



Resolution Institute

Submission to Queensland Public  
Works and Utilities Committee in  
relation to the Building Industry  
Fairness (Security of Payment)  
Bill 2017

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## Preamble

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Resolution Institute is pleased to make a submission to the Queensland Public Works and Utilities Committee ('the Committee') regarding its detailed consideration of the *Building Industry Fairness (Security of Payment) Bill (QLD) 2017* ('the Bill'). We note that on 22 August 2017, the Hon Mick de Brenni MP, Minister for Housing and Public Works and Minister for Sport introduced the Bill into the Queensland Parliament. We understand the Committee is required to report by 13 October 2017.

Resolution Institute was an authorised CPD provider in Queensland, recognised by the Queensland Building and Construction Commission ('QBCC'), up until the CPD requirements were altered. Resolution Institute's predecessor organisations were previously recognised as an Authorised Nominating Authority ("ANA") in Queensland. In other jurisdictions, Resolution Institute is a recognised ANA for the building and construction security of payment legislation in New South Wales, ACT, Victoria and Tasmania. The Institute of Arbitrators and Mediators Australia ("IAMA"), whose functions are performed by Resolution Institute, is recognised as an ANA in South Australia, Western Australia and Northern Territory.

Being an authorised CPD provider and an ANA are important aspects 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 a CPD provider and as an ANA.

Resolution Institute welcomes the Queensland Government's initiatives to undertake reform of security of payments laws in the building and construction industry. Resolution Institute has also recently participated in a roundtable forum moderated by the NSW Department of Fair Trading in relation to its current review of the NSW legislation and are consulting with John Murray in relation to the Commonwealth Government's review of Security of Payment ('SOP') laws nationally. Resolution Institute is supportive of a generally consistent approach to SOP across jurisdictions.

Resolution Institute acknowledges the explanatory notes provide that the purpose of the Bill, as stated in clause 3) is to:

- *improve security of payment for subcontractors in the building and construction industry by providing for effective, efficient, and fair processes*

*for securing payment, including the establishment of a framework to establish Project Bank Accounts*

- *modernise and simplify the provisions for making a subcontractor's charge*
- *increase ease of access to security of payment legislation, and*
- *improve legislation to provide increased ability of the Queensland Building and Construction Commission (QBCC) to provide regulatory oversight to the building and construction industry.*

In the course of preparing submissions to Government, Resolution Institute often seeks comment from our member adjudicators nationally or from certain jurisdictions. The current pending deadline for submissions in this instance unfortunately does not allow us to consult our members in a structured way. Some of our member adjudicators may be submitting responses to you independently. You will no doubt appreciate many different perspectives. In further consideration of the Bill, please contact Resolution Institute if we can assist you in seeking comment from our Queensland member adjudicators.

Resolution Institute has not addressed all of the clauses in the Bill, as there are certain topics best addressed by industry participants or other interests. Resolution Institute has directed comment to matters relevant to our role as a previously authorised CPD provider, a previous ANA in Queensland and a continuing ANA in other jurisdictions, the adjudication process and the role of the QBCC. We have specifically addressed clauses in chapters 2, 3, 5 and 6 of the Bill, (clauses numbered as per the Bill) following.

## Chapter 2 – Project bank accounts

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Resolution Institute notes that the main purpose of the project bank accounts ('PBA') chapter is to ensure that money which is to be paid to particular subcontractors is held in a way that protects the interests of subcontractors.

### *Resolution Institute comment*

Resolution Institute understands there is a diversity of opinion in relation to this issue and broadly supports any change which protects funds and increases the likelihood of cash flow during a construction project.

During a previous consultation with South Australian member adjudicators, some expressed concern about the cost impact of implementing a similar proposal (also restricted in application to Government contracts). They noted that the costs of establishing and administering PBA's could be unwieldy and may cause contractors and subcontractors to run dual banking systems without benefit. The majority felt the proposal should have a wider application to all projects, and that despite the costs, the wide use of project bank accounts would be beneficial to disputants.

