



User guide

Giving an adjudication application

The Building Commissioner has published a template for a claimant wishing to make an adjudication application 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 for an adjudication application 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 adjudication application under the Act, refer to the information available on the Building and Energy's website, or seek professional advice.

Overview

Under the Act, an adjudication application must:

- be in writing;
- identify the payment claim and the payment schedule (if any) to which it relates;
- be accompanied by a copy of the construction contract, or of the relevant provisions of the construction contract;
- be given within the prescribed time period (see also below); and
- if made to an authorised nominating authority, be accompanied by the application fee (if any) determined by the authority.

If the construction contract is not written (or is partially written and oral), you must demonstrate the existence of the contract by any applicable email and other documentation.

The adjudication application may include:

- submissions relevant to the application (see also below); and
- the information in support of the submissions (see also below).

Importantly, an identical copy of the application must be given to the respondent within 1 business day after the application had been made.

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 of giving a document is business day zero.

Different ways for making an adjudication application

The Act sets out 3 circumstances where a claimant can apply for adjudication of its payment claim:

1. Where the respondent has provided a payment schedule but has not paid the claimant the scheduled amount in full on or before the due date for the progress payment, the claimant may apply for adjudication, subject to such application being made within 20 business days after the due date of payment of the scheduled amount;
2. Where the respondent has provided a payment schedule but the scheduled amount is less than the claimed amount, or no payment is proposed in the payment schedule, the claimant may then apply for adjudication of the payment claim, subject to such application having being made within 20 business days after the claimant received the payment schedule;

3. Where the respondent did not provide a payment schedule, the claimant may still apply for adjudication of the payment claim, but only if it has given the respondent a second opportunity to provide a payment schedule. Giving the respondent the second opportunity to provide a payment schedule is referred to in the template as a section 28(2) notice (a 'notice of intention to apply for adjudication') and this requires:

- (a) the claimant to notify the respondent within 20 business days of the due date for payment that it intends to apply for adjudication of the payment claim; and
- (b) give the respondent the opportunity to provide a payment schedule within 5 business days after receiving the claimant's written notice.

Where, after the giving of the section 28(2) notice, the respondent has either provided a payment schedule within the 5 business day period or not provided a payment schedule, the claimant may refer its payment claim to adjudication subject to such application being made within 20 business days of the end of the 5-business day period.

A template for a section 28(2) notice is available for download from Building and Energy's website.

Meaning of "due dates for payment"

The due dates for payment will vary depending on the parties involved:

1. In the case of a payment claim made by a head contractor to a principal – due date for payment is 20 business days after a payment claim is given (unless the contract provides for payment on an earlier date).
2. In the case of a payment claim given by a subcontractor to a head contractor, between 2 subcontractors, or there is no head contractor – due date for payment is 25 business days after a payment claim is given (unless the contract provides for an earlier date).
3. In the case where the claim is for home building work – due date for payment is the date provided for in the contract or, if the contract does not provide a due date for payment, then 10 business days after a payment claim is given.

Inserting the claimant and respondent details in the template

Make sure you correctly set out your details and those of the respondent in the relevant sections in the template.

Double check to ensure that the details correspond to those that were set out in the payment claim and payment schedule and that it correctly (and fully) sets out the names of the legal entities that entered into the construction contract and that it matches the parties' respective Australian Business Numbers (ABN).

You will note that the template also requires you to insert the parties' respective contact details, including the names (and contact details) of their representatives (if applicable or known). This information is important, as it may be necessary for the adjudicator or authorised nominating authority to contact the parties during the adjudication process.

To whom the adjudication application is to be given

If the construction contract expressly stipulates a registered adjudicator who is to be the adjudicator for applications under the Act, the adjudication application must be given to that person.

Where this is the case, ensure that you insert the adjudicator's name, registration number (if known) and contact details where shown in the template and give that application, together with all the attachments (see below), to that person.

If there is no adjudicator specified in the contract, the application (including submissions) must be given to an authorised nominating authority of your choice. The details of the authorised nominating authority should be entered into the template.

Project details

The template includes a section for you to identify the name of the Project, its location and the type of construction work/related goods and services carried out/supplied. This information will assist the authorised nominating authority to identify a suitable adjudicator to adjudicate the application.

Contract details

Inserting the contract details in the relevant section of the template will help identify whether the payment claim can be referred to adjudication.

If the construction contract was entered into before 1 August 2022, the payment claim cannot be referred to adjudication under the Act. You will need to check whether you are eligible to instead use the adjudication process provided under the *Construction Contracts (Former Provisions) Act 2004* (WA). General information on this Act can be found on the Building and Energy website.

