



Government of Western Australia
Department of Commerce
Building Commission

Building
Commission

Subcontractor's guide to

resolving payment disputes

under the *Construction Contracts Act 2004*

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DISCLAIMER

The material contained herein provides general guidance and information only and is current at time of publishing. Readers should not act or omit to act solely on the basis of anything contained herein. In relation to a particular matter, you should seek appropriate legal/professional advice. The State of Western Australia and its servants and agents expressly disclaim liability, whether in negligence or otherwise, from any act or omission resulting from reliance on this document or for any consequence of such act or omission.

This guide is intended to help you understand how to resolve contractual payment disputes using the *Construction Contracts Act 2004* (the Act) and outlines the process for parties undertaking rapid adjudication and the rights and obligations of parties to contracts for building and construction work.

The Building Commission recommends that you are fully aware of the terms of each contract you have for construction work, including any clauses covering how disputes are to be resolved. The Act works in addition to what is in your contract, and a contract cannot provide that the Act does not apply.

Where a payment dispute arises it is important that you act swiftly to resolve it. You can use the dispute processes in your contract, take action in the courts, or use the rapid adjudication process under the Act. The choice is yours, and you may want to get advice before deciding which process is best for you. This guide deals with the rapid adjudication process under the Act.

The Act applies to contracts for the carrying out of most types of construction work, except work specifically excluded from the operation of the Act. This includes:

- drilling for the purpose of discovering or extracting oil or natural gas, whether on land or not;
- constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance; and
- fabricating or assembling items of plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance.

You should consider the type of work carried out under your contract and whether it falls within any of the exclusions before proceeding with adjudication.

The Building Commission administers the Act, it does not have any role or powers to advise on individual contractual issues or resolve payment disputes. In this regard, you should seek independent legal advice.

Legal practitioners specialising in construction law and contractual disputes can be found through the Law Society of Western Australia's 'Find a Lawyer' database at **www.lawsocietywa.asn.au/find-a-lawyer**

Alternatively, registered adjudicators may help on payment disputes in which they are not involved. You can contact them directly through the details provided on the Building Commission's website at **www.commerce.wa.gov.au/building-commission/find-adjudicator**

The scenario

You have carried out work on a construction project and have not been paid, or the client has refused to pay you the full amount owed. What do you do?

It is important to understand that your right to be paid comes from your contract and you need to follow the payment process set out in your contract. If the contract is not in writing, the Act includes a schedule of payment terms that are implied in your verbal contract.

From time to time you may be involved in a dispute with a client over payment for work you have done on a construction project. The customer or client may be refusing to pay you, withholding security, or disputing the amount they owe.

If you find yourself in this situation, acting quickly to determine your options is the vital first step in ensuring you get paid for the work you've done.

The first option should always be to discuss payment with the client directly. This could be an informal verbal discussion to identify and resolve the reasons for withholding payment, or a formal letter demanding payment.

However, if this fails to resolve the dispute then you need to consider other options.

Option 1: Using a mediation service

Mediation is a form of dispute resolution where parties voluntarily come together to discuss a dispute with the help of an independent mediator. Mediation is interest based and not rights based. It is a way of engaging in a negotiation with the help of an independent mediator to identify and work through options to resolve the dispute, rather than enforcing the legal rights of a contract.

Mediation is a good first option where you and the client wish to maintain a good business relationship and agree that an independent party may assist in working through the issues. It is likely to be quick and cost-effective and may be used prior to, or in conjunction with, other forms of dispute resolution.

There are a number of organisations in Western Australia who provide a mediation service. Alternatively, if you operate a small business or your client is a small business, you can access the subsidised mediation service provided by the Small Business Development Corporation.

Need Assistance?

The Small Business Development Corporation can be contacted on 13 12 49.

Details on the mediation service can also be found on the website at:

www.smallbusiness.wa.gov.au/i-am-in-dispute/what-happens-at-mediation/



Option 2: Using the dispute resolution clause in your contract

Most written contracts for construction work contain what are often called 'dispute resolution clauses'. These clauses provide the method in which the parties agree to resolve disputes under the contract, including any disputes over payment. There are many different types of dispute resolution clauses that prescribe the methods the parties will use to resolve disputes, which may include mediation, expert determination or arbitration.

Generally, you will need to first notify the other party of the nature of the dispute, and the resolution will then proceed based on the chosen method of dispute resolution.

For example, the Australian Standards *AS2124-1992 General Conditions of Contract* and *AS4906-2002 Minor Works Contract Conditions*, both prescribe that the parties will notify each other of the details of the dispute and then proceed to formal negotiation and arbitration.¹

Where a contract contains a dispute resolution clause the courts will normally enforce these provisions by staying proceedings until the dispute resolution method has been observed.

