



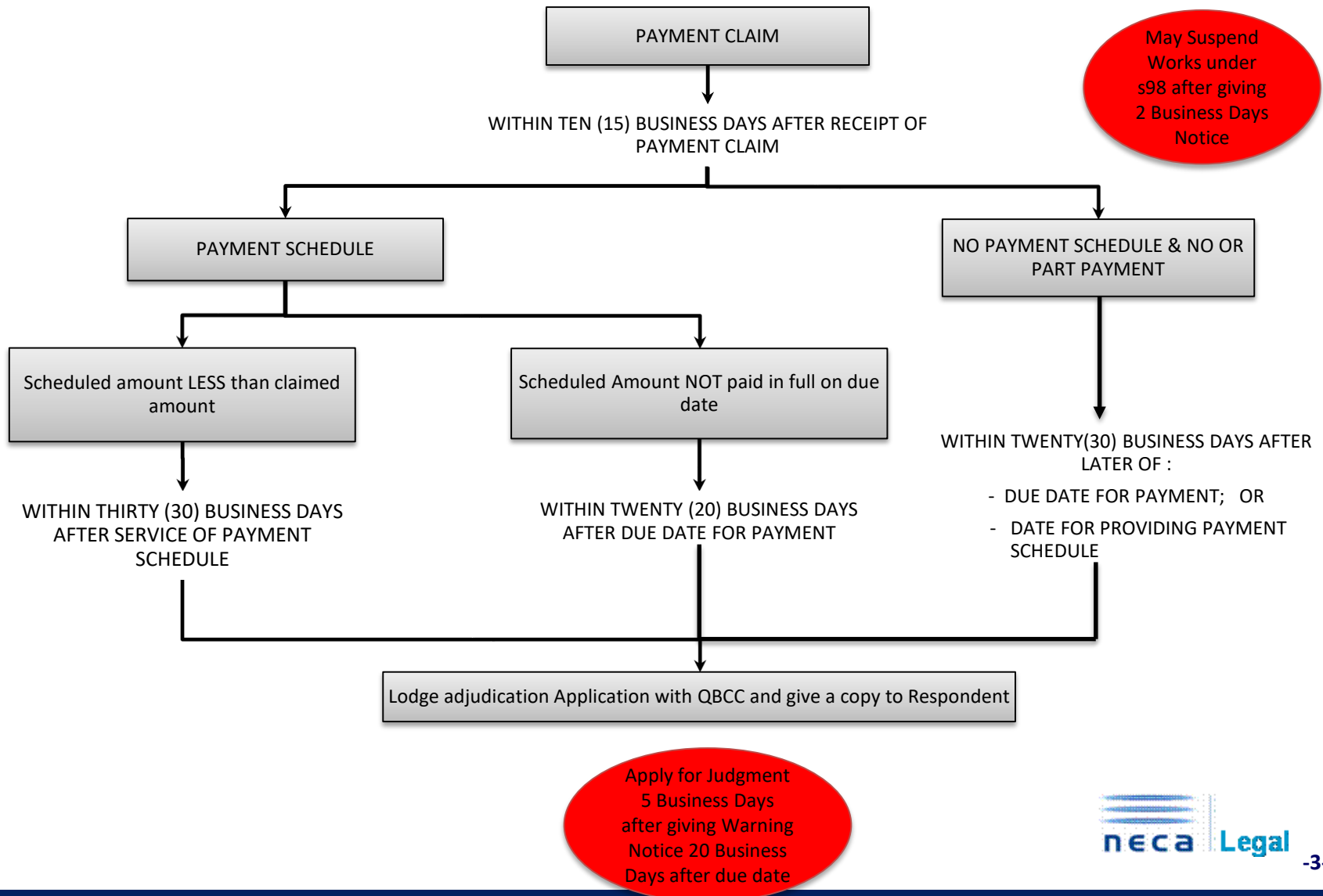
Payment Schedules under the Building Industry Fairness (Security of Payment) Act 2017

