

Building and Construction Industry Security of Payment Act 1999 NSW

Government Information Kit

**Incorporating the
Building and Construction Industry
Security of payment Amendment Act 2002**



**A New South Wales
Government Initiative**

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Building and Construction Industry Security of Payment Act 1999 NSW Government Information Kit

To find further information on the Act and to check if this Information Kit contains the latest information:

1. Refer to the Commerce website at www.commerce.nsw.gov.au, select Procurement and then select Security of Payment.
2. Contact the NSW Government Information Bookshop on:
 - 1300 656 986; or
 - Email: gpshep@commerce.nsw.gov.au
3. For information about the operation of the Act call 9372 8600 or email gpshep@commerce.nsw.gov.au

Disclaimer

The Information Kit may be amended at any time and the reader should check the Department of Commerce website at, www.commerce.nsw.gov.au, select Procurement and then select Security of Payment.

The Information Kit outlines rights and obligations in an easily understood format. It does not go into details and does not cover all situations. Consequently, there are aspects of the Act, which have not been covered. For a full appreciation of rights and obligations consult the Act or obtain legal advice.

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SUMMARY OF THE ENHANCED ACT

Prompt payment on account is vital to the stability and efficiency of the construction industry. Too often the party (the respondent) liable to pay for construction work or related goods or services, manufactures a dispute to deny, or try to delay, payment. In other situations, respondents try to string out the time for payment with promises of future work if only the claimant just waited a bit longer.

The Act in its enhanced form (operating from 3 March 2003) now ensures that the party who has provided work, goods or services can force the respondent to make payment on account.

Claimants can use the Act to secure payment on account inexpensively and speedily without the need for extensive use of lawyers, court hearings, witnesses, cross examinations and all that is usually involved in arbitration or litigation. Within a matter of weeks, a claimant can now have a judgment for a progress payment on account, which compels the respondent to pay.

Previously, obtaining judgment in a building dispute was often a drawn out, costly process that sometimes drove the claimant into insolvency or gave time for respondents to become insolvent to avoid their payment obligations.

Some respondents had been trying to delay paying by placing the amount owing into trust accounts after an adjudication. This was forcing claimants into protracted arbitration and litigation to receive payment. The new amendments that came into operation on 3 March 2003 stopped this practice and with the Act no longer permitting respondents to use trust accounts in this way.

Active use of the Act will result in a considerable reduction in the number of disputes going to arbitration or court. A claimant can use the Act to obtain judgment for a payment on account before, or even during, arbitration or court proceedings over the claim irrespective of who initiated the proceedings.

The objective of the Act is to ensure that any party that contracts to carry out construction work, or supply related goods or services, on projects for the private and public sectors in NSW is entitled to promptly receive all progress payments that are due, including final payments and retention monies.

The Act gives the claimant a statutory right to make progress payment claims and receive payment, even where the contract has no provision for progress payments. If the respondent claims to have reasons for not paying a claim, the respondent must set out the reasons in a payment schedule. This Information Kit includes sample forms for a payment claim and for a payment schedule together with clear guidelines on how to use them.

If, after 10 business days of being served with a payment claim, the respondent hasn't provided the claimant with a payment schedule, the respondent becomes liable to pay the full amount claimed. The claimant is also entitled under the Act to recover in any court of competent jurisdiction, the unpaid portion of the amount claimed. The unpaid portion is a statutory debt, which the claimant is entitled to recover independently of and irrespective of the terms of the construction contract. This Information Kit provides information on how to apply to a court for judgment for the statutory debt.

If the claimant disputes the reasons for withholding payment, as given by the respondent in the payment schedule, or if the respondent fails to pay the amount due by the due date, the claimant can apply to an Authorised Nominating Authority [ANA] for an independent adjudication of the amount to be paid.

Where the claimant disputes the payment schedule the claimant must apply for adjudication within 10 business days of receiving such a payment schedule.

Where the respondent has failed to pay the amount stated in the payment schedule by the due date, the claimant has 20 business days to apply for adjudication.

In the event of no payment schedule being provided and the respondent has failed to pay the full claimed amount by the due date, the claimant must advise the respondent that they will be proceeding to adjudication within 20 business days of the due date for payment. The respondent then only has 5

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business days to respond with a payment schedule before the claimant is entitled to pursue an adjudication.

Within 10 business days of accepting an adjudication application, an adjudicator has to provide a written decision on the amount due, unless both the claimant and the respondent agree to a different timeframe. This Information Kit includes a sample form for an adjudication application and provides information on the adjudication process.

When an adjudicator has determined the amount due, the Act provides an expedited means of obtaining a court judgment for payment of the amount due. The claimant only has to obtain an Adjudication Certificate from the ANA and lodge that with a court, together with an affidavit of the amount still unpaid. Judgment is granted automatically by the court, that is, without the need for a summons or a hearing. This Information Kit includes a sample form for the accompanying affidavit of debt and provides information on how to obtain judgment.

The respondent cannot challenge the adjudicator's determination in court, if the process has been carried out in accordance with the provisions of the Act. Adjudication is an expedited determination based on unsworn submissions, not a determination based upon sworn testimony. Inevitably, some adjudicators will make mistakes, but there is no appeal from an adjudicator's determination. A mistaken decision, as distinct from a decision that is made without jurisdiction, is still enforceable. The respondent who is dissatisfied with the adjudicator's decision has the option of suing separately for repayment of any alleged overpayment.

The Act now clearly specifies that the courts must strike out any cross-claim for damages for breach of contract or any other cross-claim. To join a claim for the statutory debt with a cross-claim is similar to chalk and cheese- they are totally different matters. The first claim is for an interim payment. The cross-claim is for a final determination of liability. Proceedings for payment of the statutory debt are separate proceedings and must not be joined with proceedings for final determination of issues. Similarly, claims for payment of the statutory debt cannot be stayed pending a final determination of issues between the parties.

Claimants also no longer have to initiate separate action under the Contractors Debt Act 1997 to secure a debt from their respondent's principal. All debts under the enhanced Act are also debts under the Contractors Debt Act 1997, providing quick and direct recourse to respondents' principals to secure payment of the debt.

The Act includes other protection to claimants such as a right to suspend work and be paid for any losses and expenses if sacked because of the suspension, and to claim a lien over unfixed plant and materials to settle any debts established under the Act. Respondents also cannot claim or sue for liquidated damages because of a suspension of work under the Act. The Act bars "pay when paid" and "paid if paid" clauses and overturns them even if they are included in the contract. All forms of contracts are covered - written and oral. It also provides a minimum rate of interest on late progress payments. The claimant and the respondent share equally the fees payable to the Authorised Nominating Authority and the adjudicator, unless the adjudicator decides otherwise.

To take advantage of the Act, a claimant will have to ensure that their payment claims include the words: "*This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW*" or words to that effect. On consideration of their situation, all claimants may want to include these words on all their invoices for payment to ensure all their claims are covered by the Act. If you make a claim for payment and you have not included these words, you can submit a new invoice with the words included and make use of the rights the Act extends to you.

The Act will again be reviewed by early 2004 to ensure that the Act is working the way the Government intended it should.

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CLAIMANT INFORMATION

Who can make claims under the Act?

Those who can make a claim under the Act include:

- Contractors against principals/developers;
- Subcontractors against contractors;
- Suppliers against customers;
- Plant and equipment hirers against clients; and
- Consultants against clients.

Construction work and services can be claimed under the Act, even if the contract:

- is not written;
- does not provide for progress payments; and
- has only a single payment to be made when the work is completed.

Can the Act be used to secure payment from Homeowners?

The Act does not apply to a construction contract for the carrying out of residential building work on such part of any premises the respondent resides in or proposes to reside in. These contracts remain controlled by the Home Building Act 1989 and its consumer protection provisions.

But if a contract includes work other than on the respondent's residence, then that work is subject to the Act. The Act applies to contracts involving residential investment properties, landlords, strata title bodies corporate, developers, builders, contractors, sub-contractors, consultants and suppliers.

Who is the "respondent"?

The person against whom the claim is made is called the "respondent" under the Act.

What can I claim for?

You can make a claim on the respondent for:

- construction work you have done;
- construction materials or plant you have provided;
- consulting services you have provided;
- interest on overdue progress payments;
- your losses and additional expenses due to work being deleted from your contract while you suspended work under the protection of the Act;
- cash security and retention monies; and
- at the end of a contract, a claim under the Act can be made for the final payment.

