

# **Pay Now, Argue Later**

## **Overview of Building and Construction Industry Payments Act 2004**

# Object of the Act

- To ensure that persons who undertake to carry out construction work (or supply related goods & services) under a construction contract are able to recover progress claims.
- Act provides for a process of rapid adjudication of disputed payment claims.

# “Pay Now, Argue Later”

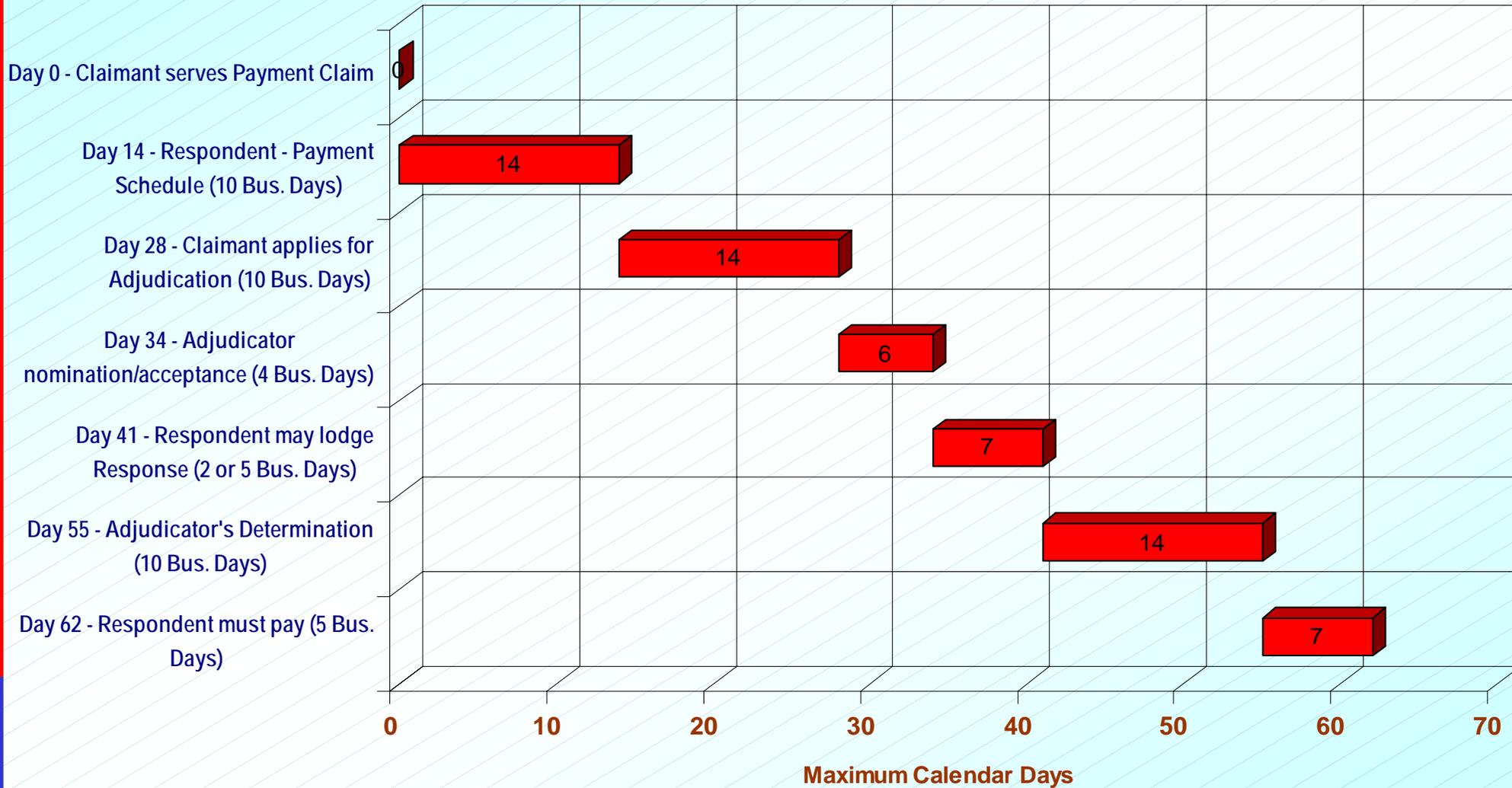
- “...the Act provides for a somewhat rough and ready way of assessing a builder's entitlement to progress claims.....the procedure is intended not only to be swift, but also to be carried out with the minimum amount of formality & expense”  
*[McDougall J in Musico]*.
- “the scheme of the Act requires that a respondent ‘*pay now, argue later*’” [Palmer J in Multiplex].