Presented by: Jacques Nel
Senior Solicitor at NECA Legal – QLD Office

Introduction

- **Overview of Scheme of the Act**
- **Time Limits**
- **Form requirements of Payment Schedules**
- **Service of Payment Schedules**
- **Failure to Provide Payment Schedules**
- **Penalties**

Adjudication under the Act



- **Must provide Payment Schedule within 15 Business Days after payment claim is given; or,**
- **Shorter period under construction contract;**
- **Watch out for old contracts with 10 Business Days provisions for payment schedules!**

Form Requirements s69

A Payment Schedule is a written document that:

- **Identifies payment claim to which it responds;**
- **States amount of payment, if any;**
- **If the amount is less, states why the amount proposed to be paid is less, including any reasons for withholding payment;**
- **S 69 does not prescribe a particular form**

*Minimax Fire Fighting Systems Pty Ltd v Brenmore Engineering
[2007] QSC 33 Chesterman J:*

*..If these three criteria are satisfied the document will be a payment schedule.
How they are expressed, with what formality or lack of it, and with what
felicity of awkwardness, will not matter.*

Identifying Payment Claim

Emails can be Payment Schedules

Gisley Investments Pty Ltd v Williams & Anor [2010] QSC 178

We do agree that we owe you a final draw for this job however, the job has yet to be finished. Due to the upsetting and threatening conversation I received from you on Tuesday, November 17, my understanding from the outcome of that was that you were blackmailing me. You demanded I pay you, a much larger amount, other than our agreement, in order for you to go ahead with finishing the job.

That was why I sent you the email stating your services were no longer required.

This job should have been completed three months ago. You serving me paperwork, stating I owe you this outrageous amount of money is shocking to say the least.

As we agreed, we were to pay you 5% of the total cost of the job. If you could save money on any part of the project then you would be paid 30% of that savings. For payment of the 30% savings (of which there were none) I gave you a Toyota Hiace 2002 valued at the time at \$12,000. I have asked you repeatedly over the course of the year to get the road worthy certificate so the vehicle could be transferred into your name. You have yet to do that. Although, I still paid for it's yearly registration and insurance. There have been traffic infringements incurred by you, of which I have paid as well.

State the Amount

- “Nil” “nothing” or “zero” may be sufficient

*Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering
[2007] QSC 333*

.....For this reasons we accept not your invoice but we suggest to have a meeting on site next year to clarify the situation and to find a solution for both sides.

- Even if no amount is stated, as long as it can be inferred from document as a whole that no amount will be paid to Claimant

Without Prejudice Letters

National Vegetation Management Solutions Pty Ltd v Shekar Plant Hire Pty Ltd [2010] QSC 3

- Without Prejudice letters may not be payment schedules;
- The relevant letter did not state an amount for payment, but was rather a proposal or offer to settle;
- Will depend on wording of letter.

Reasons for withholding payment

- Important to include all reasons for withholding payment;
- S 82 prohibits against raising new reasons in Adjudication Response, that were not included in Payment Schedule;
- Incorporation by reference allowable – contract clauses or correspondence exchanged

Service of Payment Schedules

- **Service pursuant to contract terms (S 102);**
 - Beware of deeming provisions
- **Acts Interpretation Act 1954 (s 39)**
 - Person – giving in person
 - Mail
 - Facsimile
 - Individual – leaving at, last known address of the place of residence or business of the person
 - Company – leaving at 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 ?

