national electrical and communications association

NECA response to Review of Security of Payments laws

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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 145,000 workers and delivers an annual turnover in excess of $23 billion. We represent approximately 4,000 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 principal industry bodies such as the Australian Chamber of Commerce and Industry (ACCI) and Standards Australia.

Additionally, NECA maintains responsibility for the employment, training and skilling of more than 4,000 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.

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.

NECA is well placed to provide comment on Security of Payments laws, given that our legal practitioners have extensive experience involving the adjudication of payment claims.

NECA's priorities in relation to Security of Payments are therefore as follows:

- **Timely outcomes** – appropriate timeframes to enable speedy resolutions are absolutely vital for NECA's sub-contractor members, for example, in respect of the default payment period NECA considers that 10 business days is appropriate, with a maximum date of 30 calendar days;

- **Payment Withholding Requests** – Payment Withholding Request (PWR) legislation should be adopted across all jurisdictions and in any future national regime;
- **Retention Money Trust Accounts** – Retention Money Trust Account schemes should be established across all jurisdictions and in any future national regime. Additionally, the use of deemed trusts for retention monies also warrants consideration;
- **Providing claimants one final chance to make a claim following termination of a contract** – Security of Payments legislation should allow a reference date to accrue following termination of contracts;
- **Enhancing the ability of sub-contractors to claim retention monies** – the time limit for making claims in respect of claims for the return of retention monies, bank guarantees and performance bonds should be extended to beyond the normal limitation period, which NECA advocates should be 12 month;
- **Consistency in the treatment of claims** – NECA does not support the arbitrary division of claims between "standard" and "complex" claims;
- **Project Banks Accounts (PBAs)** – NECA advocates that the merits of PBAs for selected government sector construction contracts should be considered;
- **Residential housing** – NECA is supportive of the extension of the adjudication process to the residential housing sector;
- **Alternative dispute resolution mechanisms** – alternative dispute resolution mechanisms, such as mediation, should *not* be incorporated into Security of Payments legislation; and
- **Appropriate penalties and enforcement** – are essential to address the widespread intimidation of sub-contractors which occurs in the industry to deter them from exercising their rights under Security of Payments laws.

The fact that there is such a number and variety of Security of Payments legislative regimes around Australia imposes an additional – and unnecessary – burden on our members in relation to administration and compliance.

There may therefore be considerable benefits arising from the harmonisation of these regimes – however, care must be taken that the resulting national regime represents the best possible synthesis of the current individual regimes.

Appropriate transitional arrangements would also have to be made.

We appreciate the opportunity afforded by John Murray AM and the Department of Employment to participate in this consultation process. Should you wish to discuss further, I can be contacted on ph: 02 9439 8523 or email: suresh.manickam@neca.asn.au

Yours faithfully

Suresh Manickam
Chief Executive Officer

Effectiveness of existing Security of Payments laws

Question 1

Do you consider that the legislation operating in your jurisdiction is successfully meeting its stated objectives? If so, why? If not, which comparable legislation in other jurisdictions do you consider to be more effective, and why?

Security of Payments legislation does assist sub-contractors in being paid promptly for completed work. It is faster and less expensive than other legal options as a means to obtain payment.

In the absence of the various Security of Payments Acts of the States and Territories, the only remedy available for sub-contractors would be legal action via their contract, an expensive and slow process.

NECA's legal team and members involved in litigation have experienced that without the benefits of the Acts it is not commercial for members to properly litigate a construction dispute, the quantum of which is under $100,000. The cost of building experts, legal fees, effort and time spent by members to prepare for the case often result in costs exceeding the quantum of the claim where claims are for $100,000 or under.

NECA considers that the "East Coast" legislative model is markedly superior to the "West Coast" model, which crucially makes no provision for statutory debt. There is thus reduced recourse for those owed payments to take legal action. As a result, there is less incentive for Head Contractors / Principals to comply with payment requests from sub-contractors under the West Coast model.

It is for this reason that NECA's smaller sub-contractors in West Australia utilise security of payment laws less often than their counterparts in, for example, NSW.

This is inconsistent with the aims of the Act, which endeavours to ensure industry participants are paid in full and on time and disputes over payment are resolved quickly and fairly.

Our members in West Australia do however consider the recent changes to the *Construction Contracts Act 2004*, enacted in late 2016, have improved protections for sub-contractors. In particular, the removal of the 28 day limit for lodging claims was a positive step from the perspective of NECA's members.

NECA strongly advocates that payment claims should *not* be able to be made both up and down the contracting chain, as per the legislation in West Australia.

In our view, this might well lead to Security of Payments laws becoming unworkable, as some Principals / Head Contractors would pre-emptively make claims against sub-contractors who they owed money to, in order to tie them up and avoid making payments they rightfully owe.

This would defeat the whole purpose of Security of Payments legislation.

In NSW the legislation is largely meeting its objectives, however feedback from NECA's members indicates that some of the amendments introduced more recently, in particular the abolition of the default payment date of 10 business days provision, have watered down the effectiveness of the *Building and Construction Industry Security of Payment Act 1999*.

In NSW, NECA's key priorities in relation to the current review of the *Building and Construction Industry Security of Payment Act 1999* may be found in our submission to NSW Fair Trading's ongoing consultation.

NECA's SA/NT chapter considers that in the main the legislation in SA is generally effective, however they have concerns in relation to the use of intimidation by Head Contractors to deter sub-contractors from utilising security of payments legislation.

The Security of Payments regime in Queensland has been adversely affected by changes introduced from 1 September 2014, specifically:

- Less favourable timeframes from the perspective of claimants, including a requirement that payment claims be made within 6 months of the work being performed (reduced from 12 months); and
- The replacement of ANAs by the Queensland Building and Construction Commission (QBCC) in respect of the appointment of adjudicators.

NECA believes that the Security of Payments regime was clearly more effective in Queensland prior to these changes.

The fact that there is such a number and variety of Security of Payments legislative regimes around Australia imposes an additional – and unnecessary – burden on our members in relation to administration and compliance.

There may therefore be considerable benefits arising from the harmonisation of these regimes – however, care must be taken that the best possible national regime eventuates, representing the optimal synthesis of the various individual regimes.

NECA recommends the implementation of a national regime for Security of Payments, incorporating the best features of the current individual regimes, after due consultation and with the necessary transition arrangements in place.

