



## User guide

# Giving an adjudication response

The Building Commissioner has published a template for an adjudication response 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 adjudication response is part of the adjudication process under the Act and gives the respondent, where permitted, the opportunity to provide detailed reasons for not agreeing to the payment claim.

The template for an adjudication response 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.

## Overview

Whether you can give an adjudication response depends on whether or not you gave a valid payment schedule to the claimant.

If you failed to give a payment schedule, or if your payment schedule was not given within the time period prescribed under the Act, you are not able to give an adjudication response and nor will you be entitled to make any submissions or give documents to the adjudicator.

There are two ways that you may have given a valid payment schedule:

1. by providing the claimant with a payment schedule within 15 business days after receipt of the payment claim (or any shorter time specified in the contract); or
2. you did not give a payment schedule to the but did subsequently give a payment schedule within 5 business days of being notified by the claimant of its intention to apply for adjudication.

In either circumstance, you are entitled to give an adjudication response to the adjudicator, subject to the adjudication response being given within 10 business days of receiving the adjudication 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 zero.

## The requirements of an adjudication response

Where you are entitled to give an adjudication response, the Act states that this document:

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

You are entitled to give an adjudication response if you gave a payment schedule to the claimant within the time required under the Act (i.e. 15 business days of receiving the payment claim, or such shorter time specified in the contract).

You cannot include in an adjudication response reasons for withholding payment, unless those reasons had been included in the payment schedule. If you do include new or additional reasons, the Act will not permit the adjudicator to take these into consideration when making a determination.

Raising new reasons for withholding payment is not regarded as submissions duly made in support of the payment schedule. This does not however prevent you from including submissions on the adjudicator's jurisdiction to determine the application.

The adjudication response provides you with the opportunity to elaborate on the reasons given in the payment schedule for stating that you will not be paying the amount set out in the payment claim and to provide the adjudicator with the evidence to support your position. You are also able to respond to the submissions that the claimant made in its adjudication application by, for example, refuting any of the claimant's assertions.

### **Details of adjudicator and authorised nominating authority**

If a registered adjudicator has been specified in the construction contract, the claimant must have given its adjudication application to that person.

The specified registered adjudicator will be taken to be the adjudicator for the adjudication application where that person has given the parties written notice of acceptance of appointment within five business days after the adjudication application has been given. In those circumstances, you need to insert the details of the specified registered adjudicator in the space provided in the template.

If however the contract does not specify a registered adjudicator, or the specified adjudicator does not accept the appointment within the five business days, the claimant can give its adjudication application to any authorised nominating authority it chooses.

In those circumstances the authorised nominating authority will nominate a suitable registered adjudicator from its panel and that person is taken to be the adjudicator of the adjudication application where that person has given a written notice of acceptance of appointment. The notice of appointment is required to be provided within 5 business days after the adjudication application had been made and this will be communicated to the parties by the authorised nominating authority. In those circumstances, you will insert the details of the authorised nominating authority in the space provided in the template.

### **Details of the claimant and respondent**

When you insert the claimant's and the respondent's details in the space provided, make sure that:

- these details correspond to those that were set out in the payment claim and the payment schedule;
- you set out the correct names of the legal entities that entered into the construction contract; and
- the parties' respective Australian Business Number (ABN) are correctly identified.

The relevant space within the template also allows you to insert the names of the parties' representatives, such as, for example, the name of the law firm(s) and the name of the lawyer(s) representing the parties. If this is applicable (in other words, if the parties are represented) and if you have such information, insert those details in the space provided.

### **Contract details**

The template includes a section that requires you to briefly identify the name of the Project (e.g. construction of apartment block at 50 Smith Street, Perth, or carrying out of electrical works at XYZ Mining Camp, Pilbara, etc), the claimant's status (e.g. head contractor, subcontractor, architect, etc) and the nature of your business (e.g. developer, head-contractor, etc).

If you are a homeowner who had entered into a contract with the claimant for home building work for a contract sum over \$500,000 (including GST), you would fill this section as "homeowner".

### **Dates of giving of payment claim, payment schedule, section 28(2) notice (if applicable), and adjudication application**

By inserting the dates when the:

- payment claim;
- payment schedule;
- section 28(2) notice (if applicable); and
- adjudication application,

were given in the space provided in the template, you will be providing the adjudicator with information that may identify whether there are issues relevant to the validity of the adjudication application.

