



Topic 4

Applying for adjudication



What is adjudication?

Adjudication is a dispute resolution process to assist parties resolve disagreements about a payment claim made for a progress payment. It is quick, cost effective and can be used as an alternative to court.

If a payment claim has been made under the Act and there is a disagreement, adjudication may provide the fastest way to resolve the issue and ensure you get paid. The whole process can take as little as 10 business days from making the application, but strict timelines apply so you must take early action.

When can you apply for adjudication?

You (as a claimant) can apply for adjudication of a payment claim made under the Act for construction work completed or related goods and services supplied in the following circumstances.

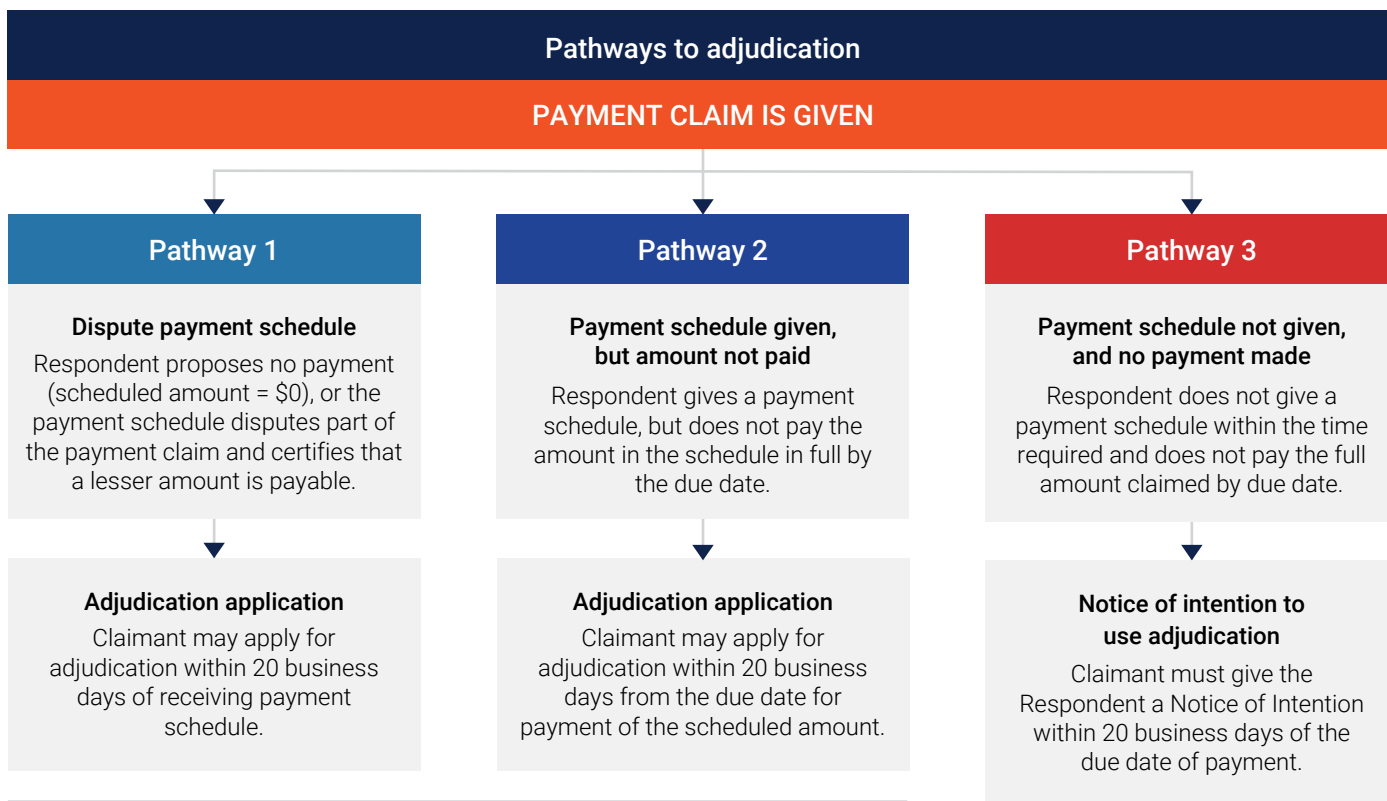
Pathway 1	Pathway 2	Pathway 3
You have received a payment schedule from the respondent, but do not agree with it and the amount to be paid.	You received a payment schedule from the respondent, but did not receive the full amount stated in the schedule by the due date for payment.	You did not receive a payment schedule from the respondent and did not receive full payment by the due date.
You must apply for adjudication within 20 business days from when you received the payment schedule.	You must apply for adjudication within 20 business days from the due date for payment of the scheduled amount.	Before you can apply for adjudication you must first give the respondent a notice of intention to use adjudication.

