



Resolution
Institute

Resolution Institute

Public consultation:

Proposed reforms to the NSW
Building and Construction Industry
Security of Payment Act 1999

18 September, 2018

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Preamble

Resolution Institute is pleased to respond to the Department of Finance, Services and Innovation's request for feedback in relation to proposed reforms to the NSW Building and Construction Industry Security of Payment Act 1999 which includes the *Exposure Draft Bill: Building and Construction Industry Security of Payment Amendment Bill 2018* and *Consultation Paper: Securing Payments in the Building and Construction Industry — A Proposal for 'Deemed' Statutory Trusts*.

Resolution Institute thanks Minister Kean MP, Minister for Innovation and Better Regulation, for his invitation to participate in a stakeholder roundtable on the proposed reform package that Resolution Institute attended with Minister Kean MP on Wednesday 12 September 2018.

Resolution Institute is the largest body in the southern hemisphere representing the profession of non-litigious dispute resolution. Being an Authorised Nominating Authority (ANA)/appointor 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. Resolution Institute is a recognised ANA for the building and construction security of payment legislation in New South Wales, ACT, Victoria, Tasmania and Northern Territory. The Institute of Arbitrators and Mediators Australia (IAMA), whose functions are performed by Resolution Institute, is recognised as a prescribed appointer in South Australia and Western Australia. Resolution Institute is an authorised CPD provider in Queensland, recognised by the Queensland Building and Construction Commission.

Resolution Institute considers security of payment laws provide an important mechanism for resolving disputes within the building and construction industry and is keen for these laws to be amended to provide an even better service to the industry. Resolution Institute supports the general directions of the recommendations of the Murray Review. Resolution Institute supports Mr Murray's recommendation that there be a nationally consistent legislative model. Resolution Institute considers that a single consistent and simple-to-understand model throughout Australia will be most effective in ensuring prompt payment of progress claims and preserving cash flow within the building and construction industry.

The responses in this paper have been constructed in consultation with Resolution Institute members including NSW Adjudicators. Before forming the representative view of the organisation, Resolution Institute seeks and values the opinions of our diverse membership base. We note that the views of our member adjudicators may not accord entirely with the views of Resolution Institute in its capacity as an ANA and a membership organisation dedicated to dispute resolution.

More about Resolution Institute

Resolution Institute is the largest membership organisation of alternative dispute resolution (ADR) professionals within Australia and New Zealand. Resolution Institute members engage in adjudication, arbitration, mediation, expert determination, facilitation, conflict coaching, conciliation and restorative justice. Resolution Institute 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 a professional membership organisation that focusses on standards of ADR practice, support services to members and developing an environment in which ADR services are frequently used. Resolution Institute encourages members to develop their own business, lead generation and marketing activities. Resolution Institute is committed to promoting and supporting the use of ADR through providing education, training and accreditation or grading, to contribute to the provision of quality ADR services.

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

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PART A Building and Construction Industry Security of Payment Amendment Bill 2018

[NSW 1999 Act amendment no. 46]

Resolution Institute has reviewed the *Exposure draft Bill Building and Construction Industry Security of Payment Amendment Bill 2018* (draft Bill) and has provided concise comments below that we believe require attention. Where the draft Bill is aligned with our previous submissions we have omitted duplicating comments in this paper.

Code of Practice ANAs

Resolution Institute supports the inclusion of provisions (s28A) for a code of practice outlining and clarifying expectations, responsibilities and obligations for ANAs.

As a membership association that provides accreditation for adjudicators we are very interested in the proposed provisions relating to adjudicator conduct, complaints handling, assessment, selection, training and monitoring.

We look forward to being involved in the public consultation of the drafted code.

Reference dates

Resolution Institute supports Murray's recommendation (No.14) that the expression 'reference date' be abandoned and a statutory at least monthly entitlement be maintained. It is noted that the draft Bill does not align with this recommendation in that the expression 'reference date' is maintained.