A two-tier system under the one legislation

Question 2

Should the legislation provide for two separate types of claims (i.e. "standard" and "complex" claims, as is the case in Queensland following the amendments introduced in 2014), or can the legislation provide for one size fits all?

NECA does not support the adoption of a two-tiered approach, as this is likely to lead to delays in adjudications.

In Queensland, the available time to decide adjudication applications for "complex" claims (those valued in excess of $750,000) increased from six weeks to six months after this differentiation by claim size was introduced.[1]

Moreover, any division into different classes of claims based on size would be at least somewhat arbitrary. For example, there is no obvious demarcation based on claim size, as there is no set relationship between the size of the claim and the time and work expended by the adjudicator in arriving at a determination.

NECA recommends that the Review should find that a two-tiered approach to claims should *not* be adopted, given our concerns that this is likely to lead to delays in adjudications, as evidenced by the experience in Queensland.

Question 3

If legislation is to provide for two types of claims, how should these be distinguished? Should it be based on the value of the claim (e.g. an amount of $750,000 as is the case in Queensland), or the nature of the claim being made (e.g. time-based/delay costs, latent conditions etc.)?

As stated above, NECA does not support the adoption of a two-tiered approach.

[1] Page 2, Bob Gaussen, Adjudicate Today's submission to the Australian Senate Economics Reference Committee consultation for its report *"I just want to be paid": Insolvency in the Australian Construction Industry*, December 2015

Moreover, there is no obvious demarcation based on claim size or the nature of the claim.

NECA recommends that the Review find that Security of Payments legislation should *not* adopt a two-tiered approach. There is no obvious demarcation threshold based on claim size or the nature of the claim.

Differences in timeframes on key process steps

Question 4

What should be the appropriate period in which a payment claim may be served under the Act?

NECA advocates that a 12 month period for normal claims is appropriate.

However, the time limit for making claims in respect of claims for the return of retention monies, bank guarantees and performance bonds should be extended to beyond this 12 month limitation period.

NECA finds that the most problematic area in regards to the time limits for taking action under Securities of Payments legislation is in relation to the return of sub-contractors' retention monies.

Our members advise that in most commercial contracts the defects liability period is 12 months after completion of the works. Given that the legislation does not permit a claim to be made after 12 months after the last works were carried out, our members have no recourse to cost effectively and expeditiously claim return of their retention monies after the 12 month defects liability period has expired.

NECA on behalf of its members therefore proposes that Securities of Payments legislation should make special provision for the adjudicators to have the power to make determinations for return of retention monies or bank guarantees in lieu of retention monies or performance bonds, after this 12 month limitation period.

Retention money belongs to the sub-contractor and generally is the sub-contractor's profit on a project. Loss of retention monies severely prejudices businesses and does not allow businesses to grow and in some cases results in insolvency.

The above proposal is extremely important given that retention trust schemes are only applicable to projects over a certain threshold.

The majority of disputes for retention monies are with the smaller contractors who make up the largest proportion of the industry.

The feedback from our members reveals that they feel very strongly and are extremely upset about the lack of protection or recourse they have in respect of their retention monies and that only the "big end of town" is protected with projects of larger dollar value.

Retention trust account requirements should therefore be extended to cover the entire contract chain, alternatively and preferably legislation for the use of deemed trusts for retention monies should be introduced.

NECA recommends that:

- **The period in which a payment claim may be served should be 12 months for normal claims;**
- **Securities of Payments legislation should make special provision for the adjudicators to have the power to make determinations for return of retention monies or bank guarantees in lieu of retention monies or performance bonds, after the 12 month limitation period; and**
- **Alternatively and preferably legislation for the use of deemed trusts for retention monies should be introduced.**

Question 5

What should be the due dates for payment of a progress payment?

NECA advocates that the default payment date should be 10 business days.

This timeframe would be especially beneficial in relation to cash flow for smaller sub-contractors, who do not always enter into formal elaborate construction contracts.

The maximum payment time should be 28 calendar days, as originally recommended by the Collins Report of 2013.

As a majority of contracts entered into by our members are not formal contracts, there is no suspension of works provision under the contract to rely upon if a head contractor does not pay the sub-contractor.

With the 10 business day default provision in place, a contractor is entitled to take the necessary steps under the Act to suspend works 10 business days after it has served a payment claim.

Prior to the due date for a progress payment, the contractor is required to continue working, paying the salaries of its labour and paying for materials before the contractor can suspend work. These additional wages and materials the contractor has to provide at the contractor's own expense, which they may never recover should the party with whom the contractor has contracted is wound up.

Longer payment times thus severely affect the cash flow of sub-contractors and defeat the objects of Securities of Payments legislation for prompt payment.

NECA recommends that the default payment date should be 10 business days with a maximum payment time of 28 calendar days.

Question 6

Should there be different timeframes for when a payment claim becomes due and payable to a head contractor as opposed to when a payment claim becomes due and payable to a sub-contractor?

NECA advocates that there should be consistency across the contracting chain with respect to when payment claims become payable, i.e. there should be no difference in the timeframes for head contractors and sub-contractors.

As stated in response to Question 5, the default payment date should be 10 business days, with a maximum payment time of 28 calendar days.

NECA holds the view that, similar to any other business entity, principals / head contractors need to ensure that their cash flow management and reserves are sufficient to meet their solvency requirements, including the payment of sub-contractors, on the projects they undertake.

Moreover, sub-contractors by value, provide more than 75 per cent of the labour, materials cost and installed active equipment in the construction process and are required to provide sufficient cash flow and reserves to meet those payments. Sub-contractors are often managing the payment of lower tier sub-contractors they themselves engage, along with suppliers of services and goods.

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

As a finishing trade, electrical contractors are often the last in the credit line to receive payment for work completed, in the event of a construction firm facing financial difficulties.

The making, assessing and processing of payments should be more sophisticated, technology driven and capable, as we move up through the contractual chain, as the various recipients of claims grow in size and capability, not less. In other words, there are no grounds for having longer timeframes for when a payment claim becomes due and payable to a sub-contractor.

NECA recommends that there should be consistency across the contracting chain with respect to when payment claims become payable. Specifically, there should be no difference in the timeframes for head contractors and sub-contractors, given

that similar to any other business entity, principals / head contractors need to ensure that their cash flow management and reserves are sufficient to meet their solvency requirements, including the payment of sub-contractors, on the projects they undertake.

