

Security of Payment Reforms – Implementation





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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.

NECA congratulates and thanks the government for the dedication and focus protecting “mum and dad” subcontractors by having the *Building and Construction Industry Security of Payment Amendment Act 2018* (the **Amendment Act**) assented to on 28 November 2019 and affording NECA the opportunity to be consulted on this important legislation.

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 and any delays in commencement of the Amendment Act may undo the good work done by the government to date.

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: 1300 361 099 or email: oliver.judd@neca.asn.au

Yours sincerely



Oliver Judd
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1. NECA's feedback

1.1. Reforms commenced with minimal transitional period

1. Is the proposed start date for these reforms feasible?

The following reforms have been identified as reforms which do not require either subordinate legislation or significant preparation time by industry stakeholders:

- Investigation and enforcement
- Increased penalty units for offences
- Executive Liability offences
- Supreme Court power to serve
- Prohibiting a corporation in liquidation from making payment claims
- Extended circumstances for releasing withheld money
- Miscellaneous reforms

The preferred option is for these reforms to commence in February 2019 and NECA is in agreement that these start times can be adhered to as they are not impacted by contractual provisions between industry parties.

2. Are there reasons why these reforms should start later?

NECA does not believe that there are any cogent reasons for these reforms to commence at a date later than that proposed by the government.

None of the 7 reforms proposed in 1 above are reforms that are likely to have a direct impact on "positive" industry practices nor do any of these reforms require any preparation time before commencement.

The Amendment Bill was assented to on 28 November 2018 and the government involved all major stakeholders in this process and as at 28 November 2018 the building and construction industry was fully aware of the proposed reforms and has in the circumstances had sufficient preparation time before the commencement of the legislation. This is not a case where the major stakeholders were not consulted and the legislation came as a major surprise to all.

1.2. Reforms with a transitional period

3. Is the proposed start date for these reforms feasible?

The reforms have been identified in the Options Paper as reforms which are likely to have a direct impact on industry practices and where it would be appropriate to provide preparation time before commencement. These have been set out in the Option Paper under the following headings:

- Progress payments and payment claims
- Due dates
- Payment claim endorsement
- Miscellaneous adjudication reforms

Of the reforms dealt with under the headings above the ONLY reform that has a bearing and a cost or cash flow implication on head contractors is the reform reducing the maximum period for payment from a head contractor to a subcontractor from 30 to 20 business days. This is the ONLY reform which should apply to new contracts entered into after a specific time. NECA recommends any new contract entered into on or from 1 May 2019.

- Progress payments and payment claims

Section 13 establishes an entitlement to make a payment claim in circumstances where a contract is terminated. Most Australian Standard Contracts (that is the AS series of contracts have a termination for convenience clause whereby a head contractor can terminate for convenience but do not provide for a reference date to make a further claim after termination for such things as demobilisation costs ect. This should commence with no transition period as it has no effect on how a project is run or how a project is financed. All it does is to provide an opportunity to claim for any costs it incurred up to termination. The only effect this reform will have is to stamp out the “un-Australian practice” of avoiding paying subcontractors by terminating contracts for the only reason of not wanting to pay subcontractors. It is critical for NECA members that this reform be implemented as soon as possible and commence with the first raft of reforms which are to commence in February 2019. This change must be implemented as soon as possible.

- Due dates

If dues dates are for contracts entered into after the commencement date it does not require significant education to implement and as such should be implemented by 1 May 2019 for contracts entered into on or from 1 May 2019.

- Payment claim endorsement

This has nothing to do with the contract administration and only solidifies the claimant’s intent with their claim. This reform is returning to what the law previously was and many

contractors/subcontractors continue to include the endorsement on their payment claims. No training is required, all that is required is for the stakeholders to publish the changes.

The removal of the endorsement caused many NECA members and subcontractors to suffer great financial hardships by not being able to their payment claims to adjudication. This reform should commence with the first raft of reforms in February 2019.

