



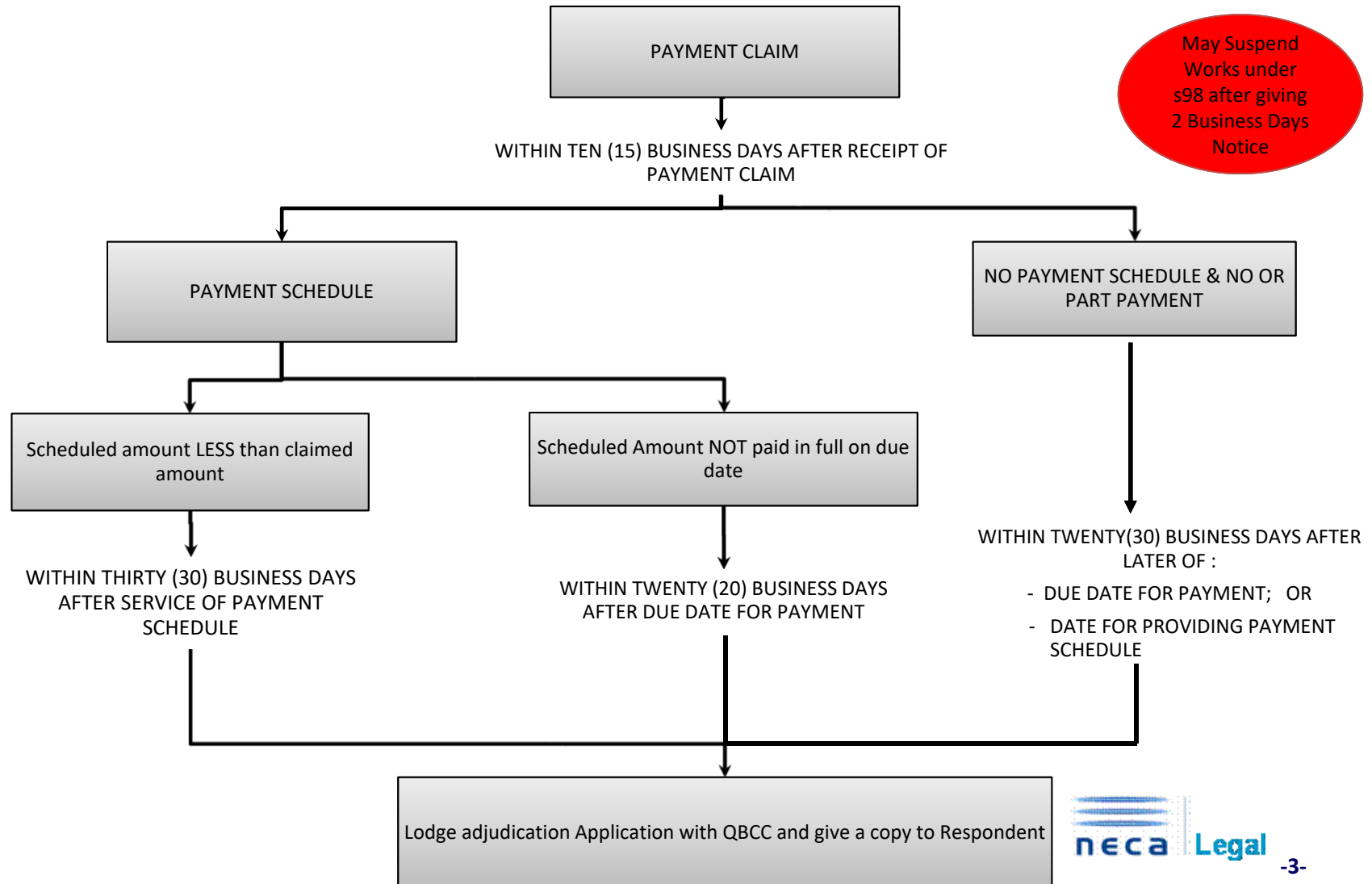
Payment Claims under the Building Industry Fairness (Security of Payment) Act 2017

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Introduction

- **Overview of Scheme of the Act**
- **4 Essential elements of a valid Payment Claim**
 1. **Construction contract/arrangement**
 2. **Identifying the construction work**
 3. **Reference date**
 4. **Service of the Payment Claim**

Adjudication under the Act



Making a Payment Claim s 75

- **Payment Claim may be given to a person liable to make payment under the relevant construction contract (s 75)**
- **Construction Contract (s 61) – written, oral or both**
- **Construction Contract (s 64)**
 -contract, agreement or other arrangement under which 1 party undertakes to carry out construction work for, or to supply related goods and services to, another party.*
- **Construction work must be carried out in QLD**

Who are you contracting with?