However, claims under the Act are claims for interim payments, pending the resolution of your final entitlement under the contract. In separate proceedings, initiated by the respondent, it may be decided that amounts recovered by way of progress payments under the Act are more or less than the final entitlement and you may end up having to refund money, or being paid extra.

In cases where you are inclined to pursue a claim through expert determination, arbitration or litigation, it will still be worthwhile to pursue a payment claim under the Act before, or in parallel, with this other proceeding. This may help you receive an interim payment under the Act whilst you are waiting for the final determination of the other proceeding.

How do I make a claim?

Your claim must:

- be made at the time stated in your contract or, if there is no time stated, on the last day of the month;
- be in writing and addressed to the respondent;
- describe the construction work, related goods or related services for which you are claiming;
- state the amount that you claim is due; and
- include the words “*This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW*” or a similar statement with that meaning.

NB: You may want to include the above words on all your invoices for payment, to ensure all your claims are covered by the Act.

The claim may also include attachments containing:

- statements detailing the extent of the work completed;
- completion certificates;
- delivery docket;
- photographs; and
- other applicable contract documentation requirements.

To make a claim you must:

- establish the reference date for making your claim;
- decide how much you are entitled to be paid calculated to the reference date;
- on or after each reference date make a written payment claim and serve it on the party liable to make payment [the respondent]. The claim will usually be a Tax Invoice;
- serve the claim by delivering, posting or faxing it to the respondent. The contract may provide for other methods of service; and
- record the date of service. It is the date that the respondent receives the claim.

Can I resubmit a claim?

Only one claim can be made under the Act for each reference date. The reference date is either the date stated in the contract for making claims or, if there is no date, it is the last day of each month.

However, if you have already made a payment claim but not under the Act, you are still entitled to make a claim under the Act for the same reference date. There may have been trust in the business relationship that led you to not use the Act, but when you have signs you may not be paid you can resort to using the Act to secure payment.

Moneys not paid in respect of a previous claim can be included in the next payment claim.

Usually, claims under the Act cannot be made more than one year after the work was last carried out or the goods or services were last supplied.

When should I receive payment?

The date by which you are entitled to be paid is the “due date for payment”.

If the contract provides a date or period for payment of claims, then you are entitled to be paid by then.

If the contract does not provide due dates for payment, then you are entitled to be paid 10 business days after you serve the payment claim on the respondent.

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If you are not paid by the due date, you have a right to interest at the greater of the rate, if any, in the contract or the rate on Supreme Court judgments. That rate changes from time to time, but is usually around 10% per annum.

A “business day” under the Act is any day other than a Saturday, Sunday, public holiday and the days between Christmas and New Year.

How long do I have to wait for a response?

If the respondent is not willing to pay all that you have claimed, they have a maximum of 10 business days after you have submitted your claim to give you a payment schedule. This has to be a written statement of the amount that the respondent is willing to pay and the reasons for not paying any part of your claim.

If the respondent fails to serve you with a payment schedule before the end of that time, the Act requires the respondent to pay the whole amount of the payment claim.

What happens if the respondent provides a payment schedule for less than the amount claimed?

You can:

- accept the reasons given by the respondent for not paying the full claim and wait for the respondent to pay the scheduled amount by the due date; or
- apply in writing to an Authorised Nominating Authority (ANA) for an adjudication. The application must be made within 10 business days after receiving the payment schedule.

What happens if I do not apply for adjudication within 10 business days?

You have no further rights under the Act to adjudication with respect to that payment claim, unless the respondent fails to pay the scheduled amount by the due date for payment.

The scheduled amount is the amount in the payment schedule the respondent says they will pay the claimant in response to the claim.

You can include the unpaid portion of the payment claim in your next payment claim.

What happens if the respondent does not respond?

If the respondent does not give you a payment schedule within the time required, the respondent must pay you the whole amount of the payment claim by the due date for payment.

If the respondent does not pay you the full amount you can sue in court to recover the amount. As an alternative to suing, you have a right under the Act to go to adjudication in order to access the simplified judgment process that adjudication gives. Before making the adjudication application you must, within 20 business days after the due date for payment, give the respondent notice that the respondent has just 5 business days to provide you with a payment schedule.

Whichever course you take, you also have a right to suspend work after giving notice and a right to a lien over unfixured plant and materials supplied by you to the respondent.

What happens if the respondent fails to pay me the amount due on the due date?

You can, under the provisions of the Act:

- apply for an adjudication of your payment claim;
- give notice of intention to suspend work;
- exercise a lien over unfixured plant or materials supplied by you;

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- a. scheduled amount if there was a payment schedule and you did not seek an adjudication application within 10 business days; or
- b. whole payment claim amount if there was no payment schedule.

What happens if I apply for an adjudication after the respondent fails to pay on the due date for payment?

As an alternative to an expensive exercise of suing for the unpaid amount, you have the right under the Act to pursue an adjudication in order to gain payment.

You cannot take court action and also seek an adjudication under the Act. You must choose which course of action that you intend to follow. This doesn't limit any other entitlement you may have under the contract or any other remedy that you may have for recovering any such other entitlement.

If you have received a payment schedule and decide to make an adjudication application after not being paid the scheduled amount by the due date for payment, you have 20 business days after the due date, to make an adjudication application.

If you did not receive a payment schedule and decide to make an adjudication application, you must give the respondent an opportunity to provide a payment schedule.

In such circumstances you must, within 20 business days after the due date for payment, give the respondent notice that the respondent has 5 business days to serve you with a payment schedule. You then have another 10 business days to make an adjudication application after the end of the 5 business days period provided to the respondent to serve the payment schedule.

The notice that you can serve on the respondent may take the form:

Notice under s.17(2) of the Building and Construction Industry Security of Payment Act 1999 NSW

In response to this Company's payment claim dated ... for \$... your Company failed to provide a payment schedule within the time allowed by the Building and Construction Industry Security of Payment Act 1999 NSW. As a consequence your Company became liable to pay the whole amount of the claim on the due date. The whole amount has not been paid. Our Company has elected to apply for adjudication of the payment claim. Your Company has 5 business days in which to serve a payment schedule or pay the payment claim in full. If, within that time, your Company fails to pay the whole amount, this company will proceed to adjudication. If your company also fails to serve a payment schedule, your Company will be barred from lodging an adjudication response [see s.20(2A) of the Act].

What are my rights to suspend work?

Irrespective of what your contract says, the Act gives you a right to suspend work, or the supply of related goods or services, and, in respect of the period of suspension, you cannot be successfully sued for liquidated damages by the respondent because of that suspension.

If the respondent fails to pay either:

- the whole claimed amount by the due date for payment, where the respondent failed to serve a payment schedule within time; or
- the scheduled amount by the due date for payment; or
- the adjudicated amount within 5 business days after an adjudication determination is received by the respondent.

You are legally entitled to suspend work or the supply of plant and materials and other construction related services.

You must first give the respondent 2 business days warning of your intention to suspend.

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You must first give the respondent 2 business days warning of your intention to suspend.

For example, if the due date for payment is Monday and you have not been paid, you can give the warning on Tuesday that you will be suspending work on Friday of the same week.

The notice may take the form:

“You have failed to pay the amount due under the Building and Construction Industry Security of Payment Act 1999 NSW in respect of my payment claim served on you on (date). Take notice that pursuant to my right under section 27 of the Act, I will suspend work at the expiration of two business days unless, in the meantime, the amount due is paid in full.”

Once you have been paid the amount due, you must resume work within 3 business days.

Notwithstanding anything in the contract, you are not liable to the respondent for any loss or expense suffered by the respondent as a consequence of the suspension under the Act.

If, in response to your suspension, the respondent removes any work from your contract, the respondent is liable to you for any loss and expense you may have incurred as a result of the respondent’s action. Payment for the loss and expense can be pursued through adjudication like any other due payments.

What contract provisions are void by the Act?

You should be aware that there are contract provisions that are void under the Act. They include:

- any provisions that are inconsistent with the Act;
- “pay if paid” and “pay when paid” clauses, even if they are included in the contract;
- clauses that attempt to “contract out” of the Act;
- clauses aimed to deter a person from taking action under the Act; and
- any provision which would limit interest on late progress payments to an amount less than the rate of interest on judgments of the Supreme Court.

Contractors Debts Act 1997

If you are a subcontractor you may now use the Contractors Debts Act 1997 to recover payments directly from the Principal. For further information on this process refer to the Information Sheets referring to the recovery of debts.

How can I exercise the right to a lien over unfixed plant and materials supplied by myself to the respondent?

The Act provides that you have a lien or charge over unfixed plant or materials supplied by yourself to the respondent for or in connection with the carrying out of the construction work.

