

# **Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2024**

**Protecting the little guys.**

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Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. You can visit our website at [www.masterelectricians.com.au](http://www.masterelectricians.com.au)

Our members predominately consist of small and medium sized enterprises (SMEs) typically utilised as sub-contractors in large projects. Due to significant power imbalances, our members are vulnerable to late and/or missed payments which not only impacts their cash flow but also the macroeconomy. Suppliers endure late or missed payments while employees face delayed payment or potential redundancy. Cumulatively, these factors contribute towards reduced disposable household income and consequently reduced spending. MEA strongly advocate that protecting SME interests is pivotal to establishing a resilient economy. It is essential Government protect SMEs from essentially being treated as financiers by head-contractors/principals and ensure they are paid promptly for completed contractual goods and services.

MEA commend QLD Government's continued proactiveness in protecting our SMEs in the construction and trades industry. QLD has become an exemplary leader in security of payment (SOP) laws setting a commendable precedent for other Australian states to draw upon as they refine and develop their own SOP legislation.

MEA support many amendments proposed in the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2024* (the Bill), however, recommend re-drafting specific clauses for clarity and understandability. We further highlight that while the *Building Industry Fairness (security of Payment) Act 2017* (the Act) has been a pillar for improvement in the construction industry, there is a continued need to improve unfair contract terms especially regarding payment terms.

MEA has focused on the following objectives:

- Who is a 'subcontractor beneficiary' of a project trust.
- Trust account ledger and record keeping requirements.
- Progress minor amendments to clarify existing provisions.

We will only be responding to clauses that we strongly support or wish to raise concerns with. All other clauses are supported without comment.

## Clauses/Amendments

### Clause 19: Meaning of Project Trust Sub-Contract

MEA is pleased to see the implementation of s 9A, especially the explicit inclusion of "contractor or trade work" (as per s 9A(1)(b)) defined in s 9A(5)(a)(ii) to include the "*Electrical Safety Act*".

### Clause 22: What is 'Project Trust'

MEA supports this amendment as it streamlines and integrates the language of s 11(a).

### Clause 23: Trustee and Beneficiary of Project Trust

The drafting of cl 23 has made s 11 more concise and understandable. We applaud the removal of "protected work" as it widens the scope of work secured under the SOP laws and removes any ambiguity of contracts intended to be protected.



### Clause 27: Contracts with Less than 90 Days Until Practical Completion

MEA supports the removal of s 15F through cl 27. Section 15F undermines the intent of the Act by displaying discriminatory tendencies based on the duration of a project and is redundant given that s 14 already establishes the threshold for project trust accounts. If anything, meeting the s 14 threshold for contract terms of 90 days or less would create the greatest burden on SMEs as it is a significant depletion of resources in a shorter time period. MEA strongly support the amendment proposed by cl 27.

### CI 32: Limited Purposes for Which Money May be Withdrawn from Project Trust Account

MEA does not support s 20A(1)(b) proposed amendment. We argue the drafting creates unnecessary confusion. The original phrasing better conveys the intention of this section.

### Clause 38: When Retention Trust Required:

Subsection (5) should be transferred to subsection (1). Transferring this to the top would make the remainder of the section easier to understand.

We submit that the drafting of cl 38 lacks conciseness thereby compromising clarity and understandability. To improve this, we propose re-drafting s 32(1)-1A and 32(6) as follows-

#### (1) Section 32(1)-

##### (1) In this section-

***withholding contract*** means-

##### (a) A project trust contract that is –

- (i) a head contract; or
  - (ii) a subcontract that is eligible for a project trust under section 14C or 14D;
- or

##### (b) a project trust subcontract for a project trust contract mentioned in paragraph.

#### (2) A retention trust is required for a retention amount withheld from payment under a contract if-

##### (a) The contract is a withholding contract at the time the retention amount is withheld; and

##### (b) the contract was not a withholding contract at the time the retention amount was withheld but the contract has since become a withholding contract; and

##### (c) the retention amount is withheld by the contracting party in the form of cash; and

##### (d) the retention amount had not been released to the parties entitled to it at the time the contract became a withholding contract.

### CI 44: Monthly Bank Reconciliation

MEA opposes this amendment and contends periodic bank reconciliations should remain a requirement, at least quarterly. While the amendment appears aimed at reducing regulatory burdens on head-contractors, we argue s 52A enacts a crucial 'checks and balances'



mechanism for ensuring the trust account is being utilised properly throughout the contract period, disincentivising risky behaviour.

We do note, however, the upcoming requirement for contractors to utilise compatible software. In the event such software essentially replaces the need for this section, then we could support the removal of s 52A. However, we would not encourage such omission until software is available to be used.

