



Construction Contracts Act 2004 (WA)

Topic 5: The determination process

The adjudicator's process

Once the adjudicator has received the application and the response, they have 10 business days to assess the dispute and make what is known as a 'determination'. This is a formal decision in relation to the disputed payment claim. If no response is provided, then the adjudicator has 10 business days from when a response would have been due.

The applicant can, at any time up until the adjudicator makes a determination, withdraw the application and end the process. This requires them to give notice to withdraw to the adjudicator and the respondent. This notice can be by letter or email. Also, where a settlement of the payment dispute has been reached following an application for adjudication, the adjudicator may make a determination that reflects the terms of the settlement.

For the adjudicator, the first step in reaching a determination will be for them to decide if there is any reason to dismiss the application outright, without making an assessment. This will be the case where:

- the contract is not a construction contract;
- the application has not been prepared and served as required;
- a decision has already been made (for example by a court decision or arbitration award in relation to the disputed payment); 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 is considered to have the stronger argument. This is based only on an assessment of the documents provided by the parties, namely the application and response together with any supporting documentation.

The adjudicator may make further inquiries to assist in making a determination. This could involve:

- requesting a party to provide further written information;
- requesting the parties to attend a conference with the adjudicator; or
- inspecting any works to which the payment dispute arises.

The adjudicator may extend the 10 business day timeframe for making a determination if both parties agree.

The determination

Once the adjudicator makes a decision, it is communicated in writing to both parties and a copy is sent to the Building Commissioner. The adjudicator may refuse to release their determination to the parties until their fees have been paid.

The determination must include certain information including:

- the amounts to be paid;
- any interest to be paid on these amounts;
- the date by which payment must be made; and
- the reasons for the decision reached.

Effect of a determination

The determination is legally binding on the parties to the construction contract under which the payment dispute arose, and any payment awarded is due on account.

This is the case even where separate proceedings relating to the payment dispute have been commenced before an arbitrator or court. Unless those proceedings resulted in a decision being made regarding the payment dispute, the adjudicator's determination is still binding.

The decision of an adjudicator can only be appealed or reviewed in very limited circumstances.

Enforcing a determination

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

Where a head contractor or principal has failed to pay a determination, a contractor may give notice to them that they intend to suspend works. The notice must be in writing and contain certain information including the date on which the contractor intends to suspend performance of the works.

If suspension of the works 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. Applications to the court are made using the relevant court forms and procedures for enforcing civil judgements.

In order to enforce a determination through the courts you will need to obtain a certified copy of the determination from Building and Energy. This can be obtained by emailing Building and Energy at cca@dmirs.wa.gov.au. Your email should provide the parties names, the Building and Energy reference number, the name of the adjudicator who issued the determination and an electronic copy of the determination (if you have one).

The certified copy of the determination along with an affidavit as to the amount owed and the court form will need to be filed with the correct court. This will depend on the value of the amount owed. Where the amount owed is \$75,000 or less it must be filed in the Magistrates Court, where the value is more than \$75,000, but less than \$750,000 it must be filed in the District Court and where it is above \$750,000 it must be filed in the Supreme Court.

It is recommended that you seek professional advice, such as from a lawyer, before enforcing a determination.

Disclaimer – The information contained in this fact sheet is provided as general information and a guide only. It should not be relied upon as legal advice or as an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations, you should obtain independent legal advice.

Building and Energy | Department of Mines, Industry Regulation and Safety

1300 489 099

8.30am – 4.30pm

Level 1 Mason Bird Building
303 Sevenoaks Street (entrance Grose Avenue)
Cannington Western Australia 6107

M: **Locked Bag 100, East Perth WA 6892**

W: www.dmirs.wa.gov.au/building-and-energy

E: be.info@dmirs.wa.gov.au

Regional Offices

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Great Southern	(08) 9842 8366
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Mid-West	(08) 9920 9800
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