But before using the dispute resolution clause in a contract, it is important to be aware of:

- the rules that may apply to the chosen method of dispute resolution;
- whether a particular person or organisation has been nominated to act as the 'independent umpire'; and
- what timelines apply to the resolution process.

In many instances, the timelines under dispute resolution clauses can be lengthy, so it is important to also consider what impact this delay may have on your business or cash flow.

Even where there is no contract or dispute resolution clause in the contract, the parties can by mutual consent enter into an arbitration process.

Option 3: Court action

Where you do not have a written contract with the customer or client, or where the dispute resolution clause in your contract allows, another option may be to commence court proceedings to recover the money owed to you.

Before commencing court action you should seek legal advice to determine the likelihood of success, the costs involved, and the time it may take to complete the court proceedings.

Depending on the amount of money owed to you, court action will need to be commenced in the Magistrates Court, District Court or Supreme Court of Western Australia.

¹ See generally clause 47 of AS2124-1992 and clause 27 of AS4906-2002.

For claims less than \$10,000, the Magistrates Court provides a 'minor case' process, where parties are generally not permitted to have legal representation during the court proceedings. Otherwise claims up to \$75,000 may be heard in the Magistrates Court civil registry.

Need assistance?

The Magistrates Court can be contacted on (08) 9425 2222.

Details on the minor case process and commencing civil proceedings can be found on the Magistrates Court website at:

www.magistratescourt.wa.gov.au/C/civil_matters.aspx



For claims up to \$750,000 (not including interest), court action must be commenced in the District Court. Claims above \$750,000 need to be commenced in the Supreme Court.

Need assistance?

The District Court can be contacted on (08) 9425 2128.

The Supreme Court can be contacted on (08) 9421 5333.

Details on commencing civil proceedings can be found on the District and Supreme Court website at:

www.districtcourt.wa.gov.au or www.supremecourt.wa.gov.au



Option 4: Rapid adjudication under the Act

Sometimes it may be too costly or lengthy to go to court or use arbitration. This is where 'rapid adjudication' may assist in resolving your dispute or you just need the money now.

Rapid adjudication is a dispute resolution process designed to help resolve disagreements between parties over payments for construction work. It's quick, cost effective and may be an alternative to going to court or arbitration. Rapid adjudication under the Act operates in addition to your contractual and legal rights. A determination under the Act may be accepted by the parties to a contract, and the dispute is resolved. However if either party wishes, the dispute can still be dealt with more formally under the dispute resolution process in the contract, or through the courts. In this case a determination under the Act makes a payment "on account" pending the outcome of the formal process.

It doesn't matter whether your contract is for carrying out construction work or supplying goods and services to the construction industry, or if you have a written or verbal agreement with the customer or client, provided it is for work carried out in Western Australia, or goods and services related to construction work carried out in Western Australia, you may be able to use the adjudication process under the Act.

The remainder of this guide provides an outline of how the adjudication process works to assist you in using it to resolve your dispute.

It is important to be aware that even where you use rapid adjudication, you may still need to use court action or the dispute resolution clause in your contract to resolve the dispute.

What does the Act do?

For anyone working in the construction industry, the Act provides a number of very important protections to ensure fair conduct and cash flow.

The Act:

- Provides that contracts with payment on terms greater than 50 days shall be read as requiring payment within 50 days.*
- Prohibits 'pay if paid' or 'paid when paid' clauses in contracts.
- Implies certain terms in contracts where the parties have not made a written provision or have only entered into a verbal agreement. This includes:
 - rights to progress payments;
 - when claims for progress payments can be made;
 - how claims for progress payments should be made;
 - interest on overdue payments;
 - when ownership of goods supplied for construction work passes;
 - clarifying the right to deal with unfixed goods on insolvency; and
 - holding of retention money.
- Provides a rapid adjudication process for resolving payment disputes.

The Act came into effect on 1 January 2005. Similar legislation currently operates in all other Australian States and Territories. However, there are some features to the Act that make it unique to Western Australia.



***ATTENTION:** Be aware that from 3 April 2017 the maximum permitted payment terms in construction contracts reduces from 50 calendar days to 42 calendar days.

Frequently asked questions

What is a contract?

A contract is a legally binding agreement between two or more parties; it can be written or oral.

What are 'paid if paid' or 'paid when paid' clauses?

These are clauses in contracts that make one party's (usually the subcontractor) right to receive payment entirely dependent on the other party (head contractor) having already received payment from another party (owner or principal) for the work carried out. The Act deems such clauses unenforceable, and the party who is subject to this clause may instead make a claim for payment at under the implied provisions after performing its obligations under the contract.

What happens if my contract states "I will be paid within a period greater than 50 days from submitting a payment claim?"

In such instances, the Act provides that the contract shall be read as requiring payment within 50 days of making a payment claim. This means the head contractor (or principal) is required to pay you within 50 days of submitting your payment claim or invoice*.