Similarly, if the contract is between a contractor and individual principal for home building work for a contract sum less than \$500,000 (including GST), the payment claim cannot be referred to adjudication under the Act.

Payment claim details

In the space provided within the template, insert the date of the payment claim, the due date for payment and the claimed amount (inclusive of GST if applicable).

As to how you identify the due date for payment, refer to the information set out above.

Payment schedule details

It is important that you select whether or not the respondent has provided a payment schedule in response to your payment claim, noting that a payment schedule may have been provided either within the 15 business day period after the giving of the payment claim or within the 5 business day period after the giving of the section 28(2) notice (see the information set out above).

If you select that a payment schedule has been given, make sure that you complete all the details set out under this heading of the template.

If you select that a payment schedule was not given, make sure you set out the details about the section 28(2) notice.

If a payment schedule was given in response to the section 28(2) notice within the time required, complete the details set out under this heading of the template. If a payment schedule was not given within the time required to the section 28(2) notice, select 'not applicable'.

Attach written submissions and supporting documentation

When you give your adjudication application, it is important that you include in the attachments written submissions that set out why you consider you are entitled to be paid the claimed amount.

Simply arguing you are entitled to be paid because you have carried out the work (or supplied the related goods and services) will not establish your entitlement. You must demonstrate your entitlement to your claim by providing evidence that supports your position.

Unless invited by the adjudicator, you will have no right to make further submissions after giving your adjudication application.

If your application does not substantially demonstrate an entitlement to the amount claimed, or if there are aspects relating to your claim which are unclear do not assume that an adjudicator will seek further submissions.

It is not the adjudicator's role to assist a party in the presentation of its case and because of the compressed timeframe within which the adjudicator is required to make the determination, there may be insufficient time for the adjudicator to request further information.

What information should be included in submissions?

Written submissions would usually include (but not be limited to) the following information:

- an outline of the Project and a description of the construction work being undertaken, or the related goods and services supplied;
- the existence of a construction contract entered into between you and the respondent, and that the payment claim has been made pursuant to the contract;
- the events leading up to the payment claim, including whether it relates to verbal directions having been issued (for example, relating to variations);
- how the valuation of the construction works or related goods and services had been calculated, with reference to the relevant provisions of the contract that set out how such works/related goods and services are to be valued;
- how the requirements and timeframes for the giving of an adjudication application under the Act have been satisfied; and
- if applicable, how the requirements for the giving of a section 28(2) notice or a homeowner notice under section 24(2) of the Act have been satisfied.

Ensure you address each reason given in payment schedule

If the respondent has given a payment schedule and has within that document set out its reasons for withholding payment, then make sure that your written submissions address each one of those reasons.

If you consider that the reasons that the respondent has given in its payment schedule are incorrect, then you should set out your arguments why you disagree and back this up by way of evidence (e.g. by reference to relevant correspondence, dated photographs or by way of a witness statement countering the respondent's argument or by way of an expert report supporting your position).

Even if no payment schedule has been provided, the adjudicator must still be satisfied that there was a construction contract under which the work has been carried out and the value claimed.

That is why, even in circumstances where no payment schedule has been provided, it is still necessary to provide written submissions that substantiate your position.

Suggested structure for your written submissions

How you set out your written submissions will depend on the nature of the items that make up your payment claim, the size and complexity of the claim, as well as the reasons that the respondent had given in its payment schedule for withholding payment. Only very limited submissions may be needed for a small payment claim.

Nonetheless as general guidance, structuring your written submissions under the following headings may assist in articulating your position in a clear and logical manner to the adjudicator. This can be done in a separate document to the template.

Introduction

This section enables you to set the scene relating to the issues in dispute. You could do this by:

- providing background to the nature of the Project;
- setting out the amount as claimed in your payment claim, the amount set out in the respondent's payment schedule and the amount you are seeking in the adjudication;
- summarising the issues for determination by the adjudicator; and
- setting out the evidence you rely on to support your claim, e.g. statutory declarations of key witnesses, expert reports, time sheets, invoices, photographs and where this evidence can be located in your adjudication application.

Jurisdiction

Set out why you consider that your payment claim and adjudication application meet the requirements of the Act and why the adjudicator has jurisdiction to make a determination.