The notice of intention must be given within 20 business days from the date full payment was due and the respondent must then be given five business days from receiving your notice to give a payment schedule.

After the five business day period, if the respondent has not made payment, not given a payment schedule, or you disagree with the reasons for withholding payment in the payment schedule given, you can apply for adjudication within 20 business days.

If pathway 2 or 3 apply, instead of applying for adjudication to recover the amount stated in the payment schedule or the amount claimed, you can recover the amount owed as a debt through an appropriate court. A notice of intention is not required for court action.

For pathway 2 it is important to be aware that the application for adjudication can only seek to recover the scheduled amount that was not paid by the date required. The adjudication application cannot seek recovery of the full claimed amount. If you are seeking recovery of the claimed amount, then, depending on the circumstances, only pathway 1 or 3 will apply.



How do you apply for adjudication?

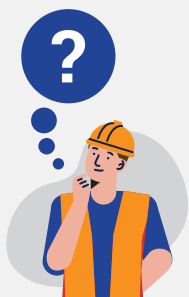
An adjudication application must be made in writing and given either to the adjudicator specified in the construction contract, or if there is no adjudicator specified, to any of the authorised nominating authorities (ANA) in WA.

The chosen ANA will then be responsible for appointing the adjudicator. If an adjudicator is specified in the construction contract, you cannot give the adjudication application to an ANA. However, if the adjudicator specified does not accept the appointment within five business days, you may then give the application to an ANA of your choice. The application can be given to the ANA within five business days after the time the specified adjudicator had to accept the appointment.

A copy of the adjudication application must also be given to the respondent within one business day after being given to the specified adjudicator or ANA.

How do you prepare the adjudication application?

You must ensure the adjudication application complies with the requirements of the Act and clearly stipulates why there is an entitlement to the progress payment. If the application does not comply with the requirements of the Act, the adjudicator cannot make a decision on the payment claim.



An adjudication application must:

- be in writing;
- identify the payment claim and the payment schedule to which it relates;
- include a copy of the construction contract or relevant extracts;
- be accompanied by any application fee charged by the ANA (if any); and
- be accompanied by any submissions and supporting documents you consider relevant to your application.

Preparing your submissions is an important part of the application. You may wish to include information about:

- the construction project and a description of the construction work being undertaken;
- the construction contract, including when the contract was entered into, whether it is in writing and been signed by both parties;
- the events leading up to the making of the payment claim, including whether it relates to variations or other verbal directions, that a valid payment claim was made, and whether a payment schedule was given;
- how the valuation of the construction works or related goods and services was calculated, including any supporting evidence such as previous payments, emails, photos or quantity surveyor reports;
- why there is an entitlement to payment, including any counter-arguments to the reasons given by the respondent for withholding payment in the payment schedule;
- how the requirements and timeframes for the making of an adjudication application under the Act have been satisfied; and
- any supporting documentation, including copies of the payment claim, payment schedule, site diaries, expert reports (for example delay analysis reports) and statutory declarations.



A clear and concise application will assist the adjudicator in making a determination.

