



17 July 2020

Mr Alan Raine
Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600
eec.sen@aph.gov.au

Dear Mr Raine,

Submission – Payment Times Reporting Bill 2020 [Provisions] and Payment Times Reporting (Consequential Amendments) Bill 2020 [Provisions]

The National Electrical and Communications Association (NECA) is the peak industry body for Australia's electrical and communications contracting industry, which employs almost 170,000 workers¹ and delivers an annual turnover in excess of \$23 billion². We represent the interests of over 5,500 electrical and communications contracting businesses across all Australian States and Territories. NECA has been advocating for, and on behalf of, the electrotechnology industry for over 100 years on a range of issues, including the need for Government to improve the transparency, accountability and equity around payment times.

NECA commends the Government on introducing the Payment Times Reporting Bill 2020 (Bill) and Payment Times Reporting (Consequential Amendments) Bill 2020. It is understood that the Bill proposes a new Payment Times Reporting Scheme (Scheme) which requires large businesses and large Government enterprises with an annual total income of over \$100 million to publicly report on their payment terms and practices for their small business suppliers. Small businesses are considered entities with an annual turnover of less than \$10 million. The Scheme is designed to improve payment outcomes for small businesses by creating transparency around the payment practices and performance of large businesses.

It is understood that the Senate referred both Bills to the Standing Committee on Education and Employment on 12 June 2020 for inquiry. NECA strongly urges the Committee to incorporate our recommendations when formulating its report.

¹ Australian Government 'Job Outlook' 2020 (Telecommunications Trades Workers) and (Electricians)

² Ibis World (May 2020) 'Electrical services in Australia Industry Statistics'

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Impact of long and delayed payment times on the electrotechnology industry

Long and delayed payment times are an ongoing and significant problem for our industry, in particularly small and medium enterprises (SMEs). SMEs are the lifeblood of the electrical and communications contracting industry, over 79% of the businesses within our industry employ up to 25 staff³. These businesses generate the vast majority of their work as subcontractors within the broader building and construction sector. For our industry, larger businesses are often principal or head contractors that engage the work of our members and broader electrotechnology industry.

Delayed payments adversely impact the sustainability of any businesses, this is even more relevant where the business is a smaller one. SMEs generally have a limited capacity to sustain late payments – particularly when compared to the capacity of a larger business which owes payment. In other words, there is an adverse asymmetric relationship.

Delays to payments can impact business operations leading to, significant cash flow issues, reduced productivity, legal disputes, high rates of insolvency/bankruptcy and broader economic, supply chain and systemic issues. These poor and/or intended practices by larger business are unfair and exploitative of SMEs. Some larger businesses may take advantage and leverage their size, power and the known dependency of SMEs.

NECA strongly objects to the abuse of market power whereby SMEs are effectively rendered as de-facto underwriters to inefficient and/or opportunistic larger business.

The coronavirus crisis (COVID-19) is having a devastating impact upon the Australian economy. COVID-19 has exacerbated several long-standing issues, such as a lack of adequate protections around payment times.

Industry looks toward Government for leadership as we begin to restart the economy. It is more important now than ever for the Government to put mechanisms in place to facilitate fair payment practices and ensure timely payments for businesses, particularly if the economy is to claw its way out of the recession.

³ NECA 2019 Industry Market Monitor <https://neca.asn.au/content/market-monitor-2019-0>



NECA's Position

Whilst NECA commends the Government for seeking to legislate greater transparency, equity and accountability for large business payment times under the Bill, there is more work to be done to mitigate the risks and address the adverse impacts of poor payment practices, as faced by our industry.

NECA is of the view that mutually beneficial and fair payment times and contract terms, for all sizes of business is critical, and that additional new provisions are put in place to ensure more balanced and transparent system, creating a level playing field for all sizes of business. The Government must ensure that the new Scheme does not lead to excessive and unnecessary additional red tape that will impact the productivity and efficiency for large business, with costs passed on to SMEs.

These proposed additional protections are as outlined below:

Security of Payments - Adopt national Payment Withholding Request legislation

Within the context of payment equity and fairness, we request that the Government consider the long-standing issue of Security of Payments.

Fundamentally, NECA strongly advocates that subcontractors should be paid for the work they do, and that safeguards be put in place to ensure that there is fairness, security and certainty in payment as part of the contract for work undertaken.

