

Submission-Unfair Trading Practices. Consultation on the proposed general and specific prohibitions

*Submission by the National Electrical and
Communications Association*

December 2024



Executive Summary

Australian subcontractors are grappling with unfair trading practices and exploitative contract terms, jeopardising their financial stability, workforce retention, and contribution to critical infrastructure projects.

As Australia embarks on major nation-building initiatives—upgrading infrastructure, transitioning to renewable energy, and building homes - the role of subcontractors is indispensable, and subcontractors' involvement is crucial to achieving national goals.

NECA's submission underscores how unfair practices exacerbate power imbalances, placing subcontractors at a significant disadvantage.

To address these challenges, NECA advocates for:

- A general prohibition on unfair trading practices.
- Expanding unfair contract term protections to cover medium-sized enterprises; and
- A nationally harmonised Security of Payment framework.

Sub-Contractors often bear up to 85% of project risk without fair protections.

Fairer contracts are essential to ensuring subcontractors can play a central role in delivering vital infrastructure projects, advancing the renewable energy transition, and supporting affordable housing.

NECA is committed to collaborating with policymakers to ensure these reforms deliver tangible benefits for businesses, workers, and consumers.

Yours faithfully,

Oliver Judd

Chief Executive Officer

National Electrical and Communications Association (NECA)

About NECA

The National Electrical and Communications Association (NECA) is the leading national voice for the electrotechnology sector. Our 7,000 members are at the forefront of designing, installing, and maintaining electrotechnology equipment across diverse sectors, including defence, construction, mining, air conditioning, refrigeration, manufacturing, communications, and renewable energy.

Small and medium-sized enterprises in the electrotechnology sector are powerhouses, generating over \$82 billion annually and employing more than 344,000 Australians. NECA is dedicated to nurturing the next generation of Australia's electrical and communications tradespeople, contractors, and subcontractors.

We champion the interests of electrical and communication businesses at all levels of government, regulatory bodies, legislative arenas, and industry development forums. Our members are essential to the national economy, driving business connections, powering homes, and supporting construction and infrastructure projects.

NECA members also encourage investment and enhance the security and reliability of Australia's energy network, which is crucial for achieving affordable and environmentally sustainable outcomes. Through our associated Group Training Organisations (GTOs) and Registered Training Organisations (RTOs), NECA offers employment and training to apprentices and tradespeople nationwide.

With a national presence and close collaboration with industry and government, NECA is committed to strengthening our sector to build a better, stronger, and more connected country for all Australians.

Power Imbalances in Contractual Relationships

Small and medium-sized businesses in the construction and electrotechnology sectors face significant challenges when contracting with larger entities. Subcontractors often absorb disproportionate project risks without equitable remedies.

The Murray Report 2018 Review of Security of Payments Laws highlighted these systemic issues and recommended the following actions to improve protections for subcontractors:

- **Address Power Imbalances in Contract Negotiations:**
 - Implement fair risk allocation practices.
 - Prohibit unilateral contract changes.
 - Ensure subcontractors have access to equitable remedies.
- **Strengthen Adjudication Processes:**
 - Enhance adjudicator training and standards.
 - Streamline dispute resolution mechanisms.
 - Ensure timely and fair outcomes for subcontractors.

Recommendations

General Prohibition on Unfair Trading Practices

NECA supports the introduction of a general prohibition on unfair trading practices. This prohibition should:

1. **Apply to all transactions, including business-to-business dealings.**
2. **Be principles-based to capture emerging unfair practices, such as digital “dark patterns” and predatory pricing.**
3. **Include clear guidance and examples to support compliance.**
4. **Expanded Coverage of Unfair Contract Terms Protections**

Payment Delays and Security of Payments

Inconsistent state-based Security of Payment (SOP) laws create confusion, hinder enforcement, destabilise supply chains, and reduce cash flow for SMEs. Despite existing payment protections, businesses suffer from delayed or ambiguous payment procedures, necessitating stronger, consistent protocols

The Murray Report 2018 Reviewed SOP laws and highlighted these inefficiencies and proposed critical reforms to address these issues:

- **Establish a Nationally Consistent Framework:**
 - Implement uniform SOP laws across all states.
 - Ensure clear and consistent payment procedures.
- **Introduce Cascading Statutory Trusts:**
 - Secure payments for subcontractors through statutory trusts.
 - Prohibit “pay-when-paid” clauses to ensure timely payments.
- **Improve Adjudicator Standards:**
 - Enhance training and standards for adjudicators.
 - Streamline dispute resolution mechanisms for quicker outcomes.

