

## Article Information

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## Awkward timing: When not to serve a payment schedule

**A recent decision of the Supreme Court of NSW[1] has clarified the status of a payment schedule served out of time, but before a section 17(2)(b) notice is issued.**

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The NSW Supreme Court recently considered the validity of an awkwardly timed payment schedule. The payment schedule was provided more than 10 business days after receipt of the payment claim, but before the section 17(2) notice had issued from the Claimant. The court had to determine whether that payment schedule was valid for the purpose of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Act).

### Background

In a recent decision of the Supreme Court of New South Wales[1], the Claimant served a payment claim on 25 May 2018.

Due to a misunderstanding, the Respondent failed to provide its payment schedule until 15 June 2018, being more than 10 business days after the payment claim was provided.

The Claimant elected to issue a section 17(2) notice, triggering a “second chance” for the Respondent to submit a payment schedule within 5 business days. The Respondent did not provide a further payment schedule, assuming that it could rely on the payment schedule already served.

The matter proceeded to adjudication. The adjudicator determined that the payment schedule served 15 June 2018 was invalid, as it was provided more than 10 business days after receipt of the payment claim. The adjudicator also found that as no payment schedule had been provided after service of the section 17(2) notice, no valid payment schedule had been provided.

### Appeal

The Respondent applied to the Supreme Court to have the determination quashed. It contended that although the payment schedule provided on 15 June 2018 was late and therefore invalid for the purposes of section 14(4) of the Act, it was valid for the purpose of the “second chance” afforded by section 17(2)(b) of the Act.

The Respondent relied on the obiter of Hodgson JA in *Falgat Constructions Pty Limited v Equity Australia Corporation Pty Limited* (2007) 23 BCL 292, in which he opined that a late payment schedule was not a nullity because on the proper construction of section 17(1)(a) it was open to a claimant to make an adjudication application in respect of a late payment schedule.

The Respondent contended that it must necessarily follow that a payment schedule is valid for the purposes of section 17(2)(b) of the Act so long as it is provided no later than 5 business days after the claimants notice of its intention to proceed with an adjudication is provided.

The Claimant disagreed, relying on the decision in *Taylor Projects Group Pty Limited v Brick Dept Pty Limited* [2005] 23 BCL 292, in which Einstein J opined that a respondent only had a window of five business days to provide a payment schedule, commencing after the claimant had given notice on its intention to apply for adjudication. In other words, a payment schedule that was provided prior to the notice being given, would be invalid for the purposes of section 17(2) of the Act.

### Decision

The court reasoned that the precise words of section 17(2)(b) necessarily mean that the further opportunity for a respondent to provide a payment schedule is triggered only upon receipt of the claimant's notice of its intention to proceed with an adjudication (i.e. the 17(2)(b) notice). A payment schedule provided prior to receipt of such notice is not recognised under the Act.

It may seem peculiar that a payment schedule provided prior to receipt of the claimants notice is 'void' or a 'nullity' for the purposes of section 17(2)(b), when it appears that the intention of section 17(2)(b) is to give the respondent a further opportunity to respond to the claim where they have failed to do so in accordance with section 14(4). Nonetheless McDougall J was not satisfied that the decision in *Taylor Projects Group Pty Limited v Brick Dept Pty Limited* was "clearly wrong", and so he was disinclined to disturb it.

As matters stand, the current state of the law is that a payment schedule served after the 10 business days has expired, but before the section 17(2)(b) notice is issued, is no payment schedule at all.

This decision clears up a grey area in the timing of payment schedules, providing more certainty. The "grey area" is now black. It reinforces the message to respondents to ensure that payment schedules are provided within ten business days (or less, if specified in the contract) of the payment claim being served, regardless of what else the contract says about the issue.

There is no certainty that a section 17(2)(b) notice will issue, but if it does, a payment schedule will only be valid if it is served within five business days of the notice being provided.

Failure to strictly comply with the Acts harsh times frames is likely to result in your payment schedule being found invalid or a "nullity", and disentitle you from providing an adjudication response in the adjudication.

[\[1\]](#) *Forte Sydney Construction v Lin Betty Building Group* [2018] NSWSC 142