What happens if I don't have a written contract?

To protect yourself, you should only carry out building work for another person where you have a written agreement in place. This ensures that in the event of a dispute the rights and obligations of each party are easily identifiable. However, if you don't have a written agreement then the Act implies certain requirements which are detailed throughout this guide.

When does the Act apply?

The Act applies to all contracts for the carrying out of construction work in Western Australia entered into after 1 January 2005.

Construction work is defined in the Act to include the carrying out of most trade work, or supply of goods and services, typically associated with building and construction. This includes:

- Building dwellings, office towers, hospitals, schools, roads etc.
- Civil engineering
- Demolition work
- Electrical work
- Supply of building materials
- Hire of plant and equipment
- Landscaping
- Maintenance
- Professional services (for example architectural design, surveying)

However, certain construction work is specifically excluded from the operation of the Act. This includes:

- drilling for the purposes of discovering or extraction oil or natural gas
- constructing a shaft, pit or quarry, or drilling for the purposes of discovering or extracting any mineral bearing substance
- Fabricating or assembling items of plant used for the purposes of extracting or processing oil, natural gas or mineral bearing substance
- construction of ships or watercrafts

The extent of work excluded from the Act has been subject to a number of court decisions. So it is important to consider whether the type of work you carry out is covered by the Act. If unsure, you should seek professional advice.

What is adjudication?

Under the Act, adjudication is when an adjudicator – a registered, trained professional experienced in construction contract administration and dispute resolution – is appointed to review the issue and expedite the resolution of a payment dispute.

Frequently asked questions

Where can I find a copy of the Act?

A copy of the Act can be located on the [State Law Publisher website](#).

Does the Act apply to wages or superannuation?

No. If you are having a dispute concerning wages or superannuation owed to you contact the Fair Work Ombudsman on 13 13 94.

Does the Act apply if I carry out other types of construction work on a mining site in Western Australia?

Sometimes you may be carrying out work or supplying goods to a mining site to construct items not necessarily related to the mining work. For example, you may be constructing accommodation, ablution block, roads or providing landscaping services. Alternatively, you might be carrying out civil works (e.g. design/planning, earthworks, plumbing and electrical) for the onsite construction of an oil/gas processing facility or mining plant. In these cases the Act is likely to apply to the work undertaken. If unsure of the application of the Act to your work you should seek professional advice.

Adjudication is an inexpensive method for obtaining swift resolution of payment disputes. It does not require the use of legal representation or use the lengthy and complex processes normally associated with other dispute resolution methods, such as litigation or arbitration.

Once an adjudicator has made a decision, referred to as a “determination”, it is immediately binding on the parties, and can only be overridden by a subsequent decision in arbitration or court if one of the parties chooses to initiate such formal proceedings.

How does it work?

In very simple terms, adjudication can only start after you make a payment claim to the person or company that owes you money. Where the person or company fails to pay your claim or disputes the amount, you can then apply to have the dispute decided by an adjudicator who will determine the payment owed.

How do I start the process?

The **first step** in the process, if you have not already done so, is to make a claim for payment under your contract. Most written contracts contain provisions detailing how and when claims for progress payment, final payment or return of security are made, and how the head contractor (or principal) determines them. If you have a written contract then it is important to follow the terms that prescribe how payment claims are to be made and dealt with.

If you do not have a written contract then the Act implies a right to make payment claims and details how claims must be made. A payment claim must:

- be in writing;
- be addressed to the party to which the claim is made;
- state the name of the claimant;
- state the date of the claim;
- state the amount claimed;
- if the claim is made by the contractor, itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim;

Frequently asked questions

When can a payment claim be made?

Most written contracts provide for when progress payments and final payments can be made. If you do not have a written contract then the Act provides a contractor can make a claim “at any time after performing its obligations.” This means you can make a payment claim any time after doing the work requested.

How do I submit a payment claim?

There are no formal requirements related to submitting a payment claim. Your contract may provide a preferred method of service, but if not, it is good practice to use a method that provides a record. This could be registered post, facsimile, or courier. The same applies for a notice of dispute.

- if the claim is made by the principal, describe the basis for the claim in sufficient detail for the contractor to assess the claim;
- be signed by the claimant; and
- be given to the party to which the claim is made.

The **second step** is for the head contractor (or principal) to assess and respond to your payment claim. Again, most written contracts contain provisions on how long the head contractor has to assess and respond to your claim and then make payment.

If you do not have a written contract, or your contract does not have a written provision dealing with the assessment of payment claims, then the Act implies the length of time the head contractor has to respond to your payment claim and/or to make payment.