Question 7

What should be the appropriate timeframe to be given to a respondent to provide a proper response to a claimant's payment claim and provide a payment schedule?

NECA considers that a timeframe of 10 business day period is appropriate.

NECA recommends that a respondent should have a period of 10 business days to provide a proper response to a claimant's payment claim and provide a payment schedule.

Question 8

What should be the appropriate timeframe to be given to a claimant for the lodgement of its adjudication application?

NECA advocates that the appropriate timeframe is 10 business days.

NECA recommends that a claimant should have a period of 10 business days for the lodgement of its adjudication application.

Question 9

What should be the appropriate time frames to be given to a respondent to prepare its response to the claimant's adjudication application?

NECA advocates that the time to provide an adjudication response should be 5 business days.

Generally speaking, the parties involved in larger claims have argued the same issues over many months before the matter goes to adjudication.

In respect of larger claims, parties in our experience generally commence preparing the adjudication response as soon as they receive the payment claim. They thus effectively have additional time (for example, 25 days under the NSW legislation) to respond.

NECA advocates that the time to provide an adjudication response should be 5 business days.

Question 10

What should be the default period within which an adjudicator is required to make a determination or decision?

The intention of Security of Payments legislation is to provide a fast track process, as opposed to a quasi-arbitration or mini-trial.

As such, a default period of 10 business days is appropriate.

NECA recommends that the default period, within which an adjudicator is required to make a determination or decision, should be 10 business days.

The process for appointment of adjudicators

Question 11

What should be the process for appointment of adjudicators?

NECA advocates that the process whereby adjudicators are appointed by Authorised Nominating Authorities (ANAs) is demonstrably superior to the Queensland model, whereby an Adjudication Registrar (located within the Queensland Building and Construction Commission) replaced the ANAs in 2014.

NSW, for example, does not have the high fall-over rate (the ratio of decisions released against applications withdrawn) that Queensland does. The fall-over rate in Queensland has increased very significantly since ANAs were abolished.

For the period July 2014 to November 2014 (the last published month for statistics prior to the amendments), the fall-over rate for all ANAs in Queensland was 33 per cent (182 decisions released; 60 applications withdrawn).

By June 2015, the 12 month fall-over rate had increased to 63 per cent (406 decisions released; 256 applications withdrawn). This suggests that since the amendments in December 2014 abolishing ANAs, in excess of 75 per cent of adjudications have not proceeded to decision. A fall-over rate of this level obviously constitutes a major breakdown in the management of adjudication in Queensland.[2]

NECA is aware of cases where adjudicators in Queensland have requested that ANAs in NSW assist them with the administration process in relation to adjudications.

Furthermore, the ANAs provide additional free advisory service to applicants involved in the adjudication process.

[2] Page 2, Bob Gaussen, Adjudicate Today's submission to the Australian Senate Economics Reference Committee consultation for its report *"I just want to be paid": Insolvency in the Australian Construction Industry*, December 2015

NECA recommends that Authorised Nominating Authorities (ANAs) should be responsible for the appointment of adjudicators.

Quality of Adjudication Decisions

Question 12

What is your experience regarding the quality of adjudication decisions?

In NECA's experience, most of the ANAs monitor the quality of adjudicators' decisions closely and provide ongoing training to adjudicators. NECA believes that the system of independent ANAs that oversee the quality of adjudicators and adjudication decisions in practice delivers optimal outcomes.

Given that the number of appeals of adjudications compared to the number of adjudications is very low, in the absence of evidence to the contrary, it can only be assumed that the quality of adjudication meets with industry expectations.

NECA recommends that the review consider that, in NECA's experience, the system of independent ANAs that oversee the quality of adjudicators and adjudication decisions in practice delivers optimal outcomes, given that ANAs:

- **Monitor the quality of adjudicators' decisions closely; and**
- **Provide ongoing training to adjudicators.**

Question 13

Should legislation set out minimum requirements for the eligibility to become an adjudicator?

NECA has no in principle objection to legislation setting out mandatory qualifications for registered adjudicators, as per the arrangements in West Australia.

It is not uncommon for rather complex legal and technical issues to come up during an adjudication.

However, this should only be done after a rigorous assessment has been conducted to establish:

- Firstly, the need for a prescriptive approach in relation to establishing minimum requirements; and
- The appropriate qualifications and / or experience required.

Unless there is specific evidence that mandatory qualifications are required to deliver better outcomes, it might be better to leave this sphere to the ANAs themselves.

NECA recommends that legislation setting out mandatory qualifications for registered adjudicators should only be considered after a rigorous assessment has been conducted to establish:

- **Firstly, the need for a prescriptive approach in relation to establishing minimum requirements; and**
- **The appropriate qualifications and / or experience required.**

In the absence of this, ANAs should continue to be responsible for ensuring that adjudicators are appropriately qualified.

Exclusion of claims

Question 14

Should certain claims be excluded or carved out from the Act?

NECA does not support the exclusion of any claims in the construction industry from the operation of the Security of Payments legislation.

Any attempt to carve out specific claims will undermine the underlying purpose of Security of Payments legislation. Even in multi-million dollar claims, Security of Payments legislation has provided parties with an avenue to resolve their disputes without having to resort to legal action and incurring millions in legal costs.

Excluding any claim from Security of Payments legislation defeats the original intent of the legislation. The capacity of adjudicators to resolve all manner of claims has been clearly demonstrated.

NECA does not support the exclusion of any claims in the construction industry from the operation of the Security of Payments legislation, as any attempt to carve out specific claims will undermine the original intent and underlying purpose of Security of Payments legislation.

Claims after termination of contract

Question 15

Should legislation be amended to allow a reference date to accrue following termination of the contract?

NECA strongly supports this, as head contractors / principals can currently terminate contracts in order to circumvent Security of Payments legislation and thus avoid making payments.

Providing claimants with one final opportunity to serve a claim when a contract has been terminated would mitigate against this practice.

As it currently stands, head contractors / principals can currently terminate contracts one day before a payment claim is able to be lodged in order to circumvent Security of Payments legislation. This should be addressed, with claimants being provided one final opportunity to lodge a claim within 12 months in cases of termination.

