

# Building & Construction Industry Security of Payment Amendment Bill 2018

Submission by:-  
Master Plumbers Association of NSW  
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## **Building & Construction Industry Security of Payment Amendment Bill 2018**

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### **INTRODUCTION**

The Master Plumbers and Mechanical Contractors Association of NSW (MPA NSW) is a registered employer organisation providing representation, training and extensive advisory services to a broad base of members in the plumbing, gas and mechanical services sector in NSW and the ACT. The principal activities of the Association are to provide business services, industry representation, training and advice on industrial relations and employment to the membership. Our members range from major contracting companies through to sole traders and are a highly reputable group to lobby government in support of various plumbing, business and environmental reforms and recommendations.

### **Consultation**

The Association appreciates the invitation to attend the Stakeholder Roundtable on the 12<sup>th</sup> September 2018 to express its unconditional support for the implementation of “deemed statutory trusts” in the NSW Building and Construction Industry.

### **Background**

Implementation of deemed statutory trusts will be the culmination of representations initially made by the Association in 1991 to the Greiner Government in respect of the introduction of deemed cascading trusts to ensure payments to sub-contractors by builders and principle contractors, the emphasis being made to the Government being that “sub-contractors on building projects are not the builder’s bank”.

The Association was represented in those discussions by Mr Allan Colquhoun AM and he advises at that time the Association proposed a form of deemed cascading trusts somewhat based on the Alberta Construction Payments Act in Alberta, Canada and Section 2.21(p) of the Income and Assessment Act in Australia which required directors to become directly responsible for the funds due to others. The section was subsequently rescinded to make directors absolutely responsible for trust fund distributions that were deemed to be held in trust.

The Association continued on this representation pathway, and although there were many barriers encountered along the road, the Association and National Electrician's Contractors Association (NECA) played significant roles with the then Building Industry Specialist Contractors Organisation of Australia (BISCOA) to convince the NSW Government to introduce the Building and Construction Security of Payments Act 1999.

The Association in subsequent years has made many representations and submissions on the reviews of the Act, but has consistently held fast to its demands for the introduction of a model of trusts that would guarantee a process to ensure the payment of subcontractors, which was a statutory regulated mechanism rather than the ad-hoc approach that still exists today.

Albeit the Security of Payments Act 1999 (SOPA) provides a mechanism to claim progress payments etc, the power, often through intimidation remains with the builder or head contractor through undertakings to pay the outstanding claims if SOPA claims are not made. If the payment is not made to the sub-contractor, and is not made within the contractual terms, the builder seeks a time extension and at the end of that extension seeks a further extension. This is the sub-contractor being required to be the builder's bank.

The sub-contractor is placed in a position that if he lodges a SOPA claim he has been held out already for a period of time without income and is guaranteed that win or lose in the SOPA claim will not get any further work from the builder. In this case, the sub-contractor may have lost on both counts, especially in the result of payment for work that has been completed and that he may have had to borrow funds to cover the loss of his payment from the builder or head contractor.

The creation of "deemed statutory trusts" will resolve the intimidation against sub-contractors by those who will be required by legislation to hold payments that are due to those sub-contractors in trust.

Some may raise concerns about the introduction of the "deemed statutory trusts" but they are minuscule in comparison to the adoption of the principle of the trust, as against the benefits to be gained by the sub-contractors who are at the bottom of the "food chain". The sub-contractors are responsible for delivering the final outcome, yet those at the top of the "food chain" gain the greatest benefit.

The Association would emphasise again that the adoption of "deemed statutory trusts" has the absolute unconditional support of the Association and commends the Minister for his action in bringing this Bill before the NSW Parliament in support of sub-contractors in the Building and Construction Industry.

