



User guide

Giving an adjudication review response

The Building Commissioner has published a template for a response to an adjudication review 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 giving an adjudication review response. It can be used equally whether you were the claimant or the respondent to the original adjudication, and are now the respondent to an adjudication review application.

The template is recommended, but not mandatory. You may use your 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 a response to an application for adjudication review under the Act, refer to the information available on Building and Energy's website, or seek professional advice.

Outline

Where an adjudication review application has been made you may give an adjudication review response to the review adjudicator, subject to such response being given within 10 business days after you received a copy of the adjudication review application.

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.

An adjudication review response:

- (a) must be given in writing; and
- (b) must identify the adjudication review application to which it relates; and
- (c) may contain submissions relevant to the response that you choose to include.

What you cannot however include are any reasons for a matter in your response unless those reasons were raised in the original application being reviewed.

To whom the adjudication review response is to be given

Once an adjudication review application has been given to an authorised nominating authority that authority is required to appoint a review adjudicator within 5 business days of receiving the application. You will be advised of the name of the person who had accepted the appointment to conduct the review adjudication.

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.

However, the review adjudicator must not consider in determining an adjudication review application:

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

Submissions made in support of adjudication review response

This is an important part of the documentation you will be providing to the review adjudicator because it is here that you will be setting out your arguments in response to what has been detailed in the adjudication review application. This can be done in a separate document to the template.

Your submissions should address each and every reason that the other party had set out in its adjudication review application. If, for example, the basis of the adjudication review application is that the original adjudicator made an incorrect decision relating to jurisdiction, then you should set out your arguments as to why you consider that decision was correct, by reference not only to the reasons that the original adjudicator had given in their decision, but also to the Act, the contract and/or relevant case law.

Similarly, if the basis for the adjudication review application is that the original adjudicator had arrived at incorrect conclusions and/or made incorrect assessments, then you should set out your response to each of the applicant's arguments.

In doing so you may set out your arguments as to why you consider that the adjudicator had in fact arrived at correct conclusions and/or assessments, and you may also include documentation that supports your position (e.g. a witness statement in the form of a statutory declaration or an expert report).

What you cannot however include are any reasons for any matter unless those reasons were raised in the original adjudication being reviewed. You cannot for example argue to be entitled to be paid for an additional item of work, or that since lodging your payment claim you have carried out more work and therefore seek a larger amount than originally claimed, or that an additional item of work has since been discovered to be defective and that the costs of rectifying this defect should be taken into account by the review adjudicator.

Completing the template

The template for the review adjudication response is to be addressed to the review adjudicator, the name of which you will have been provided by the authorised nominating authority. You should therefore insert the name of the review adjudicator in the space provided, as well as the details relating to the authorised nominating authority.

Please also complete the parties' details upon which the original adjudication application had been made including (if applicable) the details of their representatives. Make sure that you insert the correct names, Australian Business Number (ABN), addresses, telephone numbers and email addresses.

Importantly, set out the date when you received the adjudication review application as this will show whether your adjudication review response has been given within the 10 business day period after receipt of such application.

The template includes a box for you to tick that submissions and relevant documents are attached to your adjudication review response. Make sure you not only tick the box, but that you have also attached those documents with your response.

Finally, it is important that you sign and date your response.

Giving the adjudication review response

Once you have completed the template and satisfied yourself that you have included all the requisite documentation, you can then give it to the authorised nominating authority that had received the review application.

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.

Give a copy of the adjudication review response

You must give a full copy of your adjudication review response to the other party within 1 business day after you gave your response to the authorised nominating authority. It is however best practice to give your response to the review adjudicator and the other party at the same time as the respondent.

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

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

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

If the other party 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 other party. 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.

Giving a copy of the adjudication application by post is therefore unlikely to be an effective method.

The safest method of ensuring that you have given a copy of the adjudication application on 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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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.