As a finishing trade, electrical and communications subcontractors are often involved in the latter stages of the construction cycle. Further, the electrical equipment and labour involved in modern buildings is often highly sophisticated and expensive. In the event a builder falls into receivership, electrical and communications subcontractors and other finishing trades can be at a major disadvantage in terms of being recompensed for work performed, when compared to other trades who contribute to the project and have been fully recompensed, at an earlier stage in the project.

The current system of payment security penalises subcontractors by effectively rendering them de-facto underwriters to unscrupulous or inefficient principal contractors. Concerns about security of payments are further exacerbated by the fact that the relevant Building and Construction Industry Security of Payment legislation is facilitated and determined by the State and Territory where the work is carried out. NECA strongly encourages provisions to ensure that tradespeople have certainty around payment for the work they do.



NECA seeks to ensure that subcontractors are entitled to receive, and to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

NECA calls for national Payment Withholding Request legislation that allows the principal/ head contractor to be more easily served with a claim for payment – should be adopted across all States and Territory jurisdictions.

Unfair contract term protections and Low-cost Retention Money Trust Accounts

One of the most serious and ongoing issues facing SMEs is that unscrupulous principal contractors abuse their power and size to enforce detrimental and unfair contracts on smaller parties on a ‘take-it or leave-it’ basis. Subcontractors, who tend to be SMEs often do not have the capacity to fairly and equitably negotiate contracts with larger principal contracts. This can also be the case for larger contractors

Unscrupulous principal contractors will often seek to shift and allocate risks and costs associated with projects e.g. overruns/delays, design variations and changes to materials/finishes, down the contract hierarchy, and onto subcontractors through, and embedded within an inherently unfair contract. Due to the imbalanced size, power and capacity between principal contractors and subcontractors, subcontractors have a compromised ability to mitigate the transfer of these risks, or the capacity to control or manage the risks once they have been transferred. This can have dire financial consequences for a SME. Arrangements need to be implemented to address the transfer of risk through a contract from a principal contractor to a subcontractor.

Under the current arrangements, one of the requirements for a contract to be considered a SME contract is that at least one party to the contract employs fewer than 20 persons at the time the contract is entered into⁴. NECA’s experience indicates that businesses are much larger, and that the definition and size of a business should be amended from 20 to at least 100 persons employed, reflecting a more accurate picture of the business size employed to work on larger construction projects across many of our States and Territories. This should be reflected in the Bill and its definition of a SME, and there needs to be a uniform definition of SME as these vary across different parts of Government and relevant legislation.

NECA recommends the Government introduce a low-cost Retention Money Trust Account Scheme (Scheme) across all State and Territory jurisdictions, similar to those available in the real estate sector. The Scheme should be administered by a

⁴ Enhancement of Unfair Contract Term Protections <https://ris.pmc.gov.au/2019/12/20/enhancements-unfair-contract-term-protections>



Government to reduce costs and burdens and create a level playing field for industry. NECA advocates States and Territories implement a threshold for construction industry project work to a value of at least \$1 million.

Further, NECA argues that the threshold on upfront price payable on the contract should be increased from \$300,000 to \$3,000,000 for contracts of 12 months or less, and from \$1,000,000 to \$9,000,000 for contracts greater than 12 months in scope. These thresholds reflect a far more realistic value on the price of contracts across the electrical contracting sector, particularly for medium scale enterprises with a larger number of staff involved, with more time consuming and complex project scales.

NECA's Recommendations

- adopt Payment Withholding Request legislation nationally to improve security of payment;
- introduce a low-cost Retention Money Trust Account scheme (similar to models used in real estate and legal professions) across all State/Territory legislatures with a threshold for construction industry project work to a value of at least \$1 million; and
- ensure consistency in the definition of *small business*, to be at least 100 people;
- enhance unfair contract term protections by setting the threshold on the upfront price payable on a building contract should be increased to a minimum of:
 - \$3 million for contracts of 12 months or less, and
 - \$9 million for contracts greater than 12 months.

NECA appreciates the opportunity to engage and to provide a submission in response to the Bill and Senate's inquiry.

Should you wish to discuss this submission or matters concerning our industry, I can be contacted on [REDACTED] or by email [REDACTED]

Yours faithfully

Suresh Manickam
Chief Executive Officer