A lien is the right to seize and sell goods in order to obtain payment. If the goods are sold for more than the amount owed under the Act then the balance must be paid to the respondent.

The lien granted by the Act does not give you a preference over a lien or charge existing before the date upon which the progress payment became due. It does not give you any rights where a third party owns the items. Generally speaking, when a principal pays a contractor for items, they become the property of the principal.

Before exercising a lien, you should seek legal advice to ensure that you do not trespass upon the rights of others and thereby incur a liability to a third party.

RESPONDENT INFORMATION

Who is a respondent?

You are a respondent if you:

- are a party to a contract in which construction work or related goods or services are being provided to you in NSW;
- do not live or propose to live in the part of the premises where the construction work or related goods or services are being provided to you; and
- are served with a payment claim under the Act.

A payment claim under the Act must have written on it “*This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW*”, or a statement to that effect.

What is a payment schedule?

A payment schedule is the notice in writing, which you must serve upon a claimant if you do not intend to pay the full amount of a payment claim under the Act.

A payment schedule must:

- be in writing and addressed to the claimant;
- identify the payment claim to which it relates;
- state the scheduled amount of payment that you propose to make (it may be “nil”);
- if that amount is less than the amount claimed, state all the reasons why; and
- be posted, delivered or faxed to the claimant as allowed under the Act or the contract, so that it reaches the claimant no later than 10 business days after you received the payment claim.

The payment schedule may also include attachments containing detailed explanation of the reasons why you intend to:

- not pay any or all of the claimed amount; and
- withhold any or all of the claimed amount including how the valuation of the withheld amount has been calculated.

What important facts must I consider with respect to payment schedules?

If you fail to serve a payment schedule within time, you are automatically liable for the amount claimed. If the claimant sues for it, you cannot raise any defence based on the construction contract or raise any cross claim.

Therefore, keep a careful record of the date of receipt of the payment claim and the date when the claimant must receive your payment schedule.

If the claimant disputes your payment schedule the claimant may apply for an adjudication. In such cases, you have a maximum of 5 business days in which to deliver a submission to the adjudicator.

You cannot raise any defence, set off, cross-claim, or other reasons for not paying which you did not state in the payment schedule.

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What can happen if I do not respond in time with a payment schedule and do not pay the claimant on the due date?

In such circumstances, the claimant may:

- go to court immediately (or up to 6 years later) to file a summons and obtain judgment for the total amount of the payment claim; or
- within 20 business days of the due date for payment, give notice of intention to make an adjudication application;
- in either event, give notice of intention to suspend work;
- exercise a lien over unfixured plant or materials supplied to you by the claimant; and
- use the Contractors Debts Act 1997 to recover money directly from the Principal.

Can the claimant suspend work under the Act?

The claimant can suspend work under the Act, following 2 business days warning, if you fail to pay either:

- the whole claimed amount by the due date for payment, where you failed to serve a payment schedule within time;
- the scheduled amount by the due date for payment; or
- the adjudicated amount within 5 business days after an adjudication determination is received by you.

What are the consequences of suspension?

Once you have paid the claimant the whole amount due, the claimant must resume work within 3 business days.

Notwithstanding anything in the contract, the claimant is not liable for any loss or expense suffered by you as a consequence of the suspension under the Act.

If you deduct any part of the work or the supply of goods or services from the claimant, you are liable for any loss and expense suffered by the claimant.

What contract provisions are void by the Act?

Void contract provisions include:

- any provisions that are inconsistent with the Act;
- “pay if paid” and “pay when paid” clauses, even if they are included in the contract;
- clauses that attempt to “contract out” of the Act;
- clauses aimed to deter a person from taking action under the Act; and
- any provision which would limit interest on late progress payments to an amount less than the rate of interest on judgments of the Supreme Court.

ADJUDICATION INFORMATION

What is an adjudication?

An adjudication is a process carried out by an independent adjudicator to decide the amount, if any, that is due in respect of a progress payment claimed under the Act.

Only a claimant can start an adjudication.

Who selects the adjudicator?

The Minister for Public Works and Services has authorised a number of corporations to receive adjudication applications, nominate adjudicators and issue adjudication certificates. These are called an Authorised Nominating Authority [ANA].

Adjudicators can no longer operate outside of ANAs. They must be appointed by an ANA to adjudicate on a claim.

Who selects the ANA?

A claimant can lodge the claimant's adjudication application with any ANA. Different ANAs will have different fee scales and different panels of potential adjudicators.

Prior to selecting an ANA, the claimant can ask the ANA about the fees of the ANA and the likely fees and expenses of the adjudicator. The claimant can discuss with the ANA the nature of the issues and the qualifications, which might be required of the adjudicator.

Where does the claimant find an ANA?

A list of ANA's is available:

- within this Government's Information Kit which is available from the Government Information Service, and on the Construction Policy Steering Committee website www.cpsc.nsw.gov.au/sop.

What does it cost to have an adjudication?

Adjudication fees include the ANA's fees and the fees and expenses of the adjudicator. The adjudication fees are shared equally by the claimant and the respondent unless the adjudicator decides differently.

If issues are kept simple and the submissions of the parties are complete, clear and concise, adjudication fees can be kept to a minimum. The process is intended to be informal, inexpensive and quick.

Initially, to lodge the adjudication application and obtain the adjudicator's determination and the adjudication certificate, the claimant may have to pay more than the claimant's share of the adjudication fees. The respondent's unpaid share, if any, should be included in the adjudication certificate. It then becomes part of the adjudicated amount for which the claimant is entitled to receive judgment.

While a party can have a lawyer prepare submissions to the adjudicator, there cannot be legal representation at any conference, which the adjudicator may call and the legal costs are not recoverable from the other party.

How does the claimant make an adjudication application?

The adjudication application must:

- be in writing addressed to an ANA, requesting the ANA to nominate an adjudicator;
- be lodged with the ANA within the time allowed under the Act;
- at the same time be served upon the respondent;
- be accompanied by any ANA's application fee;
- attach a copy of the payment claim;
- attach a copy of the payment schedule (if any);
- contain all the information (including expert reports, photographs and arguments) which the claimant wants to put to the adjudicator in support of the claim and refuting any reasons, given by the respondent in the payment schedule for withholding payment; and
- include a copy of the contract or all relevant contract terms and conditions.

The Government Information Kit has a sample adjudication application form. Industry Associations or an Authorised Nominating Authority may be able to assist with a form as well.

What happens after the lodgment of an adjudication application?

The ANA selects and contacts a person who the ANA considers appropriate to be the adjudicator. The claimant and the respondent will receive a notice from the adjudicator that the adjudicator accepts the adjudication application.

If the claimant does not get an acceptance within 4 business days after lodging the adjudication application, the claimant can give that ANA notice of withdrawal of the adjudication application. The claimant then has 5 business days to lodge another application with another ANA.

Has the respondent got the opportunity to respond to an adjudication application?

The respondent can only lodge a submission with the adjudicator if the respondent has provided a payment schedule to the claimant within:

- 10 business days allowed by the Act after being served the payment claim; or
- 5 business days allowed by the Act after being served a notice from the claimant of the intention to apply for adjudication as a result of the claimant not being paid by the due date of payment and not being provided with an initial payment schedule.

The adjudicator cannot consider a submission made by the respondent after the latter of

- 5 business days after the respondent received a copy of the adjudication application; or
- 2 business days after the respondent received notice of the adjudicator's acceptance of the application.

What should an adjudication response contain?

The respondent's adjudication response:

- must be in writing;
- must be addressed to the adjudicator and be received by the adjudicator within time;
- must at the same time be served on the claimant;
- must identify the adjudication application that the response relates to;
- must not include any reasons for withholding payment unless those reasons have been included in the payment schedule;
- should include full details of reasons given in the payment schedule for refusing to pay or withholding payment of any amount. Also should attach any documents necessary to evidence or support those reasons. These may include, for example, expert reports and photographs evidencing defective work and statutory declarations from witnesses;
- may contain submissions relevant to the response. If documentation other than that provided in the adjudication application is referenced those documents should be attached to the response; and
- may respond to issues raised in the adjudication application. Such issues could include the fact that the claimant is not entitled to claim amounts additional to those in the payment claim or to change the payment claim.

How long has the adjudicator got to make the determination?

The adjudicator has either:

- 10 business days after the adjudicator has notified the claimant and respondent of acceptance of the application; or
- such longer time as both the claimant and respondent may agree.

How does the adjudicator make the determination?

