Resolution Institute

Feedback on the Draft Building and Construction Industry (Security of Payment) Bill 2020 (WA)

1 July 2020

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Preamble

Resolution Institute is pleased to respond to the WA Department of Mines, Industry Regulation and Safety's request for feedback on the *Building and Construction Industry (Security of Payment) Bill 2020 (WA) – Exposure Draft*.

Resolution Institute is the largest membership organisation of dispute resolution professionals within Australia and New Zealand. Resolution Institute members engage in adjudication, arbitration, mediation, expert determination, facilitation, conflict coaching, conciliation and restorative justice and has a membership base of over 3,000 ADR 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 is committed to its role as an Authorised Nominating Authority (ANA), as well as a nominator of third-party arbitrators and mediators being 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.

Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission (ACNC) as a not-for-profit organisation.

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Executive Summary

Resolution Institute considers that security of payment in construction contracts coupled with rapid adjudication is important legislation for resolution of payment disputes within Western Australia and the broader Australian community. As such, Resolution Institute supports the draft Bill and has taken the opportunity through its membership in Western Australia to provide both general and section specific comments on the draft Bill.

Our comments on the draft bill and explanatory notes are set out below.

GENERAL COMMENTS

General Comment No 1: Regulations

Whilst Resolution Institute understands that it is necessary for the regulations to prescribe certain requirements, we are concerned that the draft Bill contains too many provisions allowing substantive legislation to be determined by regulation - sections 6(3)(d), 7(1)(c), 7(2), 13(5)(e), 15, 30(3), 39, 42(4), 50(2), 76(4) are some examples.

General Comment No 2: Evidence

Resolution Institute is concerned that the draft Bill does not contain a provision excluding evidence from an adjudication in subsequent court proceedings. There was such a provision in the existing Act. Resolution Institute considers that this is necessary because the evidence obtained in rapid adjudication is often 'rushed' or incomplete.

SPECIFIC COMMENTS

Section 4 'payment claim':

Whilst the defined term payment claim has been used in both the new Act and the current Act, we consider that it would be useful to better describe the statutory rights under the Act (ie payment claim and progress payment) in terms that do not match terms and rights under the contract, notwithstanding that many payment claims will be both payment claims under the Act and payment claims under the construction contract. This will avoid any potential confusion.

Section 4 'head contractor':

Resolution Institute considers that the note on page 4 relating to the definition of *head contractor* is unclear and may cause confusion. A *principal* may contract directly with many *head contractors* who each then contract with many *subcontractors*. A subcontractor by definition is a person who undertakes to carry out construction work, or to supply related goods and services, under a construction contract otherwise than as head contractor.

Section 10(2):

The exemption of employees from the bill may lead to some confusion, especially because of how nebulous the definition of "employee" is in the case law as well as how the term is practically applied. This is overlaid by the fact that the Act would almost never be relevant in the context of a traditional employer-employee relationship.

Section 10(4):

Resolution Institute considers that the expression 'or' should be inserted after 'lent' in paragraph 4(b) and a new line should be inserted after 'indemnity', so that 'with respect to

construction work carried out, or related goods and services supplied under the construction contract' modifies each of the preceding paragraphs.

Section 10(5):

This subsection is somewhat vague and may open the door to workarounds where it can be proven that there are other considerations in the contract. Perhaps the insertion of the phrase "to such an extent that a contract's value is to be calculated otherwise than…" is wise.

Section 16:

We are concerned that this clause is in uncertain in its operation.

Notice provisions perform a useful function in the planning and management of construction contracts. Contractors will generally have knowledge of the particular work the contractor performs which is superior to that of the principal, but the contractors do not have a broader planning and co-ordination role. They generally do not have detailed knowledge of what other contractors on the job are doing. Planning and co-ordination is the responsibility of the principal.

It is, therefore, vital for the proper management of building and construction work that contractors give timely notice of events to principals. Failure to give timely notice can cause substantial prejudice to principals. In particular, it may prevent a principal complying with its own contractual notice requirements.

Failure to give timely notice can also have 'knock on' hardship to other contractors on site. It is in no-one's interest if principals cannot plan work effectively.

While Resolution Institute accepts that many notice provisions are unreasonably short, clause 16 makes the operation of notice provisions completely uncertain. Clause 16 will likely lead to endless disputation.

