

Overview of the Building Industry Fairness (Security of Payment) Act 2017

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Introduction

- **Scheme of the Act**
- **Requirements of Valid Payment Claim**
- **Requirements of Valid Payment Schedule**
- **Adjudication**
- **Penalties**
- **Tips for a seamless transition to BIF**

Building Industry Fairness (Security of Payment) Act

The Building Industry Fairness (Security of Payment) Act 2017 (“BIF”) – Security of Payment provisions:

The BIF was enacted in 2017 by the QLD Government in an attempt to overhaul and simplify the security of payment legislation in QLD.

The new Act consolidates legislation for Project Bank Accounts, the previous Building and Construction Industry Payments Act 2004 and Subcontractors’ Charges Act 1974 into one Act. This presentation provides an overview of Chapter 3 – Progress Payments and the Adjudication process.



Purpose of the Act

Statutory Right

Process

Fast Track

Contractual Rights

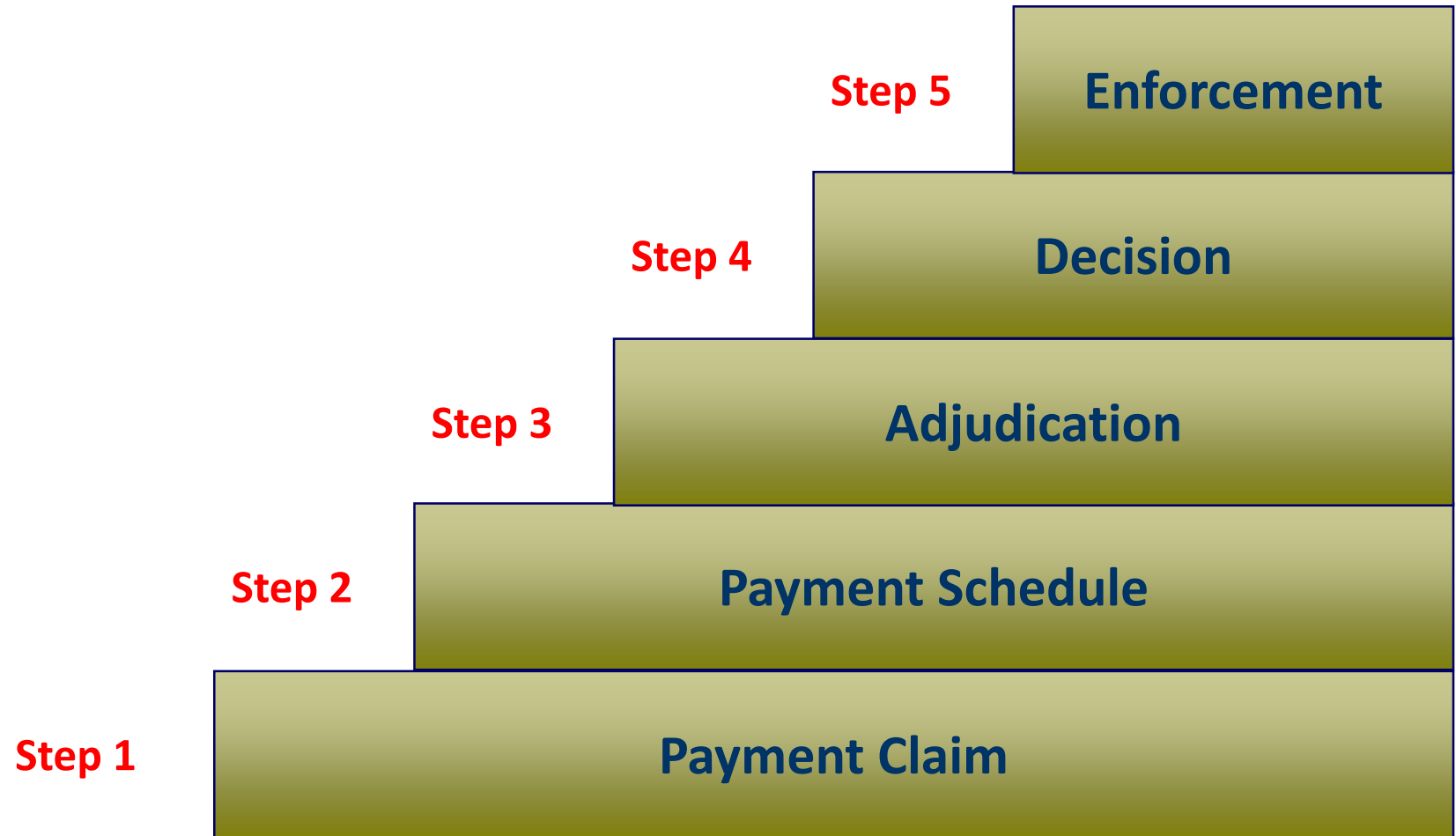
Process

Fight is preserved

What Act is NOT in practice

- **Not about guaranteeing payment**
- **Not always inexpensive**
- **Not always easy to apply**
- **Not always give the fair or right result**