The adjudicator must reach the determination considering the following matters only:

- the Act;
- the contract (verbal or written);
- the payment claim;
- the payment schedule (if any);
- the adjudication application;
- the adjudication response (if any);
- the results of inspections; and
- any other submissions (including relevant documents and submissions made at a conference, if any, called by the adjudicator) which the adjudicator allows the parties to make.

What does the adjudicator determine?

The adjudicator determines:

- the amount of the progress payment, if any, which the respondent must pay the claimant;
- the date on which the amount became or becomes payable;
- the rate of interest payable on such amount; and
- if the parties are to pay the adjudication fee other than in equal shares, the proportion payable by each.

If, in a previous adjudication, the adjudicator or another adjudicator has determined the value of work, goods or services, the adjudicator must give that work, goods or services the same value, unless the claimant or respondent satisfies the adjudicator that the value has changed since the previous adjudication.

The determination must be in writing and, unless both parties request otherwise, the determination must include the reasons for the determination.

What happens after the adjudicator has made a determination?

The adjudicator must serve a copy of the determination to each party.

The respondent must pay the adjudicated amount within 5 business days after the date upon which the adjudicator's determination is served on the respondent, or the date upon which the adjudicator determines the amount becomes payable, whichever is the later.

What happens if the respondent fails to pay the adjudicated amount?

The claimant can ask the ANA to provide an adjudication certificate..

The claimant can then have the adjudication certificate filed in the appropriate court as a judgment. The claimant must support the certificate with an affidavit stating that the amount is still outstanding. A sample form of affidavit is in the Information Kit.

The judgment debt is then enforceable in the same way as any court judgment, without time consuming and often expensive court hearings of the matters in dispute.

ENFORCING PAYMENT - OVERVIEW

If a person fails to pay a debt, ultimately, only the courts can lawfully enforce payment.

The courts have various mechanisms for enforcing payment. These mechanisms depend first upon a court declaring by way of a judgment that the debt is owed. Examples of enforcing payment include:

- using the Sheriff to seize and auction off goods or property;
- compelling creditors of the judgment debtor to pay the judgment creditor directly (attachment of debts);
- taking instalments from wages; and as a last resort
- bankruptcy or, in the case of a company, winding up the company.

To obtain judgment, a creditor must prove a “cause of action”. In the case of claims under construction contracts, this can be a very drawn out and costly process. It involves issuing and serving a summons on the debtor. If the summons is defended, it means proving that the work was done, and has the value claimed, and defending cross claims, for example, for defective work. It involves a hearing with witnesses, cross-examination and production of documents. It usually involves considerable legal expense. The time, cost and difficulty of securing judgment has often been used by respondents to delay or frustrate legitimate claims.

For these reasons the NSW Government has, through the *Building and Construction Industry Security of Payment Act 1999 NSW*, created a unique cause of action. It is a statutory entitlement to a payment on account. It is an entitlement, which is created quickly and without the expense and formality involved in proving the debt before a court.

However, the very uniqueness of the Act’s cause of action has sometimes meant that lawyers have not appreciated the implications and courts have sometimes allowed respondents to continue as before and lodge cross claims and defences such as that the work was defective or the claimant breached the contract.

In part, it was the difficulty that some claimants were having in enforcing payment through the courts that prompted the Government to make the December 2002 amendments to the Act. As a result of these amendments, when the claimant seeks judgment from a court in respect of any payment claim made under the Act, the Act specifically bars the respondent from lodging any cross claim and any defence whatsoever in relation to matters arising under the contract.

If a respondent wants to claim that the respondent is not liable to pay the payment claim or any part because the work was defective or does not have the value claimed or because the claimant breached the contract, the respondent must do so in a payment schedule served within the strict time limits provided in the Act.

The validity of the respondent’s reasons for non payment can then be decided promptly, inexpensively and without formality by an adjudicator, instead of a court. If the respondent considers that the adjudicator is wrong, the respondent must still promptly pay the amount determined by the adjudicator.

The respondent can commence legal proceedings to recover an alleged overpayment, but now the respondent has to prove a cause of action, unlike the rights of the claimant under the Act, and has the prospect of the delay, cost and expense involved in recovering the alleged overpayment.

Similarly, if the claimant considers that the amount determined by the adjudicator is too little, the claimant can sue for the balance, but that claim cannot be a claim under the Act.

There are five instances where the Act creates a statutory debt, namely:

- where the respondent fails to serve a payment schedule within time, the whole amount of the payment claim becomes a statutory debt;
- where the respondent provides a payment schedule and fails to pay the scheduled amount, the scheduled amount becomes a statutory debt;
- where an adjudicator determines the amount of the progress payment due, that amount becomes a statutory debt;
- where an ANA issues an adjudication certificate, the amount certified becomes a statutory debt; and
- when, the claimant suspends work under the Act and the respondent takes part of the work from the contract, the loss or expense consequently suffered by the claimant becomes a statutory debt.

RECOVERY OF AN ADJUDICATED AMOUNT

What may the claimant recover after adjudication?

The claimant may recover what has been determined by the adjudicator and certified by the ANA. This will be the amount of the payment due and may also include the:

- the respondent's share, if any, of fees paid by the claimant; and
- interest on the unpaid progress payment from the date due to the date of the certificate;

How do I recover a debt after adjudication?

If the respondent does not pay the amount determined by the adjudicator you may secure judgment for the adjudicated amount by:

- requesting the ANA (who nominated the adjudicator) to give you an adjudication certificate certifying the amount due to you; and
- filing the adjudication certificate (with an affidavit of debt) in any court of competent jurisdiction;

A sample form for an affidavit of debt is provided in this Information Kit. The ANA prepares the adjudication certificate. The claimant must prepare the affidavit of debt and swear the affidavit before a Justice of the Peace or a solicitor. Fees will be payable to the ANA and the court. The court will then give the claimant a certificate of judgment. Courts of competent jurisdiction are:

- Local Court for amounts up to \$40,000.
- District Court for amounts exceeding \$40,000 but not exceeding \$750,000
- Supreme Court for amounts exceeding \$750,000.

The advantages of this process include the fact that there is no need to issue a summons and, if the respondent wishes to stop enforcement of the judgment, the respondent must make an application to the court to set aside the judgment.

If the respondent makes such an application the respondent must pay into court as security the unpaid portion of the adjudicated amount. This eliminates the advantage, which a respondent had when the respondent could retain the disputed amount while legal proceedings were in progress.

If the respondent makes application to set aside the judgment for the adjudicated amount, the claimant will usually need a solicitor to assist the claimant to oppose the application.

Lien

The Act provides that the claimant has a lien or charge over unfixured plant or materials supplied by the claimant to the respondent for or in connection with the carrying out of the construction work.

A lien is the right to seize and sell goods in order to obtain payment. If the goods are sold for more than the amount owed under the Act then the balance must be paid to the respondent.

The lien granted by the Act does not give the claimant a preference over a lien or charge existing before the date upon which the progress payment became due. It does not give the claimant any rights where a third party owns the items. Generally speaking, when a principal pays a contractor for items, they become the property of the principal.

Before exercising a lien, the claimant should seek legal advice to ensure that the claimant does not trespass upon the rights of others and thereby incur a liability to a third party.

Contractors Debts Act

The claimant may also use the Contractors Debts Act 1997, where the claimant is a subcontractor claiming for work or goods which the main contractor is acquiring for the purposes of performing a main contract for a principal.

In such circumstances the claimant could ask the court, at the time of lodging the adjudication certificate, for a debt certificate under section 7 of the Contractors Debts Act 1997.

This debt certificate directs the principal to pay the claimant's judgment debt from any money that may be due to the main contractor. The clerk of the court will require the claimant to provide details of the principal and evidence that the work or goods the subject of the claimant's claim is part of or incidental to the work under the main contract.

It is strongly recommended that the claimant seek legal advice before taking this course of action.

**RECOVERY OF STATUTORY DEBT
WITHOUT ADJUDICATION**

Introduction

This Information Sheet deals with recovery of the statutory debt when there has not been an adjudication. Enforcing the statutory debt without adjudication is more time consuming and complicated than simply filing an adjudication certificate after adjudication and, for that reason, a claimant may prefer to have an adjudication even when the alternative of enforcing the statutory debt by way of a summons exists.

When there has not been an adjudication, to obtain judgment, the claimant has to issue a summons out of a court of competent jurisdiction and serve the summons on the respondent. If the respondent does not file a defence within 28 days after service, the claimant can ask the court to grant judgment. If the respondent lodges a defence, it may be a defence which is permitted by law, for example:

- the respondent did not enter a construction contract;
- the construction contract was for work on that part of the premises in which the respondent resides; or
- the respondent has paid the claim or the scheduled amount.