This view is in line with the recommendations of the Wallace Report:

> *"…in circumstances where a contract has been terminated, a claimant retains the statutory entitlement to serve a payment claim. I would however place one qualification on such a recommendation and that is that the claimant should be restricted to making one final payment claim for the construction work carried out up to the time of termination. This should also enable the claimant to claim for any retention monies or the return of security."*[3]

NECA recommends that legislation be amended to allow a reference date to accrue following termination of the contract, as:

- **Head contractors / principals can currently terminate contracts in order to circumvent Security of Payments legislation and thus avoid making payments; and**

[3] Andrew Wallace, *Payment dispute resolution in the Queensland building and construction industry: Final report*, May 2013, p.269

- **Providing claimants with one final opportunity to serve a claim when a contract has been terminated would mitigate against this practice.**

Impact of Contract Time-Bars

Question 16

Should time bars that operate to exclude a contractor/sub-contractor's right to claim for an extension of time ("EOT"), delay costs and/or variations be codified? If so how? For example, should contractual terms which set an unreasonable time frame for notification of EOT or for notification of variations, be stated to be void?

With respect to the possible codification of time bars, it must be kept in mind that most sub-contractors have limited resources to devote to administration and that delays are often caused by circumstances beyond their direct control.

NECA therefore advocates that sub-contractors should only be required to submit extensions of time (EOT) in cases where the sub-contractor is the direct cause of the delay. Contractual terms which contradict this principle should be stated to be void.

Sub-contractors should be entitled to be paid for work they have carried out. They should not be penalised for failure to submit an extension in the stipulated time period when it is clear that the sub-contractor has been delayed for reasons outside of the control of the sub-contractor themselves. Contractual terms which contradict this principle should be stated to be void.

In many cases sub-contractors submit claims within the stipulated time period, however they fail to comply with all the formalities / provisions of the contract. In such cases, NECA advocates that the sub-contractor should be allowed to supplement the claim if requested by the head contractor to do so. Claims should not be rejected simply for the reason that they are submitted in the incorrect form. Contractual terms which contradict this principle should be stated to be void.

Time bars are only one of the issues that frequently prevent contractors from claiming EOTs or variations. There are also many other unreasonable provisions in construction contracts that limit sub-contractors' entitlement to claim variations or EOTs. These provisions are all the result of current practices by principals and head contractors alike

to shift as much as possible of the risk in construction projects to the sub-contractor. The courts in Australia have generally made it clear that there is no reason why commercial parties who negotiate commercial transactions should not be held to the terms of their bargain.

It should also be remembered that Security of Payment legislation only provides an interim determination of rights, and not a final determination of the parties' rights and obligations under the contract. If the legislation allows contractors to circumvent time bars on an interim basis, this may provide an incentive for principals and head contractors to commence proceedings to claw back payments made that are contrary to the true entitlement under the construction contract.

The issue of unfair contract terms have been addressed in the recent legislation to protect small businesses from unfair terms and it may therefore be prudent to wait and see what the impact of this legislation is, before similar type of provisions are utilised in the Security of Payments legislation.

NECA recommends that:

- **Sub-contractors should only be required to submit extensions of time (EOT) in cases where the sub-contractor is the direct cause of the delay. Contractual terms which contradict this principle should be stated to be void;**
- **Sub-contractors should not be penalised for failure to submit an extension in the stipulated time period when it is clear that the sub-contractor has been delayed for reasons outside of the control of the sub-contractor themselves. Contractual terms which contradict this principle should be stated to be void; and**
- **Sub-contractors should be allowed to supplement the claim if requested by the head contractor to do so. Claims should not be rejected simply for the reason that they are submitted in the incorrect form. Contractual terms which contradict this principle should be stated to be void.**

Question 17

On what basis should such timeframes to be regarded as unreasonable?

NECA advocates that timeframes which would be insufficient for the sub-contractor to formulate a claim at the same time as carrying out their works in accordance with the construction program, might be considered to be unreasonable.

It should be kept in mind that smaller sub-contractors generally have limited administrative resources, and as such, relatively short time periods which would mitigate against the proper lodging of a claim, are problematic.

NECA recommends that timeframes which would be insufficient for the sub-contractor to formulate a claim, at the same time as carrying out their works in accordance with the construction program, might be considered to be unreasonable.

Question 18

Should legislation prescribe a time period for the giving of such notices (such as, say 10 or 20 business days) so as not to deprive a contractor/sub-contractor's right to make such claims?

NECA advocates that to prescribe a time period for the giving of such notices would be a positive step.

We believe that a time period of 10 business days is appropriate.

NECA recommends that a time period of 10 business days be prescribed for the giving of notifications.

Endorsement of Payment Claim

Question 19

Should all payment claims include the endorsement that "this is a payment claim made under the Act"?

NECA strongly supports this measure – this would save the industry considerable time and resources as currently every document received must be treated as if it is a payment claim and responded to as such.

The removal of the endorsement from the payment claim to state that it is under the Act has created significant problems for all parties, both the respondents and the claimants.

NECA's feedback from its members highlights the two major problems:

- Most accounting systems generate invoices as and when certain portions of the works are completed. These invoices are sent out during the course of the month. As the requirement for an endorsement of the face of the payment claim to state that it is under the Act has been removed under the current legislation each invoice is a payment claim under the Act. The Act only provides for one payment claim to be served on each reference date. As each invoice is a payment claim more than one payment claim is served per reference date which renders all the invoices / payment claims served invalid. Effectively now a claimant cannot send out any invoices or repeat invoices as these would invalidate any subsequent payment claim. NECA's members believe that this is very counterproductive and has severely complicated the system; and
- Conversely, every time a party receives an invoice from another party, they are obliged to prepare and serve a payment schedule in response to the invoice. There are severe ramifications under the Act for failure to serve a payment schedule. This has created an administrative nightmare for business who are now obliged to expend substantial time and money preparing and serving payment schedules in response to every invoice received.

Currently, sub-contractors are often asked at the time of the signing of contract documents by builders if they will be using the security of payment process for claims. Those who answer "yes" are often advised that the builder will need to change their claims assessment and payments process!

Such questions would never be asked if current law recognised that all claims are subject to the Act, without any need to opt in.

NECA recommends that all payment claims include the endorsement that "this is a payment claim made under the Act" as:

- **This would save the industry considerable time and resources as currently every document received must be treated as if it is a payment claim and responded to as such; and**
- **The removal of the endorsement from the payment claim to state that it is under the Act has created significant problems for all parties, both the respondents and the claimants.**

Question 20

Should such payment claims outline the period in which to respond and the potential consequences?