The Act sets out strict timeframes for the giving of payment claims, payment schedules and adjudication applications. If the dates you have set out in your adjudication response do not align with the information the claimant set out in its adjudication application, the adjudicator will have been alerted to a potential issue and may wish to obtain clarification by requesting the parties to provide further submissions.

### **Payment claim amount and scheduled amount**

By inserting the amount claimed in the payment claim and the amount scheduled in your payment schedule you will either be confirming or not that the amounts align with what the claimant has set out in its adjudication application.

If there is a discrepancy, the adjudicator may seek clarification on this matter by requesting the parties to provide further submissions.

You should also indicate in the space provided whether the amount scheduled in the payment schedule was paid by the due date.

## **What documents should you attach to your adjudication response?**

Given the compressed timeframe within the adjudication process, an adjudicator usually will make a determination on a document-only basis.

The speed of the adjudication process does not allow the conduct of a hearing and the giving of evidence by way of oral testimony, or the testing of that evidence by way of cross-examination. Accordingly, a party's prospect of success will improve based on the quality of the written submissions, and whether a party has been able to provide the adjudicator with documentary evidence to support its submissions.

Submissions are arguments that support your position. They may include legal arguments on the interpretation of the contract conditions or the provisions set out in the specifications or details in the contract drawings.

The submissions should be concise and clear and, wherever possible, be backed up by documentation, photographs or statements in the form of a statutory declaration that sets out your version of events and/or addresses the various that the claimant has made in its adjudication application.

If you disagree with any argument that the claimant has made in its adjudication application, you should not leave it unchallenged. Otherwise, the adjudicator may infer that you do not dispute the argument. When you make an argument or dispute an argument that the claimant has made, you should provide evidence to support what you are saying.

Providing documents such as emails, letters, minutes of meetings, or technical reports can be included to support your submissions. Where such documents have been included, these should be able to be readily identifiable as attachments that are clearly numbered by separate tabs.

Do not assume that the inclusion of documents without any reference or explanation will be sufficiently clear for the adjudicator to understand or to infer why you had attached those in your adjudication response.

For example, if you include photographs in your adjudication response, you should provide an explanation as to what those photographs are intended to depict and how these support your argument (e.g. they show defective workmanship, etc).

If there are aspects of your adjudication response that are unclear, do not assume that an adjudicator will seek further submissions. It is not the adjudicator's role to assist a party in the presentation of its case.

If the adjudication application has included copies of the payment claim, payment schedule and construction contract in full, there is no need for you to include these as attachments to your adjudication response – you can refer to those documents by reference to the relevant attachment in the claimant's adjudication application. If however any of these are incomplete, then you should provide a full set by way of an attachment to your adjudication response.

Once you have identified the attachments that you wish to include in your adjudication response, list those in the space provided within the template.

If you have additional attachments that do not fit within the space provided in the template, simply write in the last available row 'see attached list of further attachments'.

## **Suggested structure for your written submissions**

How you set out your written submissions will depend on a number of potential factors. These may include the nature of the dispute, the scope of issues that the claimant had detailed in the submissions that accompanied its adjudication application, and the size/complexity of the issues in dispute.

Nonetheless, as general guidance, structuring written submissions under the following headlines may assist in articulating your position in a clear and logical manner. This can be done in a separate document to the template.

### Introduction

Commence your submissions by outlining your perspective (i.e. your side of the story) of the issues in dispute. You could do this by:

- describing the nature of the Project and the basis upon which you engaged the claimant;
- setting out the amount as claimed the payment claim, the amount set out in the payment schedule, the amount the claimant stated it is seeking in the adjudication and the amount that you maintain you are entitled to withhold;
- summary of issues for determination by the adjudicator; and
- setting out the evidence you rely on to support your position, e.g. statutory declaration of key witnesses, expert reports, photographs, copies of correspondence, etc.

## Jurisdiction

If you consider that the payment claim and/or the adjudication application is invalid (and that therefore the adjudicator has no jurisdiction to make a determination) then you should set out why you believe this to be the case.

For example;

- you may consider that the payment claim did not comply with the requirements set out under the Act, or that the adjudication application was not made within the time period allowed under the Act;
- the required notices, such as those under sections 24(2) ('notice to the homeowner') and/or 28(2) ('notice of intention to apply for adjudication') of the Act (if applicable) were not validly given;
- the works (or related goods and services) to which the adjudication application relates does not fall within the definition of 'construction work' or 'related goods and services' in the Act, or otherwise the works or supply fall within one of the exclusions in section 10 of the Act.

