

Unfair trading practices protections for small businesses

NECA Submission

July 2026

Introduction

The National Electrical and Communications Association (**NECA**) welcomes the opportunity to respond to Treasury's consultation paper, *Unfair trading practices protections for small businesses*. This submission focuses on the consultation paper's business-to-business dealings stream and provides industry evidence of how unfair contract terms operate in supply chains to harm small business.

Treasury's consultation paper distinguishes between small business protections that operate in a consumer protection context and the broader question of unfair trading practices in business-to-business dealings. NECA's submission is concerned with the latter issue. From NECA's perspective, the relevant harm is not principally that small businesses are purchasing goods or services as consumers, but that subcontractors are required to accept unfair contract terms in commercial contracting chains where they have limited practical ability to negotiate. Electrical and communications contractors routinely trade with larger businesses in project delivery chains and are often required to accept subcontract terms through tender processes that materially affects price, liability, and payment.

NECA's concern is that unfair contract terms are a key mechanism through which unfair trading practices are imposed on small business subcontractors, in particular trade contractors. In practice, subcontract terms are commonly presented on a non-negotiable basis and operate to transfer risks subcontractors cannot control, restrict or deny legitimate entitlements, distort pricing, and expose small businesses to liabilities that cannot be reasonably priced.

In practice, a head contractor may receive clear upstream entitlements to extensions of time, variations, delay costs or other relief for events outside its control, while the affected subcontractor is prevented by the downstream subcontract from claiming equivalent time or cost relief for the same event. This creates a structural imbalance in the contracting chain and allows commercial risk to be displaced onto parties least able to manage it.

The consultation paper for this review seeks updated information to inform potential legislative changes to protect small businesses in business-to-business dealings. NECA submits that unfair contract terms should be a key focus of that work. NECA acknowledges the work undertaken by Government to date, but remains concerned about the practical effect embedded unfair terms have on risk allocation, payment, delay, variation, set-off, indemnity, design risk, security, defects liability and pass-through obligations. The risk and cost of these provisions disproportionately carried by subcontractors.

This impact does not arise only from isolated instances of poor conduct; rather, because unfair contract terms establish the commercial architecture for unfair dealing.

NECA supports Treasury considering protections that expressly recognise unfair contract terms as a key driver of small business harm in business-to-business markets.

This submission therefore recommends that Treasury use construction subcontracting as a priority business-to-business case study for unfair trading practices protections. The objective is not to prevent legitimate risk allocation or commercial negotiation, but to ensure

that standard form contract terms do not create significant imbalance, obscure material information, impose risks that cannot be managed by small businesses, or allow larger contracting parties to secure commercial outcomes through payment, time and liability pressure.

Executive Summary

This submission responds to Treasury's consultation paper, *Unfair trading practices protections for small businesses*, by providing evidence relevant to the business-to-business dealings stream. NECA recommends that Treasury treat unfair contract terms as a key impediment to fair trading in construction supply chains, because they provide the contractual mechanism through which risk, liability and payment pressure are shifted onto small business subcontractors.

From NECA's perspective, the unfair practices identified in this submission are not merely the result of poor conduct after contract award. They are enabled by subcontract terms that allocate risk unfairly from the outset and give larger contracting parties leverage over payment, time, variations, set-off, liability, release of security, defects liability, design responsibility and information disclosure. NECA submits that the following terms and practices should be recognised as unfair trading practices, or otherwise addressed through targeted legislative, regulatory or procurement protections:

1. Unfair contract terms should be treated as a core form of unfair trading practice where they create a significant imbalance between head contractors and small business subcontractors, particularly where they require subcontractors to accept risks they cannot control, price or manage.
2. Standard form subcontract terms should not be used to displace project management, coordination, programming, latent condition, design or documentation risks onto subcontractors where those risks are controlled by the principal, head contractor or their consultants.
3. Terms that deny or restrict legitimate variation, delay, disruption, extension of time or cost claims should be treated as unfair where the relevant event is outside the subcontractor's control or where the head contractor is entitled to equivalent relief under the head contract.
4. Broad set-off and deduction clauses should be limited to legitimate, substantiated and due claims; subcontractors should not be exposed to deductions based on speculative, estimated, future or unparticularised claims.
5. Unreasonably short or strict time bars should be treated as unfair where they extinguish genuine claims before they can reasonably be identified, assessed or particularised.
6. Pass-through clauses should not bind subcontractors to undisclosed, confidential or unidentified head contract obligations, and subcontractor entitlements should not depend solely on whether the head contractor chooses to claim, or succeeds in claiming corresponding relief upstream.
7. Unlimited indemnities, uncapped liquidated damages, extended defects liability periods and liability for consequential loss should be prohibited or confined to losses directly caused by the subcontractor and capped at a reasonable level.