It is noted that a ruling on a particular clause is not binding on subsequent adjudicators, so the same notice clause may be disputed in each of a long series of adjudications.

The clause does not recognise that a failure to give timely notice can cause real hardship to a principal. At the very least, the prejudice caused by a failure to give notice should be identified as a factor in clause 16(6). Clause 16(6) should specifically refer to preventing a principal giving notice.

Section 17:

Resolution Institute considers that the new Act does not effectively allow for milestone payment contracts.

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The definition of 'progress payment' in s 17(2) allows for, inter alia, milestone payments. Sections 18 and 19(1) then provide that the amount of the 'progress payment' is the amount calculated in accordance with the contract. Finally, the payment claim regime in Part 3 Div 1 is again predicated on there being an entitlement to a 'progress payment'. However, it is difficult (if not impossible) to reconcile s 23(2) with the operation of s 17 where a milestone will take longer than one month to be achieved. That is because s 23(2) provides for a monthly entitlement to claim a progress payment even where the progress payment concerns a milestone which has not yet been achieved at the time of the monthly claim. These provisions of the Act have been modelled on the provisions of the NSW Security of Payment legislation, and that has been the commonly accepted interpretation of those provisions in NSW.

There are many contracts (eg equipment supply contracts) which properly and reasonably provide that the supplier is only entitled to payment upon the achievement of a milestone, rather than every month on a 'percentage complete' basis.

Similarly, this issue may be seen from considering payments for construction of a domestic house, where payment is made when a milestone is achieved, say lock up. If lock up takes two months to achieve, is the contractor entitled to claim half the lock up payment at the end of the first month, or is the contractor obliged to wait till the whole of lock up is achieved?

Further, contracts often provide that payment for milestones linked to definitions requiring not only work to be complete, but other materials provided, and, often, the expression of an opinion or determination as to their satisfactory completion – by the superintendent or owner.

Furthermore, the operation of clause 23(2) also suggests that a progress claim can only be made at the end of a particular month, even if the contingency or milestone was achieved on the first day of the month. (Clause 23(3) does not cover this situation because a claim for payment based on a milestone will not be a payment claim for a 'particular claimed month'.

This appears to conflict with s17(2)(c). There is no mention of contracts that include provisions for milestone payments, for example for large manufactured items, where the construction contractor agrees to take some responsibility for financing and construction risk. This may be an impediment to the very sound business practice of seeking to allocate risk to the party most capable of managing the subject risk. Parties should be allowed to agree that payments are due only when defined milestones have been achieved, including when the elapsed time between those milestones may be many months.

The Act (including s 23(2)) should effectively provide for contracts of these nature. Parties should be allowed to agree that payments be due only when defined milestones have been achieved, including when the elapsed time between those milestones may be many months.

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Section 19(1)(b)(iv):

We recommend amending the reference to defect and defective to work that is not in accordance with the contract. Work may not be defective but may still be non-compliant and there will be a cost of achieving compliance. We suggest that there should be another clause included to recognise non-compliance as a relevant method of calculating the quantum of a claim.

Section 19(2)(b)(iv):

In line with the above, we suggest amending the reference to defect and defective to work that is not in accordance with the contract. Work may not be defective but may still be non-compliant and there will be a cost of achieving compliance.

Section 20(3):

Under 20(3)(b) a payment claim for home building work becomes due 10 business days after the payment claim. However, under 10(1)(a) the Act does not apply to individuals having home building work undertaken. It is likely an individual would have difficulty enforcing the payment period under this Act. Potentially a similar provision could be inserted in the Home Building Act.

Section 23(6)(a) 'Defects Liability Period':

We note that the *defects liability period* within a contract normally starts after practical completion not the day of practical completion.

Section 23(6)(a) and (b) 'Practical Completion':

Within the definition of *practical completion* there is likely to be confusion between the date *for* practical completion (defined as a specific date in a contract) and the date *of* practical completion (defined as the date when practical completion is actually achieved and therefore not defined as a specific date). In subsection (a) the only likely time that there is a fixed date *of* practical completion is in a maintenance contract which comes to an end on a specific day. We suggest that some rewording to account for the differences would be appropriate.