The Act provides the head contractor (or principal) must, within **14 days** of receiving a payment, notify you if they reject or dispute the whole or part of the claim. This notice must:

- be in writing;
- be addressed to the claimant;
- state the name of the party giving the notice;
- state the date of the notice;
- identify the claim to which the notice relates;
- if the claim is being rejected, state the reasons for the belief that the claim has not been made in accordance with the contract;
- if the claim is being disputed, identify each item of the claim that is disputed and state, in relation to each of those items, the reasons for disputing it; and
- be signed by the party giving notice.

If no notice of rejection or dispute is given, then under the Act the payment claim must be paid **within 28 days** of receipt.



'Tick-Tock'

It is important that you are aware of the time limits that apply under the Act.

All time limits for the adjudication process are counted in business days. Business days are all days except weekends, public holidays and any day between the period of 25 December and 7 January (inclusive). Once a payment dispute occurs the 90 business day limit will begin running from the next business day.

The following examples illustrate how the time limit for adjudication applications work.

Example 1:

Payment claim under the contract is submitted on 9 January 2017. The payment claim is then certified by the head contractor 14 calendar days later, but only part of the amount claimed is certified as owing.

In this example, the payment claim has been partly disputed on 23 January 2017, triggering a "payment dispute". This means the time limit to lodge an application for adjudication starts on 24 January 2017 and ends on 6 June 2017. Refer to Figure 1 in the Appendix.

Example 2:

The parties have a written contract that was executed on 4 April 2017. The payment claim is made under the contract on 25 April 2017. The contract provides that within 60 calendar days after receiving a claim the head contractor must make payment.

Irrespective of the party's written agreement, from 3 April 2017 the Act stipulates that where a contract requires a payment to be made more than 42 calendar days after it is claimed it shall be amended to require payment within 42 calendar days after it is claimed. This means that the Act provides that the time for payment of the claim ends on 6 June 2017. If payment of the claim is not made by 6 June 2017 then the parties are in a payment dispute. This means that the time limit to lodge an application for adjudication of the payment dispute starts on 7 June 2017 and ends on 11 October 2017. Refer to Figure 2 in the Appendix.

What happens if my payment claim is disputed or not paid?

Once you have submitted a payment claim, one of three things can occur. Either the head contractor (or principal) pays the claim; notifies you they reject or dispute the claim (e.g. by issuing a payment certificate for only part or all of the amount claimed); or fails to pay the claim within the time specified in your contract (or within 28 days if you don't have a written contract).

If the head contractor (or principal) notifies you that they reject or dispute the claim or fails to pay the claim, then for the purpose of the Act you are in a "payment dispute."

Once a payment dispute has arisen you must, **within 90 business days**, lodge an application for adjudication. If you do not lodge an application within this time then you may need to use other methods to resolve your payment dispute (for example mediation, arbitration or court action).

Even if you intend to negotiate with the head contractor (or principal) over your payment claim you should still lodge an application for adjudication within the **90 business days**. This will reserve your right to adjudication in the event those negotiations are unsuccessful.



Even though the time limit for making an application for adjudication is now 90 business days, it is very important to take action early to resolve disputes and recover any outstanding payments.



Remember: A business day is any day other than a Saturday, Sunday, public holiday or any day between 25 December and 7 January.

Frequently asked questions

How much does it cost to make an application for adjudication?

All appointors charge a small nomination fee for applications. The fees are published on the Building Commission's website and may differ depending on the value of the payment dispute. Most appointors also take a small bond to cover the adjudicator's fees.

Do I need a lawyer?

No. Adjudication is based on the paperwork submitted by parties to an adjudicator. However, either party may use a lawyer to prepare the written material. If you are having trouble preparing your paperwork, seek professional advice. Adjudicators who are not involved in your dispute may assist in preparing your paperwork. A list of adjudicators is available on the **Building Commission's website**.

What other costs are involved in adjudication?

All adjudicators will charge a fee (usually calculated on an hourly rate) to determine the dispute. Under the Act, both parties are liable for the adjudicators fees. Any costs incurred by a party in preparing the paperwork or submission (for example legal fees) will be borne by that party.

What paperwork do I need?

The majority of payment disputes occur over payment for variation works, or defects and set offs. Therefore, it is important to include in your application the documents that support your claim. This could be timesheets, variation forms, site diary notes, emails, invoices, plans, technical drawings, technical standards, notices, technical reports (if you have them), and of course the contract and payment claim.

Where do I send my application for adjudication?

Once you have prepared your application, it needs to be **served** on the respondent and the appointor. If the respondent is a company then service can be effected by delivering the application at, or by posting it to (use registered post), the company's registered office. The same applies for the appointor. If the respondent is an individual, then personal service should occur.

Can I 'recycle' a disputed payment claim?

From **15 December 2016**, changes to the Act apply which provide greater flexibility in the time limits for making applications for adjudication of disputed payment claims. In essence, these changes complement what is known as 'claims recycling' under construction contracts.