No – NECA does not consider that this would be beneficial. It is a simple process and should remain so.

NECA recommends that the legislation should *not* be amended to include a requirement that payment claims should outline the period in which to respond and the potential consequences.

Publication of Adjudicators' Determinations

Question 21

Should an adjudicator's decision / determination be published online?

NECA advocates that any initiative to publish adjudicators' decisions online should be treated with caution.

On the one hand, publishing adjudication decisions could assist in creating increased transparency and accountability across all parties, and may result in better consistency in determinations.

However, the resulting precedents from which to select competing arguments may lead to additional complexity in the adjudication process. This could result in increased costs and thus ultimately undermine the intention of Security of Payments legislation.

Moreover, respondents could be regarded as suffering unwarranted and unsubstantiated reputational damage as a result of having a claim brought against them, were adjudicators' decisions published online.

NECA does however strongly advocate that in cases where it has been established that parties are serial offenders with regards to non-payment to sub-contractors, for example companies that are party to illegal "phoenixing" activities, that governments and regulators should take appropriate measures.

For example, NECA calls on the government to consider granting the Australian Building and Construction Commission (ABCC) the power to sanction and / or exclude from federal government contracts head contractors who have repeatedly failed to make payments or return retention money within the specified time to sub-contractors, as is the case under the West Australian Building and Construction Industry Code of Conduct 2016.

NECA recommends that:

- **Any initiative to publish adjudicators' decisions online should be treated with caution; and**
- **In cases where it has been established that parties are serial offenders with regards to non-payment to sub-contractors, for example companies that are party to illegal "phoenixing" activities, that governments and regulators should take appropriate measures.**

Court's power to sever and remit

Question 22

Should the legislation provide the Courts with the power to sever that part of the adjudicator's determination/decision that is declared void but with the balance to remain an enforceable determination/decision?

NECA supports a severance power.

NECA considers that providing the Courts with the power to sever that part of the adjudicator's determination / decision that is declared void but with the balance to remain an enforceable determination / decision may be beneficial, in that it may result in sub-contractors at least receiving partial payment for the monies that they are owed.

This is in line with the Wallace Report recommendation that the *Building and Construction Industry Payments Bill 2003* (QLD) be amended to expressly permit the Court, where appropriate, to sever part of an adjudication decision that is affected by jurisdictional error, and in the process, confirm that the balance of the adjudication decision remains enforceable.

The Wallace Report states:

> *"In my view however, if an adjudicator has committed a jurisdictional error of law in part of an adjudication decision which does not affect the whole of the decision, the Act should expressly provide a court with the power to be able to sever that affected aspect of the decision with the balance to remain enforceable. The parties may have already expended significant costs on the adjudication and court processes. If the court is able to sever the affected part of the adjudication decision then there will be significant cost advantages in doing so."*[4]

In many jurisdictions the ability of the courts to set aside adjudication decisions for jurisdictional errors has resulted in an outcome that seems grossly unfair in some

[4] Andrew Wallace, *Payment dispute resolution in the Queensland building and construction industry: Final report*, May 2013, p.224

cases. For example an adjudication decisions for tens of millions of dollars may be set aside because the adjudicator made a jurisdictional error in respect of one variation to the value of say $10,000. Despite the balance of the decision being perfect and without any errors, the common law provides that a jurisdictional error infects the whole of the decision.

However, recent amendments to the Queensland legislation now allows the Courts in Queensland to sever the part of an adjudicator's decision that is affected by jurisdictional error and allow the balance of the decision to stand. This amendment has already reduced the number of decisions that are set aside in Queensland significantly. The amendments to the Queensland Act have successfully addressed this previously undesirable outcome and a number of decisions have been partially upheld since the Act was amended.

NECA recommends that a severance power be included in Security of Payments legislation.

Statutory Trusts to further protect sub-contractors

Question 23

Should consideration be given to the establishment of a statutory construction trust, and should such trusts apply to all monies owed or confined only to retention monies?

In early 2015, the New South Wales Government made further amendments to its *Building and Construction Industry Security of Payment Act 1999* (NSW) requiring head contractors to establish trust accounts to hold retention money under sub-contracts for projects with a value of at least $20 million.

This regulation came into effect on May 1st 2015 and affects contracts entered into after this time.

Retention money to which the Regulation applies must be held in trust for the sub-contractor in a trust account established with an authorised deposit-taking institution approved under Section 87 of the *Property, Stock and Business Agents Act 2002 (NSW)* or by the Chief Executive of the Office of Finance and Services.

There is some flexibility as to the structure which a Head Contractor may adopt to set up trust accounts for affected projects.

A Retention Money Trust Account may be established as a separate trust account for:

- The retention money held in respect of a particular sub-contractor;
- All retention money held in connection with a particular construction project of the head contractor, or
- All retention money held in connection with two or more (or all) construction projects of the head contractor.

It is noted that this regulation does add some burdens to the administration and record-keeping of sub-contracting arrangements.

However, given the need for more harmonised legislation and the importance of this issue to electrical contractors, who are by and large, small and medium enterprises, NECA believes that the implementation of this legislation, with a much lower project value threshold, is of key benefit to NECA members and the wider industry.

NECA advocates that legislation introducing a low cost, Retention Money Trust Account scheme should be established across all State and Territory jurisdictions (and in any future national regime), similar to those available in the real estate industry and legal profession.

In NECA's view, these types of schemes should be administered by the Government to reduce or avoid administrative burdens on business as well as seeking to create a level playing field via a consistent and transparent approach.

The scheme should be administered by a Government department to reduce costs and burdens and create a level playing field for industry. NECA has advocated that NSW and other state and territory legislatures seek to implement a threshold for construction industry project work to a value of $1 million.

This need for retention trusts also applies to any national security of payment regime.

While not canvassed in the discussion paper, NECA advocates that governments consider the merits of project bank accounts (PBAs) for selected government sector construction contracts.

PBAs have the potential to complement security of payment laws.

A PBA is a bank account opened and maintained by the head contractor, into which the principal deposits contract payments. Simultaneous payments are then made from the PBA to the head contractor and sub-contractors (including suppliers and consultants). The difference between a PBA and a "normal" bank account is that a PBA has trust status established through a Trust Deed.

