

Security of Payment 2018  
Department of Finance, Services and Innovation  
Regulatory Policy Branch

18 September 2018

Total pages: 10

## Re: Security of Payment Review

Dear Sir or Madam

I am writing in relation to the Exposure draft of *Building and Construction Industry Security of Payment Amendment Bill 2018* (PDF, 298.22 KB).

I write to you as Senior Adjudication Coordinator at Australia's foremost Authorised Nominating Authority, Adjudicate Today. I have served on the Adjudicate Today SOP helpline for over 11 years.

I have considered some of the items in the Bill and also some items that have not been included in the Bill, and respectfully ask if you would consider my thoughts as detailed below.

I trust that you will find my thoughts and suggestions of interest.

Nb: To illustrate my suggestions, I have included some example draft bill entries.

### 1. Section 14 Payment schedules

**Comments:** During my time at Adjudicate Today I have learned the term "payment schedule" to be a very problematic and misleading term for both claimants and respondents. As a general term of reference, "payment schedule" denotes "schedule of payments". However in accordance with the definitions provided by the legislation, *payment schedule* encompasses documents which indicate that a \$Nil payment will be made in respect of a payment claim.

**Why this is problematic for claimants:** Claimants who receive a document from a respondent which indicates that no payments will be made (for example a brief email response such as "go away your work is not up to scratch") in respect of a payment claim, often remain unaware until it is too late, that the document received did in fact qualify as a payment schedule. The reasonable presumption that a "payment schedule" must include a schedule of payments, can lead the claimant to lodge its adjudication application after the due date – and a determination being awarded in the amount of \$Nil due to lack of jurisdiction (due to the claimant being unaware that they had in fact been provided with a "payment schedule").

**Why this is problematic for respondents:** Many respondents are left under the reasonable presumption that a "payment schedule" and "schedule of payments" are one and the same. For those respondents in greatest opposition to the payment claim before them (respondents who intend to make a \$Nil payment in respect of the payment claim), it will not seem at all logical that their next step would be to issue a schedule of payments. As a result many respondents who dispute a payment claim in full, fail to provide a payment

schedule within the time provided, and as a consequence their right to lodge an adjudication response is forfeited.

There is currently no provision in the Act which states that respondents must be warned at any point in time, of the contrary meaning of "payment schedule" provided by the Act. As an example of the confusion, frustration, inconvenience and resultant expense that has been borne to some respondents by the term "payment schedule", I attach on the following page a recent exchange of email correspondence between a particular respondent and myself. I hope that you will closely consider the sentiments expressed in the respondent's email of 14 September 2018 and my response of 17 September 2018 and appreciate that in his email, the respondent speaks for many. All names and identifiers have been removed from the correspondence.

## Sophie Stack

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**From:** Sophie Stack  
**Sent:** Monday, 17 September 2018 10:33 AM  
**To:**  
**Subject:**

Hi

Thank you for your email.

Personally I find a very user-unfriendly aspect of the legislation to be the term of reference "payment schedule". "Payment schedule" is a very problematic and misleading term for respondents. I agree that the term "payment schedule" conveys that the legislation is assuming the claimant isn't in the wrong and deserves the claimed funds.

However if you refer to section 14 of the Act (you may well not have done so up until this point) you will find that section 14(b) states that a payment schedule:

*"(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount)."*

Note the use of the words "if any". Hence if the respondent disputes the payment claim in full, the respondent is meant to issue a payment schedule to the claimant in the amount of \$Nil. However if a respondent who disputes a payment claim in full does not know that a written payment schedule in the amount of \$Nil should be issued, the result is that if an adjudication application is lodged the respondent is barred from lodging an adjudication response.

The legislation is currently being reviewed and I hope that there can be some positive changes made in the Act in this regard, perhaps by the introduction of some requirement that respondents be directed to section 14 of Act in good time.

