



national  
electrical and  
communications  
association

# Statutory trusts for the building and construction industry



NECA NSW Chapter



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## 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.

# Foreword

Security of Payments is of vital importance for NECA members.

As such, we strongly support the implementation of statutory trusts for the building and construction sector, as per our submission to John Murray AO's review of Australia's security of payment laws.

Cash flow is the life blood of the industry. All parties in the contracting chain face potential insolvency without the free and timely movement of funds.

As a finishing trade, electrical contractors are often the last in the line of credit to receive payment for work completed, in the event of a construction firm facing financial difficulties. In cases where the company falls into receivership, electrical contractors often do not receive payment at all.

Moreover, electrical contractors arguably provide the highest value inputs of all sub-contractors by way of fixtures, fittings and labour. They are therefore the most vulnerable with respect to payments in the event of receivership. In other words, electrical contractors are at a greater potential disadvantage than any other sub-contractor.

Of critical concern to NECA is that the majority of electrical contractors are small-to medium-enterprises (SMEs) – small family owned and run businesses – who as such are particularly susceptible to cash flow issues.

We thank the Department of Finance, Services and Innovation for the opportunity to participate in this consultation.

Should you wish to discuss further, I can be contacted on ph: [REDACTED] or email:

[REDACTED]

Yours faithfully

[REDACTED]

Suresh Manickam

Chief Executive Officer

**National Electrical and Communications Association (NECA)**

# 1. NECA's feedback

NECA strongly supports the implementation of statutory trusts for the building and construction sector, as per our submission to John Murray AO's review of Australia's security of payment laws.

Our priorities are as follows:

## 1.1. Implementation of statutory trusts

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

NECA strongly supports the establishment of statutory ("deemed") trusts as proposed by the NSW government.

This reflects our consistent advocacy on security of payments for our sub-contractor members, and as recommended by both the Collins Inquiry and more recently the Murray Review.

What alternative reform(s) could be implemented?

We believe that the NSW government's proposed establishment of statutory trusts is the best option to be implemented. There are no viable alternatives at present.

## 1.2. How far would 'deemed' statutory trusts extend along the contractual chain?

Do you support the proposal to apply a cascading 'deemed' statutory trust model?

Yes, NECA supports the proposal that the requirement for deemed statutory trusts would 'cascade' and therefore apply to all subcontractors linked to the head contractor.

This would be of great assistance to many of NECA's members who are small-to-medium sized contractors who are often at the end of the contracting chain.

What would be an appropriate point in the contractual chain to limit the requirement for 'deemed' statutory trusts?

There should be no limit.

NECA supports the adoption of Scenario 2 posited in the Discussion Paper, whereby monies comprising the progress payment from the head contractor that are liable to be paid to subcontractors for work done so as to entitle the subcontractor to the progress payment from the head contractor will be held on trust.

### 1.3. What particular projects or contracts would require ‘deemed’ statutory trusts?

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

NECA has consistently advocated that NSW and other state and territory legislatures seek to implement a threshold for the application of project bank accounts for construction industry project work to a value of \$1 million, but for deemed trust there should be no limit.

What would be an appropriate alternative monetary threshold?

To ensure that everyone is protected, we do not support any alternative monetary threshold.

Do you support the proposal to limit the application of the requirement to parties based on the value of their individual contracts?

No, NECA does not support this proposal.

What would be an appropriate contract value?

There should be no contract value limit.

### 1.4. When would the obligation to establish ‘deemed’ statutory trusts arise in the project lifecycle?

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

NECA supports the proposal that the requirement to establish a ‘deemed’ statutory trust arises immediately when the contract monies are received by the head contractor or subcontractor (trustee), as recommended by the Collins Inquiry. As noted in the Discussion paper, this provides the added security of ensuring that the trust money is not available to be distributed to creditors in an insolvency. It is also preferred because there is no point in time when the head contractor or subcontractor has beneficial ownership of the money.

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

As above.

### 1.5. Who would be responsible for managing the ‘deemed’ statutory trust?

Do you support the proposal that responsibility for managing ‘deemed’ trust monies is placed on the trustee?

NECA supports the option proposed in the Discussion Paper that responsibility for managing the ‘deemed’ statutory trust will belong to the participants in the construction project. Specifically, it would be a responsibility on the entity that is the ‘trustee’ in the relationship (that is, a contractor who is holding retention money that is owed to another contractor or ‘beneficiary’).