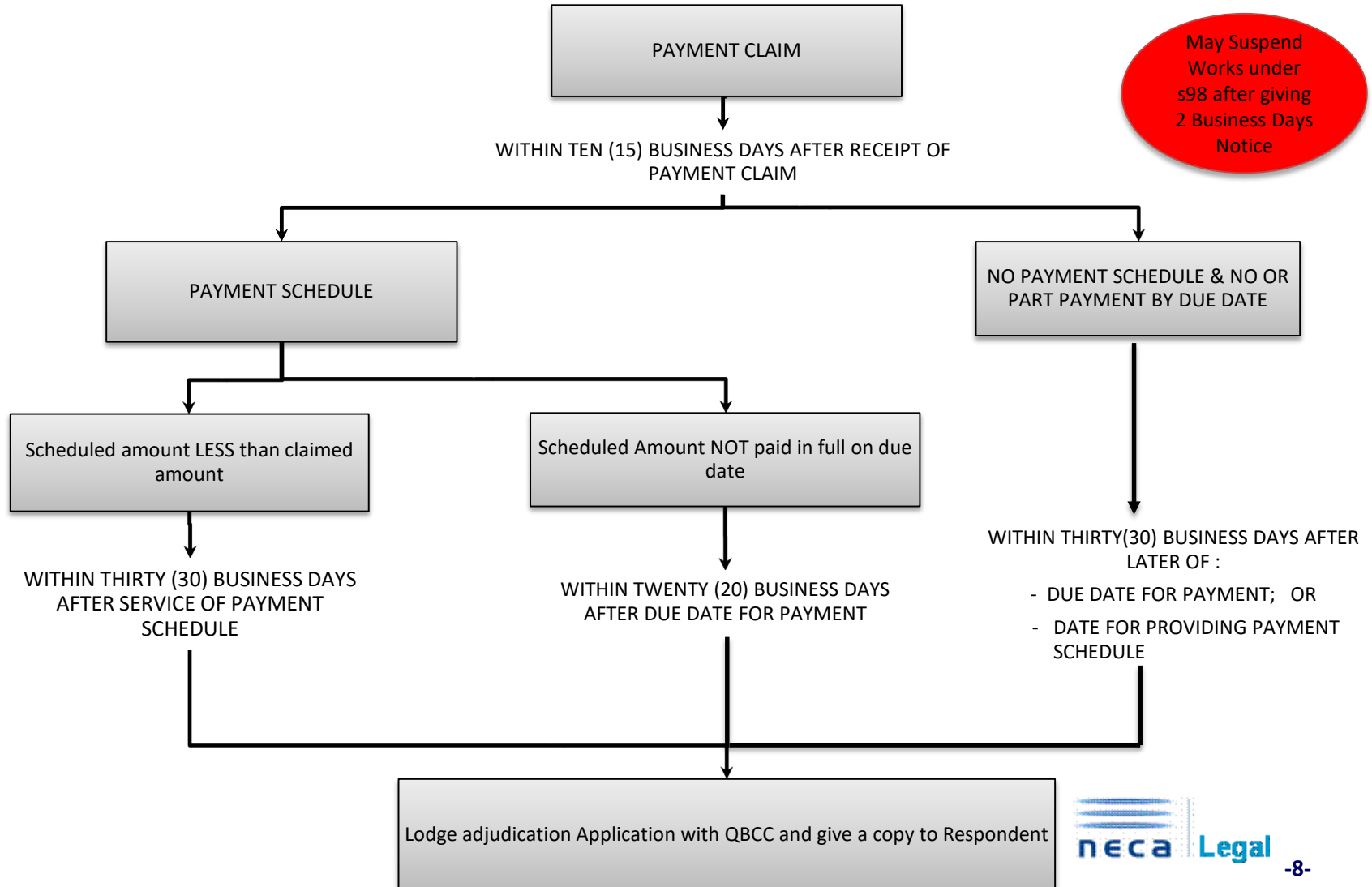
Understanding Adjudication



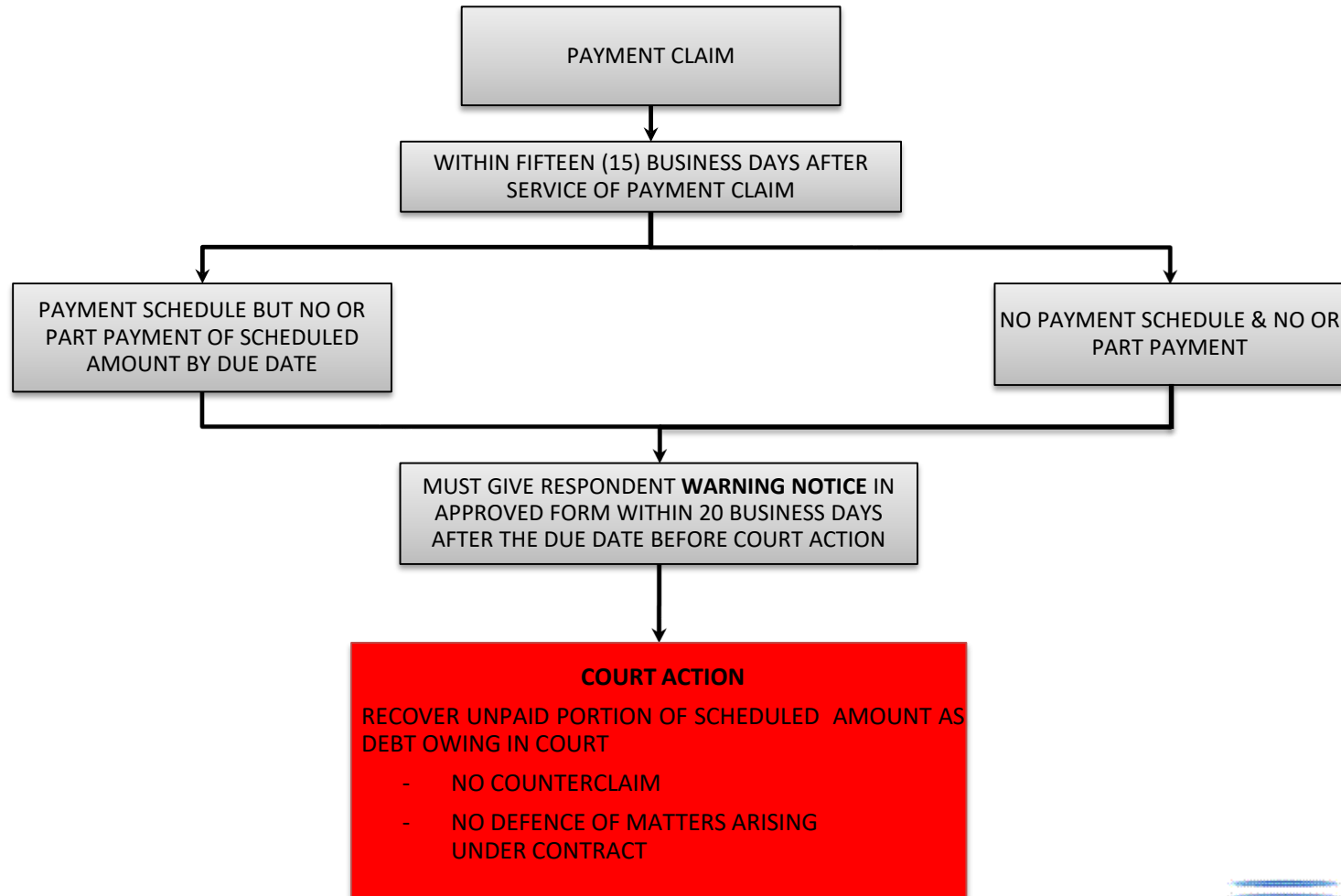
Before you start – Essential Terms

- Construction contract - exceptions (sections 61 & 64 of the Act);
- Construction work (section 65 of the Act);
- Related goods and Services (section 66 of the Act);
- Entitlement to progress payment (section 70 of the Act);
- Meaning of reference date (section 67 of the Act)
New Statutory reference date if construction contract terminated;
- No payment schedule and no payment on due date for payment (section 77 of the Act);
- Pay when paid provisions (section 74 of the Act);
- Payment schedule with scheduled amount but no payment (section 78 of the Act).