Resolution Institute is aware that in NSW there is a proposal that:

- retention money be held on trust;
- the trust account threshold be lowered to \$10M; and
- subcontractors be able to inspect trust account records.

Resolution Institute supports nationally consistent initiatives which encourage certainty and transparency. On balance, we support Chapter 3 PBAs and the establishment of a statutory construction trust for monies owed under security of payment disputes.

## Chapter 3 – Progress payments

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### ***Clause 67 - Meaning of reference date***

Resolution Institute notes that clause 67 is a new provision defining the term ‘reference date’ additionally providing for when a construction contract is terminated and does not provide for a reference date surviving beyond termination. In such cases, the final reference date for when a payment claim may be made is the day the contract is terminated.

### ***Resolution Institute comment***

We agree this is a positive reform and will increase certainty in the industry.

### ***Clause 68 - Meaning of payment claim***

Resolution Institute notes that clause 68 is a new provision defining the term ‘payment claim’ as a written document that:

- (a) identifies the construction work or related goods and services to which the progress claim relates;
- (b) states the amount of the progress payment that the claimant claims is payable by the respondent;
- (c) requests payment of the claimed amount; and ...
- (d) includes the other information prescribed by regulation.

### ***Resolution Institute comment***

Resolution Institute notes that there is no requirement for endorsement on a payment claim in the Bill. We understand that NSW is currently considering whether to reinstate the endorsement requirement as there is a perception that since the 2014 amendments there is now too much confusion regarding what is or is not a payment claim. In a previous consultation with our member adjudicators, the majority agreed all payment claims should include the endorsement “this is a payment claim made under the Act”, mainly to eliminate doubt.

### ***Arguments for the endorsement:***

- not difficult for claimants to do - most small subcontractors/contractors have the endorsement written on their standard pro-forma tax invoices
- for claimants this means reference dates are not applied to correspondence that meets the low threshold of a payment claim such as variation quotations or other contemporaneous correspondence

- for respondents this means there is no need to respond to every ‘possible’ payment claim with a payment schedule
- absence of the endorsement limits the ability of parties to negotiate claims and payments, or make separate variation and other claims during the contract. Every progress claim must be fully documented and fully responded to in case the matter goes to adjudication. There is a significant cost implication to contractors, subcontractors and principals.

#### *Arguments against endorsement:*

A minority of our adjudicator members previously thought that endorsed payment claims can be used as a means to intimidate contractors and subcontractors, and represent an additional hurdle for claimants, especially those unrepresented.

#### *Conclusion*

On balance, Resolution Institute supports endorsed payment claims. Acknowledging that Resolution Institute consistently supports broadly accessed schemes, with minimum impediments to participation, on this occasion we support maximum clarity. Although Resolution Institute has not experienced a high volume of negative feedback from NSW disputants since 2014, we receive many enquiries regarding whether correspondence received constitutes a valid payment claim. Achieving more certainty about the validity of payment claims is a desired outcome and may result in fewer invalid adjudication applications being referred to adjudicators.

### ***Clause 69 – payment schedules***

Clause 69 defines the term ‘payment schedule’ as a written document that identifies the payment claim to which it responds, and states the amount of the payment, if any, that the respondent proposes to make and if the amount is less than the claimed amount, any reason for withholding payment.

#### ***Resolution Institute comment***

Resolution Institute supports clarification of what constitutes a valid payment schedule. Resolution Institute perceives the main issue is that if the payment claim endorsement is removed, and payment schedules are compulsory and lead to penalties for not issuing one on time, respondents may be disadvantaged. Resolution Institute is concerned there is a gap in the current Bill in that respondents may not have adequate, if any, access to notification that correspondence or communication they receive is intended to be a payment claim, **and** that response to that purported payment claim, via a valid and timely payment schedule, is compulsory.