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 for judgment 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	<input type="checkbox"/> Subcontractor	<input type="checkbox"/> Consultant	<input type="checkbox"/> Supplier	<input type="checkbox"/> Client	<input type="checkbox"/> Head contractor					
*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)	<input type="text"/>																				
ABN	<input type="text"/>										<input type="text"/>										
*Respondant	<input type="checkbox"/> Subcontractor	<input type="checkbox"/> Consultant	<input type="checkbox"/> Supplier	<input type="checkbox"/> Client	<input type="checkbox"/> Head contractor																
QBCC no.	<input type="text"/>										QBCC owner-builder no.	<input type="text"/>									
*Postal address	<input type="text"/>																				
	<input type="text"/>																				
State	<input type="text"/>	Postcode	<input type="text"/>																		
*Business address (no P.O. box)	<input type="text"/>																				
	<input type="text"/>																				
State	<input type="text"/>	Postcode	<input type="text"/>																		
*Phone	<input type="text"/>										Mobile	<input type="text"/>									
*Email	<input type="text"/>																				
*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)	<input type="text"/>																				
	<input type="text"/>																				
*Project type (i.e. Apartments/ factory)	<input type="text"/>																				
	<input type="text"/>																				
*Contract date or date agreement commenced	D	D	M	M	Y	Y	Y	Y	*Reference date under contract	D	D	M	M	Y	Y	Y	Y				
	<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"/>				
(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	<input type="text"/>																				
	<input type="text"/>																				
Suburb	<input type="text"/>										State	<input type="text"/>	Postcode	<input type="text"/>							

5. PAYMENT CLAIM DETAILS

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

6. DECLARATION

Date this warning notice was issued D D / M M / Y Y Y Y

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

Date D D / M M / Y Y Y Y

- **Failure to provide Payments Schedule is only an offence if the Respondent fails to make payment, of the claimed amount, by due date**
- **Maximum fine of \$13,055**
- **Ground for disciplinary action by QBCC**

Tips and Traps



- All claims are payment claims (emails or letters)
- No Second Chances
- Service of payment schedules
- 15 business days (shorter period under contract)
- Include all reasons
- S99 Warning Notice

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



Contact Us

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Consultant Solicitor

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(02) 9744 1830

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www.neca.asn.au

www.constructionlawyersydney.com

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State	<input type="text"/>			Postcode	<input type="text"/>																
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	<input type="text"/>																				
State	<input type="text"/>			Postcode	<input type="text"/>																
*Phone	<input type="text"/>										Mobile	<input type="text"/>									
*Email	<input type="text"/>																				
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Surname	<input type="text"/>																					
First names	<input type="text"/>																					
Business name	<input type="text"/>																					
Address	<input type="text"/>																					
Suburb	<input type="text"/>																					
State	<input type="text"/>			Postcode	<input type="text"/>			Business phone	<input type="text"/>													
Email	<input type="text"/>																					

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.

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ABN	<input type="text"/>										<input type="text"/>										
*Respondant	<input type="checkbox"/> Subcontractor	<input type="checkbox"/> Consultant	<input type="checkbox"/> Supplier	<input type="checkbox"/> Client	<input type="checkbox"/> Head contractor																
QBCC no.	<input type="text"/>										QBCC owner-builder no.	<input type="text"/>									
*Postal address	<input type="text"/>																				
	<input type="text"/>																				
State	<input type="text"/>			Postcode	<input type="text"/>																
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	<input type="text"/>																				
State	<input type="text"/>			Postcode	<input type="text"/>																
*Phone	<input type="text"/>										Mobile	<input type="text"/>									
*Email	<input type="text"/>																				
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	<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"/>
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	<input type="text"/>																				
Suburb	<input type="text"/>										State	<input type="text"/>			Postcode	<input type="text"/>					

5. PAYMENT CLAIM DETAILS

*Payment claim date D D M M Y Y Y Y
 / /

Date payment claim was given to respondent

*Payment claim due date D D M M Y Y Y Y
 / /

Date the payment claim due for payment

*Payment claim amount \$

Claim amount excluding GST

+

\$

GST if applicable

\$.

TOTAL claim amount including GST

6. DECLARATION

Date this warning notice was issued D D M M Y Y Y Y
 / /

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

Date D D M M Y Y Y Y
 / /