Under these changes if a payment claim is made under a construction contract, and the claim is initially disputed or not paid, if the claim is made again under contract and again disputed or not paid, you now have **90 business days** to make an application for adjudication from the latest time the payment claim is disputed or not paid.

Previously, the time limit for making an application for adjudication of a payment dispute commenced from the first occasion the payment claim was disputed or not paid.



Be aware the Act does not allow for a disputed payment claim to be 'resurrected' (i.e. provide an ability to make an application for adjudication when 90 business days has elapsed), if the amount or obligations performed which are being claimed have already been considered by an adjudicator.

How do I make an application for adjudication?

Adjudication is a quick, cost effective alternative to going to court or arbitration. While there are specific rules that must be followed, you don't need to be a legal expert.

An application for adjudication is either made to a nominated adjudicator, or to a prescribed appointor.

An application for adjudication **can only** be made directly to an adjudicator, **where both parties have agreed** either in the contract, or in a separate agreement.

If you have not agreed on a particular adjudicator, then the application must be made to one of the eight prescribed appointors in Western Australia.

Where there is no prior agreement on an adjudicator, the party commencing the adjudication (known as the "applicant") is free to choose whichever appointor best suits their needs. A list of the appointors can be found on the **Building Commission's website**.

An application for adjudication must be made in writing and contain certain information. This includes:

- the name of the appointed adjudicator or prescribed appointor and their contact details;
- the applicant's name and contact details;
- the respondent's name and contact details;
- the construction contract involved (or relevant extracts);
- the payment claim that has given rise to the dispute; and
- any information, documentation and submissions which will be relied upon in the adjudication.

The respondent is the party you are claiming owes you money (e.g. head contractor or principal).

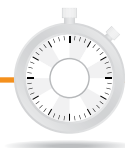
The Building Commission has produced a form to assist you in preparing a response, which is available on the **Building Commission's website**.

Once you have prepared your application, it must be served on both the respondent and the appointor. Again, remember the application needs to be served **within 90 business days** of the payment dispute arising.

What happens once I have made an application for adjudication?

Once an application for adjudication has been properly served, the **first step** will be for the appointor to appoint an adjudicator to determine your dispute.

Under the Act, the appointor must appoint an adjudicator within **five business days** after receiving the application and notify all parties in writing accordingly. If the appointor fails to appoint an adjudicator within this timeframe, then the Building Commission will do so.



'Tick-Tock'

Remember all time limits that apply under the Act are counted in business days. If you are responding to an application for adjudication you have 10 business days beginning from the business day after being served with the application.



Frequently asked questions

Does the adjudicator hold a hearing?

No. In most circumstances the adjudicator will make a decision based only on the paperwork provided. This is why it is important to ensure that you prepare proper submissions. However, the adjudicator may choose to hold a conference with the parties if the adjudicator requires further information.

What should I do if the client says "I am not going to adjudication, I'll see you in court."

Irrespective of whether the client is telling you they won't participate, you should still continue with the adjudication. Under the Act, the adjudicator will still make a determination even where the respondent fails to provide a response. Once a determination has been made, it can be enforced as a court order.

What happens if the adjudicator dismisses the adjudication without making a determination?

Depending on the reason given for dismissing the adjudication, you may commence proceedings in the State Administrative Tribunal seeking a review of the adjudicator's decision. Alternatively, you may decide to use another option for resolving the dispute, such as court action or arbitration. If the adjudicator does dismiss the application, you should seek professional advice to identify the best option for resolving the dispute.

The **second step** is for the respondent to then prepare its response. The respondent has **10 business days** from being served with the application to prepare a response.

If you are the respondent, it is important to be aware of the time limit you have for preparing a submission. Failure to provide a response does not prevent the adjudicator from determining the payment dispute, and without your submission it may make it difficult for the adjudicator to assess your position or make a determination in your favour.

The response must be in writing and contain certain information. This includes:

- the name of the appointed adjudicator or prescribed appointor and their contact details;
- the applicant's name and contact details;
- the respondent's name and contact details;
- the details of the rejection or dispute of the payment claim; and
- any information, documentation and submissions which will be relied upon in the adjudication.

Once the response has been prepared it must be **served** on the applicant and the adjudicator (or the appointor if an adjudicator has not yet been appointed). The Building Commission has produced a form to assist you in preparing a response, which is available on the **Commission's website**.

The **third step** is then for the adjudicator to assess the payment dispute and make a determination based on the information provided by both parties.

What does the adjudicator do?

Once the adjudicator has received the application and the response the adjudicator has **10 business days** to assess the dispute and make a determination. If no response is provided, then the adjudicator has **10 business days** from when a response would have been due.