## ***Clauses 76 and 77- Responding to payment claim by payment schedule***

Clause 76 incorporates and varies section 18 of the repealed BCIPA. It provides that a respondent who receives a payment claim must serve a payment schedule to the claimant, (whether or not the respondent intends to pay the amount stated in the payment claim), unless the respondent has a reasonable excuse for not doing so. The clause also sets out the timeframes for serving a payment schedule and makes it an offence not to reply. Clause 77 provides that in the event of non-response, the respondent is liable to pay the amount claimed under the payment claim to the claimant on the due date for the progress payment to which the payment claim relates.

### ***Resolution Institute comment***

#### ***Arguments against requiring response via payment schedule***

- the requirement may be onerous for small contractors, especially if there is no endorsement on the payment claim
- establishing valid service of a payment claim may be difficult. Resolution Institute often experiences difficulty in contacting reluctant and busy respondents, especially at the beginning of the process
- confusion and arguments may arise regarding the meaning of a “reasonable excuse” for not responding. It may provide another ground for delay and proliferation of litigation
- there are too many procedural rules already

#### ***Arguments in support of requiring a payment schedule within time***

- it is the responsibility of respondents to understand relevant legislation and respond accordingly
- if the claimant has a formal procedure requirement to express and serve a payment claim in a certain way, then procedural fairness dictates that potential respondents should have similar statutory obligations.

### ***Conclusion***

On balance, Resolution Institute accepts that this requirement will lead to the possibility of more procedural defects and decreased accessibility to the scheme. The inclusion of standard form payment claims and payment schedules in regulations should be considered, which will alleviate doubt about form and content.



## Chapter 3 - Part 4 – Adjudication of disputed progress payments

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### ***Clause 79 - Application for adjudication***

Clause 79 enables a claimant to apply for adjudication in the event that the respondent fails to pay an amount to the claimant by the due date for the payment, or the amount set out in the respondent's payment schedule is less than the amount set out in the claimant's payment claim. The timeframes for making an adjudication application are:

- (i) for an application relating to failure to serve a payment schedule and pay the full amount stated in the payment claim, 30 business days after the due date for the progress payment to which the claim relates;
- (ii) 40 business days after the due date for payment where the respondent fails to pay the full amount stated in the payment schedule; or
- (iii) for an application relating to an amount stated in the payment schedule being less than the amount in the payment claim, 30 business days after the claimant receives the payment schedule.

### ***Resolution Institute comment***

Resolution Institute is concerned that the draft time frames in clause 79 are lengthy and are not consistent with the original legislative intent of SOP schemes to ensure quick access to a resolution and secure cash flow. We acknowledge that the draft amended time frames may provide more advantage to claimants as it gives them more time to prepare their arguments and documentation. Resolution Institute considers that this benefit is of less significance than maintaining the benefit of the current time frames which provide quick access to a resolution and secure cash flow.

### ***Clause 80 - When adjudicator ineligible to adjudicate***

Clause 80 prevents an adjudicator from adjudicating a particular construction contract if the adjudicator is a party to the contract or has a conflict of interest as prescribed by regulation.

### ***Resolution Institute comment***

Resolution Institute does not think legislation will benefit from expansion of eligibility criteria or specific definition of conflict of interest scenarios. As an ANA, Resolution Institute has appropriate procedures in place to ensure adjudicators who

are nominated are the most appropriate and free from any conflict of interest or 'material personal interest'. Resolution Institute understands much of the criticism directed at adjudicators and ANAs are that they have a vested financial interest in the outcomes of adjudications. We are not aware that these criticisms refer to alleged personal interest in contracts, the subject of disputes, or parties to adjudications, and are more a predisposition to favour either claimants or respondents. As a not for profit registered charity, Resolution Institute is uniquely positioned and unbiased. We take our obligations as an ANA very seriously and operate independently and impartially. We agree it is important the process for the nomination of adjudicators is transparent, consistent and efficient. Resolution Institute considers that a government agency such as QBCC is well placed also to meet these three criteria.