8. Security of payment should be recognised as an important consequence of these unfair terms, particularly where payment, retention, security release, certification or interest entitlements are delayed, reduced or denied through contractual mechanisms that create a significant imbalance.

NECA submits that Treasury should give strong consideration to the recommendations set out below, which were previously provided in NECA's submissions to recent reviews concerning unfair contract terms. Any potential changes to the current legislative framework should address the underlying issue that unfair contract terms remain a key mechanism through which unfair trading practices are imposed on small business subcontractors.

Annexure A

| Standard risk allocation (AS4901) | Typical risk allocation in industry | Risks identified / reasons unfair | Potential proposal to Government |
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| <p>The Principal shall ensure that the Superintendent fulfils all aspects of the role and functions <u>reasonably and in good faith.</u></p> <p>This positive obligation is highly relevant when approving variations, EOTs and issuing practical completion certificate etc.</p> <p>They cannot unreasonably deny subcontractor claims.</p> <p>(Clause 20)</p> | <p>Head Contracts often don't include an obligation that the Head Contractor or the Superintendent acts reasonably, fairly, honestly and in good faith.</p> | <p>Without such an obligation, the Head Contractor can act unfairly or dishonestly without breaching the contract, despite often working for government clients who are bound by model litigant obligations and broader public expectations of integrity.</p> <p>For example, a Head Contractor may refuse to issue a practical completion certificate due to minor or non-critical defects, thereby delaying final payment and release of security, despite the works substantially being otherwise complete.</p> | <p>There must be a positive obligation that the Subcontract Superintendent (and Head Contractor where relevant) act reasonably and in good faith when assessing variations, extensions of time, set-off, deductions and completion, as this will improve productivity, promote better contracting culture and reduce insolvency risk across the construction supply chain.</p> |
| <p>The coordination responsibility remains with the Head Contractor and protects subcontractors where delays are caused by others.</p> <p>It defines “qualifying causes of delay” and “compensable causes” broadly to include acts, defaults, or omissions of the Principal, Superintendent, Head Contractor, or other contractors.</p> <p>Subcontractors are entitled to an EOT when such delays occur, and to delay damages when the cause is compensable.</p> <p>(Clause 34)</p> | <p>Head Contracts often require that:</p> <ul style="list-style-type: none"> - Subcontractor must coordinate all work with Head Contractor, Principal, Client, and other subcontractors. - Subcontractor must accept delays, disruptions, or re-work caused by others without compensation; and waive any right to claim costs/time due to coordination issues. | <p>Requiring subcontractors to bear the full risk of coordination failures, including those caused by the Head Contractor, Principal, Superintendent or other subcontractors, and denying any entitlement to extensions of time or compensation for such disruptions, improperly shifts the Head Contractor’s project management responsibility onto the supply chain, despite the Head Contractor being engaged and paid to manage those risks.</p> | <p>The Head Contractor must retain responsibility for site management and coordination, as this is the basis on which it is selected and paid by the Principal;</p> <p>Subcontractors should not bear coordination risks they cannot control and must be entitled to time and cost relief where they are impacted by acts or omissions of others in the supply chain.</p> |