Adjudication under the Act



Recovery through Courts



Requirements for valid Payment Claims

- Written document identify the construction work or related goods to which the progress claim relates (s 68(1))
- States the amount of progress claim
- Request payment of claimed amount;
- Must be given no later than 6 months after works completed or related goods and services supplied (s 75);
- Final Claim – given before end of the longest of period worked out under contract or 28 days after end of defects liability period or 6 months after all construction work to be carried out under the construction contract
- No more than 1 claim in relation to each reference date

Removal of Endorsement

- It was always a mandatory requirement under old Act that all payment claims must state that it is made under the Act – the magic words:

“ This is a payment claim pursuant to the Building and Construction Industry Payments Act 2004”

- ENDORSEMENT IS NO LONGER A REQUIREMENT FOR A VALID PAYMENT CLAIM
- Benefits – every invoice is now a payment claim under the BIF Act;
- Downside – cannot opt out, may burn reference dates unintentional
- **Watch out for emails that claim payment!**

Requirements for valid Payment Schedules

s 69 - Written document that:

- Identify payment claim to which it responds;
- States the amount of the payment (if any) it proposes to make
- If amount is less than claim, state why the amount is less, including reasons for withholding payment;
- Must be served on claimant within earlier of :
 - Period, if any, within which must give payment schedule under the contract; or,
 - 15 business days after payment claim is received
- **Watch out for old contracts – 10 business days may apply!**

Adjudication Applications

Important to identify the relevant time limit:

- **Payment Schedule and payment (if any) by due date - 30 business days after receipt of Payment Schedule; or**
- **Payment Schedule – No or part payment only by Due Date then you have 20 business days after Due Date**
- **No Payment Schedule – 30 business days after the later of the Due Date or date for providing Payment Schedule**
- **Remember you only have one opportunity to apply for Adjudication of a claim – raise all available arguments**

Adjudication Response

Standard Payment Claim up to value of \$750,000 – later of:

- **10 business days after receiving copy of application OR**
- **7 business days after receiving notice of acceptance of nomination by adjudicator**

Complex Payment Claims over \$750,000 – later of :

- **15 business days after receiving copy of application OR**
- **12 business days after receiving notice of acceptance of nomination by adjudicator**

Respondents of Complex Claims may request additional time up to a further 15 business days (see s 83(4))

Adjudication Response

- **Adjudication Response is limited to reasons included in Payment Schedule**
- **S 82(5) Adjudicator may require respondent to resubmit the adjudication response without the new reasons**
- **No Payment Schedule = No Adjudication Response**
- **Adjudicator has 10 business days to decide the application after receipt of the Adjudication Response**

Payment



- **Payment is due within 5 business days of date when a copy of decision is given to the Respondent by the Adjudicator**
- **Adjudication Registrar (QBCC) must give claimant an adjudication being given a copy of the decision**
- **If no payment received – proceed to file certificate as judgment in Court**

Cap on Adjudicators Fees Claims up to \$25,000

Amount of Claim	Max Adjudication Fee
Up to \$5000	\$600.00
\$5,001 - \$15,000.	\$930.00
\$15,001 - \$20,000	\$1,860.00
\$20,001 - \$25,000	\$2,070.00

Offence	Maximum Penalty
Failure to provide Payment Schedule (only if claimed amount is not paid by due date)*	\$13,055
Failure of Adjudicator to provide copy of decision to Registrar	\$5,222
Failure to pay Adjudicated* Amount by due date	\$26,110

* Also grounds for taking disciplinary action under the *Queensland Building and Construction Commission Act 1991*

- Remember from 17 December 2018 every progress claim is now made under the Act
- Accurate calculation of Due Dates can be important
- Watch out for old contract terms with provisions requiring payment schedules within 10 business days
- Remember over Christmas holiday the following ARE NOT business days under the Act:
 - 22 December to 10 January

Conclusion



- **Act can work well**
- **Handle with care**
- **Get your administration right**
- **Watch the time frames**

Further NECA Legal Services

- Building Defects and Home Warranty Insurance Claims
- Commercial and Contractual Advice
- Debt Collection
- Representation
- Security of Payment Advice (SOPA)
- Training
- Workplace Health and Safety
- Workplace Relations



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