You may wish to refer to relevant court cases that you consider support your position.

## The contract

This section provides you with the opportunity to identify the relevant provisions within the contract documents that you consider to be relevant to the issues in dispute and as to how you believe they should be interpreted. You may also wish to comment on the submissions that the claimant had made in its adjudication application regarding this matter in terms of why you disagree with its position.

## Assessment of claimed contract works

If the claimant's payment claim had included a claim for works carried out and if in your payment schedule you had disputed the claimant's entitlement to the amounts claimed, then you should expand on why you maintain your position.

This may require you to demonstrate that the various items of claimed work had not been carried out, or not carried out to the extent as claimed.

You may wish to substantiate your position by highlighting any deficiencies and/or inconsistencies in the material provided by the claimant, and/or refer to the assessment made by the superintendent or an independent quantity surveyor.

Remember, you cannot raise additional reasons for disputing the claimant's entitlement to the amounts claimed in your submissions if these were not included in your payment schedule.

You may only expand on, or provide further support to, the reasons given in the payment schedule.

## Assessment of claimed variations

If the claimant's payment claim had included amounts for claimed variations and if in your payment schedule you had disputed the claimant's entitlement to all or some of the claimed variations, then expand on why you maintain this position.

For example, you may have stated in your payment schedule that a claimed variation was not a variation because the work fell within the claimant's original scope, in which case you should set out the basis for adopting this position (e.g. that the work claimed to be a variation was work required to be carried out under the contract as evidenced by a specific provision within the "specifications" etc.).

Alternatively, you may have stated in your payment schedule that no direction had been issued to the claimant to carry out this work, in which case your written submissions may refer to a statement within the statutory declaration of a key witness (e.g. the superintendent) to that effect.

Similarly, if in your payment schedule you stated that the claimant's assessment of some variations were excessive, then your written submissions should set out the basis upon which you have arrived at an alternative assessment, such as for example, the assessment given by the superintendent, or an independent quantity surveyor.

## Respondent's claimed set-offs/deductions

If in your payment schedule you claimed an entitlement to a set-off, whether by way of liquidated damages due to late completion, or an estimate of the costs of rectification of defective work, then you should detail the basis upon which you have adopted this position.

For example, if you have claimed a deduction for liquidated damages, then you would need to set out whether the deductions can be made under the contract and as to how the amount deducted had been assessed. You may wish to demonstrate how the claimant delayed the works and that it was not contractually entitled to an extension of time.

Similarly, if you have claimed the estimated costs of rectifying part of the claimant's defective work, then you would need to demonstrate not only that such work was defective, but also the basis upon which your estimated costs have been arrived at. You may wish to refer to a report produced by an independent expert, a copy of which has been attached to the adjudication response.

## Due date for payment

Set out your view as to the due date for payment of any adjudicated amount. To do this you will need to refer to section 20 of the Act.

## Interest

Set out your view as to the applicable interest rate on any adjudicated amount. To do this you will need to refer to section 21 of the Act.

## Adjudication fees

Section 50(4) of the Act provides that parties to an adjudication are jointly and severally liable for payment of the adjudication fees and expenses or in such proportion as determined by the adjudicator.

If you consider that a greater share of the adjudication fees and expenses should be paid by the claimant, then you will need to make submissions as to why the adjudicator should make a determination to that effect. This may be because, you believe that, the claimant was not justified in referring its payment claim to adjudication. For example, because it had improperly claimed payment from you for ill-conceived reasons and had put you to considerable time and expense in responding to the adjudication application.

## **Signing and dating the application**

Make sure you sign and date the adjudication response. The date should be when the adjudication response is given to the adjudicator (where applicable) or the authorised nominating authority.

## **How to give the adjudication response**

The adjudication response can be given by either:

- delivering a hard copy personally to the adjudicator (where applicable) or to the office of the authorised nominating authority during normal business hours;
- leaving the document at the adjudicator/ authorised nominating authority's ordinary place of business;
- emailing the document to the adjudicator/ authorised nominating authority's address; or
- if an authorised nominating authority allows for the use of an electronic lock-box, uploading the document into that lockbox.

## **Give a copy to the claimant**

You must also give a full copy of your adjudication response to the claimant within 1 business day of your adjudication response being given to the adjudicator/ authorised nominating authority.

It is however best practice to give your response to the "claimant" and authorised nominating authority or adjudicator on the same day.

Your response will not be taken as having been given until it is validly received.

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 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 response 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 respondent. 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.

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