Starting point is to identify:

- **Correct name of company/person/trust**
- **ABN (use ABN Lookup - <https://abr.business.gov.au/>)**
- **Address**
- **Facsimile**
- **Email**

Form Requirements s68

Payment claim is a written document that:

- Identifies the construction work or related goods to which the progress claim relates (s 68(1)(a));
- States the amount of progress payment claimed (s 68(1)(b));
- Requests payment of claimed amount(s 68(1)(c))
- Claimed amount may also include any amount held under the construction contract that is due for release
- Written document bearing the word “invoice” satisfies s 68(1)(c)

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

Reference Dates

Why are reference dates so important?

- Statutory entitlement to progress payments for construction work performed arise only from each reference date under a construction contract.

S 70 Right to Payment Claim

From each reference date under a construction contract, a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract.

- Only one payment claim per reference date (s 75(4))

Identifying the correct Reference Date s 67

1. **Date stated in or worked out under the contract as the date for making progress claims.**
2. **If no provision in contract, then last day of the month.**
3. **If a contract is terminated, the final reference date is the date that the contract is terminated.**

Example : Oral Contract

June 2019




Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
26	27	28	29	30	31	1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	1	2	3	4	5	6

- Oral Contract on 1 June 2019
- Work commence on 3 June
- Work completed on 21 June
- Invoice given on 24 June
- Invoice re-issued on 30 June
- Invoice again re-issued on 4 July 2019

Which Invoice is the valid Payment Claim?

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-  Invoices given on any date before reference date are invalid
-  Invoice given on reference date is valid payment claim
-  A second invoice issued in the same month is also invalid

Time Limits for giving payment claims

- 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;
- Remember also claimants can only make 1 payment claim for each reference date.

Service of Payment Claims

- **Service pursuant to contract terms (S 102);**
 - Beware of deeming provisions
- **Acts Interpretation Act 1954**
 - Mail
 - In person
 - Facsimile
 - Individual - last known address of the place of residence or business of the person
 - Company - head office, registered office or a principal office
- **Section 109X of the Corporations Act 2001**
 - Sending by mail or leaving at company's registered office during business hours

What happens if no Payment Schedule is given ?

When is the Payment Schedule due ?

- Shorter of time provided in contract or **15 Business Days** after service of payment claim (S 76);
- Many contracts still provide for payment schedules within 10 Business Days.

Consequence of failure to provide Payment Schedule

- Respondent is liable to pay amount claimed on due date;
- Due date is the date worked out under contract or if no date under the contract then **10 Business Days** after service of payment claim.

What happens if no payment is received ?

No Payment Schedule and No or Part Payment by Due Date

- Claimant may apply for Adjudication within **30 Business Days** after due date or last day for providing Payment Schedule (S 79); or,
- Apply for judgment of unpaid amount, subject to first giving a warning notice within **20 Business Days** after due date under s 99(2);
- May also suspend work until receipt of payment by giving **2 Business Days** prior written notice of suspension pursuant to s 98.

Judgment and Warning Notice

Warning Notice must be in prescribed form

- **Download prescribed form from QBCC Website**

http://www.qbcc.qld.gov.au/sites/default/files/BIF_s99_Notice_of_Intention.pdf

Form s99 Warning Notice – Notice of Intention to Start Legal Proceedings

- **Can only apply upon expiry of 5 business days after giving warning notice;**
- **Claimants may still decide to rather proceed to Adjudication after issuing a warning notice;**
- **In any application for Judgment, the Respondent may not bring a counterclaim or raise any defence in relation to the merits of the claim**

PURPOSE OF THIS FORM

Section 99 of the *Building Industry Fairness (Security of Payment) Act 2017* (the Act) requires this notice to be given by the claimant to the respondent advising of their intention to start legal proceedings to recover the unpaid portion of the amount owed. This warning notice only applies if, after being given a payment claim, the respondent fails to pay the amount

stated in the claim on or before the due date for the progress payment to which the claim relates; and because of the failure to pay, the claimant intends to start proceedings in a court to recover the unpaid portion of the amount owed to the claimant. This warning notice must be given no later than 20 business days after the due date for the progress payment. No action must be taken by the claimant before the end of 5 business days after giving the respondent this warning notice.