Due to its trust status and the simultaneous payment of moneys to the head contractor and sub-contractors, the PBA offers a higher level of protection for sub-contract payments than traditional payment mechanisms.

The purpose of the PBA arrangement is to ensure, as far as possible, that money paid to the head contractor for work undertaken by sub-contractors is passed on promptly. The trust status of the PBA prevents money paid to the head contractor from being used for other purposes or, in the case of a head contractor's insolvency, being available to an administrator or liquidator.

The use of PBAs for contract payments has been trialled on selected government sector construction contracts in NSW, with the two-year trial ending in January 2016.

In the NSW trial, consistent with the *Building and Construction Industry Security of Payment Act 1999*, the principal had 15 business days to pay against a valid payment claim from the head contractor. Funds must therefore be released from the PBA within 15 business days after the payment claim is served. The bank must receive the signed authorisation in time to comply with this requirement.

On 23 November 2016, the Queensland Government announced a plan to introduce an array of new measures to ensure security of payment for sub-contractors. The plan anticipates that by 1 January 2019, every construction project in Queensland over $1 million will be required to operate a PBA. The Queensland Government plans to introduce PBAs on all government projects between $1 million and $10 million from the beginning of 2018.

NECA advocates that use of PBAs should be considered by governments for use more broadly. This might be informed by the example and experience in NSW and Queensland as above.

NECA recommends that:

- **Legislation introducing low cost, Retention Money Trust Account schemes should be established across all State and Territory jurisdictions (and in any**

future national regime), similar to those available in the real estate industry and legal profession;

- **These schemes should be administered by the Government to reduce or avoid administrative burdens on business as well as seeking to create a level playing field via a consistent and transparent approach;**
- **A threshold for construction industry project work to a value of $1 million should be mandated for retention trusts; and**
- **Governments consider the merits of project bank accounts (PBAs) for selected government sector construction contracts.**

Adjudication for domestic construction

Question 24

Should the adjudication system be extended to include the housing sector so as to enable a contractor/builder to make a progress payment claim against an owner–occupier?

NECA would support the extension of the adjudication process to the residential housing sector.

Contracts between builders and residential owner-occupiers should be covered by Security of Payments legislation for the sake of consistency, especially given that contracts between builders and owners of investment properties are covered.

Additionally, many of NECA's members have suffered financial losses as a result of unmade payments in the residential housing sector.

NECA recommends the extension of the adjudication process to the residential housing sector.

Question 25

Can such a domestic adjudication process operate under the same rapid adjudication scheme that operates in the commercial sector of the building and construction industry?

NECA believes that the Tasmanian model might be considered in relation to domestic adjudication.

Under the *Building and Construction Industry Security of Payment Act 2009* (TAS), residential home owners have 20 business days (compared to 10 business days for other debtors) to respond to payment claims.

Additionally, Tasmania's *Residential Building Work Contracts and Dispute Resolution Act 2016* created a new process for mediation through which builders and consumers are encouraged to negotiate in respect of disputes and to settle on an arrangement.

Under the new process, either a builder or property owner are able to lodge a dispute with the Director of Building Control, who then encourages the parties to negotiate and settle and who may appoint one or more people to a mediation panel to assist the parties in reaching an agreement.

The parties have 6 weeks in which to resolve the dispute through mediation, after which time they must turn to other avenues of dispute resolution, such as through a more formal process of adjudication.

The mediation process is free of charge and entirely voluntary, meaning that neither party will be forced into the process.

This latter point is crucial – it is critically important that the right to use Security of Payments laws is not abrogated or delayed.

Consumers also have a right to serve a new "work completion claim" on the contractor which requires the builder to complete the works as specified in the contract, and will have the option to lodge an adjudication for application with the Director of Building Control where the builder does not complete the work within the required time frame.

The new legislation also:

- Specifies minimum contractual clauses as mandatory requirements in all residential building contracts;
- Provides for mandatory consumer warranties as to the fitness and quality of building work (enforceable by an owner for up to six years after the completion of work);
- Mandates that all variations to residential building contracts be agreed upon in writing;

- Introduces a "cooling off" period (5 business days) following the signing of the building contract in which time an owner may withdraw from the contract; and
- Specifies that attempts to contract out of the Act are illegal.

NECA recommends that the Tasmanian model should be considered in relation to domestic adjudication.

Special mechanism for small business

Question 26

Should the Security of Payments laws be enhanced so as to provide small business with other dispute resolution mechanisms?

NECA has serious concerns in relation to the introduction of any additional dispute resolution mechanisms.

Were this to occur, it could lead to additional delays, confusion and additional costs for small sub-contractors seeking payment.

NECA considers that mediation (and in particular compulsory mediation) would be a backward step, as it is likely to prolong the period of time until a binding decision can be made through adjudication, thus delaying sub-contractors being paid.

As such, we would not be supportive of such a change to Security of Payments legislation.

Other dispute resolution mechanisms have a valid place, however it is not within Security of Payments legislation.

NECA recommends that there should be no change to Security of Payments legislation to introduce any additional dispute resolution mechanisms, as were this to occur it could lead to prolonging the period of time until a binding decision can be made through adjudication, thus delaying sub-contractors being paid.

Question 27

Does security of payments laws provide an effective or suitable mechanism for dealing with small claims?

Yes, NECA considers that Security of Payments laws provides an effective and suitable mechanism for addressing small claims.

NECA recommends that the review finds that Security of Payments laws do provide an effective and suitable mechanism for addressing small claims.

Question 28

Do the costs associated with adjudications deter applications from small parties?

The situation varies across the jurisdictions.

Generally speaking, the adjudication process provides a relatively inexpensive, rapid and effective process, which is not a deterrent to small parties.

The fact that Security of Payments legislation prohibits legal representation at any conference or inspection (albeit parties can have a lawyer prepare submissions to the adjudicator) assists in keeping costs down.

Under the Act, all fees are shared equally by the claimant and the respondent unless the adjudicator determines differently. Most adjudicators will award 100 per cent of their fee against the respondent if the payment claim is found to be wholly justified. Therefore a successful claimant should expect to recover most if not all the fees for the adjudication.

If issues are kept simple and the submissions of the parties are complete, clear and concise, adjudicator fees can be kept to a minimum. The process is intended to be informal, inexpensive and quick.

