

18th September 2018

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NECA (NSW) response to the exposure draft of the Building and Construction Industry Security of Payment Amendment Bill 2018

NECA thanks the NSW Government for once again, being at the forefront and the driver for these initiatives towards reform of the Building and Construction Industry Security of Payment Act (SOPA). Our members are grateful for this opportunity to comment on the draft Bill (the Bill).

About NECA

The National Electrical and Communications Association (NECA) is the peak industry body for Australia's electrical and communications contracting industry, which employs more than 150,000 workers and delivers an annual turnover in excess of \$24 billion.

We represent close to 5,300 electrical contracting businesses across Australia.

NECA represents the electrical and communications contracting industry across all states and territories. We aim to help our members and the wider industry to operate and manage their business more effectively and efficiently whilst representing their interests to Federal and State Governments, regulators and principle industry bodies such as the Canberra Business Chamber, Australian Chamber of Commerce and Industry (ACCI) and Standards Australia.

Additionally, NECA maintains responsibility for the employment, training and skilling of more than 4,500 current and future electricians and contractors through our Group Training and Registered Training Organisations.

In Response

In this response, we adopt the numbering convention of the Bill. Where there is no comment on a numbered section, we agree and endorse the Bill's provision.

[3] Section 8 Rights to progress payments

Sections (2) (b) and (3) (b)

We are of the view that of the term 'related' before 'goods and services' should be reinstated.

Both sections (2) (b) and (3) (b) limit the creation of a reference date to a period in a named month in which the work is carried out or the goods and services are provided. SOPA does not limit the creation of a reference date to a named month in which the work is carried out or the goods and services are provided.

Section 13 (5) of SOPA provides a claimant cannot serve more than one payment claim in respect of each reference date under the construction contract. If, as proposed by the Bill, a reference date is limited to a named month in which the work is carried out or the goods and services are provided, new reference dates after the reference date on completion of work or services provided cannot be created.

As there can only be one payment claim in respect of each reference date, the amendment frustrates the intention of Section 13 (4) of SOPA which allows payment claims to be made within a period of at least 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied).

The amendment to the reference date prevents the making of more than one payment claim after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied). To place such a restriction on the capacity of a claimant to make a payment claim will make our members and Subcontractors most unhappy. The amendment results in an unintended consequence. In a practical sense, many mid-size projects, and of course larger projects, following completion are subject to a reconciliation of all accounts. Additionally, often the potential claimant may be awaiting invoices for work. This process may cause the issue of a payment claim during what is usually the defect liability period and not the month in which work has been undertaken. As we understand the current draft, such payment claims would be excluded and invalid for want of a reference date.

We believe sections (2)(b), (3)(b) and sections 4, 5 and 6 should be amended as follows:

Amend sections (2) (b) and (3) (b) by

- a) deletion of the words: '*in which the work is carried out or the goods and services are supplied*'; and
- b) insertion of the word 'related' before 'goods and services'.

Section (4)

In relation to a single or one-off payment, omit "immediately following the day"
so it will read:

'The **reference date**, in the case of a single or one-off payment, is the day on which the construction work was last carried out, or the related goods and services were last supplied, under the contract.'

Reason: In the majority of cases, a single or one-off payment is made at the conclusion of a small contract and the tradesperson will leave his invoice (payment claim) with the contractor when leaving the job. As drafted, and without the amendment, many payment claims will be rendered invalid. Additionally, as noted above, should that occur toward the end of the month, a real argument exists as to

the validity of a claim for payment issued early in the following month as no reference date would be created as no work would have been undertaken in that named month.

As drafted, the same unintended consequence as identified in Sections (2) (b) and 3 (b) is created. Only one reference date is available under the amendment while SOPA permits them at least monthly for at least 12 months after construction work was last carried out or related goods and services supplied.

Section (5)

Omit 'immediately following the day'.

Reason: Consistency with Section (4) above.

As drafted, the same unintended consequence as identified in Sections (2) (b), 3 (b) and (4) is created. Only one reference date is available under the amendment while SOPA permits them at least monthly for at least 12 months after construction work was last carried out or related goods and services supplied.

Section (6)

Omit 'immediately following the day'.

Reason: Consistency with Sections (4) and (5) above.

In the alternative, we endorse the Murray recommendations 15, 16 and 17.

[4] **Section 11 Due date for payment and**
[5] **Section 11 (1B) (a)**

NECA supports these proposals.

