



Resolution  
Institute

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Submission on the review of NSW  
Building and Construction  
Industry Security of Payment Act  
1999

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6 April 2018

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## Preamble

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Resolution Institute is pleased to submit this response to issues discussed at the Building and Construction Industry Security of Payment Act 1999 (Act) stakeholder roundtable with the NSW Government Department of Finance, Services and Innovation on Tuesday 27 March 2018. Resolution Institute would be very pleased to discuss items raised in this submission.

Resolution Institute is appreciative of the efforts of its NSW Adjudication Panel who were consulted prior to this response.

## About Resolution Institute

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Resolution Institute is the largest membership organisation of dispute resolution (DR) professionals in Australasia. Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission ("ACNC") as a not-for-profit organisation. Resolution Institute has a membership base of over 3,000 DR professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family.

Resolution Institute members engage in adjudication, arbitration, mediation, expert determination, facilitation, conflict coaching, conciliation and restorative justice. Resolution Institute is committed to promoting and supporting the use of dispute resolution through providing education, training and accreditation or grading, to contribute to the provision of quality DR services.

Resolution Institute provides a nomination service for parties in dispute, when:

1. parties need a contractually agreed, independent and unbiased service to appoint a dispute resolver
2. a government, industry or agency scheme requires an independent and unbiased third party to appoint an appropriately qualified dispute resolver; and
3. less commonly, an individual requests a dispute resolver.

## Contact details

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## 1. Payment due dates – Concern over the length of the current default due dates

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**Suggested solution – amend to allow parties to negotiate due dates to a maximum of 10 business days (for payments from principal to head contractor) and 20 business days for payments from head contractor to subcontractor). Where the contract is silent on the due date, or the contract nominates a date more than the maximum period, the default dates would be 5 business days (for payments from principal to head contractor) and 10 business days (for payments from head contractor to subcontractor).**

Resolution Institute supports the intent of the solution and notes a few areas of concern.

- i) The maximum of 20 business days for payments from head contractor to subcontractor may be perceived as too long by subcontractors.
- ii) The default of 5 business days for payments from principal to head contractor may be too short and difficult to implement in practice.
- iii) The necessity of defining and determining the “principal”, “head contractor” and “subcontractor” would complicate the Act.

An alternative solution may be as follows: amend to allow parties to negotiate due dates to a maximum of 15 business days. Where the contract is silent on the due date, or the contract nominates a date more than the maximum period, the default date would be 10 business days.

## 2. Reference dates – reference dates do not survive termination

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**Suggested solution: amend to provide a final reference date for when a payment claim may be made as the day the contract is terminated.**

Resolution Institute supports the intent of this solution and suggests that as contracts are on occasion repudiated causing termination on little or no notice (whether valid or invalid) a final reference date should be 7 calendar days after the contract termination date, to enable a claimant time to collate the documents that are needed to accompany the payment claim.

### 3. Adjudication – jurisdictional error in one part of the decision renders the whole decision void

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**Suggested solution: amend to allow severance of parts of an adjudication decision not affected by jurisdictional error to remain binding on the parties to a proceeding.**

Resolution Institute supports this solution.

### 4. Retention money trust accounting – concern annual reporting requirement too onerous

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**Suggested solution – amend to remove the annual reporting requirements.**

Resolution Institute supports this solution and notes that this issue is not prominently brought to our attention.

### 5. Reference dates – no limitation on how long a head contractor/principal can delay the time for making payment claim

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**Suggested solution – amend to allow parties to negotiate for a minimum of one reference date per month. Where the contract is silent, the statutory default reference date would be the 28<sup>th</sup> day of the month.**

Resolution Institute supports this solution and believes this is supported by caselaw.