For example:

- that the works (or related goods and services) to which the progress payment relates are 'construction work' or 'related goods and services' within the meaning of the Act;
- your construction contract does not fall within any of the exclusions from the Act (e.g. is a contract for home building works directly with a homeowner for a total value less than \$500,000, or is a contract of employment within the meaning of relevant employment laws);
- the payment claim and adjudication application have been validly given within the time required; and
- if applicable, required notices under the Act have been validly given, such as homeowner notice under section 24(2) of the Act and/or a section 28(2) notice of intention to apply for adjudication.

You should also address any jurisdictional issues that the respondent has raised in its payment schedule and why you disagree. You may wish to refer to relevant court cases and how these cases support your position.

Remember, the homeowner notice under section 24(2) is required to be given with a payment claim under the Act where:

- the works or supply under the contract are home building works (within the definition of the *Home Building Contracts Act 1991*);
- the value of the total works under the contract are greater than \$500,000; and
- the principal (to whom the payment claim is given) is the individual homeowner.

A homeowner notice is not required where the payment claim relates to home building works and is given by a subcontractor to a head contractor or between 2 subcontractors. A homeowner notice is also not required if the principal is a corporation, the works or supply are in respect to multiple dwellings, or for a residential development business of the principal.

A copy of the homeowner notice should be attached to the adjudication application if it has been given to the respondent to support your submission.

Further details about a homeowner notice (including a template), and when the Act applies to a contract for home building work, can be found on the Building and Energy website.

The Contract

Set out all the documents that comprise the contract (for example General and Special Conditions, Specifications, Drawings etc.). Also identify the contract conditions relevant to the issues in dispute and how you consider these provisions should be interpreted (for example the mechanism relating to the making of the claims for extension of time, etc.).

Assessment of claimed contract works

Set out your arguments as to why you are entitled to the various work items being claimed. Make sure that you can substantiate the amounts for each of the claimed items.

This may require you to demonstrate that the various items of work, as claimed, have in fact been carried out, by, for example, referring to your time sheet records, invoices, etc. copies of which should be attached to your submissions.

Assessment of claimed variations

If you are claiming amounts for variation work carried out, then set out the basis upon which you claim the work constitutes a variation and the basis upon which you have valued the variations. If you say that a direction to carry out a variation had been given, then provide such details e.g. if the direction was in writing, then provide a copy of the direction, if the direction was oral, then set out the circumstances when such direction had been given and by whom.

Make sure that you deal with each of the variations being claimed and that you detail how you arrived at your assessment (by reference to timesheets, invoices and the percentage margin applied).

Respondent's claimed set-offs/deductions

If in its payment schedule the respondent claimed an entitlement to set-offs, such as a deduction for liquidated damages or a deduction representing the estimated costs for rectification of defective work, then you should provide your response.

If the respondent had deducted liquidated damages, then you may wish to demonstrate that you did not delay the works and/or that the date for practical completion should have been extended.

Similarly, if the respondent has deducted an amount said to represent the costs for rectifying defects, then you may wish to dispute such deduction by referring to a report prepared by an expert consultant, or by way of other evidence (for example photographs).

Due date for payment

Set out your view as to the due date for payment of any adjudicated amount. To do this you will need to refer to section 20 of the Act.

Interest

Set out your view as to the applicable interest on any adjudicated amount. To do this you will need to refer to section 21 of the Act.

Adjudication Fees

Section 50(4) of the Act provides that parties to an adjudication are jointly and severally liable for payment of the adjudication fees and expenses, or in such proportion determined by the adjudicator.

If you consider that a greater share of the adjudication fees and expenses should be paid by the respondent, then you will need to make submissions as to why the adjudicator should make a determination to that effect.

This may be because, you consider the respondent had withheld payment for no valid reason and that the referral of your payment claim to adjudication had been vindicated.

Tick the checklist in the template

Under the Attachments section in the template, there is a checklist for you to advise whether the application contains the various attachments.

Importantly, if you were required to give a section 28(2) notice of intention to apply for adjudication, make sure you select the checkbox. If this was not required, then select not applicable.

Make sure that if you have included attachments, these are given with the application.

Sign and date the application

Make sure you sign and date the application. The date should be the date when the application is given to the adjudicator (where applicable) or the authorised nominating authority.

Give a copy of the adjudication application to the respondent

You must also give a copy of your application to the respondent within 1 business day of having made your application. It is however best practice to give your application to the authorised nominating authority or adjudicator and the respondent on the same day.

Your adjudication application will not be regarded as having been given until it has been taken to be received.

If the contract stipulates a way of giving documents, such as to a particular person or email address, the 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 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 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 after posting 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.

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