Remember to include all necessary supporting documentation when preparing your application.

If you are unsure how to prepare an application, seek expert advice from a professional advisor, such as a lawyer or construction contracts specialist.



A recommended form for an application is available for download from the Building and Energy website. This form can be used to help prepare your application.



What does adjudication cost?

There are costs to use the adjudication process and adjudicators will charge fees to determine the adjudication application. Adjudicator fees are usually charged on an hourly basis and the total cost will depend upon the time it takes to determine the application.









The adjudicator will inform you of their fees once they are appointed to determine the application, and may request that both parties pay a reasonable deposit as security. You may also be required to pay a small application fee, if your application is given to an ANA.

Both you and the respondent will be liable for the adjudicator's fees, and will generally be required to pay half each, unless the adjudicator determines otherwise.

There are maximum adjudication fees and expenses that may be charged by an adjudicator where the payment claim is \$50,000 (including GST) or less. These are set out on the Building and Energy website.

Both you and the respondent are responsible for paying your own costs, such as legal costs incurred in preparing an adjudication application or adjudication response, and these cannot be recovered.

Tips for applying for adjudication

-  Strict timelines apply for making an adjudication application. You must take early action to resolve disagreements about payment claims and comply with the timeframes applicable to your circumstances.
-  An adjudication application should attach copies of all documents referred to in the application – the adjudicator cannot consider them if you did not attach them to your application.
-  A carefully prepared adjudication application will assist with successfully resolving disputed payment claims, and could reduce the costs of the adjudication process.
-  Ensure that you keep a record of the manner (for example post, personal service, etc.) that you used for giving the adjudication application, together with the relevant times and dates. If the application was not in fact received, you must be able to evidence the date it was given.
-  If there is an adjudicator stipulated in the construction contract, the application must be given to that individual. Otherwise the application can be given to an ANA of your choice. An application fee may be charged by the ANA and/or a reasonable deposit for the adjudicator's expected fees may be required.
-  The Building Commissioner has published a template to assist with making an adjudication application.

Important terminology

Adjudicator	is an individual registered under the Act as an adjudicator.
Authorised nominating authority (ANA)	is the body or individual authorised under the Act to receive applications and responses and, if applicable, undertake other administrative tasks.
Business day	is any day other than a Saturday, Sunday or public holiday or day between 22 December and 10 January inclusive.
Claimant	is the person who is or who claims to be entitled to a progress payment and who makes a payment claim.
Give	<p>means to give a document under the Act (for example a payment claim, payment schedule, application or response) either in accordance with the method stipulated in the construction contract, or, if the contract is silent (or there is no contract), the document can be given by either:</p> <ul style="list-style-type: none"> • delivering it personally to the person who is to receive the document (for example the claimant, respondent, adjudicator, etc.); • leaving the document at the person's ordinary place of business; • sending the document by post to the person's ordinary place of business; • emailing the document to an address specified by the person; or • if an authorised nominating authority allows for the use of an electronic lock-box, submitting documents via that facility. <p>The adjudicator or authorised nominating authority will often stipulate how documents are to be given to them and should be given in this manner.</p>
Payment claim	is a claim given under the Act.
Respondent	is the person who has been given the payment claim.

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.

Building and Energy | Department of Mines,
Industry Regulation and Safety
1300 489 099

8.30am – 4.30pm
Level 1 Mason Bird Building
303 Sevenoaks Street (entrance Grose Avenue)
Cannington Western Australia 6107
M: **Locked Bag 100, East Perth WA 6892**
W: www.dmirs.wa.gov.au/building-and-energy
E: be.info@dmirs.wa.gov.au

Regional Offices

Great Southern	(08) 9842 8366	Mid-West	(08) 9920 9800
Kimberley	(08) 9191 8400	North-West	(08) 9185 0900
Goldfields /Esperance	(08) 9021 9494	South-West	(08) 9722 2888

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Translating and Interpreting Service (TIS): 13 14 50

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