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| <p>Clause 25 – Latent Conditions: If the Subcontractor encounters a latent condition differing materially from what should reasonably have been anticipated, the effect is treated as a <u>deemed variation</u>, entitling the Subcontractor to time/cost adjustments.</p> <p>Clause 34 – Time and Progress: Subcontractor is entitled to an Extension of Time (EOT) if delayed by a qualifying cause of delay (e.g., acts or omissions of the Principal, Superintendent, Head Contractor, or their agents). Notice must be given within 21 days. The Subcontractor is also entitled to delay damages for compensable causes.</p> <p>Clause 33 – Suspension: Subcontract Superintendent may direct suspension for reasons such as acts/omissions of the Head Contractor, Principal, or Superintendent, or for safety. If suspension is not caused by the Subcontractor, cost/time impacts are compensable.</p> <p>Clause 11 – Legislative Requirements: If changes in law or statutory requirements cause additional cost, the difference is assessed and added to or deducted from the subcontract sum.</p> | <p>Head Contracts impose obligations that</p> <ul style="list-style-type: none"> - Subcontractors are required to accept that the subcontract price covers all disruptions and delays, allowances, latent site conditions and are prevented from claiming additional time or cost even if the disruption arises from the Head Contractor or circumstances beyond their control. - Subcontractors are not entitled to recover any additional payment for any loss, expense or damage for any disruption to the Subcontractor's execution of the work under the Subcontract including prolongation, delay, acceleration, lack of continuity, overtime, lack of co-ordination, overcrowding, industrial disruption or lack of access, whether or not they were attributable to HEAD CONTRACTOR. - The Subcontractor is responsible for, accepts the risk of, and must carry out all work required to deal with and overcome the effects of, all Site Conditions without any recourse provisions for time/cost. | <p>This approach forces subcontractors to absorb risks they cannot reasonably manage, including latent conditions, restricted access, coordination failures and industrial issues, resulting in unrecoverable costs such as standing down labour while continuing to incur wages and overheads.</p> <p>These risks are compounded by the limited opportunity subcontractors typically have to inspect site conditions or review extensive tender documentation within compressed timeframes, compared to head contractors who generally have greater resources, specialist teams and significantly longer tender periods.</p> <p>The effect is that systemic project risks are transferred to parties least able to manage or price them, while head contractors and principals preserve their own entitlements under the head contract. This creates a significant imbalance in risk allocation and undermines fair and efficient project delivery.</p> | <p>Subcontractors should have fair entitlement to time and cost relief where delays or disruptions arise from factors outside their control, including:</p> <ol style="list-style-type: none"> 1. Acts or breaches by the Head Contractor 2. Industrial relations issues not caused by the Subcontractor 3. Latent conditions where the Subcontractor had no reasonable opportunity to inspect the site conditions 4. Contamination where the Subcontractor had no reasonable opportunity to inspect or not reasonable for the contamination 5. Changes in law, codes or standards 6. Suspensions not caused by the Subcontractor 7. Circumstances where the Head Contractor is entitled to relief under the Main Contract <p>This entitlement framework should commence with the Head Contractor being afforded appropriate qualifying causes of delay under the head contract and passing those entitlements through to subcontractors.</p> <p>Failure to do so enables systemic project risks to be deliberately underpriced upstream and displaced onto the supply chain, undermining</p> |

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| <p>Clause 14.3 – Excepted Risks: Loss or damage caused by negligent acts/omissions of the Head Contractor, Superintendent, or Principal are at the risk of the Main Contractor, not the Subcontractor.</p> | | | <p>fair pricing, productivity and financial sustainability.</p> <p>Subcontractors should not be required to absorb risks that head contractors have chosen not to price or programme, particularly on government projects where price-driven procurement already incentivises risk transfer.</p> |
| <p>The Subcontractor is responsible for the care of the subcontract works (WUS) until practical completion. However, AS4901 provides an excepted risk regime: if loss or damage occurs due to excepted risks, the Subcontractor is not liable and the effect is treated as a deemed variation. (Clause 14 – Care of the Work and Reinstatement of Damage)</p> <p>Excepted risks include negligent acts or omissions of the Head Contractor, Superintendent, or Principal (and their consultants, agents or contractors), war, civil commotion, radioactive contamination, use or occupation by the Principal or Head Contractor, and defects in the design (other than subcontractor design). (Clause 14.3 – Excepted Risks)</p> | <p>Head Contracts often require that:</p> <ul style="list-style-type: none"> - Any loss or damage caused by others to the subcontract works during the period the subcontractor is responsible for their care must be rectified by the subcontractor at its own cost. - No excepted risk regime is provided, meaning the subcontractor remains liable even where loss or damage is caused by others. | <p>This places subcontractors at risk for damage to completed or partially completed works that they cannot practically control (e.g., finishing trades damaging earlier work done by the subcontractor).</p> <p>In practice, if Subcontractor A damages Subcontractor B’s work, Subcontractor B may not be able to recover its costs from the Head Contractor, even though the Head Contractor may have recourse against Subcontractor A.</p> | <p>Subcontracts should include a clear contractual mechanism that allows subcontractors to recover time and cost where loss or damage to the subcontract works is caused by the Head Contractor, the Principal or other subcontractors even during the period the subcontractor is responsible for the care of the subcontract works.</p> |
| <p>If a party fails to pay moneys due and payable under the subcontract, that party shall be liable to pay interest compounded at the rate stated in the Annexure, or if not</p> | <p>Head Contracts don’t provide any right to the interest in delay or non-payment.</p> | | <p>The Subcontractor should be entitled to interest on late payments.</p> |