# Who can claim under the Act?

- The Act will principally assist:
  - contractors seeking payment from principals
  - subbies seeking payment from contractors
  - construction industry suppliers seeking payment for goods supplied
  - Architects, engineers, etc seeking payment for services
- Act does not apply to contracts for domestic building work, if a resident owner is a party
- No “contracting out” of the Act.



### Typical Claim and Adjudication Process



# When do I make a Payment Claim?

1. Claimant may serve a *payment claim* from each *reference date*

## 2. *Reference date*:

- Date for progress claims agreed in contract
- If not agreed, the last day of the month.

# What do I put in my Claim?

Payment Claim must include:

- Details of construction work carried out;
- Amount claimed to be payable;
- *“This Payment Claim is made under the Building and Construction Industry Payments Act 2004”.*

# Payment Claim – What not to do!

- *Hawkins v Mac's*
  - *“Building Construction Ind Security of Payments Act 1999”*
  - *Act not to be approached in an unduly technical manner*
- *Jemzone v Trytan*
  - *identify particular work the subject of the claim rather than work under the contract as a whole*
  - *“motel construction for Jemzone Pty Ltd”*

# Payment Claim—What Claims can I include?

- Original Contract Work
- Variation Work
- Costs associated with EOT
- Retention due for release
- Expense arising from suspension under Act

# Payment Claim–Can Damages Be Claimed?

- Damages for a breach of contract cannot be claimed.
- *Walter v CPL*
  - Contract contained a delay costs clause (cl 36 AS 4300)
  - Walter made a payment claim which included delay costs
  - Owner’s challenge to the claim was unsuccessful
- *Paynter Dixon v Tilston*
  - Cannot claim general damages in a payment claim
  - Inclusion of a damages will not invalidate rest of claim

# When do you get a Response?

- Respondent may reply with *Payment Schedule* within 10 bus. days after Claim served.
  - *Business days* – Mon to Friday (except public holidays & Xmas to New Year)
  - RDO's count as business days!
- If *Payment Schedule* is not delivered on time, Respondent is liable to pay the amount claimed

# What goes in the Payment Schedule?

Payment Schedule must:

- Identify the Payment Claim
- State the amount of the payment, if any, that the respondent proposes to make
- State why the scheduled amount is less and ALL reasons for withholding payment
- You can't put forward additional reasons later

# How detailed does Payment Schedule need to be?

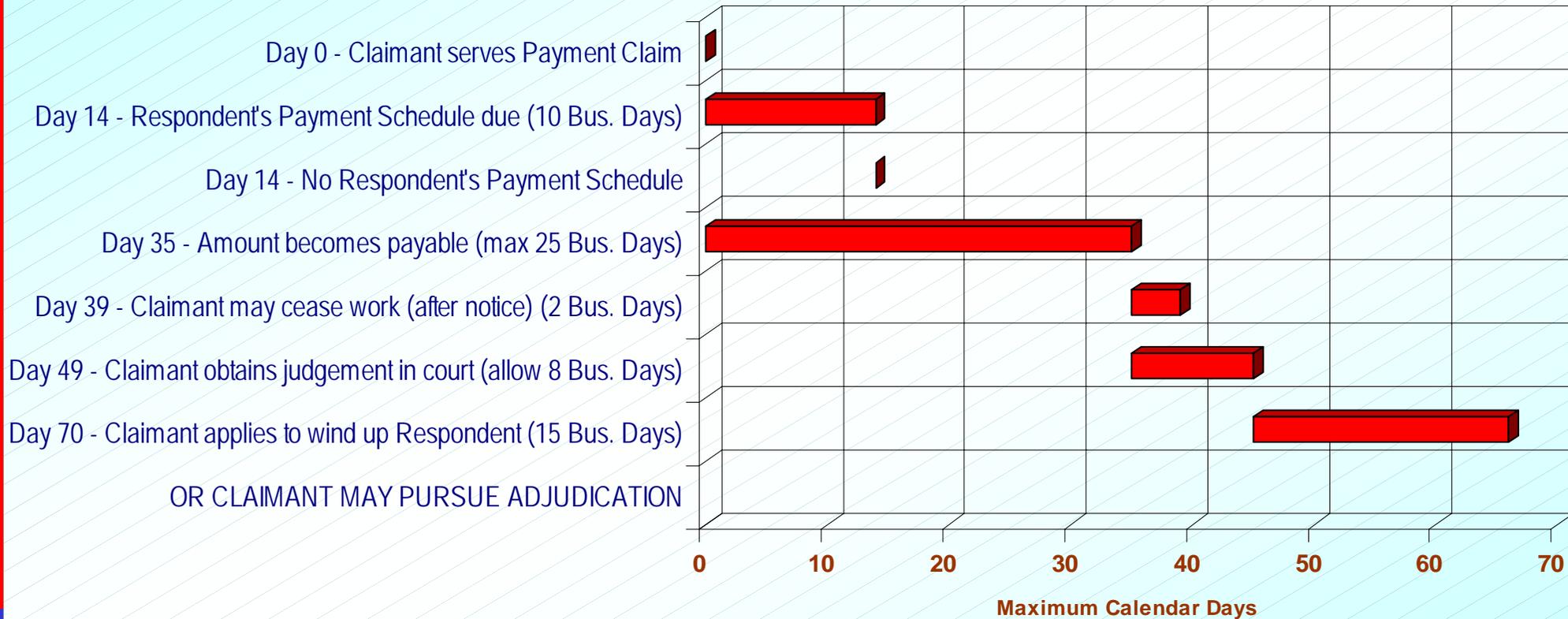
- Respondent must make known the essence of the reason for withholding payment
- Claimant must understand the nature of Respondent's case (to enable decision whether to pursue)
- *Multiplex v Luikens*- a “cryptic” schedule was OK (given the history of the parties' dealings).