Resolution Institute notes that the wording of s8(4) invalidates invoices issued on the same day as the work/supply which we believe to be a common practice and contrary to the intent of the Act.

References in Bill: [3] Section 8 Rights to progress payments (4) The reference date, in the case of a single or one-off payment, is the day immediately following the day on which the construction work was last carried out, or the related goods and services were last supplied, under the contract.

Resolution Institute notes that a potential unintended consequence of the wording "the last day of the named month in which the construction work is first carried out, or the related goods and services are first supplied, under the contract", draft Act s8(2)(a), in conjunction with the limiting of one payment claim per reference date, is that the allowance of up to 12 months following the work/supply, s13(4), is reduced to one month.

Shortening payment due dates

Resolution Institute supports uniformity and the simplicity of Murray's recommendation (No.19) for a maximum payment period of 25 business days, unless contracts provide for a lesser period, and where a contract is silent a default 10 business day period.

Withdrawal of adjudication applications

Resolution Institute supports expressly allowing for the withdrawal of adjudication applications consented to by both claimant and respondent when served on the adjudicator and/or the ANA.

Resolution Institute notes that the allowance for claimants to unilaterally withdraw an adjudication application at any time before the application is determined is unfair to the respondent. The respondent may have invested considerable time and expense in the process and may wish to have closure on the issue. This may also leave the respondent with liability for 50% of adjudicator fees and no outcome.

This practice may result in behaviour that in effect gives claimants the power to 'shop around' or choose the adjudicator.

This may also enable claimants to compel respondents to disclose arguments and/or evidence through their adjudication response, that then may be used form the basis of a new adjudication application on a different basis.

Adjudicator to provide determination to claimant and respondent

Resolution Institute agrees with the intent of draft Bill s22 (3)(c) and notes that the requirement of 'service' may be overstating the intent of 'delivery' to both parties.

Respondent payment withholding request

Resolution Institute notes that in the event of an adjudication timing out without determination or withdrawal, the requirement of the principal contractor to retain money owed to respondent will unfairly cause the respondent to suffer financially.

S26B should therefore be amended to account for this scenario.

Judicial Review

Resolution Institute does not support S32A (1)(b) providing for courts to remit matters to adjudicators for redetermination.

Remitting to an adjudicator presents other challenges, similar to that which would be incurred is a court remitted to a judge and not the court. If it is determined that remittance must remain this section should be amended to remit to adjudication via an ANA. Nominating a specific ANA within the Act, for example the same ANA as the original determination, may generate complications in the event that the ANA is no longer in operation.

Remitting to an adjudicator also requires the Act to expressly state if the remitted adjudication has the same procedures, timeframes, powers and obligations as other adjudications under the act.

Transitional provisions

The bill is silent on transitional provisions that the industry, and adjudicators, must have certainty on.

When are the amended provisions effective?

Will it be for all contracts retrospectively or only apply to new contracts entered into after the commencement of the amended act?

PART B Consultation Paper Securing Payments in the Building and Construction Industry — A Proposal for ‘Deemed’ Statutory Trusts.

Resolution Institute supports the general directions of the recommendations of the Murray Review including Murray’s recommendation that there be a nationally consistent legislative model.

Resolution Institute has answered the consultation paper questions focusing on issues applicable to our role as an Authorised Nominating Authority (ANA) and as a membership association representing the views of adjudicators.

1. Do you support the proposal to establish deemed statutory trusts in the Act?

Yes

2. What alternative reform(s) could be implemented?

None

3. Do you support the proposal to apply a cascading ‘deemed’ statutory trust model?

Yes.

4. What would be an appropriate point in the contractual chain to limit the requirement for ‘deemed’ statutory trusts?

None

In addition to our responses to questions 3 and 4 we note that:

- Limits of any kind may have the undesired consequence of becoming a point of dispute;
- Smaller sub-contractors may not have the skills or resources to understand and utilise the scheme; and
- Limits may lead to issues with special purpose vehicles being inserted into the contracting chain precluding the desired operation of the scheme.

