



## **Construction Contracts (Former Provisions) Act 2004 (WA)**

# Topic 3: Applying for adjudication

***The adjudication process is designed to provide a fair, cost-effective and rapid means of resolving payment disputes between parties to a construction contract. The purpose of the process is to “pay now, argue later” – this means the process is intended to keep money flowing in the contracting chain.***

It's important to remember that using any legal mechanism to recover payment might cause the commercial relationship to become strained. It is therefore recommended that you keep the lines of communication open with the other party, with a view to being able to negotiate an early resolution of your payment dispute if possible.

### **Eligibility for adjudication of a payment dispute**

Eligibility to apply for adjudication depends on the definition of a payment dispute under the *Construction Contracts (Former Provisions) Act 2004* (the CCA). The CCA states that a payment dispute arises where:

- a payment claim is rejected or disputed (wholly or partly);
- payment in full has not been received by the time the amount claimed is due under the contract;
- any money retained by a party has not been paid by the time it is due under the contract; or
- any security held by a party has not been returned by the time it is due under the contract.

It is important to be aware that strict rules apply to the period of time you have to apply for adjudication of a payment dispute. After a payment dispute arises, the party seeking payment has 90 business days to lodge an application. A business day means any day other than a Saturday, Sunday, public holiday or day between 25 December and 7 January inclusive.

There are special rules that apply to 'recycled' and 'resurrected' payment claims.

A 'recycled' payment claim is where a claim is made, disputed or not paid, made again (often as part of a subsequent claim), and again disputed or not paid. Recycled payment claims may be determined by adjudication. In this case, the party seeking payment has 90 business days to make an application for adjudication from the latest time the claim was disputed or not paid. A payment claim can only be adjudicated once and if it is determined or dismissed, then it cannot be recycled again.

However, a 'resurrected' payment dispute cannot be adjudicated. This occurs where the dispute is already the subject of an existing order, judgement or other finding by an arbitrator, court or other person/body dealing with a matter under a construction contract.

### **Process for applying for adjudication**

An application for adjudication is either made to a 'nominated adjudicator' or to a 'prescribed appointor'.

A 'nominated adjudicator' is the adjudicator who is to be appointed should payment dispute arise, as specified in either the contract or in a separate agreement. In this case, the application for adjudication is made directly to the nominated adjudicator.

If a particular adjudicator has not been agreed upon, the application must be made to one of the five 'prescribed appointors' in Western Australia. A prescribed appointor is a person or body, such as an industry association, who is authorised under the CCA to appoint an adjudicator. The party commencing the adjudication is free to choose whichever appointor best suits their needs. A list of the appointors can be found on the [Building and Energy website](#).

An application for adjudication must be made in writing and contain certain information, including:

- the name of the appointed adjudicator or prescribed appointor and their contact details;
- the applicant's name and contact details;
- the construction contract involved (or relevant extracts);
- the payment claim that has given rise to the dispute; and
- any information, documentation and submissions which will be relied upon in the adjudication.

The application should also provide details that show:

- the contract is a construction contract;
- a valid payment claim was submitted, which was rejected or not paid; and
- the application has been made within the 90 business days of the dispute.

It should also set out why the amount claimed is due and owing and the basis upon which it was calculated.

The application must also be given to the respondent and to either the nominated adjudicator or the prescribed appointor. This must be done by:

- posting the application, including by regular or registered mail;
- delivering the application personally;
- leaving the application for the other party at their usual or last known place or business, or their usual or last known home; or
- in the case of a corporation or association (including a prescribed appointor), by leaving the application at, or by posting it to, their principal place of business or principal office in WA.

Wherever possible, it is good practice to serve the application in a manner that can be tracked, or where a record of receipt can be obtained (e.g. express post or registered mail).

If the application is given to the prescribed appointor, they must within five business days after receiving the application appoint an adjudicator and notify the parties accordingly.

It is strongly recommended that you take action early to prepare your application, taking into account the 90 business day deadline you have to lodge it. A lawyer is not required in the adjudication process but if you are unsure of how to prepare your application, you may wish to obtain expert advice from one or from a construction contracts specialist. Registered adjudicators may also help to advise you on payment disputes they are not involved in. You can contact them directly or through a prescribed appointor listed on the [Building and Energy website](#).

The Building and Energy's '[Form 2 – Application for adjudication](#)' can assist you in preparing an application for adjudication and is available on the 'Construction Contracts Act' section of the Building and Energy's website.

While there is no minimum or maximum amount that can be adjudicated it is important to be aware that there are costs associated with the process. Adjudicator's will charge fees to determine the payment dispute. The adjudicator will inform the parties of their fees once they receive the application, and may request that both parties pay a small bond. Both parties will be liable for the adjudicator's fees, and will generally be required to pay half each, unless the adjudicator determines otherwise.

Once the application has been made, a decision will generally be made within 20 business days (four weeks).

**Disclaimer** – The information contained in this fact sheet is provided as general information and a guide only. It should not be relied upon as legal advice or as an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations, you should obtain independent legal advice.

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