Section 24(1):

The Bill does not require the claimant to justify or provide any basis for the claims that are being made, or to provide sufficient materials to enable the value of the work to be assessed. The claimant merely has to identify the work that was done. This could cause difficulties for the respondent under s 34(3). We consider that it is appropriate to require sufficient detail to facilitate assessment of a payment claim. 24(1) should be expanded to add some defined detail enabling the claim to be assessed. One way of achieving this might be to amend 24(1)(a) to: *be in writing and in the form and containing the evidence required by the contract (if any).*

24(1)(d) has caused much contention in other states. Generally, it is inappropriate in the industry because the failure to add a few words can invalidate the claim. That adversely affects

small subcontractors unfamiliar with the finer details of the Act. We do note that homeowners have special protections under 24(2) and do not require the statement except on the prescribed form.

We welcome the insertion of 24(4) to remove a difficulty imposed within the current Act. It would seem counter-productive to introduce a new difficulty posed by 24(1)(d).

Section 24(3):

Whilst the clarification regarding invoices is noted, it is felt that this may have the potential to cause confusion, for many contracts provide for a process of progress claim, certificate and then invoice before payment is made. Some parties have sought to argue (wrongly) that the payment terms under the Act apply from the Invoice, not the progress claim.

Section 25(3):

The requirement for the respondent to give reasons why the full amount is not paid, is noted. However, the potential for unfairness (see also the comment with regard to s30) arises because the respondent's reasons for not paying will be focused upon the basis for the claim as articulated and advanced by the claimant (see also the comment with regard to s24(1)). For example, if a claim is for a variation comprising earthworks is valued based upon the quantity of earth moved, the reasons for non-payment will only focus upon that. If the claim as articulated in the application is for the same variation but now valued in the alternative on the basis of time and labour, then the respondent is unable to respond to that. The difficulty arises as there appears to be no prohibition on the claimant changing the grounds advanced to support its position between the payment claim and any application for adjudication. We are of the view that this has the potential to cause unfairness as an unintended outcome.

Section 27:

We suggest that the drafting of s27(4) may exclude the possibility of a respondent arguing (in court proceedings) that the payment claim was not properly made in accordance with the requirements of ss23 and 24, for the courts enquiry is limited to only the particular circumstances noted in s27(4). It is doubtful that it would be a fair outcome for the court to order a respondent to pay an amount that has been improperly claimed, but not responded to.

Section 28:

Resolution Institute considers that the requirement for a claimant to request, and the respondent to provide a payment schedule, where one has not previously been given, is a necessary and appropriate step for the claimant prior to commencement of adjudication. This ensures the respondent has a chance to set out its position on the payment claim, such that the claimant can address the reasons given in its application.

The Bill appears silent on whether there is then a second time limit for the respondent to pay any amount it then determines is payable in this "second chance" payment schedule (noting that it would be provided after the date payment was due in any event).

The time limits for commencement of adjudication are strict.

Section 29:

The Bill permits parties to agree the identity of the adjudicator or nominating body, save for circumstances where the appointment fails, or the adjudicator fails to determine in time. This is consistent with the practice under the current Act, of which there is no evidence of abuse.

It is noted that the application is commenced once it is "made to the adjudicator or nominating authority". It is suggested that there is space for confusion to arise amongst users who do not appreciate that making an application means providing the totality of the application, in a compliant manner.

Section 30:

We note that there is no express requirement within s30 (or elsewhere) that the claim made in an adjudication application is the same (or advanced in the same manner) as that pressed by the claimant when making the payment claim. This is contrasted to the position in outlined in s34(3) where the respondent is limited in its submissions to the matters referred to in the payment schedule.

The prohibition in s34 means that a respondent may be unable to respond to matters raised in the adjudication application (for they were not advanced in the claim, and hence not addressed in the payment schedule) and could lead to unfairness and challenges to the outcome. It is uncertain whether a request for submissions from the adjudicator under s35(3) could overcome this limitation. We therefore recommend that s34(3) be modified to remove the restriction on submissions.

Section 32:

We note that the consequence of a failure to appoint in time is that the claimant gets to make another application. The Building Commissioner is not given power to appoint. It is suggested that the Building Commissioner could be given power to appoint.

The adjudicator's discretion to withdraw is noted.

Section 34(3):

On balance, the prohibition in s34(3) that the respondent cannot include in its response any reasons for withholding payment that were not included in the payment schedule is commended.

However, as noted above, some concerns arise if the claimant articulates its claim in its adjudication application in a different manner to that set out in the payment claim, particularly given that the application may contain submissions '…that the claimant chooses to include' (refer s30(1)(d)). The respondent should be permitted to raise new grounds and material, if the claimant departs from the grounds identified in its payment claim or it provides further information or reasons, including expert reports.