These measures would provide subcontractors with more robust protections, streamline dispute resolution mechanisms, ensure timely payments, and reduce insolvency risks.

Recommendations to address inconsistencies in state-based SOP laws, NECA calls for a unified federal framework that:

1. Implements cascading statutory trusts to secure payments for subcontractors.
2. Prohibits “pay-when-paid” clauses and ensures timely payments for all variations.
3. Establishes adjudication mechanisms for swift resolution of disputes, incorporating the Murray Review’s recommendations for enhanced adjudicator training, registration, and standards.

Complexity and Lack of Transparency

Ambiguous contract terms and a lack of standardisation in subcontracting agreements disadvantage SMEs. Subcontractors often unknowingly agree to terms that impose disproportionate risks or fail to reflect the terms in head contracts, leading to financial and operational vulnerabilities.

The Murray Report 2018 emphasised the need for simplified and transparent contractual language to protect smaller entities and create fairer market conditions. Key recommendations include:

- **Simplify Contractual Language:**
 - Use clear and straightforward language in contracts.
 - Avoid legal jargon that can confuse subcontractors.
- **Standardise Subcontracting Agreements:**
 - Develop standardised contract templates for common agreements.
 - Ensure consistency between head contracts and subcontracting terms.
- **Enhance Transparency:**
 - Clearly outline all terms and conditions in contracts.
 - Provide subcontractors with a comprehensive understanding of their obligations and risks.

These measures aim to protect smaller entities, reduce financial and operational vulnerabilities, and create fairer market conditions.

Recommendations

1. Use clear and straightforward language in contracts.
2. Develop standardised contract templates for common agreements that cannot be amended.
3. Within Government procurement ensure head contract terms are equitably reflected in subcontractor agreements.

Digital Interfaces and Fair Practices

In an increasingly digitised economy, misleading digital interfaces or subscription traps undermine trust and fairness. NECA urges the government to incorporate these digital

practices into the scope of unfair trading prohibitions, ensuring that such protections extend to businesses providing or using technology-driven services in the electrotechnology sector.

Impact on Workforce Stability and Economic Growth

Unfair trading practices contribute to workforce instability by exacerbating project delays, increasing costs, and creating adversarial relationships. This instability undermines SMEs' ability to retain skilled labour, which is critical for delivering infrastructure and renewable energy projects.

The Murray Review recommendations stress that consistent SOP laws and equitable contract terms would help stabilize the industry and support broader economic growth.

- **General Prohibition on Unfair Trading Practices:**
 - Apply to all transactions, including business-to-business dealings, and be principles-based to capture emerging unfair practices.
- **Expanded Coverage of Unfair Contract Terms Protections:**
 - Extend protections to medium-sized enterprises, redefine small business thresholds, and prohibit specific unfair clauses.
- **Harmonised National Security of Payment Framework:**
 - Implement cascading statutory trusts, prohibit “pay-when-paid” clauses, and
 - establish adjudication mechanisms for swift dispute resolution.

Recommendations

NECA advocates for extending unfair contract term (UCT) protections to medium-sized enterprises (MEs), in addition to small businesses. Specifically:

1. Redefine small business thresholds to include entities employing fewer than 200 employees or with turnover under \$50 million.
2. Prohibit specific unfair clauses, such as unilateral termination clauses, disproportionate indemnity provisions, and onerous variation terms.
3. Simplify contract language to ensure transparency and accessibility.
4. Harmonised National Security of Payment Framework.



Conclusion

NECA thanks the Treasury for the opportunity to contribute to this important consultation. By addressing unfair trading practices and harmonising security of payment laws, the government can create a fairer, more resilient marketplace that benefits businesses, consumers, and the broader economy. NECA remains committed to working collaboratively with policymakers to achieve these goals.