## And the money rolls in... hopefully

- If no Pmt Sched-respondent is liable for full amt
- If Pmt Sched for full or lesser amount-respondent is liable to pay that amount
- What happens if respondent fails to pay?
  - Claimant may recover amount as a debt in court or make an adjudication application; or
  - Serve notice of intention to suspend work

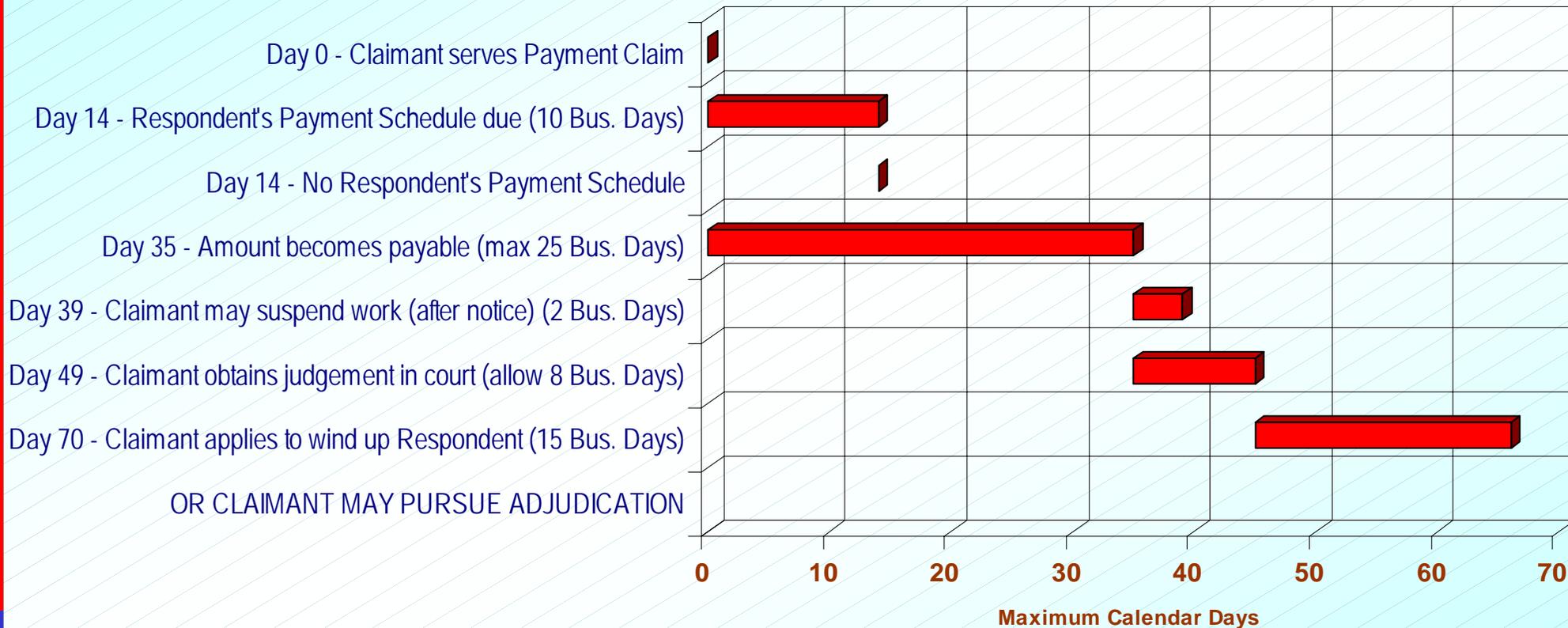


**Typical Process - Failure to Provide Payment Schedule or Failure to Pay**





### Typical Process - Failure to Provide Payment Schedule or Failure to Pay





# Most likely outcome: Adjudication Application

- Usual Position – Payment Schedule issued but for an amount less than the claim.
- Claimant may apply for adjudication of claim
- Application must be made within 10 business days after claimant receives payment schedule

# Adjudication Application - MUST DO's

- Must be in writing & identify pmt claim & sched
- Must be made to ANA (eg IAMA)
- Must be accompanied by application fee
- ANA must refer application to adjudicator ASAP
- Must be served on respondent
  - Courts have found it invalid to serve an application on a respondent's solicitor [Emag v Highrise]

# Race against the clock to respond

- Respondent may give adjudicator *Adjudication Response* to the claimant's application
- Adjudication Response to be given:
  - 5 business days after receiving copy of application;
  - 2 business days after receiving notice of the adjudicator's acceptance of the application (whichever is the later)
- Adjudicator cannot consider a late Response

# Adjudication Response – MUST DO's:

- Adjudication Response:
  - Must be in writing & identify the application
  - May contain submissions relevant to the response
  - Must be served on claimant
- Can only relate to reasons for withholding payment that were given in payment schedule

# Adjudication - So what actually happens?

The Adjudicator decides:

- Amount of progress payment to be paid
- Date on which any amount became or becomes payable
- Rate of interest payable

Adjudicator to make a decision within 10 business days of receipt of the adjudication response (unless extended by agreement).

Adjudicator can ask for further submissions, call a conference of the parties (no lawyers allowed) or carry out an inspection.