### ***Clause 83 - Time for making adjudication response and clause 86 - Extending time for deciding adjudication application***

Our comments relate to the definition of complex claims in Queensland.

Clause 83 sets out the timeframes for making an adjudication response which vary depending on whether the adjudication application relates to a standard payment claim (for an amount of \$750,000 or less) or a complex payment claim (more than \$750,000).

Clause 86 allows an adjudicator to decide an adjudication application within a longer period than that set out elsewhere for a complex payment claim

#### ***Resolution Institute comment***

During previous consultation processes with our member adjudicators, Resolution Institute received feedback that the Queensland model of defining complex claims appears somewhat arbitrary and has not been effective in accurately categorising matters. Small quantum matters can be complicated and have much documentation associated with an adjudication application. Resolution Institute regularly see claims for under \$5000 with copious documentation and numerous contract variations.

Therefore Resolution Institute considers that a preferable approach is to allow an extension of time for making an adjudication response and for adjudicators to consider adjudication applications in certain limited and clearly defined circumstances such as number of variations, volume of supporting documentation, presence or absence legal representation, detail of contract, scale of project etc.

Quantum is only one factor in assessing complexity of a matter. Resolution Institute encourages further review of the effectiveness of the current dichotomy.

## Chapter 5 – Administration/Adjudicators

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### ***162 - Request for further information (new application)***

Clause 162 provides that the registrar may seek further information from the applicant to assist the registrar in deciding an application to be an adjudicator.

#### ***Resolution Institute comments***

Resolution Institute member adjudicators demonstrated a commitment to increased regulation of adjudicator's qualifications during a recent consultation process. The majority agreed that legislation or regulations should prescribe adjudicators' qualifications as this would result in improved standards and outcomes.

#### ***Options***

We have included a comprehensive list of legislative requirements suggested by our member adjudicators below. Resolution Institute recognises that some of these overlap and are options for achieving similar outcomes in relation to ensuring quality outcomes from suitably qualified adjudicators. Resolution Institute does not consider that all the options listed below should be mandatory; rather we consider that they provide the basis for developing a set of criteria, some combination of which could be the requirements for adjudicators to meet.

- construction industry experience - a minimum 15 years post-graduate industry experience in roles such as contract administrator (making or assessing progress claims, valuing construction work, assessment of variation and extension of time claims, or project engineer or construction cost estimator)
- a degree or diploma in quantity surveying, architecture or engineering
- SOP knowledge and experience including detailed knowledge of legislation
- some type of construction training (trade certificate, engineering qualifications, building degree etc)
- some form of legal training (Grad Dip or Master of Construction Law or similar)
- a qualification in construction contract law and/or a minimum of 10 years of experience in preparing or reviewing contractor's progress claims, valuing variations and negotiating contractor/subcontractor claims.
- an understanding of the principles of natural justice
- solicitor/barrister or arbitrator engineer (all varieties) or architect with experience in building law

- qualified arbitrator with Resolution Institute or Chartered Institute of Arbitrators
- specialised adjudication training – could be completion of a 1 week training course in adjudication
- defined levels of competency of adjudicators in relation to such matters as value, simple/complex, commercial or contractual or legal.' Provision of an adjudication decision aligned with the skill rating requirements of an adjudicator
- basic skills in award writing
- a person of good character (4 referees) with membership of an appropriate technical professional institution
- minimum age limit of at least 40 years
- ongoing CPD compliance

### *Conclusion*

The above is a comprehensive list of all suggestions Resolution Institute received from our adjudicator members. Resolution Institute supports that nationally uniform legislation should set out minimum requirements for eligibility to become an adjudicator, including some of the suggestions above.