In that event there will be a hearing where the defence can be tested. The Act now clearly prohibits defences by way of cross claims and defences in relation to matters arising under the construction contract, for example, that the work was defective or that the claimant is in breach of contract. The claimant can apply to the court to have such defences struck out

Getting started

Before starting the process it is advisable to seek assistance from any of the following to obtain some detailed information on the course of action to take:

- A solicitor;
- Industry Associations; and/or
- The Court's Chamber Magistrate.

The decision to go to court should be made only after the claimant has checked that:

- The claim for payment has been made in accordance with the Act;
- The respondent has failed to comply with payment obligations under the Act;
- Direct action is preferable to an adjudication and obtaining an adjudication certificate;
- Alternative ways of solving the dispute have been considered;
- The claimant knows how to complete the information needed for summons; and
- If a defence is lodged, the claimant has the means to present the claimant's case and to meet possible legal costs.

The claimant needs to be aware that fees apply throughout the court process and that those court fees are to be paid progressively by the claimant. A summary of possible fees include:

- solicitor's fees;
- Fees for filing a "Statement of Liquidated Claim";
- fees to the Sheriff for serving the "Statement of Liquidated Claim" on the respondent;
- Filing a "certificate of readiness";
- Writ of Execution; and
- Garnishee Order submission.

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If the claimant wins the case, a judgment (order of the court for payment) may be made in the claimant's favour. The fees spent during the court case will then be added onto the amount owed by the defendant. The costs awarded by the court may not cover all the solicitor's fees and the claimant will have to pay the difference if this situation arises.

Selecting the court

The selection of the court will depend upon the amount of the claim. It should be:

- Local Court, Small Claims Division for amounts up to \$10,000
- Local Court for amounts exceeding \$10,000 but not exceeding \$40,000
- District Court for amounts exceeding \$40,000 but not exceeding \$750,000
- Supreme Court for amounts exceeding \$750,000.

Rarely would a claimant institute legal proceedings in the District Court or the Supreme Court without a solicitor. Legal costs are included in the judgment and are recoverable in the same way as the original debt.

If the respondent is insolvent then the only recourse may be to have the respondent made bankrupt (in the case of an individual) or wound up (in the case of a corporation).

Application to recover a debt through the courts

The following is an outline of the procedure to recover a debt through the Local Court. The forms and procedures in the District Court and the Supreme Court are more complicated but the differences are in the detail not in the substance of the claim.

Approaching the court

When approaching the court the claimant should ensure that at a minimum the claimant has the original or copies of:

- the contract;
- the payment claim made under the Act;
- the payment schedule (if provided by the respondent);

The claimant will need to know the unpaid amount of the statutory debt, the name and address of the respondent, the date of service upon the respondent of the payment claim, the date of service upon the claimant of the payment schedule, if any, and the due date for payment of the progress claim. The due date will be either the date stated in the contract or, if no date is stated, 10 business days after the payment claim was served on the respondent.

Upon reaching the court the claimant requests a "Statement of Liquidated Claim" form and completes four (4) copies of this form. These copies are then distributed to:

- The court (1 copy)
- The claimant (1 copy)
- The defendant (respondent) (1 copy)
- the court after completion of the affidavit of service

The cost of issuing a "Statement of Liquidated Claim" varies with the amount the claimant is owed and must be paid at the time of issue. This amount is added onto the claimed amount owed to the claimant.

Completing the "Statement of Liquidated Claim" form

Each Local Court provides a free Chamber Magistrate service to assist clients in preparing forms and providing procedural advice on service.

To complete the "Statement of Liquidated Claim", the claimant must insert the plaintiff's and defendant's names and addresses. The claimant being the "plaintiff" and the respondent being the "defendant". It is

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important that names, addresses, ACN's and ABN's (company numbers) are exactly the same as on the payment claim and the payment schedule, if any. The "Statement of Liquidated Claim" form also requests cost details as follows:

The plaintiff claims	\$.....
Interest	\$.....
Issue and Service Fees	\$.....
Solicitor's costs	\$.....
Total Claimed	\$.....
Date of issue

in respect of the following cause of action

(Solicitor for the) Plaintiff.

Notes:

1. After the words, "The plaintiff claims" the claimant should insert the amount of the debt, for example, \$25,000. The claimant should only insert the unpaid balance. The claimant should give credit for any part of the progress claim or adjudicated amount which has been paid
2. Court staff can assist the claimant with "Interest" and "Issue and Service Fees".
3. If the claimant does not have a solicitor representing the claimant, the claimant should:
 - leave blank the item "solicitors costs";
 - rule through the words "Solicitor for" before the word "Plaintiff" at the end.
4. The claimant then inserts the total.
5. The date of issue will be the date that the completed Statement of Liquidated Claim is accepted by the court clerk and the fees paid by the claimant.
6. If the claimant is a corporation, the corporation must duly authorise an officer of the corporation to act for the corporation and sign the claim form for the corporation.

Selecting a cause of action

To complete the insert under "cause of action" the claimant will have to know whether the debt sued upon arises under section 15 or 16 of the Act.

When suing for the statutory debt it is most import to state in the statement of liquidated claim that the cause of action is for the "*debt due under section 15 of the Building and Construction Industry Security of Payment Act 1999 NSW*" (where there was no payment schedule) or the "*debt due under section 16 of the Building and Construction Industry Security of Payment Act 1999 NSW*" (where the scheduled amount was not paid on time) in respect of the particular progress claim and the particular contract. The cause of action is that statutory debt. The claim should not be for work done or moneys due under the contract. That is a different cause of action. Some claimants and their solicitors have made the mistake of suing upon the wrong cause of action.

Contractors Debts Act 1997

If the claimant is a subcontractor the claimant can now ask the court (at the time of lodging the Statement of Liquidated Claim) for an attachment order under section 14 of the Contractors Debts Act 1997.

An attachment order is an order from the court to the principal directing the principal to withhold from payments to the contractor the amount of the claimant's claim. This freezes money in the hands of the principal.

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When the claimant obtains judgment against the respondent then the claimant can ask the court for a debt certificate, under section 7 of the Contractors Debts Act 1997, directing the principal to pay the claimant's judgment debt from any money that may be due to the main contractor. This can occur regardless of whether or not the claimant has previously obtained an attachment order.

The clerk of the court will require the claimant to provide details of the principal and that the work or goods the subject of the claimant's claim is part of or incidental to the work under the main contract.

Case number

When the claim is filed, it will be allocated a case number and a copy returned to the claimant. The claimant must quote the case number when making inquiries or taking further steps in the matter.

Serving the claim on the defendant

The claimant must elect between serving the claim on the respondent himself or having the court arrange for a Sheriff's officer to serve the claim on the respondent. It is advisable that if a claimant is unfamiliar with legal processes the claimant should elect to have a Sheriff's officer serve the claim.

When the Sheriff's officer has served the Statement of Liquidated Claim on the respondent, the Sheriff's officer will give the claimant an affidavit of service.

The cost of serving a "Statement of Liquidated Claim" by the Sheriff must be paid at the time of issue. This amount is added onto the claimed amount owed to the claimant.

Obtaining A judgment

A judgment is an order of the court for the payment of a specific amount of money. It can be obtained by:

- A confession;
- Default;
- A court hearing

A Confession

If the defendant agrees that the defendant owes the plaintiff the money, the defendant can file a statement of confession and offer to pay by instalments. If the registrar thinks the amount offered is reasonable, the order will be made and the plaintiff will be sent a notice. The plaintiff has the chance to object to the payment scheme by filing a notice of objection within 14 days of receiving the notice from the court. The case will then be listed before the court and both parties can attend to have their say. The court will then accept, reject or vary the payment scheme.

Default judgment

If the defendant does not confess, pay or lodge a defence to the plaintiff's claim within 28 days after being served with the statement of liquidated claim (the summons), the plaintiff can file:

- an affidavit of service; and
- an affidavit of debt at the registry.

These sworn documents tell the registrar that the claim has been properly served and that the money is still owed.

Assuming the claimant's forms are all in order and no defence has been lodged, the court will provide the claimant with an Order for Judgment.