# Adjudication – What the parties are limited to?

- Claimant - limited to claim
- Respondent - limited to response
- Adjudicator - limited to both of these + contract + law
- Decision to include reasons unless otherwise agreed

# End result: Show me the money

- If adjudicator decides respondent is to pay, respondent must pay within 5 business days or such later decided by adjudicator.
- If respondent does not pay, Claimant can:
  - Obtain an adjudication certificate from ANA & which can be filed as a court judgment & enforced;
  - Suspend work.

# What if it doesn't go your way?

- NSW – lots of challenges to decisions but few have been successful.
- Process does not affect your normal rights.
- Contract Dispute Resolution Clause still applies
- NSW-adjudication decision is often end of line

# Key Issues

- Adjudicator's fees-variability
- What if a party doesn't pay its share of adjudicator's fees?
- Expert reports
- Do Adjudicator's deliver decisions in 10 days?
- Do Adjudicators balance poor/good subs?
- What is the quality of the decisions?

# Advantages

- Rapid, Inexpensive & Enforceable Process
- Paid When Paid Clauses Prohibited
- Subcontractors' Charges Preserved (but election)
- No Oral Evidence or Oral Submissions

# Disadvantages

- Ambushing of Respondents:
  - Claimant can have substantial time to prepare a claim yet respondent only has 10 days to respond (and must raise all defences in that time)
- Resubmitting Previously Rejected Claims:
  - Contractor's may resubmit claims which were previously rejected & get a *second bite at the cherry*



# Disadvantages (Continued)

- Possible Errors by Adjudicators:
  - Given the short time frame & lack of project familiarity, the adjudicator’s decision may be “flatly wrong” [Master *Macready-Transgrid v Siemens*]
- Cost of Dual System:
  - In large projects it may be costly for the parties to convince the Superintendent of their positions and then repeat that process for the adjudicator

# Final Observations

- Contractors/subbies/suppliers/consultants will be able to obtain payment quickly & cheaply.
- Respondents must have systems to promptly address payment claims.
- Failure to meet time limits can be fatal.
- Friend or Foe?