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| stated, at 18% per annum. (Clause 37.5 – Payment) | | | |
| <p>It allows the parties to negotiate DLP. If a specific subcontract DLP is agreed and stated in Item 30, that period will apply.</p> <p>If nothing is stated, the default is that the subcontract DLP expires on the date of expiry of the last defects liability period under the main contract. (Clause 35)</p> <p>This provides flexibility by leaving the period open to bargaining and negotiation between the parties, rather than automatically imposing the head contract period.</p> | <p>Head Contracts require that:</p> <ul style="list-style-type: none"> - The subcontractor’s defects liability period is tied to the head contractor’s obligations under the main contract, rather than being limited to the subcontractor’s own works. | <p>By tying the subcontractor’s defects liability period to the project or main contract rather than its own works, subcontractors are exposed to extended warranty obligations at no cost.</p> <p>If the project is delayed by the Head Contractor or Principal, the subcontractor must provide a longer DLP without compensation. This effectively transfers the cost of project delays to subcontractors.</p> | <p>The defects liability period under a subcontract should be linked to completion of the subcontract works, not the main contract.</p> <p>Subcontractors should not be required to provide extended warranties when the project is delayed by the Head Contractor or Principal.</p> |
| <p>AS4901 does not give the head contractor an unfettered right to set off speculative claims. Deductions from payment must be supported by the contract (e.g., adjustment of variations, assessed damages, or proven costs due).</p> | <p>Head Contracts state that:</p> <ul style="list-style-type: none"> - The Head Contractor may set off or deduct from payments any amounts it asserts may become due from the subcontractor (even if only estimated or future amounts) or | <p>This allows the Head Contractor to withhold payments from subcontractors based on unproven, estimated, or speculative claims, even where no contractual liability exists.</p> <p>The reliance on the Head Contractor’s subjective “bona fide opinion” creates scope for manipulation and unfairness, leaving subcontractors with limited recourse.</p> | <p>Set-off and deduction rights under subcontracts should be limited to legitimate, substantiated claims that can be properly particularised and supported by contractual entitlement.</p> <p>Subcontractors should not be subject to deductions based on estimated, speculative or future claims, as such regimes undermine cash flow, defeat legitimate payment claims and increase insolvency risk within the construction supply chain.</p> |
| <p>AS4901 does not require the subcontractor to warrant the accuracy, completeness, or suitability of preliminary designs,</p> | <p>Head Contracts require:</p> <ul style="list-style-type: none"> - Subcontractors to warrant that preliminary designs, drawings, | <p>This shifts design and documentation risks from the Head Contractor onto subcontractors, even though subcontractors are not given the</p> | <p>Subcontractors should be entitled to rely on designs, drawings and specifications provided by the Head Contractor or Principal where they</p> |