The adjudicator must decide to dismiss the application without determining the dispute if:

- the contract is not a construction contract;
- the application has not been prepared and served as required;
- a finding has already been made (for example by a court decision or arbitration award); or
- the matter is too complex and there is insufficient time to make a determination.

Otherwise, the adjudicator makes a determination based on which party has the stronger argument, which is in turn based on the paperwork submitted.

The determination made by the adjudicator must be in writing and contain certain information, including the reasons for the decision reached. The determination will set out the amount to be paid and the date by which payment must be made, including interest.

It is important to be aware that the adjudicator may refuse to release the determination until the adjudicator's fees have been paid. It is usual for the adjudicator to ask the applicant to make a deposit or to pay the fees, and to include the respondent's payment in the final sum determined to be paid.

What happens if I don't want to continue with adjudication or we reach a settlement?

Once you have made an application for adjudication, it may be withdrawn at any time up until the adjudicator makes a determination. If you wish to withdraw the application and cease adjudication, the Act requires that you serve a notice to withdraw on both the adjudicator and the respondent.

Where a settlement of the payment dispute has been reached following an application for adjudication, the adjudicator may, at the consent of both parties, make a determination that gives effect to the terms of the settlement.



Be aware that where an application for adjudication is withdrawn prior to the adjudicator issuing a determination, both parties may still be liable for any costs that the adjudicator has incurred in determining the payment dispute. The same applies where the adjudicator has issued a determination giving effect to a settlement.

Effect of a determination

The adjudicator's determination is binding on the parties, until the time of a court judgement or arbitration award is made concerning the matter arising under the contract. If neither party initiates court or arbitration proceedings the determination will remain binding.

If the determination relates to a progress payment then the payment due is on account.

Generally, the determination will require the party who owes money to make the payment within **five business days**, or if the due date is in the contract, and that date has not been reached, the determination will require payment by that date.

What happens if I still don't get paid?

If the adjudicator has made a determination and payment has not been received within the time specified, then there are **two steps** that should be taken.

The **first step** is to suspend works on the construction project.

Under the Act, a contractor may give notice to the head contractor (or principal) that they intend to suspend works where the head contractor (or principal) has failed to pay a determination. The notice may be given **three business days** after payment was ordered in the determination. The notice must be in writing and contain certain information, including:

- the name of the appointed adjudicator;
- the principal's name and contact details;
- the contractor's name and contact details;
- the date and identification number of the determination;
- the amount to be paid by the head contractor (or principal) under the determination;
- the date by which the head contractor (or principal) was to pay the amount under the determination; and
- the date on which the contractor intends to suspend performance of works.

The notice must be given at least **three business days** before works are suspended. Once works have been suspended in accordance with the notice then the contractor is not liable for any damage suffered by the head contractor (or principal) as a result of the suspension of works.

If the head contractor (or principal) subsequently pays the determination, then work must be commenced within **three business days** of receiving payment.

If the suspension of works has failed to result in payment, or the works had finished prior to the determination, then the **second step** is to enforce the determination through the courts.

Determinations may be enforced as a court order by filing a copy of the determination and an affidavit as to the outstanding amount with the relevant court. This requires the making of an application to the:

- Magistrates Court if the payment under the determination is less than \$75,000;
- District Court if payment under the determination is less than \$750,000; or
- Supreme Court if payment under the determination is greater than \$750,000.

Before making an application to the relevant court you need to obtain a certified copy of the determination. This can be obtained by applying directly to the Building Commission.

Applications are made to the court using the relevant forms and procedures for enforcing civil judgments.

It is recommended that you contact the relevant court registry or seek professional advice before commencing proceedings to enforce a determination.

Can the adjudicator's decision be appealed?

An adjudicator's determination is binding on the parties and appeal rights are very limited.

The Act provides a right to apply to the State Administrative Tribunal **only** where the adjudicator dismissed the application for adjudication without making a determination of the dispute. The adjudicator can only dismiss the dispute if:

- the contract is not a construction contract;
- the application has not been prepared and served as required;
- a finding has already been made (for example by a court decision or arbitration award); or
- the matter is too complex and there is insufficient time to make a determination.

A limited right of appeal to the Supreme Court is also available. It is limited to only jurisdiction grounds (such as the adjudicator did not have the power to make the determination) and not the merits of the decision.

Other frequently asked questions



I have heard that adjudication is too costly?

While there are costs involved with using adjudication, typically these costs are far less than those involved in commencing court action.

Do construction contracts need to be in writing?

No. There is no requirement that construction contracts be in writing, but it is good practice to do so. If you do not have a written contract then the Act will imply terms in your agreement. These terms cover how payment claims need to be made and assessed. Where there is no written contract:

- a payment claim means a claim:
 - a) by the contractor to the head contractor (or principal) for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or
 - b) by the head contractor (or principal) to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.
- A payment claim must be in writing and meet the requirements specified on page 8 of this guide.
- A claim for a progress payment can be made at any time after the contractor has performed its obligations.
- The amount of the payment claim is to be calculated by reference to a reasonable amount for the obligations performed and detailed in the claim.