Resolution Institute considers that it is important that adjudicators with a wide variety of qualifications and expertise be available to undertake adjudications. Therefore, Resolution Institute does not consider that legal qualifications in themselves should be a mandatory qualification as some disputes are best suited to other skill sets (eg quantity surveying matters). There are also matters where technical legal issues are present so some legal knowledge is beneficial. In our experience, it is beneficial to have access to adjudicators with different strengths and experiences as not all adjudication applications are the same.

Resolution Institute agrees that adjudicators should demonstrate a breadth and depth of experience.

### ***Clause 166 - Request for further information (renewal)***

Clause 168 provides that the registrar may seek further information from the applicant to assist the registrar in deciding a renewal application for adjudicators.

### ***Resolution Institute comment***

Resolution Institute asserts that all adjudicators should have to demonstrate that they have met minimum CPD requirements and have retained the necessary skills and knowledge to adjudicate.

Some specific suggestions Resolution Institute has previously received from our member adjudicators are:

- a minimum of 10 hours of CPD points for 10 hours of structured and directed training / seminars on security of payment topics including: 1. The Act, updates, legal cases and interpretation of the Act. 2. Construction related items. 3. Relevant issues such as extension of time claims and liquidated damages
- weighted combination of discussions evenings, master classes, practice, private study and associated/related CPD from outside providers
- annual workshop to review the latest cases and legislative changes
- Quarterly (or similar) discussion groups to discuss issues arising
- regular submission of case notes on a relevant matter
- ongoing refreshers on the legislation
- participation in, or delivery of, training
- circulation or publication of high quality determinations
- a system whereby the busiest and most experienced adjudicators mentor the new and inexperienced adjudicators (see above comments in relation to potential grading of arbitrators).

Resolution Institute supports that a regulator or appropriate outsourced service provider should be responsible for training and accrediting adjudicators to meet agreed criteria and for providing ongoing CPD events to demonstrate that the accredited adjudicators are maintaining their skills and knowledge.

When previously consulted in relation to the NSW review in 2016, our adjudicators expressed a concern that CPD events run by a government agency do not attract the same level of engagement as those run by ANAs who are also professional member bodies. This is, in part, because in a professional membership body, adjudicators participate in identifying the content required and developing a CPD calendar.

Resolution Institute, a professional member body, has strong systems in place to monitor the performance of adjudicators, which serves to motivate adjudicators to continue their learning and perform to meet the high standards exhibited by their peers. Maintenance of reputation is a strong driver for ensuring that member adjudicators are accredited, meet the organisations' ongoing accreditation requirements and perform to a high standard.

### *Conclusion*

Resolution Institute supports registering and maintaining a record of CPD with government regulators and supports that administration of assessment of eligibility lie with an independent specific training and accreditation body.

## Chapter 6 – Legal proceedings

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### ***189 - Proceedings for offences***

Clause 189 provides that proceedings for an offence under the Bill are to be addressed summarily under the *Justices Act* QLD 1886, and provides relevant timeframes for commencement.

### ***Resolution Institute comment***

Resolution Institute is concerned at the proliferation of offences created under the Bill, as it may act as a disincentive for parties to access the scheme which was originally intended to provide an inexpensive and easy alternative to engaging in protracted and expensive legislation. Resolution Institute acknowledges that it is important for regulators to have access to certain enforcement mechanisms and think a heavy handed approach will be counterproductive to legislative intent

## **Conclusion**

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

One observation is that Resolution Institute is often contacted by parties in dispute seeking general information about a path forward. We are careful not to provide legal advice and focus on information sharing. We have received many phone calls from disputants in Queensland advising that they have not been successful in receiving this sort of practical information from the QBCC. Resolution Institute considers that ANAs perform an important role in basic filtering of disputes suitable to adjudication, or suggesting possible alternatives.

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.

Resolution Institute would be very pleased to provide additional information on this submission and/or to engage in further consultation. Please contact us as the need arises. We are pleased to meet with you again or provide any further information you require.

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