#### Cl 52: Amendment of s 14.

MEA supports cl 52, in particular –

- **Reducing threshold level to \$1 million:** The existing \$10 million threshold (and transitional threshold at \$3 million) excludes a significant number of sub-contractors from legislative protection. For many SMEs, \$1 million in failed and late payments is enough to liquidate them. MEA fully support the \$1 million threshold.
- **New s 14:** We support the original s 14 being completely replaced by cl 52. The significantly condensed section broadens the scope of the threshold, appropriately capturing any project (subject to cl 19) that is ‘more than 50% of the contract price ... for project trust work’ and has a contract cost of more than \$1 million.

We do, however, propose widening the scope of s 14 to protect SMEs involved in multiple projects under distinct sub-contracts for the same project, each falling below the \$1 million threshold but collectively reaching the specified threshold. MEA argues these sub-contractors face comparable risks and potential consequences when affected by delayed or missed payments and further provide a potential loophole for head-contractors.

#### Clause 53: s 218 When retention trust is required

We note that the cl 53 definition of *withholding contract* differs in breadth from that of cl 38.

<p>(3) Section 32(5)— <i>omit, insert—</i></p> <p>(5) In this section— <b><i>withholding contract</i></b> means—</p> <p>(a) a project trust contract that is—</p> <p style="padding-left: 20px;">(i) a head contract; or</p> <p style="padding-left: 20px;">(ii) a subcontract that is eligible for a project trust under section 14C or 14D; or</p> <p style="padding-left: 20px;">(b) a project trust subcontract for a project trust contract mentioned in paragraph (a).</p> <p>(4) Section 32(1A) to (5)— <i>renumber</i> as section 32(2) to (6).</p>	<p><b>Clause 53 Replacement of s 218 (Amendment of s 32 (When retention trust required))</b></p> <p>Section 218— <i>omit, insert—</i></p> <p><b>218 Amendment of s 32 (When retention trust required)</b></p> <p>Section 32(6), definition <i>withholding contract</i>— <i>omit, insert—</i></p> <p><b><i>withholding contract</i></b> means—</p> <p>(a) a project trust contract; or</p> <p>(b) a project trust subcontract; or</p> <p>(c) any other subcontract for subcontracting work that contributes to the performance of a project trust contract.</p>
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We propose cl 5 either replicate cl 38 or amend cl 53, line 26 as follows-

**“*Withholding contract* includes-“**



## Conclusion

MEA commends QLD Government's exemplary pro-active response to the security of payments issues endured by sub-contractors. The trust is proving to be an effective protection mechanism and we applaud the Government in its continued efforts to improve the scheme. It is essential on both a micro and macro-economic scale that sub-contractors are protected from the power imbalance of construction projects which often result in SMEs functioning as financiers for external projects, thereby jeopardising their business cash flow and going concern.

In summary –

MEA supports the following clauses:

- *Cl 19: "project trust sub-contract"* – explicitly includes protection of the electrical industry.
- *Cl 22: "what is a project trust"* – this has been made more understandable.
- *Cl 23: "trustee and beneficiary of project trust"* – this has been made more understandable.
- *Cl 27: "contracts with less than 90 days until practical completion"* – this has positively widened the scope of protection to include all sub-contractors (subject to cl 19 and cl 54), regardless of length of project.
- *Cl 54: "amendment of s 14"* – MEA supports the amendment. It is more concise and inclusive of a wider range of subcontractor projects to be protected by security of payment laws.

While MEA supports majority of the amendments, we raise concern with the following clauses:

- *Cl 32: "limited purposes for which money may be withdrawn from project trust account"* – we argue the amendment will create confusion. The existing wording in s 20A(1)(b) is clearer and should remain.
- *Cl 38: "when retention trust is required"* – We propose to move the definition (currently drafted as s 32(5)) to become the first sub-section. The excessive inclusion of repetitive subsections has reduced clarity and understanding. MEA has proposed a re-draft.
- *Cl 44: "monthly reconciliation"* – MEA does not support the removal of the bank reconciliation requirement as it removes a 'check and balance'. At most, we propose a change to quarterly reconciliations.
- *Cl 53: "s 218 when retention trust is required"* – Clause 53 definition of *withholding contract* differs in breadth from that of cl 38. We propose cl 53 either replicate cl 38 wording or change wording at line 26 to "withholding contract includes".
- *Cl 54: "amendment of s 14"* – MEA have proposed to implement an additional threshold to protect a sub-contractor who provides services under multiple sub-contracts for the same project, which cumulatively total \$1 million.

In general, MEA endorses the Bill but expresses reservations about certain clauses that we believe may impede progress in safeguarding subcontractors or introduce ambiguity compared to the original drafting.

MEA looks forward to the development of the Bill and are eager to be a part of any further discussion regarding its development.