1. CLAIMANT DETAILS

Note: The 'Name' field is to be completed as per name of the party to the contract. If no written contract exists, please list the individual's name or company name that has carried out work or supplied related goods and services.

*Name (Company/ individual)										
*ABN				ACN						
*Claimant	Subcontractor	<input type="checkbox"/>	Consultant	<input type="checkbox"/>	Supplier	<input type="checkbox"/>	Client	<input type="checkbox"/>	Head contractor	<input type="checkbox"/>
*Type of work undertaken (e.g. Project Management, Building)										
QBCC no.				QBCC owner-builder no.						
*Postal address										
State			Postcode							
*Business address										
State			Postcode							
*Phone				Mobile						
*Email										
*Preferred contact method	<input type="checkbox"/> Post	<input type="checkbox"/> Agent's postal address	<input type="checkbox"/> Email	<input type="checkbox"/> Agent's email address						

2. CLAIMANT AGENT DETAILS (if applicable)

Surname										
First names										
Business name										
Address										
Suburb										
State			Postcode			Business phone				
Email										

3. RESPONDENT DETAILS

Note: The 'Name' field is to be completed as per name of the party to the contract. If no written contract exists, please list the individual's name or company name that work was carried out for.

*Name (Company/ individual)																								
ABN																								
*Respondant	<input type="checkbox"/> Subcontractor				<input type="checkbox"/> Consultant				<input type="checkbox"/> Supplier				<input type="checkbox"/> Client				<input type="checkbox"/> Head contractor							
QBCC no.									QBCC owner-builder no.															
*Postal address																								
State			Postcode																					
*Business address (no P.O. box)																								
State			Postcode																					
*Phone													Mobile											
*Email																								
*Preferred contact method	<input type="checkbox"/> Post				<input type="checkbox"/> Agent's postal address								<input type="checkbox"/> Email				<input type="checkbox"/> Agent's email address							

4. CONTRACT AND PROJECT DETAILS

*Project name (as per contract)																								
*Project type (i.e. Apartments/ factory)																								
*Contract date or date agreement commenced	D D		M M		Y Y Y Y																			
	(If no contract or contract silent, the last day of the month that work was undertaken, or related goods and services were first supplied; and the last day of each month after this)																							
*Address																								
Suburb													State				Postcode							

**FORM S99 – WARNING NOTICE
NOTICE OF INTENTION TO START LEGAL PROCEEDINGS**

5. PAYMENT CLAIM DETAILS

*Payment claim date	<div>D D M M Y Y Y Y</div> <div><input type="text"/>/ <input type="text"/>/ <input type="text"/><input type="text"/><input type="text"/><input type="text"/><input type="text"/></div>	*Payment claim due date	<div>D D M M Y Y Y Y</div> <div><input type="text"/>/ <input type="text"/>/ <input type="text"/><input type="text"/><input type="text"/><input type="text"/><input type="text"/></div>
	Date payment claim was given to respondent		Date the payment claim due for payment
*Payment claim amount	\$ <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	+	\$ <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>
	Claim amount excluding GST		GST if applicable
	\$ <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>		TOTAL claim amount including GST

6. DECLARATION

Date this warning notice was issued	<div>D D M M Y Y Y Y</div> <div><input type="text"/>/ <input type="text"/>/ <input type="text"/><input type="text"/><input type="text"/><input type="text"/><input type="text"/></div>
I issue this warning notice to declare that I intend to begin court proceedings for the unpaid progress payment mentioned in this notice.	
*Claimant's signature	<div><input type="text"/></div> <div>Date <div>D D M M Y Y Y Y</div><div><input type="text"/>/ <input type="text"/>/ <input type="text"/><input type="text"/><input type="text"/><input type="text"/><input type="text"/></div></div>