Court Action

The defendant may lodge a notice of grounds of defence with the court. However, the grounds of defence, which the defendant can raise to a claim under the Act, are very limited. The defendant cannot raise any defence in relation to matters arising under the contract or any cross claim. If the defendant attempts to do so the claimant should apply to the court to have the defence struck out and summary judgment entered. If the defendant lodges a defence, which is not prohibited by the Act, the case will then be listed for hearing by an assessor, Arbitrator, Magistrate or Judge.

Court Hearing or Arbitration

At the Local Court, if the case involves an amount under \$10,000, it will be heard by a small claims assessor. The plaintiff (the claimant) will receive a notice asking for a pre-trial review at the court. The assessor will help the parties to work out what has caused the problem and try to settle the case. If no agreement is reached, the assessor will set a date when the parties can return for the case to be heard.

At the Local Court, if the case involves an amount of money more than \$10,000 and the matter is to be heard in Court, the plaintiff must file a "certificate of readiness" and pay a fee to do so.

The case will be listed for a directions hearing or call-over where the registrar will check that the case is ready and will set a date for either arbitration or court hearing.

ENFORCING A JUDGMENT DEBT

Getting paid by the Debtor

Once judgment is granted by a court, the claimant may need to enforce judgment in one of several ways:

- Writ of Execution;
- Garnishee Order
- Examination Summons;
- Use of a debt collector
- Bankruptcy proceedings
- Contractors Debts Act 1997

Writ of Execution

This is an order to a Sheriff asking to seize and auction personal property belonging to the debtor and to give the claimant the proceeds of the sale. The claimant can ask for a writ by filing an application for issue of execution and paying a fee. If the Sheriff has to pay advertising, towing or removalist fees, these expenses must be paid by the claimant but will be added onto the debt.

Garnishee Order

If the claimant is aware of where the debtor works or holds a bank account, the claimant can get a garnishee order asking that the employer or bank pay the debt to the claimant from their wages or bank account. The order must be served on the employer or bank and the claimant must pay a garnishee fee to the court for the order.

The garnishee can also be used in conjunction with the Contractor's Debt Act.

Examination Summons

This is a document that requires the debtor to attend the courthouse so that the claimant can question the respondent as to the respondent's assets and means of paying and seek agreement or an order of the court on how the debtor is to pay the debt.

The debtor may make an application to the court for the right to pay the debt by instalments.

Debt Collector

The claimant may choose to use a debt collector.

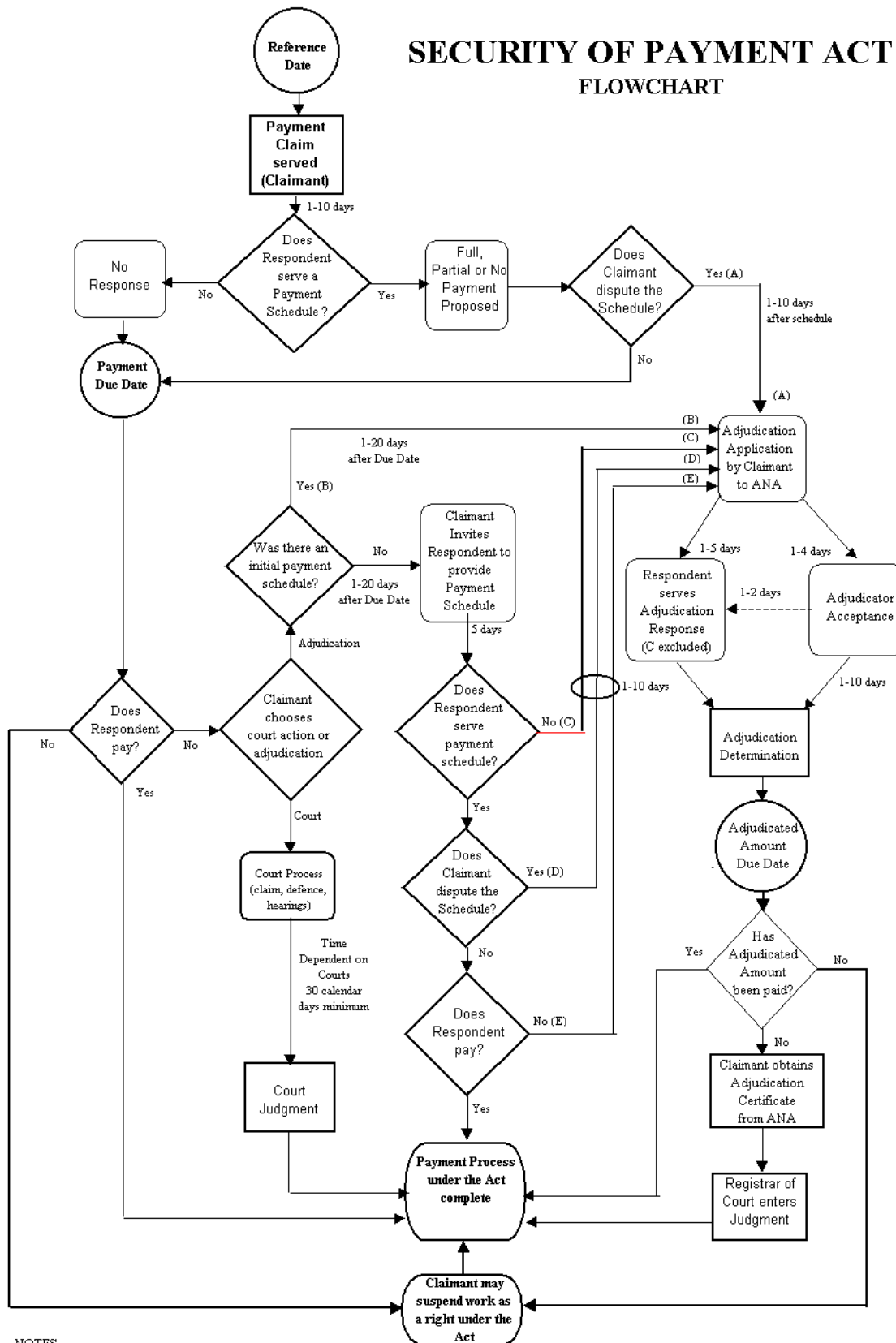
Bankruptcy

If the respondent [defendant] is insolvent then the claimant may consider instituting proceedings to have the respondent make bankrupt or, in the case of a corporation, have the corporation wound up and finally dissolved.

Contractors Debts Act 1997

The claimant could ask the court, at the time of lodging the adjudication certificate or after obtaining judgment from the court for a debt certificate under section 7 of the Contractors Debts Act 1997. This debt certificate directs the principal to pay the claimant's judgment debt from any money that may be due to the main contractor. The clerk of the court will require the claimant to provide details of the principal and that the work or goods the subject of the claimant's claim is part of or incidental to the work under the main contract.

