should be removed from the Act and dealt with solely by the court system. It adds cost and delay. One notable exception was a comment that the Act has been abused as a process for many years and that high value and complex claims should fall outside its jurisdiction.

One member adjudicator noted that the Act works for all levels of claims and introducing different processes unnecessarily complicates the Act. Providing a threshold removes the ability of some contractors to pursue a quick method of payment. One noted that the amount of the claim is irrelevant to the complexity of the dispute and the time required. Resolution Institute agrees and has observed that the quantum of the claim is not necessarily linked to the level of complexity of issues to be resolved.

One adjudicator noted that use of the term "complex claim" is not assisting in QLD as the definition is a hybrid of concepts and poorly drafted. He observed that the terms detract from the expeditious principles of the scheme. Others agreed and thought that complex claims should not fall within the parameters of the Act as that is not what the Act was created for. A further adjudicator noted that no extension is necessary and no provision for more complex claims should be made.

One adjudicator disagreed and thought that separate consideration should be given to complex claims, together with including a definition of the term.

Conclusion – As there seems to be some disagreement regarding "complex claims" Resolution Institute identifies this area for further consideration and generally supports an approach consistent with expedition. Resolution Institute has observed that the 10 day deadline for releasing a determination for more complicated matters (those involving technical issues, lawyers, voluminous documents, large scale projects) is sometimes not long enough for adjudicators. This is especially so when an adjudication response is received, leaving adjudicators less time to consider all information provided and prepare a determination within time.

Payment claims

Most member adjudicators were satisfied with the current provisions regarding payment claims. One noted that if claims could be made down the contracting chain, this may result in contractors being unduly pressured by head contractors to prevent contractors using the Act.

Another noted that removing the endorsement was not sensible and claims should state that they are being made under the Act. We assume this is in the interests of clarity.

Resolution Institute has made available model payment claims on its website.

Payment schedules

A clear majority of our adjudicator members were satisfied with the current provisions regarding payment schedules.

Adjudicators and Fees

Adjudicators' qualifications

The Discussion paper raised the following specific issues:

- Should the Act prescribe Adjudicators' qualifications?
- Should the Act contain a disciplinary provision for adjudicators?
- Should Adjudicators be registered with a government agency?

We observed a trend in responses from adjudicators demonstrating a commitment to increased regulation of adjudicator's qualifications. The majority agreed that the Act should prescribe adjudicator's qualifications. However, the majority did not support the introduction of disciplinary provisions for adjudicators in the Act. The majority strongly agreed that adjudicators should be registered with a government agency.

One adjudicator thought that all adjudicators should have legal qualifications. In contrast, Resolution Institute thinks it is important that adjudicators with a wide variety of qualifications and expertise be available to undertake adjudications. Certain disputes are suited to particular skill sets and legal qualifications may not be necessary (eg quantity surveying matters). There are also matters where technical legal issues are present so some legal knowledge is beneficial.

One adjudicator noted that the qualifications and discipline of adjudicators should be managed by ANA's. The adjudicator commented that registering and maintaining a record of CPD with government is a good idea but it needs to be with an agency with suitable background and expertise.

Conclusion: Resolution Institute agrees that adjudicators should demonstrate a breadth and depth of experience. Resolution Institute has a rich history of training, accrediting and offering CPD opportunities to adjudicators, so is equipped to take on extra functions should the NSW government require assistance in this regard.

Fees

The Discussion paper asked:

- Should fees charged by ANAs and/or adjudicators be regulated?
- Should fees use a sliding scale based on the amount of the claim?

There was a range of opinion expressed in response to the issues raised in the discussion paper. A narrow majority agreed that fees charges by ANA's and/or adjudicators should be regulated, although some disagreed. Similarly, there was a range of opinion expressed in response to the issue of charging a sliding scale, with a narrow majority agreeing that a sliding scale based on the amount of the claim should be charged.

In terms of the fees charged by ANA's, one adjudicator noted that the fees set by individual ANA's should continue to promote competition. Similarly, one noted that market forces should impact on fees, not regulation. The adjudicator observed that the market should cause claimants to move to ANA's with the best administration and adjudicators. The adjudicator noted his perception was that price is a minor factor.

Resolution Institute, as a registered charity, sets its fees based on meeting its administrative and associated costs, and pursuing its goals in education, training, and the promotion of dispute resolution services rather than price competitiveness and market forces. We are currently conducting a review of our fee structure and are considering appropriate options, including a fixed fee for lower quantum and relatively simple adjudications. This would provide the benefit of certainty in advance of embarking on the process.

In terms of the fees charged by Adjudicators, Resolution Institute monitors fee levels in line with our conditions of authorisation as an ANA in various jurisdictions. We have received some feedback that adjudicator's hourly rates are at the lower end of what they might expect to be paid for other work (this observation is mostly confined to those adjudicators with senior legal experience). Again, Resolution Institute values a range of adjudicators with various hourly charge rates and tries to match suitably skilled and qualified adjudicators to appropriate disputes. Cost effectiveness is an important factor.