NECA considers that, if this responsibility was delegated to a government entity, this might lead to problems with bureaucracy and delays, particularly if the government body was not adequately resourced.

### 1.6. Is a separate bank account required for ‘deemed’ trust funds?

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

Yes. The Collins Inquiry considered that a single consolidated trust account appropriately balanced the desire to plainly demarcate the trust monies with reducing the administrative burden imposed on trustees.

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)?

NECA favours establishing trust accounts separate from a contractor’s general banking account, as per the recommendations of the Collins Inquiry.

### 1.7. Should ‘deemed’ trust account records be subject to external audits?

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

NECA supports the recommendations contained in the Discussion Paper whereby Fair Trading would adopt a risk-based compliance program that involved investigations (or other forms of compliance activity), to confirm that the obligation was appropriately being complied with.

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?

NECA strongly supports the proposal to provide subcontractors with a right to inspect trust account records. We believe that this will incentivise greater levels of self-regulation.



We also advocate that NSW Fair Trading be given sufficient resources to conduct random audits to ensure compliance.

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

As stated above, NECA supports the proposed compliance and enforcement regime, provided sufficient resources are devoted to ensure it works correctly.

### 1.8. When is a trustee entitled to payment?

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

No. This provision is contrary to the object of the draft exposure bill. The second object is:

“(b) to reduce the period required to elapse after a head contractor or subcontractor makes a payment claim before payment of the claim becomes due and payable.”

It is also contrary to the speedier resolution of disputes as identified on page 24 of the consultation paper under the heading “Statutory trusts can create efficiencies”.

If trustees can dip into trust funds to pay themselves before all beneficiaries are paid, the trust will have little purpose. Certainly, the incentive to quickly settle all claims for payment will be lost. In all probability, the existing practice of using funds for cashflow, being funds which are owed to others, will continue. In the event of insolvency, it is most unlikely that funds to pay the legitimate claims would be available. Many of the benefits of the trust would be lost.

#### When should a trustee be permitted to withdraw funds?

A trustee should withdraw funds only after the claims of all subcontractors (beneficiaries of the trust) have been agreed or adjudicated and paid.

### 1.9. What happens when there are insufficient funds in the ‘deemed’ statutory trust account?

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

It is considered that remaining funds be distributed on a pro rata basis, consistent with a trustee’s common law duty to act impartially between beneficiaries. That is, if a trust fund is insufficient to pay out the beneficiaries in full, monies would be distributed to the beneficiaries as a proportion of their initial claim of payment.

#### What other model of distribution would be preferred?

NECA supports the above-mentioned distribution model.

### 1.10. What happens when there is a dispute about monies held in a 'deemed' statutory trust account?

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

Yes, NECA supports statutory trusts being subject to the existing dispute resolution mechanisms in the Act.

Are any new or amended mechanisms required?

NECA does not support the introduction of any new or amended mechanisms, which we believe would be likely to increase costs, time delays and bureaucracy faced by sub-contractors seeking prompt payment.

### 1.11. Can 'deemed' statutory trust monies be invested?

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

NECA has no objection to trust monies being invested per se, however in the past we have been concerned with the risky nature of some investments that retention monies have been put into and as provided by the *Trustee Act 1925* (NSW).

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

No.

### 1.12. Can a beneficiary inspect the books of a 'deemed' statutory trust account?

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

Yes, NECA supports this measure, which we believe will assist with regards to compliance and accountability. We note that a beneficiary seeking to exercise such a right may be subject to coercive or threatening conduct. We support immediate implementation of the Murray review recommendation 76:

“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.

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

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

No.

### 1.13. Should directors be liable for a breach of trust by a corporation?

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

Yes, if there is no liability on these parties it may nullify the effect of the deemed statutory trust.

### 1.14. Benefits

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

Yes.

Are there any other significant benefits that are relevant?

If all monies are only kept in one account, the trustee will be less reluctant to provide full disclosure of all relevant transactions in his account to beneficiaries. Tracing trust monies that are gouged or wrongfully transferred is of great benefit.

### 1.15. Costs

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

The additional costs are likely to be of no mind.

Are there any other significant costs that are relevant?

No.



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