**SECURITY OF PAYMENT ACT
FLOWCHART**



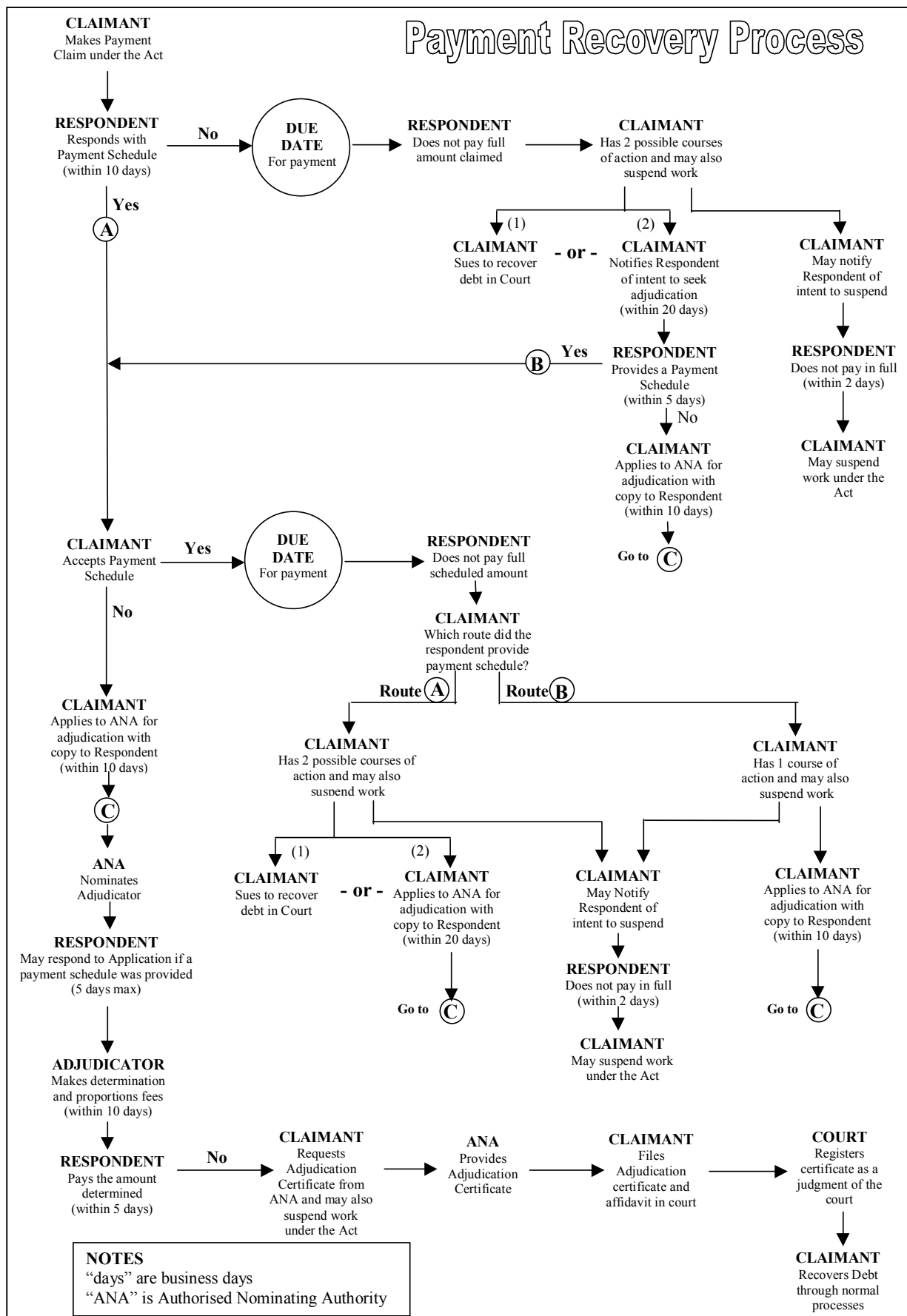
NOTES

"days" are business days

"ANA" is Authorised Nominating Authority

Any subsequent action necessary to recover a court judgment can include the use of the Contractors Debts Act 1997.

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INFORMATION SHEET 10

*Sample Payment Claim Form under the
Building and Construction Industry Security of Payment Act 1999 NSW*

PAYMENT CLAIM

To (Respondent's Name):

ABN (where applicable)

Address (ordinary place of business)

Phone Number

Fax Number

This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW.

From (Claimant's Name):

ABN (where applicable)

Address (ordinary place of business)

Phone Number

Fax Number

Contract Details

Project:

Contract Number (where applicable):

Reference date (date when claimant can claim and to which claim is calculated):

Total amount of this Payment Claim \$

The construction work or related goods and services in respect of which this Payment Claim is made and the method of calculation of the total amount of the claim are set out in the Attachment(s) to this Payment Claim.

Signed (Claimant):

Date:

Attachment(s)

Details of Claim (attach other relevant documentation as required) :

Payment Claim

Notes for the guidance of the Claimant and Respondent

1. The work or related goods or services in respect of which the Payment Claim is made must be detailed in the Schedule. The schedule may include information supporting the claimed amount. Examples of such information are :
 - a. statements detailing the extent of the work completed;
 - b. completion certificates,
 - c. delivery docketts,
 - d. photographs,
 - e. other Contract documentation requirements where applicable
2. The payment claim must contain a statement along the lines of “*This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 NSW*”.
3. The Payment Claim may be served in accordance with the Contract or may be served as provided under the Act by delivering it :
 - a. in person to the respondent; or
 - b. by lodging it during normal business hours at the respondent's ordinary place of business; or
 - c. by sending it by post to the respondent's ordinary place of business; or
 - d. by sending it by facsimile to the respondent's ordinary place of business.
4. The Payment Claim is not served until it is received by the respondent in the correct manner as detailed above. It is important that evidence of serving is kept, for example, facsimile receipts.
5. If the respondent wishes to dispute liability to pay, as a progress payment on account, the amount claimed or any portion thereof, the respondent must serve upon the claimant a Payment Schedule within 10 business days after being served with a Payment Claim under the Act.
6. If the respondent fails to serve a Payment Schedule on the claimant within 10 business days after being served with a Payment Claim under the Act, the respondent must pay the full amount of the Payment Claim. Payment is to be made on the due date as defined in Section 11 of the *Building and Construction Industry Security of Payment Act 1999 NSW*.
7. Amounts paid in respect of a Payment Claim are taken to have been paid on account. It should be noted that payment does not constitute an admission that work has been done or goods or services provided, or of their value. An amount paid may have to be repaid (by the claimant) if the claimant is not entitled to payment under the terms of the relevant construction contract.

Payment Schedule

Notes for the guidance of the Claimant and Respondent

1. If a Payment Claim is made under the *Building and Construction Industry Security of Payment Act 1999 NSW* on a respondent, the respondent must provide a Payment Schedule if the intent is not to pay the claim in full. This is regardless of whether the respondent believes that the claimant is not entitled to make the claim.
2. The respondent must serve the Payment Schedule on the claimant within 10 business days after being served with the Payment Claim.
3. If the respondent fails to serve a Payment Schedule on the claimant within 10 business days after being served with a Payment Claim under the Act, the respondent must pay the full amount of the Payment Claim.
4. The Payment Schedule must identify the Payment Claim to which it relates and must indicate the payment (if any) that the respondent proposes to make.
5. If the amount that the respondent proposes to pay is less than the amount claimed in the Payment Claim, the respondent must :
 - a. set out the amount (if any) that the respondent agrees to pay the “scheduled amount”;
 - b. set out the amount (if any) that the respondent does not agree to pay under the payment claim;
 - c. set out detailed reasons in the attachment(s), as to why the respondent intends not paying any amount with respect to the payment claim;
 - d. set out detailed reasons in the attachment(s), as to why the respondent intends withholding any amount with respect to the payment claim including how the valuation of the withheld amount has been calculated.
6. The Payment Schedule may be served in accordance with the Contract or may be served as provided under the Act by delivering it:
 - a. in person to the claimant; or
 - b. by lodging it during normal business hours at the claimant's ordinary place of business; or
 - c. by sending it by post to the claimant's ordinary place of business; or
 - d. by sending it by facsimile to the claimant's ordinary place of business.
7. The Payment Schedule is not served until it is received by the claimant in the correct manner as detailed above. It is important that evidence of serving is kept, for example, facsimile receipts.
8. If the amount that the respondent proposes to pay is less than the claimed amount, the claimant may apply for adjudication of the progress payment to be made. The claimant must lodge an adjudication application within 10 business days after receiving the Payment Schedule.
9. The respondent must pay the scheduled amount by the due date for payment under the contract or if the contract does not provide a due date, then within 10 business days after receiving the payment claim.

INFORMATION SHEET 12

*Sample Adjudication Application Form under the
Building and Construction Industry Security of Payment Act 1999 NSW*

ADJUDICATION APPLICATION

To (Authorised Nominating Authority)

Name:

Business Address:

Phone Number:.....Fax Number:.....:

From (Claimant's Name):

Name:

ABN (where applicable):ACN (where applicable):

Business Address:

Phone Number:.....Fax Number:.....Email:.....

Respondent's Name:

Name:

ABN (where applicable):ACN (where applicable):

Business Address:

Phone Number:Fax Number:

CONTRACT DETAILS

Project:

Contract Number (where applicable):

Claimant's status (eg. subcontractor, contractor, consultant, supplier):.....

Business Type of Claimant (eg. Electrician, Plumber, Architect):

Business Type of respondent (eg. NSW Government agency, statutory authority, local government council, developer, head contractor, head consultant, fabricator of materials):

Reference date (date to which progress value is calculated):

Due date for payment (date when payment is due to be made):

Date payment claim served on respondent:

Date payment schedule, if any, served on claimant:

Payment claim amount: \$......

Scheduled amount (amount that respondent proposes to pay): \$......

Application fee accompanying this application: \$......

The claimant will serve a copy of this adjudication application (including all attachments) on the respondent on the same day as it is lodged with the Authorised Nominating Authority. If it is not served on the same day the Applicant will immediately notify the Authorised Nominating Authority of the date of service upon the respondent.

The claimant hereby applies for adjudication under the *Building and Construction Industry Security of Payment Act 1999 NSW* of the referenced Payment Claim.