The extent of the prohibitions application in practice is not clear and will need to be determined in practice. For example, where an applicant serves an expert report in support of its application, there will need to be an analysis to determine if the report expands the justification of the claim as presented, or articulates the claim using a different basis. Likewise, the response will need to be analysed to see whether an expert report within the response responding to an application merely expands a reason for rejection (eg providing evidence that a delay costs claim is not proven) or provides different and additional grounds for rejection beyond those set out in the payment schedule. On larger and more complex adjudications, Resolution Institute considers that the possibility of challenges to the determination based upon the application of the prohibition, are likely to increase.

Section 36:

We recommend that s36 should deal with the assessment of matters relating to Jurisdiction and frivolous / vexatious separately.

It may well be that the adjudicator will only discover that the application is frivolous or vexatious in the depths of the merits, but it is necessary to have determined jurisdiction before proceeding to address the merits.

The section on jurisdiction needs to address the question of multiple issues in dispute, where some issues are beyond jurisdiction and others are within jurisdiction (and similarly, some matters may be vexatious, and others not), for it is not clear whether severance will apply and it seems unfair to apply 36(2)(b) to the entire application.

The position in having a determination following a finding that there is no jurisdiction seems different to the east coast model, although there does not appear to be an express prohibition on an applicant seeking to adjudicate a future payment claim which seeks payment for the same matters.

The existing regime regarding complexity should be included in the new Act. It is suggested that an adjudicator may decline to determine an application on the ground that it is not fair to do so because of:

- the volume of the material provided in support of the application or provided by the respondent;

- the change in the claim made by the claimant, couples with s 34(3);
- new material (particularly expert evidence);
- factual uncertainty which make it impossible to determine facts within the adjudication framework – eg the parties really have no idea who the parties are or what occurred.

We are of the view that this power should exist.

Section 37:

If the claimant and the respondent agree that the determination shall be deferred for more than 20 days, Resolution Institute sees no reason why their wishes should not be respected. This may facilitate the parties achieving a consensual resolution.

In addition, we consider that the effect of section 37(6) should be clarified. If a determination is made after the time allowed by section 37, is it still valid if the claimant has not withdrawn from the adjudication? What is the effect of “must determine” in section 37(2)?

In relation to Note 2, Division 4, we consider it heavy-handed to effectively fine an adjudicator the entire fee for a late determination without regard for the reasons that the determination was late. For example, it may be too complex, or the volume of material is too significant to determine in time.

Section 38(2):

It may not be clear whether section 38(2) allows the adjudicator to seek further submissions from the parties, although section 38(2)(d) includes “…together with all submissions…”. It will be helpful to clarify this.

Section 39(3):

We see no reason to prevent an adjudicator from considering a response received out of time, if to do so will not delay provision of the determination.

Furthermore, we consider that $200,000 is too low a threshold for allowing an application for review.

Section 41:

Resolution Institute, as an experienced and well-respected ANA, sees no reason why only ANA’s can appoint. If the reasoning is that it would ensure high quality adjudication without bias, then the process should be left only to ANA’s for regular adjudications as well.

Section 47(3):

We can see no reason why the parties should not be allowed to agree on a longer extension than 20 days.

Section 47(4):

As noted above, in relation to section 37, we consider it heavy-handed to effectively fine the review adjudicator the entire fee for a late determination without regard for the reasons that the determination was late.

Section 50(8):

As noted above, in relation to section 37 and 47(4), we consider it heavy-handed to effectively fine the review adjudicator the entire fee for a late determination without regard for the reasons that the determination was late.

Section 50(10)(b):

This may work unfairly, where an adjudicator is removed from the application because the Commission does not make a determination of the merits of a challenge within 10 days. We recommend that paragraph (a) should be amended to disentitle the adjudicator to fees if the adjudicator was disqualified because of a conflict that the adjudicator knew about.

Section 51(2):

We recommend that in order to avoid manipulation by potentially unscrupulous adjudicators, the adjudicator should provide the determination to the Building Commission by the statutory time, while withholding it from the parties until they pay.

