



User guide

Giving a payment claim

The Building Commissioner has published a template for a person wishing to make a payment claim 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 person giving the payment claim (the claimant).

The template is recommended, but not mandatory. A claimant may prepare and use their own template for giving a payment claim under the Act, or alter the template provided.

The template also allows you to make a claim for the return of retention money withheld under the construction contract, but not for the return of other performance security (e.g. bank guarantees) or the substitution of retention money for a compliant performance security (if permitted). You should prepare your own template for these types of payment claims.

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 payment claim under the Act, refer to the information available on Building and Energy's website, or seek professional advice.

Overview

Under the Act, a person who has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment for the work performed or for supplying the related goods and services. The Act refers to that person as the "claimant".

The Act is prescriptive and it is therefore important for the claimant to follow the correct process by ensuring a valid payment claim is made.

First and foremost – there must be a construction contract

If you wish to make a payment claim under the Act, you must show that you have entered into a construction contract. In other words, you must have entered into a contract with the other party (the respondent) whereby you undertook to carry out construction work or supply related goods and services.

Such a contract may be in a written form, or of an oral nature, or partly written and partly oral.

What can be claimed?

The Act defines construction work and related goods and services in broad terms, this includes (but is not limited to) the following:

- building work;
- civil engineering;
- demolition;
- electrical, painting, bricklaying, plastering, tiling;
- hire of plant and equipment;
- landscaping;
- professional services such as architectural design, engineering and surveying; and
- supply of building materials and/or labour

Payment claim must properly identify respondent

The payment claim must identify the relevant details of the parties that have entered into the construction contract.

In particular, it is important that the details of the parties set out in the template correspond to those set out in the construction contract. This means making sure that you have inserted not only your correct name, but also the name of the legal entity with whom you have contracted (i.e. the respondent).

If the respondent's name is ABC Building and Construction Services Pty Ltd trading as ABC Building then that will require you to set out the full name (i.e. "ABC Building and Construction Services Pty Ltd trading as ABC Building"), and not any abbreviated name, such as ABC Building.

Make sure the name matches the ABN

It is also important that you include the correct Australian Business Number (ABN) details because courts will not enforce payment of amounts determined by an adjudicator unless the name matches.

Also include the contract number and name of project

Usually, a written construction contract sets out the name of the project and where the works are to be carried out, or where related goods and services are to be supplied, as well as a contract reference number. Include these details in your payment claim. This will link the payment claim to the relevant contract and project.

What type of payment claims can be made?

A payment claim may be for the following:

- a progress payment, which is a claim made on and from the last day of the named month in which the construction work was first carried out (or related goods and services were first supplied) under the contract and on and from the last day of each subsequent named month. However, if the contract makes provision for an earlier date in the named month (e.g. 28th day of the month) then that will be the applicable date rather than the last day of the month; or
- a single or one-off payment for carrying out construction work or supply of goods and services under the construction contract; or
- a payment based on an event or date ("Milestone Payment"); or
- the final payment for construction work carried out or the supply of goods and services under the construction contract. The date of a final payment claim will either be:
 - o the date specified in the contract; or
 - o before the day that is 28 days after the defects liability period in the contract ends; or
 - o 6 months after completion of the work or supply of goods and services,whichever of these is the latest.

Note the limitations when making a payment claim

Unless your contract provides otherwise, only one progress payment claim can be made for each month, however a payment claim can include amounts from previous months or the unpaid amount of a claim from a previous month.

Unless the construction contract provides for a longer period, a claimant has 6 months to give a payment claim to the respondent from the time construction work was last carried out, or goods and services were last supplied.

Giving a payment claim to a homeowner

Where a claimant has entered into a construction contract with an individual homeowner for home building work (as defined in the *Home Building Contracts Act 1991*) and the total value of the contract is over \$500,000.00, the claimant can make a payment claim, so long as the payment claim has attached to it the 'homeowner notice' prescribed under the Act.

Failing to attach the homeowner notice whenever giving a payment claim to a homeowner will invalidate the payment claim. That means the payment claim is treated as though no claim was ever made. You can download the notice from the Building and Energy website.

The homeowner notice is not needed if the payment claim is being made to:

- a head contractor or subcontractor on a residential or home building work project;
- a principal who is a corporation; or
- the works carried out are on multiple dwellings or for the purposes of a residential development business of the principal.

If you are making a payment claim to an individual homeowner for home building work, then in addition to any other relevant categories in the Payment Type section of the template you should select 'Residential Construction'. At the end of the template you can also indicate in the section made available that the homeowner notice is attached to the payment claim.

Building and Energy has published a dedicated guide on the operation of the Act in the residential segment of the building and construction industry on its website.

Registration for prescribed building services

Under the *Building Services (Registration) Act 2011* (WA), a party who has entered into a construction contract for various types of construction work (i.e. building work, building surveyor work, painting work), is required to be registered under that Act.

A valid claim for a progress payment cannot be made if a claimant does not hold the necessary registration for the work the subject of the claim.

In circumstances where you are required to be registered, identify your registration number in the space set out in the template. Remember to select the right prefix before the number that corresponds with your particular type of registration (i.e. BC, PC, BSC).

No payment claim if insolvent

If you are a company in liquidation (i.e. being wound up), you cannot give a payment claim under the Act.

List of attachments to substantiate the payment claim

You will note that if there are relevant attachments, the template provides space for you to list the attachments to further support the payment claim. Such a list could include:

- statements/records that detail the extent of the work completed;
- completion certificates;
- dockets confirming delivery of goods; or
- photographs of the works.

If you have additional itemised attachments that do not fit within the space provided in the template, simply write in the last available row 'see attached list' and include an additional attached list.

Extremely important to endorse the payment claim

It is essential that you endorse the payment claim as a claim being made under the Act and this is done by the inclusion at the top of the template:

"This is a payment claim made under the Building and Construction Industry (Security of Payment) Act 2021 (WA)".

The purpose for endorsing your payment claim is that it alerts the respondent that this is not only a progress claim made under the contract, but also a claim made under the Act and that the respondent has a limited time (15 business days or any lesser period specified in the contract) in which to provide its response.

This endorsement on the template must not be removed or deleted, otherwise the payment claim will not be validly made under the Act.

Sign and date the payment claim

A payment claim does not need to be signed by the claimant, however it is good practice to do so. A person making the claim can enter their signature on the template.

The payment claim should also be dated.

Finally, give the payment claim to the respondent

The Act requires that a payment claim be given to the respondent. If the contract stipulates a way of giving claims, such as to a particular person or email address, the payment claim must be given to the respondent in that way.

If the contract does not stipulate a way of giving claims, then the payment claim 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 by the person for giving payment claims under the contract.

If the respondent is a corporation, the payment claim 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 payment claim was given to the respondent, because the time for the respondent to provide the payment schedule runs from the date of receipt of the payment claim.

If a respondent denies receiving a payment claim, you will be required to prove that you had given the payment claim 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 correct giving of the payment claim is to do this in person by courier with instruction to obtain a signed receipt or other evidence.

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