



Topic 6

The determination process

What is the adjudicator's process?

Once the adjudicator has received the application and the response, they have up to 10 business days to make a determination. This is a formal, written decision of the adjudicator.

If no adjudication response is given, the adjudicator has 10 business days from when a response was due, or if an adjudication response was not allowed at all, they start to determine the application as soon as they are appointed. At any time up until the adjudicator makes a determination, a claimant can withdraw the application by giving a written notice to the respondent, adjudicator and ANA.



If the respondent pays the claimed amount before the application is determined, the adjudication application is automatically withdrawn. The adjudicator can extend the time for making a determination by up to an additional 20 business days, provided both parties agree.

How is the determination made?



The adjudicator must make a determination. If the adjudicator decides that:

- they do not have jurisdiction i.e. the authority to determine the adjudication application; or
- the adjudication application is frivolous or vexatious or too complex,

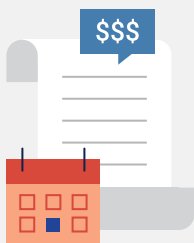
they must make a determination without valuing the payment claim. Otherwise, the adjudicator determines the value of the progress payment.

An adjudicator's determination is made based on the documents provided. However, the adjudicator may make further enquiries to assist in making a determination, such as by seeking further submissions, calling a conference or inspecting the works or supply (but they are not obligated to do so).

The adjudicator cannot take into consideration any reasons included in an adjudication response that were not raised in the payment schedule and any unsolicited submissions and accompanying documents made to the adjudicator cannot be taken into account either.

How is the determination communicated?

Once the adjudicator makes a determination, it is communicated in writing to both parties. The adjudicator is entitled to refuse to release their determination until their fees and expenses have been paid. If one party refuses to pay their share of the fees and expenses, the other party may pay the full amount of the fees and expenses, and the adjudicator can adjust the amount determined as owing accordingly.



The determination must include:

- the amount of the progress payment, if any, to be paid by the respondent to the claimant;
- any interest to be paid on these amounts;
- the date by which payment must be made; and
- the reasons for the decision reached.

The determination may also require the release of any performance security held under the construction contract.

What is the effect of a determination?

The determination is legally binding and can be enforced through the courts if the amount determined is not paid. However, the determination does not affect the on-going rights of either party to subsequently commence court action. A determination can only be reviewed where certain limited circumstances apply.

Can an adjudication be reviewed?

There is an adjudication review mechanism under the Act for certain types of adjudication decisions.

A claimant may seek a review of an adjudicator's determination where:

difference exceeds

\$200,000

the adjudicated amount is less than the claimed amount, and the difference exceeds \$200,000 (inclusive of GST).

or

no jurisdiction and the claimed amount exceeds

\$50,000

the adjudicator determined they did not have jurisdiction to determine the application and the claimed amount exceeds \$50,000 (inclusive of GST).

A respondent may seek a review where the adjudicated amount is more than the amount certified in a payment schedule and the difference exceeds \$200,000 (inclusive of GST).

A respondent cannot apply for review if they did not give a payment schedule within the required timeframe.

Reviews are conducted on the application of one of the parties within five business days of the original adjudication determination. Any amount owed under the original adjudication determination must be paid into a relevant trust account.

Applications for adjudication review must be made to an ANA who will then appoint a review adjudicator to determine the application.



The respondent (if an adjudication review is made by the claimant) or the claimant (if an adjudication review application is made by the respondent) may give the appointed review adjudicator an adjudication review response within 10 business days of receiving the application. The adjudication review response cannot raise new reasons or submissions not raised in the original adjudication.

Once appointed, the review adjudicator has 10 business days from the date the adjudication review response was given, or when it was otherwise due to be given, to carry out the review. The parties may agree to extend the time of the review by up to an additional 10 business days.

The review adjudicator can only consider the documents supplied by the parties as part of the original determination, the construction contract, the original determination and the requirements of the Act.

Once the review adjudicator has completed their review, they must either confirm the original determination, or quash the determination and make a new review determination. The new review determination can be enforced in the same way as the original determination.

How is the determination enforced?

If the adjudicator has made a determination and payment has not been made, two steps may be taken by the claimant to enforce the determination.

The claimant may suspend ongoing work or supply by giving notice. The notice must be in writing and include a clear statement that it is given under the Act. To do this, simply write:

“ This is a notice of suspension of work or supply given under the *Building and Construction Industry (Security of Payment) Act 2021*. ”

The notice must be given to the respondent at least two business before the date works or supply are to be suspended. The claimant cannot suspend works or supply if an adjudication review application has been made, but not yet determined.

If suspension does not result in payment, or the works or supply finished prior to the adjudicator making their determination, the determination can be enforced as a monetary judgment of an appropriate court.

Applications to the court are made using the relevant court forms and procedures for enforcing civil judgements. A respondent can also enforce a review determination as a monetary judgement of an appropriate court to recover any over-payments.





To enforce a determination as a monetary judgment a certified copy of the determination needs to be obtained from Building and Energy. This can be done by emailing Building and Energy at determinations@dmirs.wa.gov.au.



The certified copy of the determination along with an affidavit as to the amount owed and the court form will then need to be filed with the correct court to commence civil judgement enforcement processes.

If you are unsure of the enforcement process, seek professional advice from a lawyer.

Tips relating to adjudication determinations

-  If you have not been paid an amount determined by an adjudicator, do not delay and act quickly to enforce your rights under the Act, (for example to suspend works and/or enforce the determination in a court of competent jurisdiction).
-  If you are unhappy with an adjudicator's determination, you should consider seeking independent legal advice on your eligibility for adjudication review or to appeal the determination in the courts. There are strict timeframes for applying for adjudication review or appealing an adjudicator's determination.

Important terminology

Adjudicator	is an individual registered under the Act as an adjudicator.
Authorised nominating authority (ANA)	is the body or individual authorised under the Act to receive applications and responses and, if applicable, undertake other administrative tasks.
Business day	is any day other than a Saturday, Sunday or public holiday or day between 22 December and 10 January inclusive.
Claimant	is the person who is or who claims to be entitled to a progress payment and who makes a payment claim.

Give	<p>means to give a document under the Act (for example a payment claim, payment schedule, application or response) either in accordance with the method stipulated in the construction contract, or, if the contract is silent (or there is no contract), the document can be given by either:</p> <ul style="list-style-type: none"> • delivering it personally to the person who is to receive the document (for example the claimant, respondent, adjudicator, etc.); • leaving the document at the person's ordinary place of business; • sending the document by post to the person's ordinary place of business; • emailing the document to an address specified by the person; or • if an authorised nominating authority allows for the use of an electronic lock-box, submitting documents via that facility. <p>The adjudicator or authorised nominating authority will often stipulate how documents are to be given to them and should be given in this manner.</p>
Payment claim	is a claim given under the Act.
Respondent	is the person who has been given the payment claim.
Review adjudicator	is an individual registered under the Act as a review adjudicator.

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.

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