

User guide

Giving a section 28(2) notice of intention to apply for adjudication

The Building Commissioner has published a template for giving a section 28(2) notice of intention under the *Building and Construction Industry (Security of Payment) Act 2021* (the Act).

This document provides guidance on using the template if you are a claimant giving a section 28(2) notice.

You may use your own template for giving the notice.

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 a section 28(2) notice or the circumstances in which it should be given, refer to the information available on Building and Energy's website, or seek professional advice.

Outline

The Act requires that where you have given a payment claim to the respondent they must either give a payment schedule within 15 business days (or such shorter period specified in the construction contract), or pay the claimed amount in full by the due date.

If the respondent does not give you a payment schedule within the time required and make full payment by the due date, you can elect to either recover the full amount claimed as a statutory debt in the courts by way of a 'summary judgement' application to a court of competent jurisdiction, or make an application for adjudication.

If you elect to apply for adjudication, you must first give the respondent a notice under section 28(2) of the Act of your intention to apply for adjudication. This is known as a 'section 28(2) notice'. If you apply for adjudication without properly giving a section 28(2) notice, the application will not be valid.

You must not give the respondent a section 28(2) notice until after the due date for payment of claim has passed (and, where no payment schedule has been received). If you give the respondent the section 28(2) notice before the due date for payment, it will be invalid and any subsequent adjudication will be unsuccessful.

A section 28(2) notice must be given to the respondent within 20 business days of the date payment was due to be made. Once you have given the section 28(2) notice to the respondent, they will

have 5 business days to respond by giving a payment schedule (or make full payment).

After the end of the 5-business day period, you can apply for adjudication within 20 business days. The full 5-business day period must run its course, even if the respondent gives a payment schedule earlier (for example, on day 3).

The 20 business day timeframe for applying for adjudication applies irrespective of whether the respondent has or has not given a payment schedule.

A respondent will not have validly given a payment schedule if it is given outside of the 5 business day period from when the section 28(2) notice was first properly given.

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

- (a) a Saturday, Sunday or public holiday; or
- (b) 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.

Purpose of the section 28(2) notice

The purpose of the section 28(2) notice is to alert the respondent of your intention to apply for adjudication if

full payment is not made or a payment schedule is not given.

It provides the respondent with a further but final opportunity to advise you why they are not making payment.

You do not need to give the respondent a section 28(2) notice if you are electing to recover the full amount claimed through the courts.

If you give a section 28(2) notice to the respondent and then elect to apply for adjudication within the time required, a copy of the notice should be attached to your adjudication application.

If you decide to use the template form for making an adjudication application that has been published by the Building Commissioner, you should also indicate in the space provided that the section 28(2) notice was given and include the other relevant details.

Completing the template

The template published by the Building Commissioner for a section 28(2) notice is a guide only.

The Act does not specify any requirements for a section 28(2) notice, only that it must be given in writing to the respondent within 20 business days of the due date for payment.

This template can be used for individuals, non-incorporated entities and as well as companies.

The template uses “you” to refer to an individual or the company that they represent, and “We” to refer the issuing individual or company that they represent.

Make sure you enter the date when the payment claim under the Act was given to the respondent and the total amount of the payment claim (including GST if applicable) in the spaces provided in the template.

Finally, give the section 28(2) notice to the respondent

The Act requires the section 28(2) notice to be “given” to the respondent.

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

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

- delivering it to the respondent personally;
- leaving it at the respondent’s ordinary place of business;

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

If the respondent is a corporation, the notice 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 in which the section 28(2) notice was given to the respondent, because the time for the respondent to pay and/or provide the payment schedule runs from that date.

If a respondent denies receiving the section 28(2) notice, you will be required to prove that you had given one to the respondent. When items are sent by ordinary post they can be taken to be received anywhere between 3-7 business days after posting depending on the sending and receiving location. One sure way of ensuring the notice is given is to do this in person by courier with instruction to obtain a signed receipt or other evidence.

Building and Energy | Department of Energy, Mines, Industry Regulation and Safety

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8.30am – 4.30pm

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National Relay Service: 13 36 77

Translating and Interpreting Service (TIS):
13 14 50

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