However, the Queensland Government's amendments to the *Building and Construction Industry Payments Act 2004* (BCIPA) of December 2014, significantly changed Queensland's building disputes resolution system.

Prior to these changes, the Queensland system mirrored other States and Territories.

The amendments encompassed ANAs having their statutory existence abolished, including the indemnity which allowed them to provide free advice.

After the changes in Queensland, parties are now required to seek paid advice from a law firm specialising in construction law or a reputable preparer.

Additionally, the Queensland Government began charging an application fee to commence adjudication, based on a sliding scale varying from $50 to $5,000.

In the other States and Territories, some of the ANAs do not charge an adjudication application fee. Parties therefore have the benefit that if a matter is withdrawn before the adjudicator commences work, the parties have nothing to pay.

ANAs also provide reduced fees for small claims, assisting small parties. For example, Adjudicate Today adjudicators offer the following fixed price adjudications for small claims (current at the time of writing):

- Up to $15,000 – fixed price of $1,089;
- From $15,001 to $25,000 – fixed price of $2,178; and
- From $25,001 to $40,000 – fixed price of $3,300.

NECA recommends that the Review finds that generally the costs associated with adjudications do not act as a deterrent to small parties from making applications; however, the amendments enacted in Queensland in 2014 constitute a negative development in this regard.

Acts of intimidation and retribution

Question 29

How should acts of intimidation and retribution in relation to the use of security of payments legislation be handled?

NECA members have reported that they are hesitant to utilise the Act to recover monies owed due to concerns about losing future work and damaging relationships. This is particularly the case for smaller sub-contractors dealing with larger contractors; as there are relatively fewer larger contractors, a smaller sub-contractor risks forgoing a considerable amount of potential future work if a larger contractor will not deal with them in future.

There is a long-standing issue in the building industry of head contractors making false declarations in relation to payments made to sub-contractors, i.e. falsely declaring that they have made payments to the sub-contractors when they have not in fact done so.

This has been documented in a variety of fora, including government consultations and inquiries.

NECA advocates that there should be penalties in relation to attempts to obstruct lawful use of Security of Payments laws. A prohibition on aiding and abetting should also be considered.

Otherwise, there is no disincentive for unscrupulous head contractors to do so.

Similarly, the Australian Senate's report *"I just want to be paid": Insolvency in the Australian Construction Industry* recommends (Recommendation 24) that:

> *"…it be made a statutory offence to intimidate, coerce or threaten a participant in the building industry in relation to the participant's access to remedies available to it under security of payments legislation."*[5]

[5] Page 142, Australian Senate, Economics References Committee, *"I just want to be paid": Insolvency in the Australian Construction Industry*, December 2015

NECA advocates that governments consider whether additional offence provisions in legislation are necessary and more importantly, the provision of adequate resources for compliance.

NECA also calls on the government to consider granting the Australian Building and Construction Commission (ABCC) the power to sanction and / or exclude from federal government contracts head contractors who have repeatedly failed to make payments or return retention money within the specified time to sub-contractors, as is the case under the WA Building and Construction Industry Code of Conduct 2016.

In this way, the government can set a good example for the construction industry more broadly.

NECA recommends that:

- **Governments consider whether additional offence provisions in legislation are necessary, including penalties in relation to attempts to obstruct lawful use of Security of Payments laws. A prohibition on aiding and abetting should also be considered;**
- **Governments should make provision of adequate resources for compliance; and**
- **The Commonwealth government should consider granting the Australian Building and Construction Commission (ABCC) the power to sanction and / or exclude from federal government contracts head contractors who have repeatedly failed to make payments or return retention money within the specified time to sub-contractors, as is the case under the WA Building and Construction Industry Code of Conduct 2016.**

Payment Withholding Requests

While not specifically canvassed in the Issues Paper, NECA's existing national policy in relation to Payment Withholding Requests (PWR) is as follows.

Building and Construction Industry Security of Payment legislation was first adopted by New South Wales in 1999, followed by Victoria, Queensland, Western Australia and the Northern Territory and lastly in 2009, the Australian Capital Territory, South Australia and Tasmania.

At a national level, NECA calls for the harmonisation of the creditor line process across Australia so that electrical contractors are not disadvantaged from the collapse of a construction company.

In New South Wales, changes to the Act in 2012 now allow sub-contractors to serve a PWR on a principal at the same time it serves an adjudication application on the respondent / contractor.

Upon receiving a PWR, the principal must withhold from any amount payable or that becomes payable to the respondent / contractor which includes an amount in respect of the work done / services provided by a claimant / sub-contractor, an amount commensurate to that claimed by the claimant / sub-contractor. If the principal fails to comply with this request, it will become jointly and severally liable with the respondent / contractor for the amount owed to the claimant / sub-contractor.

A PWR must be served by a claimant / sub-contractor who has made an adjudication application for a payment claim and include a written statement by the claimant in the form of a statutory declaration that it genuinely believes that the amount of money claimed is owed to the respondent by the claimant.

NECA advocates that PWR legislation – that allows the Principal / Head Contractor to be more easily served with a claim for payment – be adopted across all State and Territory jurisdictions.

This should also be incorporated in any prospective national legislative regime.

NECA recommends that:

- **At a national level, the creditor line process should be harmonised across Australia so that electrical contractors are not disadvantaged from the collapse of a construction company;**
- **To this end, Payment Withholding Requests (PWR) legislation – that allows the Principal / Head Contractor to be more easily served with a claim for payment – be adopted across all State and Territory jurisdictions; and**
- **This should also be incorporated in any prospective national legislative regime.**

Summary of NECA's recommendations

Effectiveness of existing Security of Payments laws

- NECA recommends the implementation of a national regime for Security of Payments, incorporating the best features of the current individual regimes, after due consultation and with the necessary transition arrangements in place.

A two-tier system under the one legislation

- NECA recommends that the Review find that of a two-tiered approach to claims should not be adopted, given that:
    - This is likely to lead to delays in adjudications, as evidenced by the experience in Queensland; and
    - There is no obvious demarcation threshold based on claim size or the nature of the claim.

Differences in timeframes on key process steps

- NECA recommends that:
    - The period in which a payment claim may be served should be 12 months for normal claims;
    - Securities of Payments legislation should make special provision for the adjudicators to have the power to make determinations for return of retention monies or bank guarantees in lieu of retention monies or performance bonds, after the 12 month limitation period; and
    - Alternatively and preferably legislation for the use of deemed trusts for retention monies should be introduced.