Conclusion



- All claims are potentially payment claims under Act
- One claim per reference date
- Time Limits
 - 6 months
 - 28 days after DLP
- Adjudication Decisions are not final determination of rights
- See Check List in handout

Conclusion

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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www.constructionlawyersydney.com

GET YOUR DOCUMENTATION RIGHT AND GET PAID

CHECKLIST

	ACTION THAT SHOULD BE TAKEN
STEP ONE	<p>Determine who the company is that is engaging you. This includes ensuring that you have the following information:</p> <ul style="list-style-type: none"> • Company/business name; • ABN/ACN; • Business address; • Email addresses; • Facsimile number; and • Phone number.
STEP TWO	<p>REFERENCE DATES</p> <p>These are the dates on which Payment Claims are to be submitted. The default position under the <i>Building Industry Fairness (Security of Payment) Act 2017 (QLD)</i> is the last day of the month. However, you should ensure that you review your contract, because if there is a different date for progress claims stated in your contract, that date will apply.</p> <p>If your contract has been terminated, then the reference date will be the date of termination.</p>
STEP THREE	<p>PAYMENT CLAIM</p> <p>A. Ensure that the Payment Claim is addressed to the correct entity. This includes ensuring the following:</p> <ol style="list-style-type: none"> The name of the entity matches the ABN/ACN; It is addressed to the usual place of business; or As otherwise provided by the contract (this must be written in the contract). <p>B. Ensure that the Payment Claim contains a detailed description that sets out the following:</p> <ol style="list-style-type: none"> The work carried out; Number of hours worked; Labour rates; Materials; and The price for the supply of these materials. <p>C. Note some contracts have a list of prerequisite documents you must also submit alongside your Payment Claim, check what your contract says and attach these documents to your payment claim.</p>

STEP FOUR	<p>TIMING OF THE PAYMENT CLAIM</p> <ul style="list-style-type: none"> • The Payment Claim must be served on your client on or from the reference date (<u>NEVER BEFORE THE REFERENCE DATE</u>); • The Payment Claim must be within 6 months from when the works were last carried out; or • 28 days after the end of any defects liability period under the contract; • The Payment Claim must only be in relation to work in the period leading up to that particular reference date. • The Payment Claim should also claim for works in previous progress claims that are unpaid or in dispute.
STEP FIVE	<p>SERVICE OF THE PAYMENT CLAIM</p> <p>You can serve a Payment Claim through the following methods:</p> <ul style="list-style-type: none"> A. By Post: this should be by express post and tracking number should also be kept; B. In Person: this should be served during normal business hours and contemporaneous notes should be maintained (A Statutory Declaration may be required for an Adjudication Application). C. By Email: ensure that you keep a delivery receipt for proof of service. Email where the contract provides or where this has been the usual method of communication during the project. D. By Facsimile keep a copy of the transmission slip as proof of service
STEP SIX	<p>PAYMENT SCHEDULE</p> <p>If a Payment Schedule is received within 15 business days of Payment Claim, seek legal advice.</p>
STEP SEVEN	<p>DUE DATE FOR PAYMENT</p> <p>It is not necessary to put a due date for payment on your Payment Claim. The default position of the due date for payment under the <i>Building Industry Fairness (Security of Payment) Act 2017 (QLD)</i> is 10 Business Days.</p>
STEP EIGHT	<p>IF NO PAYMENT SCHEDULE IS SERVED AND NO PAYMENT BY DUE DATE</p> <p>Seek legal advice the day after the later of due date of the Payment Schedule or due date for payment to consider whether you should apply for judgment or take the matter to Adjudication. If you wish to apply for judgment you must issue a s99 Warning Notice within 20 business days after the due date for payment</p>

Please note that this checklist is general information only and not legal advice, your contract may include special provision that have not been considered in the above information. You should seek legal advice that has considered your particular circumstances.

NECA Legal was established to provide specialist legal advice and services to the electrical contractors' industry. The services are available to both NECA members and non-members at competitive rates. Special discounts apply to NECA members with the first consultation being free.

If you would like additional copies of this checklist, please email jacques.nel@neca.asn.au or law.clerk@neca.asn.au.