- Miscellaneous adjudication reforms

These reforms assist the adjudication process and the only parties who would require preparation time before commencement of these reforms are the ANA's and adjudicators. This is "bread and butter" stuff for the ANA's and adjudicators and extremely simple and logical. More importantly these are the very changes that were purported by the ANA's themselves. Very little training is required and these changes should commence from 1 May 2019 with the new "due date" provisions.

4. Are there reasons why these reforms should start earlier or later?

Reference dates after termination of contracts should start in February 2019 only as they only improve industry practice as it only provides the Claimant with an entitlement to make a claim for monies which are due and owed up to the date of termination and stamps out the "un-Australian practice" of not paying subcontractors and/or having an illegitimate tool for not paying.

This is critical for NECA members as each day that goes by more and more subcontractors are suffering financial hardship as more and more unscrupulous contractors learn about this tool and use it to avoid paying subcontractors.

1.3. Reforms requiring subordinate legislation before commencement

5. Is the proposed start date for these reforms feasible?

The following reforms have been identified as requiring subordinate legislation or administrative changes before they commence. It is proposed that these reforms should commence late in 2019.

- Removal of 'owner occupier' exemption
- Inspection of trust records by subcontractors
- Prescribing information for subcontractors
- Code of Practice for Authorised Nominating Authority (ANAs)
- Reducing the threshold for retention money trust requirements

The first three amendments listed above do not require extensive consultation and training as they simply provide the power to do something by regulation in the future and for this reason would be able to transition to these requirements by February 2019.

6. Are there reasons why these reforms should start earlier or later?

The first three amendments listed above do not require extensive consultation and training as they simply provide the power to do something by regulation in the future and for this reason they should be implemented earlier.

1.4. Application of amendments

7. Do you support the reforms only applying to a construction contract entered into after commencement?

As a general rule, the Amendment Act currently provides that each of the reforms will not apply to the construction contract entered into prior to commencement.

Due Date for Payment

NECA is of the view that the above is the ONLY reform that has a bearing and a cost or cash flow implication on head contractors (and the contractual chain) is the reform reducing the maximum period for payment from a head contractor to a subcontractor from 30 to 20 business days. This is the ONLY reform which should apply to new contracts entered into after a specific time. NECA recommends that this apply to any new contract entered into on or from 1 May 2019

8. Are there specific reforms which you would consider to be more appropriate to apply to contracts entered into prior to the commencement? If yes, why?

From NECA's stand point the following items are the most important and should be implemented as soon as possible:

1. Legislating for an entitlement to make a progress claim after termination of a contract.

The reasons for immediate implementation for making this reform appropriate to apply to contracts entered into prior to the commencement of this reform is as follows:

- (i) This reform does not have a direct impact on industry practice as it only provides the Claimant with an entitlement to make a further claim after termination of a contract;
- (ii) Many contractors are not even aware that they not entitled to make a further payment claim after termination of a contract;
- (iii) Unscrupulous contractors are using this as a tool not to pay subcontractors and this is an ongoing crisis which needs to end rather sooner than later.
- (iv) This is a major cause for adjudication invalidity which should be removed as soon as possible rather than be unnecessarily delayed.

2. Payment Claim endorsement.

The reasons for immediate implementation for making this reform appropriate to apply to contracts entered into prior to the commencement of this reform is as follows:

- (i) This reform has nothing to do with a contract.
- (ii) This is a major cause for adjudication invalidity which should be removed as soon as possible rather than be unnecessarily delayed.
- (iii) Many contractors are not even aware that the endorsement fell away and this merely restores the status quo.

3. Supreme Court power to sever

The reasons for immediate implementation for making this reform appropriate to apply to contracts entered into prior to the commencement of this reform is as follows:

- (i) This reform has nothing to do with a contract.
- (ii) Many head contractors threaten to challenge adjudication determinations in court should the claimant be successful and this stops many subcontractors from proceeding with adjudications, given the all or nothing approach of the Court.
- (iii) This will result in more subcontractors going to adjudication, this is a positive step and not negative and should be apply sooner rather than later.