- NECA recommends that the default payment date should be 10 business days with a maximum payment time of 28 calendar days.

- NECA recommends that there should be consistency across the contracting chain with respect to when payment claims become payable. Specifically, there should

be no difference in the timeframes for head contractors and sub-contractors, given that similar to any other business entity, principals / head contractors need to ensure that their cash flow management and reserves are sufficient to meet their solvency requirements, including the payment of sub-contractors, on the projects they undertake.

- NECA recommends that a respondent should have a period of 10 business days to provide a proper response to a claimant's payment claim and provide a payment schedule.

- NECA recommends that a claimant should have a period of 10 business days for the lodgement of its adjudication application.

- NECA recommends that the time to provide an adjudication response should be 5 business days.

- NECA recommends that the default period, within which an adjudicator is required to make a determination or decision, should be 10 business days.

The process for appointment of adjudicators

- NECA recommends that Authorised Nominating Authorities (ANAs) should be responsible for the appointment of adjudicators.

Quality of Adjudication Decisions

- NECA recommends that the review consider that, in NECA's experience, the system of independent ANAs that oversee the quality of adjudicators and adjudication decisions in practice delivers optimal outcomes, given that ANAs:
    - Monitor the quality of adjudicators' decisions closely; and
    - Provide ongoing training to adjudicators.

- NECA recommends that legislation setting out mandatory qualifications for registered adjudicators should only be considered after a rigorous assessment has been conducted to establish:
    - Firstly, the need for a prescriptive approach in relation to establishing minimum requirements; and
    - The appropriate qualifications and / or experience required.

  In the absence of this, ANAs should continue to be responsible for ensuring that adjudicators are appropriately qualified.

Exclusion of claims

- NECA does not support the exclusion of any claims in the construction industry from the operation of the Security of Payments legislation, as any attempt to carve out specific claims will undermine the original intent and underlying purpose of Security of Payments legislation.

Claims after termination of contract

- NECA recommends that legislation be amended to allow a reference date to accrue following termination of the contract, as:
    - Head contractors / principals can currently terminate contracts in order to circumvent Security of Payments legislation and thus avoid making payments; and
    - Providing claimants with one final opportunity to serve a claim when a contract has been terminated would mitigate against this practice.

Impact of Contract Time-Bars

- NECA recommends that:
    - Sub-contractors should only be required to submit extensions of time (EOT) in cases where the sub-contractor is the direct cause of the delay. Contractual terms which contradict this principle should be stated to be void;

- Sub-contractors should not be penalised for failure to submit an extension in the stipulated time period, when it is clear that the sub-contractor has been delayed for reasons outside of the control of the sub-contractor themselves. Contractual terms which contradict this principle should be stated to be void; and
- Sub-contractors should be allowed to supplement the claim if requested by the head contractor to do so. Claims should not be rejected simply for the reason that they are submitted in the incorrect form. Contractual terms which contradict this principle should be stated to be void.

- NECA recommends that timeframes which would be insufficient for the sub-contractor to formulate a claim, at the same time as carrying out their works in accordance with the construction program, might be considered to be unreasonable.

- NECA recommends that a time period of 10 business days be prescribed for the giving of notifications.

Endorsement of Payment Claim

- NECA recommends that all payment claims include the endorsement that "this is a payment claim made under the Act" as:
  - This would save the industry considerable time and resources as currently every document received must be treated as if it is a payment claim and responded to as such; and
  - The removal of the endorsement from the payment claim to state that it is under the Act has created significant problems for all parties, both the respondents and the claimants.

- NECA recommends that the legislation should *not* be amended to include a requirement that payment claims should outline the period in which to respond and the potential consequences.

Publication of Adjudicators' Determinations

- NECA recommends that:
    - Any initiative to publish adjudicators' decisions online should be treated with caution; and
    - In cases where it has been established that parties are serial offenders with regards to non-payment to sub-contractors, for example companies that are party to illegal "phoenixing" activities, that governments and regulators should take appropriate measures.

Court's power to sever and remit

NECA recommends that a severance power be included in Security of Payments legislation.

Statutory Trusts to further protect sub-contractors

- NECA recommends that:
    - Legislation introducing low cost, Retention Money Trust Account schemes should be established across all State and Territory jurisdictions (and in any future national regime), similar to those available in the real estate industry and legal profession;
    - These schemes should be administered by the Government to reduce or avoid administrative burdens on business as well as seeking to create a level playing field via a consistent and transparent approach;
    - A threshold for construction industry project work to a value of $1 million should be mandated for retention trusts; and
    - Governments consider the merits of project bank accounts (PBAs) for selected government sector construction contracts.

Adjudication for domestic construction

- NECA recommends the extension of the adjudication process to the residential housing sector.

- NECA recommends that the Tasmanian model should be considered in relation to domestic adjudication.

Special mechanism for small business

- NECA recommends that there should be no change to Security of Payments legislation to introduce any additional dispute resolution mechanisms, as were this to occur it could lead to prolonging the period of time until a binding decision can be made through adjudication, thus delaying sub-contractors being paid.

- NECA recommends that the review finds that Security of Payments laws *do* provide an effective and suitable mechanism for addressing small claims.

Acts of intimidation and retribution

- NECA recommends that:
    - Governments consider whether additional offence provisions in legislation are necessary, including penalties in relation to attempts to obstruct lawful use of Security of Payments laws. A prohibition on aiding and abetting should also be considered;
    - Governments should make provision of adequate resources for compliance; and
    - The Commonwealth government should consider granting the Australian Building and Construction Commission (ABCC) the power to sanction and / or exclude from federal government contracts head contractors who have repeatedly failed to make payments or return retention money within the specified time to sub-contractors, as is the case under the WA Building and Construction Industry Code of Conduct 2016.

Payment Withholding Requests

- NECA recommends that:

- At a national level, the creditor line process should be harmonised across Australia so that electrical contractors are not disadvantaged from the collapse of a construction company;
- To this end, Payment Withholding Requests (PWR) legislation – that allows the Principal / Head Contractor to be more easily served with a claim for payment – be adopted across all State and Territory jurisdictions; and
- This should also be incorporated in any prospective national legislative regime.