Conclusion – Resolution Institute would like to further consider the use of a sliding scale based on the amount of the claim. A concern is that sometimes disputes with a small quantum unfold to have complicated technical issues and may be time consuming to resolve. A major benefit of a sliding scale would be that fees do not end up larger than or close to the amount in dispute, as we have observed on rare occasion.

ANA's and Adjudicators – bias and impartiality

Adjudicator and ANA Selection - "shopping"

The *Discussion Paper* asked for comment in relation to

- Adjudicator shopping

The *Discussion Paper* raises questions about the neutrality of ANAs: we understand that the concern is that an ANA's desire to attract business may lead them to appoint "claimant friendly" adjudicators. We are also aware of a related concern regarding the current system and the potential for actual and perceived bias where "for profit" ANA's appoint adjudicators and have a vested interest (percentage based commission) in the outcome.

A majority of our member adjudicators agreed that adjudicator shopping is a problem. One member does not accept the perception as legitimate and holds the view that the perception arises from aggrieved parties. Nonetheless, Resolution Institute has received feedback from parties and adjudicators that there is a perception of bias among some users of adjudication services.

- Choice of ANA and whether both parties should agree

A narrow majority disagreed both parties to a dispute be required to agree on the choice of ANA. Some preferred the view that both parties should agree on the choice of ANA, although this raises the problem of what happens if they cannot agree. Does this mean a claimant cannot continue with the process? There was a mix of views whether the current process for appointing adjudicators is impartial.

One adjudicator noted that as it is claimants who are experiencing problems obtaining payment, they should have access to their preferred ANA.

- Impartiality in the current process for appointing adjudicators

Resolution Institute's experience in appointing adjudicators is that the current system works well and our process is transparent and consistent. Resolution Institute checks for conflicts of interest, identifies any special knowledge or experience requirements and adjudicator availability. Within these parameters, Resolution Institute offers adjudications to adjudicators (registered under the BCISOPA) on the Resolution Institute panel. The imperative is to impartially ensure the most appropriately qualified and experienced adjudicator is nominated.

Resolution Institute maintains its role strictly as administering the adjudication service and refrains from comment on adjudicators' determinations.

All adjudicators registered under the BCISOPA, must comply with the general conditions of registration which specify requirements in relation to conduct, conflict of interest and compliance with the BCISOPA.

Resolution Institute – not for profit

We suggest that the above potential deficiency in the current ANA system is of limited application to a not for profit organisation such as Resolution Institute. Our current fee structure is designed to cover the administrative and associated costs of providing the adjudication service and pursuing our goals in education, training and the promotion of dispute resolution. We have never received feedback that we are either Claimant or Respondent biased.

If the NSW Government were to consider reforming the current ANA system and move to a QLD type model, Resolution Institute would be well positioned to assist as a single not for profit external provider of ANA services. Fees could be fixed to reflect administrative and associated costs, offering an efficient and economical administration service.

Outsourcing service delivery to a single external provider such as Resolution Institute provides the additional benefit of access to an established panel of suitably qualified and trained Adjudicators. This model of service delivery will also assist to address the views expressed widely about stakeholders' perceptions that ANAs do not offer an impartial service, because of the imperative they have to attract claimants.

Conclusion – Resolution Institute is pleased to discuss this option with you further.

Alternative Models

QLD Model

There was diversity of opinion as to whether the Queensland Registrar of Adjudicators system is preferable to the NSW ANA system. Our adjudicators were quite polarised in their views, with a small majority strongly favouring the NSW system. One adjudicator noted that the QLD registry has removed all the assistance that was previously available to claimants along with promotion of the Act. The remaining adjudicators strongly favoured the QLD model.

One adjudicator member commented that the QLD experiment has caused long delays, additional cost and little or no improvement in the outcomes. It was further noted that the single benefit is the neutrality of appointment. There was a concern expressed that there are too many adjudicators which is diluting quality as adjudicators are not doing enough adjudication each year to maintain their skills.

Another adjudicator noted that the division of claims into categories in QLD is artificial and nonsensical. Eg a claim for $740,000 is treated vastly differently to a claim for $751,000.

Conclusion - Resolution Institute acknowledges there are a number of lessons to be learned from the QLD experience and identifies positive outcomes from neutrality of appointment, a departure from commercial ANAs and uniformity of approach through a centralised regulator.

Mediation

Adjudicators expressed a strong preference that mediation should not be introduced for disputes under the Act. It was noted that mediation would slow down the payment process by extending the adjudication process, make enforcement problematic. One adjudicator noted that the parties need a decision, certainty of process and cash flow.

Conclusion

Resolution Institute would be very pleased to provide additional information on this response and/or to engage in a further consultation process.

Contact details:

Fiona Hollier
Chief Executive Officer
Resolution Institute
Level 2, 13-15 Bridge Street,
Sydney NSW 2000

fiona.hollier@resolution.institute

Belinda Cachia
Growth Manager
Resolution Institute
Level 2, 13-15 Bridge Street,
Sydney NSW 2000

belinda.cachia@resolution.institute