



User guide

Respondent giving an application for adjudication review

The Building Commissioner has published a template for an application for adjudication review by a respondent 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 respondent.

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

The template for an application for adjudication review by the respondent is recommended, but not mandatory. A respondent 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 the Building and Energy website, or seek professional advice.

Outline

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

- (i) it gave the claimant both a payment schedule and an adjudication response within the time allowed under the Act; and
- (ii) the adjudicated amount is \$200,000 (incl. GST) or more than the scheduled amount; and
- (iii) the claimant had not already applied for a review of the adjudicator's determination (or, if the claimant has already applied, the claimant has withdrawn its application).

A respondent cannot make an application for adjudication review challenging a decision that the adjudicator had jurisdiction to determine an adjudication application.

Further, a respondent cannot make an application for adjudication review unless the respondent has:

- (i) paid to the claimant any part of the adjudicated amount that the respondent does not dispute; and
- (ii) paid the adjudicated amount (or part) that is disputed into a trust account with a recognised financial institution:
 - established by the respondent; or
 - established by the authorised nominating authority to which the application was made; and

- (iii) given the claimant written notice of the payment into the trust account, together with information that identifies the trust account.

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) 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.

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 that the claimant gave the original adjudication application to, or any other authorised nominating authority.

You can refer to Building and Energy's 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 the review adjudicator.

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;
 - (iv) the complete documentation that comprised the adjudication application;
 - (v) the complete documentation that comprised the adjudication response;
 - (vi) any submissions made to the adjudicator by the parties (including accompanying documents); and
- (c) not include any reasons relating to matters in the adjudication review application unless those reasons were raised in the original adjudication.

You can include as part of the adjudication review application, submissions that you consider to be relevant in support of your application (see also below).

What the Act requires a review adjudicator to do?

Where an adjudication review application has been made, 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;
- (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 adjudicator 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, in the making of the adjudication determination, incorrectly or improperly assessed the adjudicated amount.

This is the most important part of the documentation you will be providing 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.

You may, for example, consider that the original adjudicator's assessment of several of the claimant's claimed items were excessive or that, in arriving at the assessment of items, the adjudicator failed to have due regard to the evidence you had provided, or that the adjudicator's assessment had not been made in accordance with the terms of the contract.

Alternatively, you may consider that the adjudicator had incorrectly determined that the claimant was entitled to a claimed variation by incorrectly rejecting your argument that the claimed variation was work that fell within the claimant's original scope, or that the value that the adjudicator had given to a claimed variation was excessive, or that your claim to deduct liquidated damages had been incorrectly rejected.

The submissions that accompany your adjudication review application should set out why you consider the original adjudicator's reasons and conclusions to be incorrect, and you can provide documentation to support your position (e.g. a witness statement or an expert report from 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 response, the template requires you to complete the relevant details relating to you and the claimant, including the parties' correct names, Australian Business Number (ABN), addresses, telephone numbers and email addresses. If you and/or the claimant 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 application is being made.

The template also includes the following two sections that serve as important checklists:

1. Pre-requisite for Adjudication Review Application: This lists the various pre-requisites that a respondent must meet when making an application for adjudication review. The ticking of the various boxes serve as a checklist that your application meets all of the pre-requisite conditions.
2. Required copies of documents to be included: This section lists the various documents that should be included with your application.

It is important that you sign and date the application.

How to give your adjudication review 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;
- if an authorised nominating authority allows for the use of an electronic lockbox, using that lockbox.

Finally, give a copy to the claimant

You must give a full copy of the adjudication review application to the claimant within 1 business day of giving your application to the authorised nominating authority. It is however best practice to give your application to the claimant 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 claimant 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 claimant personally;
- leaving it at the claimant's ordinary place of business;
- sending it by post to the claimant's ordinary place of business; or
- emailing it to an address specified for giving documents under the contract.

If the claimant 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.

When items are sent by ordinary post they can be taken to be received anywhere between 3-7 business days of 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 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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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.