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| <p>drawings, or specifications prepared by the Head Contractor or Principal.</p> <p>Where there are discrepancies, the Subcontract Superintendent is to direct the resolution, and the subcontractor is entitled to claim any adjustment in time or cost as a variation. (Clause 8.1 – Discrepancies; Clause 36 – Variations)</p> | <p>and specifications provided by the Head Contractor are suitable, free of errors, and will produce works that are fit for purpose.</p> <ul style="list-style-type: none"> - Subcontractors to accept that the Head Contractor has no liability for their accuracy or completeness. | <p>same time, resources, or information to conduct due diligence.</p> <p>This forces subcontractors to accept risks they cannot reasonably manage and creates exposure for defects or inconsistencies in designs and information provided by others.</p> | <p>have not been given a reasonable opportunity to verify them.</p> <p>Responsibility for errors, ambiguities or inadequacies in those documents should remain with the party that prepares and controls the design, and any increase or decrease in time or cost arising from discrepancies should be treated as a variation to the subcontract.</p> |
| <p>If after award, the Head Contractor issues a revised drawing requiring additional reinforcement or extra fittings, the subcontractor can claim both cost and time relief as a variation under Clauses 8.2 and 36.</p> | <p>Head Contracts don't provide any compensation for design change.</p> <ul style="list-style-type: none"> - The subcontractor is not entitled to a variation or give rise to any claim when there are design changes from the original design and the detailed design issued after contract award. - The subcontractor also bears the risk of ambiguities, errors, or buildability problems in the subcontract documents and must rectify them at its own cost, without entitlement to time or cost relief. | <p>This exposes subcontractors to additional scope and design changes without compensation.</p> <p>For example, if the Head Contractor's consultant revises the design to include extra fittings, the subcontractor must install them at its own cost.</p> <p>In construct-only engagements, subcontractors price exactly what is shown; forcing them to absorb ambiguities or incomplete design shifts responsibility for design management onto them, even though they have not been engaged to undertake that risk.</p> | <p>Where a subcontract is let on a construct-only basis, subcontractors should be entitled to time and cost relief for design changes, ambiguities or errors in documentation issued after contract award.</p> <p>Responsibility for design risk should remain with the party that prepares and controls the design (the Head Contractor and its consultants), and post-award design changes should give rise to variations under the subcontract rather than being absorbed by subcontractors without compensation.</p> |

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| <p>If the Subcontractor fails to reach practical completion by the Date for Practical Completion, the Subcontractor shall pay the Contractor liquidated damages at the rate stated in Item 27(a) of the Annexure. (Clause 34.7 – Time and Progress)</p> <p>Item 27(b) and subclause 34.7A provide an optional mechanism for linking subcontract LDs to the main contract LD rate (only if the parties choose to do so).</p> <p>This leaves the subcontract LDs open to bargaining and negotiation between the parties, rather than automatically imposing main contract LDs on subcontractors.</p> | <p>Head Contracts state that:</p> <ul style="list-style-type: none"> - The subcontractor is required to pay liquidated damages if it fails to achieve completion by the due date, but this does not limit the Head Contractor's right to claim additional unliquidated damages. - The subcontractor must also indemnify the Head Contractor for losses or claims brought by the Principal or other contractors arising from delays, meaning liability goes beyond the agreed LD regime. | <p>The Head Contractors often impose harsher obligations on subcontractors than those faced by the Head Contractor under the main contract.</p> <p>LDs are not capped, are not the Head Contractor's sole remedy, and are often set at higher rates than those applicable under the head contract.</p> <p>This allows LDs to be used as a penalty rather than a fair pre-estimate of loss and gives Head Contractors leverage to offset subcontractors' legitimate claims.</p> | <p>Liquidated damages under subcontracts should be proportionate to the value and scope of the relevant subcontract and should not exceed the rates applicable under the head contract.</p> <p>Where liquidated damages are the Principal's sole remedy under the head contract, they should also operate as the sole remedy under the subcontract.</p> <p>Subcontractors should not be exposed to additional or uncapped delay liabilities beyond the agreed liquidated damages regime.</p> |
| <p>There is no strict time bar for notice of EOT.</p> <p>The Subcontractor's entitlement is not conditional on the Head Contractor obtaining an extension under the Main Contract.</p> <p>If the delay is caused by a compensable cause (e.g., Principal's breach, failure to provide access, or Superintendent delay), the Subcontractor is also entitled to recover delay damages in addition to an EOT.</p> | <p>Head Contracts provide limited entitlement for EOT.</p> <ul style="list-style-type: none"> - Subcontractor must notify Head Contractor of any possible delay within 48 hours of becoming aware, and then submit a detailed claim within 48 hours of the delay ceasing. - Entitlement is conditional on Head Contractor receiving a corresponding EOT under the Head Contract. - EOT is a sole remedy and there is no entitlement to delay | <p>Creates an unreasonable time bar.</p> <p>by tying the Subcontractor's entitlement to whether the Head Contractor secures an EOT under the Head Contract, the Subcontractor may be unfairly denied extensions.</p> <p>The absence of delay damages means the Subcontractor bears the cost of delays outside its control (e.g., Principal's breach, access failures, Head Contractor's omissions).</p> | <p>Subcontracts should not impose unreasonably short or strict time bars (such as 48-hour notice requirements) that extinguish genuine extension of time claims; notice periods should be reasonable and proportionate to the nature of construction projects (e.g. no less than 7 days).</p> <p>Subcontractors should have an entitlement to both time and cost relief where delays are caused by the Principal, Head Contractor, or other external factors.</p> |