NECA strongly supports the previous 10 business day default being reinstated. In the absence of the default, the parties may dispute the nature of their contractual relationship. Given time elapsed from the due date for payment triggers the commencement of times for the claimant's right to:

- a) serve a section 17(2) notice,
- b) commence an adjudication application; and
- c) suspend work on giving 2 business days' notice

it is essential that the due date for payment is identified with certainty. The absence of a statutory maximum timeframe creates uncertainty.

In the alternative NECA supports Murray Recommendation 19 that provides:

"The legislation should provide that the due date for when a progress payment is to be paid is:

- a) the date provided for under the terms of the contract, subject to the payment term not exceeding 25 business days after the payment claim has been made, or
- b) if the contract makes no express provision with respect to the matter, 10 business days after the payment claim has been made."
- d) commence an adjudication application; and

- e) suspend work on giving 2 business days' notice

it is essential that the due date for payment is identified with certainty.

Mr Murray has proposed an appropriate maximum payment term. That maximum term is also reflected in sections 67U and 67W of the Queensland Building and Construction Commission Act.

[6] **Section 12A Trust account requirements for retention money**

NECA supports these proposals

[8] **Section 13 (2) (c)**

We strongly endorse reinserting the statement that a payment claim must state that it is a payment claim under the Act to commence adjudication proceedings (the endorsement).

The endorsement was removed because the Collins Inquiry was concerned that this requirement had led to under utilisation of the Act by subcontractors because of fear of possible intimidation.

Reinserting the provision does not address the issue of possible intimidation and will be viewed by some as removing an impediment to intimidation. The removal was, in any event, ineffective as the requirement to identify the Act remained for the purposes of section 17(2).

The South Australian Government has legislated to make it an offence to directly or indirectly assault, threaten or intimidate, or attempt to assault, threaten or intimidate, a person in relation to an entitlement to, or claim for, a progress payment under its Act [Section 32A].

The Senate Economic Reference Refer Committee recommended it be made a criminal offence to intimidate subcontractors from exercising their statutory rights. The Murray review at recommendation 76 says:

“The legislation should make it an offence to use coercive and threatening conduct, whether directly or indirectly, in relation to a person’s statutory rights to, or claim for, a progress payment under the legislation.

Section 32A of the Building and Construction Industry Security of Payment (Review) Amendment Bill 2017 (SA) provides a suitable model.”

Inclusion of a similar provision is suitable given the introduction of penalties for infringement and development of the investigative powers in the draft legislation.

[14] **Section 17A**

We do not agree with providing a claimant with an unfettered right to withdraw an adjudication application. This provision may cause adjudicator shopping and unnecessary expenses for Respondents.

- a) Encourage a claimant to submit an adjudication application to an ANA

[22] **Section 26B Obligation of principal contractor to retain money owed to respondent**

Agree save that this section must be amended to allow release of the retained monies in the event of an adjudication application being out of time and a new adjudication application is not made.

[30] **Sections 32A and 32B**

We support these recommendations save that remittal may cause problems if it is remitted to the same adjudicator and that adjudicator is unavailable.

32B Application of Part to a claimant in liquidation

NECA supports this.

a) Removing the owner occupier (owner builder) exemption

We support this proposal. If an owner builder is going to act like a building professional and reap the rewards of being 'the builder', the subcontractors that work on the project should have the same protection and access to the Act as if they were working for a 'builder'.

NECA supports the Murray review in recommendations 12 and 13. We propose that the legislation apply to the residential housing sector so as to enable a residential contractor/builder to make a progress payment claim against an owner-occupier.

We support extension of SOPA to the residential sector for the reasons detailed by the Murray review at Section 10.3.

b) Requirement copies of supporting statements served on the principal to be served on subcontractors as well

NECA fully supports this idea to ensure subcontractors are notified when the contractor advises they have been paid. However, without an effective enforcement regime, it will be ignored by many industry participants.

NECA also supports the scheme proposed where:

- i) an invoice is issued, (note that we are deliberately not using the term "payment claim"), and the invoice has not been paid in full by the due date of payment, either under the Act or the contractual provision, whichever appropriate; and
- ii) no payment schedule or written explanation has been provided to the claimant; and
- iii) the contractor has made a supporting statement that a subcontractor has been paid which the subcontractor believes to be incorrect;

a new right to make an application for adjudication by a subcontractor is created.

One of the biggest complaints of our members is that nothing is being done in relation to head contractors signing incorrect supporting statements. The enforcement of incorrect supporting statements, allows government grounds on which to consider prosecution of repeat offenders and creates a new ground on which an application for adjudication may be founded. We submit that this approach provides effective enforcement and allows government to decide whether to prosecute at minimal cost to the taxpayer.

NECA is available to discuss these and any related issues with government.

Yours sincerely



Oliver Judd
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NECA