

## 3.10 Security of payments

### Background

**As a finishing trade, electrical contractors are often involved in the latter stages of the building and 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 contractors can be at a disadvantage in terms of being recompensed when compared to all other trades who contribute to the project and have been fully recompensed at an earlier stage in the project.**

This concerns NECA given the majority of electrical contractors are SMEs – frequently small family owned and run businesses.

The current system of payment security penalises sub-contractors by effectively rendering them de-facto underwriters to unscrupulous or inefficient head/principal contractors. Of all sub-contractors, electrical contractors provide the highest value inputs by way of fixtures, fittings and labour towards the latter stages of the construction cycle. In other words, electrical contractors are more disproportionately disadvantaged than any other sub-contractor.

Concerns about the security of payments are further exacerbated by the fact that the relevant Building and Construction Industry Security of Payment legislation is facilitated by state and territory governments and determined by the state or territory where the construction work is carried out.

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.

**R44: NECA calls for the harmonisation of the creditor line process across Australia so electrical contractors are not disadvantaged by the collapse of a construction company.**

### Key issues and recommendations

#### Payment withholding requests

In New South Wales, changes to the *Division 2A Building and Construction Industry Security of Payment Act 1999 (NSW)* in 2012 allowed subcontractors to serve a Payment Withholding Request (PWR) on a principal at the same time it serves an adjudication application on the respondent/contractor. In 2017, Queensland passed legislation based upon the changes made to the Act in NSW.

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/subcontractor, an amount commensurate to that claimed by the claimant/subcontractor. 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/subcontractor.

A PWR must be served by a claimant/subcontractor 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.

**R45: 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 jurisdiction**

## Retention trust scheme accounts and project thresholds

The New South Wales Government has recently made further amendments to its *Building and Construction Industry Security of Payment Act 1999 (NSW)*, that call for head contractors to establish trust accounts to hold retention money under subcontracts for projects with a value of at least \$20 million. This regulation came into effect on 1 May 2015 and affects contracts entered into after this time. In 2017, Queensland also passed legislation based upon the model used in NSW.

Retention money to which the regulation applies must be held in trust for the subcontractor 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 subcontractor
- » all retention money held in connection with a particular construction project of the head contractor
- » all retention money held in connection with two or more (or all) construction projects of the head contractor.

This regulation does add some administrative and record-keeping burdens to subcontracting arrangements. However, given the need for more harmonised legislation and the importance of this issue to electrical contractors who are, by and large, SMEs, 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 argues that a low cost Retention Money Trust Account Scheme could be established, similar to those applied and managed by NSW Fair Trading on behalf of the real estate sector. In NECA's view, this type of scheme could be administered by government to reduce or avoid administrative burdens on SMEs as well as seeking to create a level playing field through a consistent and transparent approach.

**R46: NECA recommends legislation introducing a low cost Retention Money Trust Account scheme, similar to those available in the real estate sector, be established across all state and territory jurisdictions. The scheme should be administered by a government department to reduce costs and burdens and create a level playing field for industry.**

**R47: NECA advocates that NSW and other state and territory legislatures seek to implement a threshold for construction industry project work to a value of \$1 million.**