In respect of the other reforms, namely:

- Removal of 'owner occupier' exemption
- Inspection of trust records by subcontractors
- Prescribing information for subcontractors
- Prohibiting a corporation in liquidation from making payment claims
- Extended circumstances for releasing withheld money
- Miscellaneous reforms

These are not impacted on contractual provisions between industry parties and should apply to all contracts entered into before the commencement date of the reforms.

9. Are there specific reforms that you would not support being applied to contracts entered into prior to commencement? If yes, why?

Due Date for Payment

NECA is of the view that the above is the ONLY reform that has a bearing and a cost or cash flow implication on head contractors (and the contractual chain) is the reform reducing the maximum period for payment from a head contractor to a subcontractor from 30 to 20 business days. This is the ONLY reform which should apply to new contracts entered into after a specific time. NECA recommends that this apply to any new contract entered into on or from 1 May 2019

1.5. Proposed reforms to the Regulation

10. Do you support maintaining a threshold to limit the application of the retention money trust obligations or should it be removed?

No.

It is proposed that clause 5 of the Regulation is amended to extend the existing trust obligations for retention money to provide protection to a greater number of construction projects.

11. Do you support reducing the threshold for retention money trust obligations from \$20million to \$10million?

NECA supports any reduction in the threshold, however believes that there should be a threshold of \$1 million.

NECA still supports the Murray Review recommendations and that statutory trusts be the proper mechanism to protect subcontractors .

12. Is there another amount you consider appropriate for the threshold?
Why?

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 at value of \$1 million.

NECA still supports the Murray Review recommendations and that statutory trusts be the proper mechanism to protect subcontractors and that there be no threshold. ie statutory trusts should apply to all projects which fall under this legislation.

13. Do you support extending the retention money trust obligations to the entire contracting chain and not just limiting the obligation to head contractors?

NECA has always supports this and continues to support this.

NECA still supports the Murray Review recommendations and that statutory trusts be the proper mechanism to protect subcontractors and that there be no threshold. ie statutory trusts should apply to all projects which fall under this legislation.

14. Do you support removing the annual reporting requirements in clause 16 of the Regulation?

This is supported especially if the threshold is reduced to \$1 million projects.

15. What is an appropriate transitional period to allow for industry to prepare for the proposed changes to the retention money trust obligations?

4 months should be sufficient.

16. Do you support the inspection of retention money trust account records?

This proposed reform relates to existing obligation of a head contractor to hold retention money in trust for the subcontractor from whom the money has been retained. Yes NECA supports the inspection of retention money trust account records.

17. Do you support inspection being subject to an appropriate fee?

NECA does not support the inspection being subject to an appropriate fee.

18. Should the Regulations prescribe a maximum fee to be imposed? If yes, what do you think an appropriate maximum fee would be?

NECA does not support the inspection being subject to an appropriate fee, however to protect subcontractors, should the government impose an inspection fee, then to protect subcontractors it would be appropriate to impose an appropriate maximum fee. The maximum fee should be \$200.00 (two-hundred dollars).

19. Do you support the offences listed above being subject to a penalty infringement notice?

NECA supports these

20. Do you support the proposed penalty notice amounts for these offences?

NECA supports these.

21. Are there any other offences which you consider appropriate for a penalty infringement notice? If yes, what penalty notice amount would you consider appropriate?

One of the biggest complainants by NECA members is that Head Contractors' submit false or misleading supporting statements. The penalties for this should be \$2,200 for individuals and \$11,000 for corporations.

22. Do you support increasing the value of the penalty unit for the offences listed above?

NECA supports the values of the penalties proposed.

23. Do you support the proposed penalty notice amount for these offences?

NECA supports the values of the penalties proposed.

24. Do you support accessorial liability applying to all offences under the Regulation which are capable of being committed by a corporation?

NECA supports accessorial liability .

25. Do you support executive liability applying to offences listed above?

NECA supports executive liability.

26. Are there any other offences in the Regulation which you consider executive liability should apply to?

One of the biggest complainants by NECA members is that Head Contractors' submit false or misleading supporting statements. The penalties for this should be \$2,200 for individuals and \$11,000 for corporations. These should flow onto executives.

27. Do you support the proposed penalty amounts listed above for these offences?

NECA supports these.



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