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| | damages, even if the delay is caused by the Head Contractor or Principal. | | Subcontractor's entitlements should not be subject to whether the Head Contractor recovers EOT under the Main Contract. |
| There is no clause in AS4901 that forces the subcontractor to automatically accept the head contractor's obligations under the main contract. | <p>Head Contracts impose obligations:</p> <ul style="list-style-type: none"> - To shift Main Contractor's obligations to Subcontractors without disclosing them in the subcontract. - Subcontractors must comply with Main Contract obligations, but Head Contractor can withhold disclosure of key terms it deems confidential. | <p>Subcontractor is forced to accept obligations under a head contract it cannot fully review.</p> <p>Key information (e.g., contract sum, completion requirements, benefits to Head Contractor) may be withheld.</p> <p>Subcontractor's entitlements are limited to what the Head Contractor can recover under the Main Contract.</p> | <p>Any obligations intended to be passed down from the head contract to subcontractors must be expressly identified and fully detailed in the signed subcontract (for example, in a dedicated appendix).</p> <p>Subcontractors should not be bound by undisclosed, confidential or unidentified head contract terms, and no head contract obligation should be enforceable against a subcontractor unless it is expressly incorporated into the subcontract.</p> |
| <p>The Subcontractor must indemnify the Contractor for property damage and personal injury arising out of the work, but AS4901 limits this by excluding liability for excepted risks (Clause 14.3) and by requiring proportionate liability so that the indemnity is reduced where loss or damage is caused by the Principal, Contractor, Superintendent, or others (Clause 15.1).</p> <p>AS4901 does not extend indemnities to consequential loss (such as loss of profits or financing costs). The subcontractor's indemnity is limited to direct loss or damage within its control.</p> | Head Contracts require the subcontractors to provide unlimited indemnities, often including liability for indirect or consequential loss. | <p>Subcontractors are exposed to open-ended liability that may far exceed the subcontract value and their insurance cover.</p> <p>Consequential loss can include loss of profits, financing costs, and third-party claims of which risks subcontractors cannot control or price.</p> | <p>Unlimited indemnity obligations should be prohibited in subcontracts, particularly where they extend to consequential loss.</p> <p>Indemnities should be limited to losses arising directly from the subcontractor's negligence or breach, and capped at a reasonable amount (e.g., the subcontract sum or the value of insurance cover).</p> |

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| AS4901 does not permit the Contractor or Principal to sign novation documents on behalf of the Subcontractor without its agreement. | Head Contracts allow the Head Contractor or Principal to sign documents (such as novation deeds) on behalf of the Subcontractor, even where the Subcontractor does not consent. | It may result in subcontractors being forced into contracts with third parties (e.g., through novation) that they never agreed to. | Any novation or transfer of obligations should require the subcontractor's agreement and signature. |

To arrange a meeting or discuss this submission further, please contact:

Scott Faragher

Government Relations Manager

NECA National

E scott.faragher@neca.asn.au **W** www.neca.asn.au