- Payment of any undisputed payment claims, or undisputed parts of payment claims, must be made within 28 days after the head contractor (or principal) receives a payment claim.
- If a head contractor (or principal) that receives a payment claim disputes the whole or part of the claim they must within 14 days of receiving the claim give the contractor a written notice of dispute.

Can the Building Commission resolve my contractual dispute?

No. The Building Commission cannot resolve payment disputes under construction contracts. However, the Building Commission can provide advice on options to resolve the dispute.

Can I get assistance preparing my application for adjudication?

Yes. There are a number of professionals who specialise in managing contract claims and disputes. These include legal practitioners, adjudicators and contract claim managers. These services can be found through a simple web search. The Building Commission cannot prepare adjudication applications for you.

Can I lodge my application for adjudication online?

Some appointors allow you to serve the application on them via an internet form or email. However, service of the application on the head contractor or principal needs to occur by registered post, or by courier to their business address. If they are an individual then you should use a process server.

Other frequently asked questions



Can I only seek adjudication for disputes over progress payments?

No. The Act allows for adjudication of any dispute over a payment claim made under a contract. This could include disputes over claims for the balance of the contract sum, claims for interim payment on account, claims for payment for additional work or variations, claims for payment relating to extensions of time or delay, and claims upon termination.

What should I do if I have not been paid while working on a Government project?

If you are having trouble being paid on a Government-funded construction project, then the same options to resolve the dispute with the head contractor should be pursued. However, you should also inform the Government principal about the issue so they can carry out a 'spot check' on the head contractor.

The head contractor (or principal) has told me I need to sign a statutory declaration saying I have been paid?

You should only sign the statutory declaration if you have been paid up to that time.

What should I do if the head contractor has become insolvent?

The Act does not provide a means for recovering outstanding payment claims if the head contractor (or principal) has become insolvent or entered administration. Where this has occurred then the laws on insolvency and bankruptcy will apply. If the head contractor (or principal) has gone into administration this does not prevent

you from lodging an application for adjudication. However, it is important to be aware that any claim you may be awarded could be subject to the priority payment provisions in the bankruptcy laws should the head contractor or principal enter into liquidation. You should seek professional advice on your options if a head contractor (or principal) has become insolvent and owes you money.

What services are available to carry out 'due diligence' on a head contractor before entering into a contract?

Carrying out due diligence on a head contractor before entering into a contract for works is good business practice. It allows you to better manage any risks. There are a number of financial reporting services available to assist with this including payment reports, credit checks and solvency information. The Australian Securities and Investment Commission provides access to a range of reporting services through the **ASIC Connect Portal**, alternatively a number of reputable firms offering these services can be found through a simple web search.

Can the timeframes for adjudication be extended?

The only time limit that can be extended under the Act is the 10 business days the adjudicator has to make a decision. This can only be extended with the consent of both parties.

Can liquidated damages be awarded as part of a determination?

Yes.

Other frequently asked questions



What should I do if I have not been paid for work carried out interstate?

All Australian States and Territories have legislation that allows for the rapid adjudication of payment claims under construction contracts. If the work was carried out in another State or Territory then an application for adjudication needs to be lodged in accordance with the legislation operating in that jurisdiction. It is important to be aware that the legislation operating in New South Wales, Queensland, Victoria, South Australia, Tasmania and the Australian Capital Territory is different from the Act in a number of ways. You should familiarise yourself with the legislation in the relevant State or Territory before commencing an application.

Can I lodge an application for adjudication if I reside in another State or Territory?

The Act applies to construction work carried out on site in Western Australia, or goods and services supplied for construction work carried out on site in Western Australia. This means that even if you reside in another State or Territory you can still lodge an application for adjudication of a payment dispute for work undertaken or goods and services supplied in Western Australia.

I have heard the Act is changing?

Yes, important changes to the Act commenced on 15 December 2016. A change to the maximum payment terms permitted in construction contracts also commences operation from 3 April 2017. Further reforms to the Act are also planned over 2017–18. Details about the reforms and regular updates will be provided on the Building Commission's website.