Regarding your next course of action, please note that if a payment schedule was not issued, it does not mean that the adjudicator will automatically decide that the claimant is entitled the funds. Your solicitor will be the best person to speak to in the interim and perhaps he or she will advise that the best course of action will be to wait until the adjudicator's determination has been released to the parties. If after the release of the determination you wish to commence proceedings to dispute the result, your solicitor can advise you on the best course of action.

Please do not hesitate to contact us if we may be of further assistance.

Kind regards

Sophie Stack  
**Adjudication Coordinator**

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Resolving Building and Construction Disputes

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**From:**  
**Sent:** Friday, 14 September 2018 5:54 PM  
**To:** Sophie Stack [REDACTED]  
**Subject:**

Hi Sophie,

I read everything in the email and on the website and it offers no advice on how at to do when the respondent, I.e myself, had no intention on providing a payment schedule or paying the claimant anything given the poor quality of the unfinished work that they did.

In this scenario, what is the next course of action?

The website seems very one sided and comes across like it's assuming the claimant isn't in the wrong and deserves the claimed funds.

Should I be speaking with my solicitor to counter claim through the local court for the additional funds I am having to spend to finish the work?

Many thanks

On Fri, 14 Sep 2018 at 9:38 am, Sophie Stack [REDACTED] wrote:

Hi

In short, you should establish whether you are entitled to lodge an adjudication response in the matter. This will depend on whether you did or did not provide a payment schedule to the claimant either within 10 business days of receiving the payment claim, or failing that, within 5 business days of receiving a notice under section 17(2). If you did provide a payment schedule within one of these two timeframes, then you will be entitled to lodge an adjudication response and you must ensure that your adjudication response is lodged with us on or by your due date.

If you are entitled to lodge an adjudication response, the due date for the adjudication response is calculated as being the later of two dates; it is either five (5) business days of receiving the adjudication application from the claimant or two (2) business days of receipt of the notice of an adjudicator's acceptance of the application (our records show that this document was sent to you via email yesterday).

Please do not hesitate to contact us should you have any queries in relation to this matter.

Kind regards

Sophie Stack

**Adjudication Coordinator**



p: 1300 760 297 | f: 1300 760 220 (all states)| w: [www.adjudicate.com.au](http://www.adjudicate.com.au)

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**From:** .....  
**Sent:** Thursday, 13 September 2018 4:39 PM  
**To:** Sophie Stack [REDACTED]  
**Subject:**

Hi Sophie,

All received. What happens now, the explanation in the email attachments is very confusing.

Thanks

On Thu, Sep 13, 2018 at 8:10 AM, Sophie Stack [REDACTED] wrote:

Dear Sir

Please find attached the Notification of Acceptance in this matter.

Would you kindly confirm receipt of this email.

Kind regards

Sophie Stack  
Adjudication Coordinator

p: 1300 760 297 | f: 1300 760 220 (all states) | w: [www.adjudicate.com.au](http://www.adjudicate.com.au)

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-----Original Message-----

From: Lockbox

Sent: Thursday, 13 September 2018 4:09 PM

To: Sophie Stack [REDACTED]

Subject: Send data from MFP11617025 13/09/2018 18:09

Scanned from MFP11617025

Date:13/09/2018 18:09

Pages:11

Resolution:200x200 DPI

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In a perfect world, claimants and respondents would consult the relevant sections of the legislation in good time, however many do not, and therefore the term “payment schedule” is going to have an ongoing capacity to mislead.

On the following pages, I respectfully propose suggestions that could lead to claimants and respondents being less likely to draw incorrect presumptions about the meaning of “payment schedule”, and therefore, fairer outcomes in adjudication:

**Suggestion 1:**

That the term of reference “payment schedule” be changed to “section 14 payment schedule”. With this change in reference, claimants and respondents would be more likely to consult section 14 of the Act in good time.