Section 54(5)(c):

The intent of this section is unclear. One assumes that this is to do with jurisdictional challenges to judgements entered on the basis of determinations, in which case, challenging the determination is the intention. Possibly, however, this means challenging the substantive merits (as opposed to the jurisdictional basis of the determination). We suggest that this section should also deal with the position in suspension order proceedings under the CJEA or proceedings for an injunction to restrain enforcement proceedings. If this section is intended to prevent any merits or jurisdictional review by a higher court of an adjudicator's decision, this requires clarification in combination with s66.

Section 57(1)(b):

We recommend that 10 business days would be a more equitable period should it be desirable to prepare and serve an application for an injunction against the recourse to performance security.

Section 58:

We suggest that it would be helpful for the definition of 'payment claim' in s4 to include a reference to both ss22 and 58, so that it is clear to a claimant that a payment claim may be for the payment of a progress payment and for the release of performance security to which the

progress payment relates, and to a respondent that a payment schedule must also be given in response to (or address) a claim for the release of performance schedule.

Section 60:

We recommend that s35(1) to be amended so that there is also an obligation to determine an adjudication application "fairly" (as is the case in s30 of the current Act). That will mean that an adjudicator acting under the new Act has the same express, statutory obligation to afford natural justice and procedural fairness to the parties which an adjudicator acting under the current Act has.

Section 66:

We recommend, firstly, that it would be helpful for s54(5) to make clear that it relates to a proceeding referred to in s66.

Secondly, it has previously been decided in Western Australia that the better course in judicial review proceedings is not to restrain the successful claimant from enforcing a determination at all, or to restrain conditional on payment of the adjudicated amount into court, pending the outcome of the review proceedings: see Sandvik Mining and Construction Australia Pty Ltd v John Fisher & Anor [2019] WASC 352, Easy Stay Mining Accommodation Pty Ltd v Faigen [2017] WASC 266 and Re Anstee-Brook; Ex parte Karara Mining Ltd [2012] WASC 129. That is because a stay of the adjudication determination or payment of the adjudicated amount into court pending the outcome of the review proceedings does not 'keep the money flowing' to the successful claimant. That is important because it may take 6+ months for judgment to be delivered in the review proceedings. Therefore, it would be helpful for s54(6) to either be deleted altogether, or amended so that it is clear that the court may either order payment into court or to the successful claimant pending the outcome of the review proceedings.

PART 4:

ANA Fees and Expenses

Consistent with s 14.1 of the Murray Report (relating to authorised nominating authorities' fees) Resolution Institute members, who are practicing adjudicators, have suggested that it would be helpful if there were provisions in the new Act or regulations regarding:

a) the maximum lodgement fee which the ANA may charge the applicant for lodging an application (the limit might vary depending upon the claimed amount);
b) the maximum percentage fee which the ANA may charge an adjudicator for adjudicating an adjudication;
c) the publication of both of the above fees charged by each ANA.

The object of the Act is that the adjudication process be effective, fair and as inexpensive as possible. ANA's derive revenue from adjudicators by charging a claimant a lodgement fee, and by requiring that an adjudicator pay a percentage of their adjudication fees charged to the

parties. The latter percentage fee is not currently publicised or known by a claimant when choosing an ANA to work with.

For not-for-profit organisations such as Resolution Institute, this revenue derived from fees as an ANA is used to cover administration, training and other services provided to adjudicators, supporting our value of excellence and continuous improvement, so that the highest practitioner and practice standards are achieved.

Conflict of Interest

An ANA should not be permitted to be named as the ANA in a construction contract, or accept the lodgement of an adjudication application, where that ANA is itself the publisher of the form of the relevant construction contract or involved in the preparation of the contract. That is because there is a conflict of interest in an ANA appointing an adjudicator who must then decide now the contract should be interpreted, including whether time bars included in the contract are 'unfair'.

Section 105(1)(c):

We strongly recommend that the regulations should additionally prescribe minimum annual continuing professional development obligations (or other training requirements) for adjudicators.

Section 113:

Resolution Institute members and practicing adjudicators suggest that it would be helpful if s113 be amended, or the regulations drafted, to prescribe that:

d) an Adjudicator may require that an adjudication response or additional information provided by a party in an adjudication be provided in hard copy rather than soft copy. Not all adjudicators have access to high capacity printers or copiers, and it is unreasonable to expect adjudicators to have to print out voluminous responses or submissions;

e) a document may be provided electronically by a file sharing service (eg Onedrive, Dropbox etc), rather than solely by email.