



User guide

Claimant giving an application for adjudication review

The Building Commissioner has published a template for an application for adjudication review by a claimant under the *Building and Construction Industry (Security of Payment) Act 2021* (the Act).

This document provides guidance on using the template if you are the claimant.

The template can be used where a claimant wishes to make an application for review of an adjudicator's determination.

The template for an application for adjudication review by the claimant is recommended, but not mandatory. A claimant may use their own template or one provided by an authorised nominating authority.

The Department of Mines, Industry Regulation and Safety – Building and Energy Division (Building and Energy) cannot assist with filling out the template or completing it on your behalf.

If you are unsure how to prepare an application for adjudication review under the Act, refer to the information available on Building and Energy's website, or seek professional advice.

Outline

A claimant may make an application for a review of an adjudicator's determination if either:

- (i) the difference between the claimed amount and the adjudicated amount is \$200,000 (incl. GST) or more; or
- (ii) the adjudicator decided that they did not have jurisdiction to determine the application and the claimed amount had exceeded \$50,000 (incl. GST).

If, however, the respondent has already made an application and that application has not been withdrawn, the claimant cannot make its own application for a review adjudication.

Time within which to give an adjudication review application

You must make an application for adjudication review within 5 business days after you received a copy of the adjudicator's determination. Applications made outside of this time will not be valid.

A business day is defined in the Act to mean a day other than –

- a Saturday, Sunday or public holiday; or
- any other day that falls between 22 December in any year and 10 January in the following year (inclusive).

For the purpose of counting business days, the day a document is given is business day 0.

To whom the adjudication review application is to be given

An application for adjudication review must be given to an authorised nominating authority.

You are free to choose whichever authorised nominating authority you wish. This may be the same authorised nominating authority to whom you had given your original adjudication application, or any other authorised nominating authority. You can refer to the Building and Energy website for the list of authorised nominating authorities and their contact details.

Once you have given your application for adjudication review, the authorised nominating authority will appoint a registered review adjudicator from its panel within 5 business days of having received your application and the parties will then be advised of the name of that person.

Requirements relating to adjudication review application

A review adjudication application must:

- (a) be in writing; and
- (b) be accompanied by a copy of the following:
 - (i) the construction contract or the relevant provisions of the construction contract;
 - (ii) the complete documentation that comprised the payment claim;

- (iii) the complete documentation that comprised the payment schedule (if such payment schedule had been given);
 - (iv) the complete documentation that comprised the adjudication application;
 - (v) the complete documentation that comprised the adjudication response (if such adjudication response had been given);
 - (vi) any submissions made to the adjudicator by the parties (including accompanying documents); and
- (c) not include any reasons relating to matter in the adjudication review application unless those reasons were raised in the original adjudication.

The claimant can include as part of its adjudication review application, submissions relevant in support of the application (see also below).

What the Act requires a review adjudicator to do

Where an adjudication review application has been given, the review adjudicator is required to either:

- (i) confirm the determination of the original adjudicator; or
- (ii) “quash” that determination and make a new determination.

Where the review adjudicator has quashed the original adjudicator’s determination, the review adjudicator must determine –

- (i) the amount of the progress payment, if any, to be paid by the respondent to the claimant; and
- (ii) the due date for payment of that amount; and
- (iii) the rate of interest payable on that amount.

The review adjudicator’s determination must specify:

- (i) the amount that has already been paid by the respondent; and
- (ii) any excess amount that is repayable by the claimant and the date on which it becomes payable.

In determining the adjudication review application, the review adjudicator may consider only the following matters:

- (i) the Act and the regulations;
- (ii) the relevant construction contract;
- (iii) the relevant adjudication review application and adjudication review response (if any), together with submissions (including accompanying documents) duly made; and

- (iv) the relevant payment claim, payment schedule, adjudication application and adjudication response (if any), together with submissions (including accompanying documents) duly made.

What however the review adjudicator must not consider in determining an adjudication review application are:

- (i) any adjudication review response that is given after the time period prescribed under the Act;
- (ii) any reasons for a matter that have been raised unless those reasons were raised in the original adjudication being reviewed; or
- (iii) any submissions (including accompanying documents) made to the review adjudication that are not authorised to be made by the Act.

Submissions made in support of adjudication review application

As this is your application you will bear the burden of providing materials to support your argument that the original adjudicator had either incorrectly decided that no jurisdiction existed or had, in the making of the adjudication determination, incorrectly assessed the adjudicated amount.

This is the most important part of the documentation you will be providing to the review adjudicator and you should therefore give careful consideration as to how you structure and set out your arguments. This can be done in a separate document to the template.

If you are contending that the original adjudicator had “erred” (i.e. got it wrong) on the jurisdiction issue, then your submissions should set out why you believe that to be the case.

Under the Act, the original adjudicator is required to consider whether they have jurisdiction to determine the adjudication application. If the original adjudicator decided that no jurisdiction existed, the Act also requires the adjudicator to set out the reasons for arriving at that decision.