**Section 14 Payment schedules**

In name of section, omit “Payment schedules”. Instead insert “Section 14 payment schedules”

**Section 14 (1)**

Omit “payment schedule”. Instead insert “Section 14 payment schedule”

A similar amendmet would be made for Section 3 (3) (b), Section 4 (1), Division 1 Payment claims and payment schedules, 14 (2), Section 14 (b), Section 15 Consequences of not paying claimant where no payment schedule, 15 (1) (a), Section 16 Consequences of not paying claimant in accordance with payment schedule, Section 16 (1) (b), Section 16 (1) (c), 17 (1) (a), Section 17 (1) (a) (i). Section 17 (1) (b), Section 17 (2) (b). Section 17 (3) (c), Section 17 (3) (f), Section 20 (2A), Section 20 (2B), Section 22 (2) (d).

Please note that I did discuss the matter of a change to the term of reference “payment schedule” with John Murray AM during his review of the legislation. John indicated that I was free to make a submission on this topic, however at the time I could think of a suitable alternative term. It is only in recent weeks that I have considered that the term “section 14 payment schedule” could be an appropriate alternative.

## **Suggestion 2**

That section 14 of the Act "Payment schedules" include a note which states that if a respondent proposes to make a \$Nil payment, a payment schedule (or section 14 payment schedule) in the amount of \$Nil should be issued:

### **Section 14 Payment schedules, note**

Insert at the end of section 14:

Note. If a respondent proposes to make a \$Nil payment in respect of a payment claim, the respondent should issue a payment schedule in the amount of \$Nil.

## **2. Section 13 Payment claims**

### **Suggestion 1**

I respectfully suggest that a payment claim should state that the respondent has 10 business days (or a shorter period if one is provided in the contract) to provide a payment schedule (or section 14 payment schedule).

### **Section 13 (2)**

Insert after section 13 (2)

13 (2) (d)

must state that the respondent has 10 business days to provide a payment schedule, or, if the construction contract provides for a shorter period, the payment claim should state the number of days as specified in the contract as being the period to provide a payment schedule.

### **Suggestion 2**

I respectfully suggest that a payment claim should draw the respondent's timely attention to the need to study the sections of the Act that deal with payment schedules and adjudication responses.

### **Section 13 (2)**

Insert after section 13 (2)

13 (2) (d)

must state that the respondent should review section 14 and section 20 of the Building and Construction Industry Security of Payment Act NSW 1999



### 3. Section 17 Adjudication applications

#### Suggestion 1

I respectfully suggest that an optional notice should clearly state that the respondent has 5 business days to provide a payment schedule (or section 14 payment schedule)

##### Section 17 (2) (b)

Omit “the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant’s notice.” Instead insert “the claimant has notified the respondent that it has 5 business days to provide a payment schedule”

#### Suggestion 2

I respectfully suggest that an optional notice should state that if the respondent fails to provide a payment schedule (or section 14 payment schedule) within the time allowed, that it will not be entitled to lodge an adjudication response.

##### Section 17 (2)

Insert after section 17 (2)

##### 17 (2) (c)

the claimant has notified the respondent that if the respondent fails to provide a payment schedule within the time allowed and adjudication application is lodged, the respondent will not be entitled to lodge an adjudication response

#### Suggestion 3

I respectfully suggest that an optional notice should draw the respondent’s timely attention to the sections of the Act that deal with payment schedules and adjudication responses.

##### Section 17 (2)

Insert after section 17 (2)

##### 17 (2) (c)

the notice states that the respondent should review section 14 and section 20 of the Building and Construction Industry Security of Payment Act NSW 1999

I understand that some of my suggestions are outside of the recommendations made by John Murray AM. I am not sure whether it is possible at this time, to introduce amendments that are outside of those 86 recommendations. However I feel these are very important suggestions and I hope that if it is not possible for them to be implemented at this stage, that you will keep my submission on file for future reference.

Thank you for considering this submission.

Yours sincerely



Sophie Stack  
Senior Adjudication Coordinator  
Adjudicate Today