Appendix

Figure 1



Excluded day

Business day

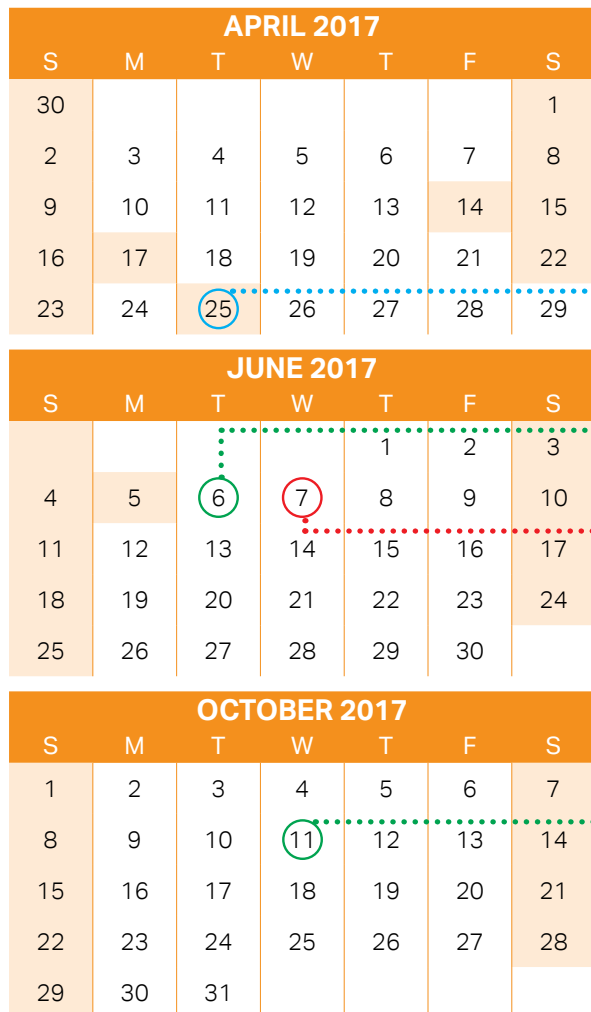
Payment claim made

Payment dispute arises

First day when application for adjudication of the payment dispute may be prepared and served

Last day when application for adjudication of the payment dispute may be prepared and served.

Figure 2



Excluded day

Business day

Payment claim made

Payment dispute arises

First day when application for adjudication of the payment dispute may be prepared and served

Last day when application for adjudication of the payment dispute may be prepared and served.

Payment Claim

lodged by Principal or Contractor (s3)

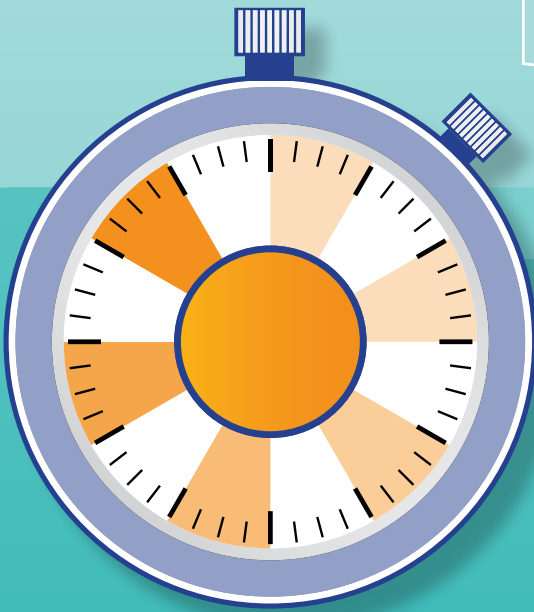
Written contract

Payment claim made under the construction contract (s3) for construction work (s4)

Oral contract

If contract has no written terms for payment claim (s16), then implied terms apply to the contract pursuant to Part 2 of the CCA

- If:
- the payment claim is rejected or wholly or partly disputed; or
 - the period for a payment claim to be paid under the contract has ended and the amount due has not been paid (s6).



Payment Dispute (s6)

Within 90 business days after the payment dispute arises

Adjudication Application made by Principal or Contractor (s26)

Within 10 business days after the Application

Adjudication Response made by other party (s27)

Within 10 business days after the Response (or an extension made under s32(3)(a))

Adjudication Determination made by the appointed adjudicator

Suspend

Contractor can issue notice of its Intention to Suspend (s42(1))
After 3 business days

Principal or Contractor may enforce adjudicator's determination as judgement or order by filing copy and affidavit with the court (s43(2))

If application dismissed under (s31(2)(a)) by adjudicator, applicant may apply to have decision reviewed by SAT (s46(1))

Failure to pay

Principal or contractor to pay **Adjudicated Amount** as directed by adjudication determination

Note: A business day is any day other than a Saturday, Sunday, public holiday or day between 25 December and 7 January inclusive.

Department of Commerce, Building Commission

Office: Level 1, 303 Sevenoaks Street,
Cannington WA 6107

Post: Locked Bag 14, Cloisters Square WA 6850

Phone: 1300 489 099 Fax: (08) 6251 1501

Email: cca@commerce.wa.gov.au

Web: www.commerce.wa.gov.au/building-commission