Signed (claimant):

Date:

ADJUDICATION APPLICATION CHECKLIST

Notes for the guidance of the Claimant and Respondent

(attach all documents to the application)

1. In accordance with section 17 of the Act, the time for lodging an adjudication application is:
 - a. where the claimant received a payment schedule within 10 business days and the claimant disputes any reasons for non payment – 10 business days from the day of receipt of the payment schedule;
 - b. where the claimant received a payment schedule within 10 business days showing that an amount will be paid and the claimant did not seek adjudication and the amount was not paid on the due date for payment - 20 business days from the due date for payment;
 - c. where the claimant did not receive an initial payment schedule within 10 business days and the full amount of the payment claim was not paid on the due date for payment -
 - i. the claimant has 20 business days from the due date for payment to notify the respondent of the claimant's intention to apply for adjudication; and
 - ii. the respondent has 5 business days to provide a payment schedule; and
 - iii. the claimant may apply for adjudication within 10 business days of the expiry of the 5 business days period provided to the respondent regardless of whether or not a payment schedule was served on the claimant.
2. The claimant must include with the application the fee payable to the Authorised Nominating Authority. If the application fee does not accompany the application, the application is not valid.
3. The applicant should attach to the application copies of:
 - a. The construction contract (which may be a formal contract document, an exchange of letters, a quotation and acceptance or a record of an oral agreement) under which the payment claim is made;
 - b. The payment claim;
 - c. The payment schedule, if any (see Guidenote 1c for times where no payment schedule was provided within 10 business days of the claimant serving the payment claim on the respondent);
 - d. Any supporting documents (eg. certificates, test results, delivery dockets, invoices, photographs, statutory declarations, expert reports, written statements, etc);
 - e. A written submission by the claimant evidencing that the claimed amount is due and unpaid and evidencing the value of the work, materials or services for which payment is claimed. The submission must also respond to the reasons, if any, given by the respondent for not paying and must provide evidence or arguments to refute the respondent's grounds for withholding payment.
4. A copy of the adjudication application and all attachments or other things accompanying it must be served on the respondent. To expediate the adjudication this should be done at the same time as it is served upon the Authorised Nominating Authority.
5. The adjudication application may be served on the respondent in accordance with the Contract or it may be served in accordance with the Act. by delivering it :
 - a. in person to the respondent; or
 - b. by lodging it during normal business hours at the respondent's ordinary place of business; or
 - c. by sending it by post to the respondent's ordinary place of business; or
 - d. by sending it by facsimile to the respondent's ordinary place of business.
6. The respondent may lodge a response to the application only if the respondent served a payment schedule under the Act. The response may be served on the adjudicator on or before the latter of:
 - a. 5 business days after receiving a copy of the adjudication application; or
 - b. 2 business days after receiving notice of the adjudicator's acceptance of the adjudication application.
7. If within 4 business days after lodging the adjudication application, the claimant has not received an adjudicator's notice of acceptance of appointment, the claimant may, by notice in writing to the adjudicator or Authorised Nominating Authority, withdraw the adjudication application. The claimant may make a new adjudication application within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application.

This form is not mandatory and is provided to assist a claimant to make an adjudication application.

INFORMATION SHEET 13

*Sample Adjudication Application Response Form under the
Building and Construction Industry Security of Payment Act 1999 NSW*

RESPONDENT'S ADJUDICATION RESPONSE

Adjudicator: *[Insert name of adjudicator]*

**Authorised Nominating Authority (ANA) to whom
the adjudication Application was made:** *[Insert name and ACN of the ANA]*
[Insert address of the ANA]
[Insert telephone and fax numbers]

Adjudication Application Reference Number: *[Insert Adjudication Application Ref No]*

Project : *[Insert description of the project]*

Date of Payment Claim : *[Insert date]*

Amount Claimed : *[Insert amount]*

Date of Payment Schedule : *[Insert date]*

Scheduled Amount : *[Insert amount]*

Claimant's details : *[Insert name and ACN, if any, of the claimant]*
[Insert address of the claimant]

Respondent's details : *[Insert name and ACN, if any, of the claimant]*
[Insert address of the claimant]

**Date on which the respondent received a copy of
the adjudication application** *[Insert date received]*

**Date on which the respondent received notice of the
adjudicator's acceptance of the application** *[Insert date received]*

The scheduled amount is less than the claimed amount for the reasons set out in the respondent's payment schedule. In support of those reasons, the respondent provides further information set out in the attachments below and makes the following submissions:

Submissions:

Note : Provide submissions to support the reasons set out in the payment schedule. If lengthy list and attach submission as a referenced document

List of Attachments:

Note : List and attach all the referenced documents

Signed (respondent):

Date:

Adjudication Response Checklist

Notes for the guidance of the Claimant and Respondent

1. The respondent can only lodge a submission with the adjudicator if the respondent has provided a payment schedule to the claimant within:
 - 10 business days allowed by the Act (or such shorter period as may be provided in the contract) after being served with the payment claim; or
 - 5 business days allowed by the Act after being served with a notice from the claimant of the intention to apply for adjudication as a result of the claimant not being paid by the due date for payment and not being provided with an initial payment schedule.
2. The adjudicator cannot consider a submission made by the respondent after the later of
 - 5 business days after the respondent received a copy of the adjudication application; or
 - 2 business days after the respondent received notice of the adjudicator's acceptance of the application.
3. The respondent's adjudication response:
 - must be in writing;
 - must be addressed to the adjudicator and be received by the adjudicator within time;
 - must at the same time be served on the claimant;
 - must identify the adjudication application that the response relates to;
 - must not include any reasons for withholding payment unless those reasons have been included in the payment schedule.
 - should include full details of reasons given in the payment schedule for refusing to pay or withholding payment of any amount. Also should attach any documents necessary to evidence or support those reasons. These may include, for example, expert reports and photographs evidencing defective work and statutory declarations from witnesses.
 - may contain submissions relevant to the response. If documentation other than that provided in the adjudication application is referenced then it should be attached to the response.
 - may respond to issues raised in the adjudication application. Such issues could include the fact that the claimant is not entitled to claim amounts additional to those in the payment claim or to change the payment claim.
4. Submissions are essentially arguments in support of the respondent's case. They may include legal arguments, arguments on the interpretation of the contract or other documents. These documents usually don't speak for themselves. The adjudicator cannot be expected to assume that something said by the respondent in a letter or minutes of a meeting or other document is true. In the submissions, the respondent can state that it is true but if the respondent fails to do so the adjudicator might draw the inference that the respondent is not prepared to argue that the statement is true.

INFORMATION SHEET 14

*Sample Affidavit of Debt Form under the
Building and Construction Industry Security of Payment Act 1999 NSW*

AFFIDAVIT OF DEBT FORM

In the :[Insert court eg Local]
issued at :[Insert court location]
Number :[Insert Plaintiff No & year]
Plaintiff :[Insert name of claimant]
Defendant :[Insert name of defendant]

On the[Insert date]

I,[Insert name]

Of[Insert address]

say on oath:

1. I am the plaintiff / the [Insert position such as managing director/secretary / accountant]of the plaintiff and am in a position to know the facts attested hereto; *Note - Delete that is not applicable*
2. This affidavit is made pursuant to section 25 of the *Building and Construction Industry Security of Payment Act 1999 NSW* to accompany an adjudication certificate for an adjudicated amount of \$ [Insert amount].
3. The adjudication certificate is dated.....[Insert date] and was issued by the Authorised Nominating Authority [insert ANA name].....
.....
4. The defendant has not paid the plaintiff the full adjudicated amount at the date hereof, and the unpaid part of the adjudicated amount is \$[Insert amount]

Sworn at :[Insert Court Loc]

On :[Insert Date]

Before me :[Insert Name]

Signature :
Officer of the Court / Justice of the Peace / Solicitor [Delete the titles that are not applicable]

AFFIDAVIT OF DEBT FORM

GUIDE NOTES:

1. Indicate the court where the affidavit is to be lodged. For example the Local Court (Civil Claims), Local Court, District Court or the Supreme Court.
2. The affidavit is to accompany the filing of an adjudication certificate. It must be sworn on the day upon which the adjudication certificate is filed in the court. Usually, there will be an officer of the court before whom the affidavit can be sworn. It can also be sworn before a Justice of the Peace or a solicitor.
3. This sample form is provided to assist a claimant to make an affidavit. Use of this form is not mandatory.

Authorised Nominating Authorities

Up-to-date contact information for Authorised Nominating Authorities is available on the Commerce website at www.commerce.nsw.gov.au. Select Procurement, then select Security of Payment and refer to information sheet 15.