Accordingly, the submissions that accompany your adjudication review application should address each of the reasons that the original adjudicator had given for deciding that there is no jurisdiction and you should set out why you consider those reasons to be incorrect. It would follow that if your arguments as to jurisdiction were to be accepted by the review adjudicator, you would then be requesting the review adjudicator to proceed with determining your payment on the same basis as you had pressed in your original adjudication application.

If however, the original adjudicator had determined that jurisdiction existed but determined an adjudicated amount that was less than the claimed amount (and where the amount of that difference exceeded \$200,000.00 (incl. GST)), then your submissions should set out why you consider that those conclusions and assessments were incorrect.

It may be that in arriving at the adjudicated amount, the original adjudicator had rejected your entitlement to some of the claimed items within your payment claim, such as, for example, several variation items. Alternatively, it may be that the original adjudicator had arrived at the adjudicated amount by giving a lower valuation to several of the items of work claimed, or that the adjudicator had concluded that the respondent was entitled to deduct liquidated damages from amounts due to you.

Whatever the reasons the original adjudicator had for arriving at a lesser adjudicated amount than what you had claimed, those reasons would have been set out in the adjudication determination and accordingly, the submissions that accompany your adjudication review application should set out why you consider those conclusions to be incorrect. In setting out your submissions, you can provide documentation to support your position (e.g. a witness statement or an expert report such as that of a quantity surveyor).

Finally, if you make an assertion within your submissions, then make sure that you have substantiated this by reference to relevant documentation and that this can be easily referenced by the review adjudicator. Don't assume that because you have provided a bundle of documents that have not been referenced within your adjudication review application, that the review adjudicator will understand or appreciate why such documents have been included and take them into account in the making of the review determination. For example, if you include photographs, then you should explain what those photographs are intended to show and why their inclusion is relevant to your case.

Completing the template

As in the case when you completed your adjudication application, the template requires you to complete the relevant details relating to you and the respondent, including the insertion of the parties' correct names, Australian Business Number (ABN), addresses, telephone numbers and email addresses. If you and/or the respondent are represented by a law firm or other person, then also include those details as this will facilitate any future contact by the authorised nominating authority or the review adjudicator.

You should also complete the details relating to the original adjudicator's determination (i.e. name, date of determination, whether jurisdiction decided and adjudicated amount), as well as the basis upon which the present adjudication review is being made. If the respondent had made a review adjudication application, but had subsequently withdrawn the application, you should set out the date of such withdrawal.

The template includes a box for you to tick to show the copies of documents that are included in your adjudication review application. This serves as a checklist to ensure that your application complies with the requirements of the Act.

Once you have identified the attachments that you wish to include in your adjudication response, list those in the space provided within the template.

How to give your application to an authorised nominating authority

Once you have completed the template and satisfied yourself that you have included all the requisite documentation, you can give it to the authorised nominating authority you have chosen.

You can give your application by either:

- delivering a hard copy personally or by courier to the office of the authorised nominating authority during normal business hours;
- leaving the application at the authorised nominating authority's ordinary place of business;
- emailing the application to the authorised nominating authority's address; or
- if an authorised nominating authority allow for the use of an electronic lockbox, using that lockbox.

Finally, give a copy to the respondent

You must give a full copy of the adjudication review application to the respondent within 1 business day of giving your application to the authorised nominating authority. It is however best practice to give your application to the respondent and authorised nominating authority on the same day.

If the contract stipulates a way of giving documents, such as to a particular person or email address, the adjudication review application must be given to the respondent in that way.

If the contract does not stipulate a way of giving documents, the application can be given in a number of different ways, including:

- delivering it to the respondent personally;

- leaving it at the respondent's ordinary place of business;
- emailing it to the address specified under the contract for giving documents; or
- sending it by post to the respondent's ordinary place of business.

If the respondent is a corporation, the application may also be served in accordance with the requirements of the *Corporations Act 2001* (Cth).

You should keep a record of the time, date and manner it was given to the respondent. When items are sent by ordinary post they can be taken to be received anywhere between 3–7 business days depending on the sending and receiving location.

As you are required to give a copy of the adjudication application within 1 business day when the application has been given to the authorised nominating authority (or specified adjudicator), giving a copy of the adjudication application by post is unlikely to be an effective method.

The safest method of ensuring that you have given a copy of the adjudication application to the respondent within the time period allowed is to do so in person by courier, with instructions to obtain a signed receipt or other evidence.

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

Goldfields/Esperance (08) 9021 9494

Great Southern (08) 9842 8366

Kimberley (08) 9191 8400

Mid-West (08) 9920 9800

North-West (08) 9185 0900

South-West (08) 9722 2888

National Relay Service: 13 36 77

Translating and Interpreting Service (TIS): 13 14 50

This publication is available in other formats on request to assist people with special needs.