## **PREVIOUS SUBMISSION**

**Submission** – 28 July 2017 – Building and Construction Industry Security of Payment Act 1999 – Stakeholder Roundtable – RESPONSE. (see attached)

## CONSULTATION PAPER AUGUST 2018

### Priority Responses for the introduction of a cascading “deemed” statutory trust

- (a) The Association unconditionally supports the introduction into legislation of a cascading “deemed” statutory trust model;
- (b) There should be no threshold placed on the value of contracts made under a head contract;
- (c) The purpose of the trust is to protect the payments to sub-contractors that in turn creates cash flow and ensures the payment of wages to tradesmen, apprentices and labourers.
- (d) Deemed funds shall be held in the name of the sub-contractor;
- (e) Contractors shall not be able to take/access the funds in the trust before all sub-contractors are paid. If this practise is not adopted the objects of the act of paying quickly is negated.

In general, for the remainder of the questions posed in the Consultation Paper, the Association takes the position that the proposals put forward in the Paper are supported. History would tell the Association that this implementation of the trusts will have some difficulties, but as a starting point the points (a) to (e) outlined above are the practices that must be adopted in the legislation in the first instance.

The Association would again emphasise point (b) in that there should be no threshold placed on the value of contracts made under the head contract. The majority of building contracts in the domestic sector today would generally be under the \$1m threshold, but more importantly, this is where the vast majority of small businesses operate. They are the sole traders, single director companies and those larger companies generally employing less than 10 staff.

What argument exists that they will have a lesser exposure to the contractor going into bankruptcy or delaying payments to sub-contractors than the head contractor who only works on contracts above \$1m? If anything, it is these sub-contractors working on contracts less than \$1m who are more exposed to the intimidation, delayed payments and bankruptcy, who can less afford not to be paid for work completed. It is not only just an issue of cash flow, but one of retention of staff in times of skill shortages. When employees cannot be paid on a regular basis in accordance with industrial law, they will go elsewhere for employment and then the skills shortage will have a greater impact not only on domestic building employees, but that vast number of associated trades and suppliers who provide services and products on completion of a domestic building or residence.

By contrast, the larger head contractors and builders, because of the size of their operations can absorb the delays, more than the individual sub-contractor in the domestic building market.

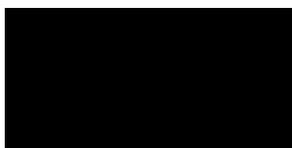
Accordingly, there should be no threshold on the value of contracts and all sub-contractors should be treated equally and not be discriminated against due to the size of their operation or who they sub-contract to in the building and construction industry. Their livelihood and that of their employees is a key factor in the establishment of the Security of Payments Act 1999 and should not be ignored on the basis of the financial value of the contract.

By way of example, if a threshold is adopted at say \$1m and a plumbing contractor doing specialist works for two domestic builders in one month on say one home for each builder, he would not have the guarantee of payment because the contracts for each home would not exceed the threshold, so a “deemed statutory trust” would not be in place. He has no protection against the default or non-payment by the builder of progress and final payments except by SOPA. In the next month he works for a larger builder on a domestic building above a certain height restriction and the contract for the project is greater than \$1m, he would have the full protection of the “deemed statutory trust” to protect his progress payments for the work he completes and his final payment.

He does the same work that he is licensed to do as a specialist plumbing contractor for both builders but because of the value of contract in the latter example exceeds the \$1m threshold his payments are protected, whereas in the first example he has no guarantee of payment.

Why should he be discriminated against by the threshold value of the two different contracts for the same work that he undertakes and certifies under his licence?

The Consultation Paper in referencing the threshold value of contracts has raised that ongoing question of the licensing of builders who undertake commercial construction work as opposed to domestic construction work. Commercial construction work does not require the builder/developer to be licensed, as commercial construction work is not defined in the Home Building Act 1989. For a licensed plumbing contractor the work done in either domestic or commercial construction is the same, just a slightly different scope but still requires the plumbing contractor to conform with the Plumbing and Drainage Act 2011 and Plumbing and Drainage Regulation 2017.



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