5. Do you support the proposal to apply the requirement for ‘deemed’ trusts to construction contracts valued at \$1 million or more?

Yes, subject to the recommended review after 2 years.

In setting this limit we note that the act should be drafted in a way that prevents disputes arising out of the issue of contract value. The act may consider:

- Is this limit triggered from the original contract value?
- How will the act accommodate amendments to initial contract value?
- How will the act accommodate contracts valued at less than \$1 million that are subsequently amended to be over \$1 million, for the purpose of avoiding this limit?
- How will sub-contractor know when project money is deemed to be in trust? Should head contracts with a value of \$1,000,000 or more provide that it is a contract to which trusts apply and require that statement cascaded in all contracts made under the head contract?

6. What would be an appropriate alternative monetary threshold?

Not applicable

7. Do you support the proposal to limit the application of the requirement to the value of contracts between specific parties (rather than the value of the head contract)?

Not applicable

8. What would be an appropriate point to limit the application of the monetary threshold?

Not applicable

9. Do you support the proposal that the requirement for a deemed trust should arise immediately when the contract monies are received by the trustee?

Yes

10. What would be an appropriate point in the contract lifecycle for the deemed statutory trust to be established?

When the money is received by the trustee.

11. Do you support the proposal that responsibility for managing 'deemed' trust monies is placed on the trustee?

Yes

12. Do you support the proposal to allow trust monies on multiple construction projects to be held in a consolidated account?

Yes

13. Should there be any further obligations applied to trustees and/or beneficiaries to support the efficient flow of monies in/out of accounts (for example, a requirement for transaction certificates of some form)?

Payments from trust accounts should identify the trust account from which the payment is made.

14. Do you support the proposal to not require auditing of trust records?

Yes, provided beneficiaries are able to inspect the records of 'deemed' trust accounts.

15. Do you consider that the compliance and enforcement powers proposed in the exposure draft Bill are sufficient to support the operation of 'deemed' statutory trusts?

Yes

16. What type of compliance and enforcement powers or framework would be preferred?

As per the exposure draft bill.

17. Do you support the proposal to allow the trustee to withdraw funds from the account before a subcontractor has been paid?

Yes, up to the amount that is keeping in trust for itself.

18. When should a trustee be permitted to withdraw funds?

Whilst trustees should not use monies received as working capital, they should be able to claim monies for work they have completed. However, they should not be able to draw monies from the pool of monies allocated for work it has subcontracted until all subcontractors have been paid. For example, a trustee receives \$1,000,000 for work of which \$800,000 has been subcontracted. The trustee should be able to claim up to \$200,000 for itself and no more until all subcontractor claims are settled.

19. Do you support the proposal to allow funds to be distributed on a pro rata basis as a proportion of their payment claims?

Only in the case of insolvency, otherwise no.

20. What other model of distribution would be preferred?

Not applicable

21. Do you support the proposal relying on the existing dispute resolution mechanisms in the Act?

Yes

22. Are any new or amended mechanisms required?

No

23. Do you support the proposal to allow the investment of 'deemed' statutory trust monies?

Yes, as per the Trustee Act 1925.

24. Are any further provisions necessary to support the operation of this proposal?

No

25. Do you support the proposal to allow the beneficiaries to inspect the records of 'deemed' trust accounts?

Yes, provided offenses relating to coercive or threatening conduct are also addressed.

26. Is there an alternative approach that would provide beneficiaries with a similar degree of awareness?

Not applicable

27. Do you support the proposal to apply executive liability to directors and other relevant persons for breaches?

Yes

28. Do you consider these are the likely benefits associated with the proposal?

Yes

29. Are there any other significant benefits that are relevant?

None that are apparent at this time.

30. Do you consider these are the likely costs associated with the proposal?

Yes

31. Are there any other significant costs that are relevant?

None that are apparent at this time.