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GUIDE TO THE  
BUILDING AND CONSTRUCTION  
INDUSTRY SECURITY OF PAYMENT ACT  
(2009) SA

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## INTRODUCTION

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1. This booklet is a guide to the *Building and Construction Industry Security of Payment Act 2009* (SA) ("**Act**"). The Act applies to work done in South Australia. Other States and Territories in Australia have different requirements.
  - 1.1. This is a summary. The Act is available online at [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).
  - 1.2. The Act came into operation on 10 December 2011 and applies to construction contracts signed since that day.<sup>1</sup>
  - 1.3. The object of the Act is to ensure that persons who work or supply goods or services in the construction industry are entitled to progress payments, even if their contract does not give that right.<sup>2</sup>
2. This booklet uses some defined terms. These terms or words commence with a capital letter and are in bold type when they are defined.
  - 2.1. A valid claim for a progress payment is a "**Payment Claim**".
  - 2.2. A valid response to a Payment Claim is a "**Payment Schedule**".
  - 2.3. The person making the Payment Claim is the "**Claimant**".
  - 2.4. The person receiving the Payment Claim is the "**Respondent**".
3. There are seven sections in this booklet:
  - 3.1. Making a Payment Claim (see paragraphs 5 to 27 below);
  - 3.2. Responding with a Payment Schedule (see paragraphs 28 to 39 below);
  - 3.3. Responding to an Adjudication Application (see paragraphs 68 to 78 below);
  - 3.4. Steps towards a determination (see paragraphs 40 to 78 below);
  - 3.5. Steps towards getting paid (see paragraphs 79 to 90 below);
  - 3.6. Suspending work when payment is late (see paragraphs 91 to 93 below);  
and
  - 3.7. Strategies for challenging adjudications (see paragraphs 94 to 104 below).
4. It is mandatory to carefully follow the procedures in the Act.

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<sup>1</sup> See paragraph 6.1.1 for clarification.

<sup>2</sup> s3 of the Act.

## MAKING A PAYMENT CLAIM

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5. In this section we cover:
  - 5.1. Who can make a Payment Claim;
  - 5.2. When a Payment Claim can be made;
  - 5.3. How to make a Payment Claim; and
  - 5.4. When payment of a Payment Claim is due.

### Who can make a Payment Claim?

6. Almost any person or business that does construction work, or supplies related goods or services for construction work, under a construction contract,<sup>3</sup> can make a Payment Claim.<sup>4</sup>
  - 6.1. There are two exceptions:
    - 6.1.1. Where the construction contract is for domestic building work and the other party to the contract proposes to reside in the premises, the Act does not apply.<sup>5</sup> Put another way, the Act only applies to domestic building work contracts if the paying party does not intend to reside in the premises. The Act applies to all subcontracts for building work, whether commercial or domestic.
    - 6.1.2. Employees cannot use the Act to claim wages.<sup>6</sup>
  - 6.2. Construction work does not include mining.
  - 6.3. Those who can make a Payment Claim include:
    - 6.3.1. contractors;
    - 6.3.2. subcontractors;
    - 6.3.3. suppliers of materials for construction work;
    - 6.3.4. suppliers of plant and equipment (for sale or hire) for use in connection with construction work; and
    - 6.3.5. providers of services related to construction work.

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<sup>3</sup> Construction contract is defined in s4 of the Act and includes an "other arrangement".

<sup>4</sup> Construction work is defined in s5 of the Act. Related goods and services is defined in s6 of the Act.

<sup>5</sup> See s7(2)(b) of the Act.

<sup>6</sup> s7(3) of the Act.

- 6.4. Even if the contract is not in writing or does not state an entitlement to progress payments, a Payment Claim can be made.

### When can a Payment Claim be made?

7. Most construction projects run over a period of months and progress payments are made on a regular basis during the construction period, ending with a final payment at or after completion of the work. There are two aspects to consider when asking when a Payment Claim can be made:
  - 7.1. The first relates to the date in each month by which a claim can be made.
  - 7.2. The second relates to the last date for claiming payment, after work has been completed.
8. These two aspects are considered separately below:
  - 8.1. There is a specific day in the month on which the right to send a Payment Claim arises. If the contract is silent on this point, the day is the last day of the month. This aspect is discussed below under the heading "[Reference Date](#)".
  - 8.2. Every Payment Claim must be made within 6 months of the completion of the work, unless the construction contract allows for a longer period. This aspect is discussed below under the heading "[The Long Stop](#)".

### Reference Date

9. For a Payment Claim to be valid, it must be sent on or after a specific day in a month, described as the "**Reference Date**".<sup>7</sup> In many construction contracts, the terms of the contract will specify a date in the month by or on which payment claims or progress payment claims are to be made. If the contract includes this term, the Act adopts the date specified in the contract as the Reference Date. If the contract terms include a provision of this type, the Payment Claim for that month must be made on or after that date.
10. If the contract does not mention the date upon which progress payments or payment claims should be made, the last day of each month is specified by the Act as a Reference Date, being a date on or after which a Payment Claim can be made.

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<sup>7</sup> Reference Date is defined in s4 of the Act.

11. Many contracts include a term saying that a request for a progress payment sent after a specific day in the month (e.g. the 21st) will be deemed to be received on the 21st of the following month. A contract term like this does not alter the requirement to send a responding Payment Schedule within 15 business days of receipt of a Payment Claim (see below for further details).
12. Only one Payment Claim can be made for each Reference Date. If two or more Payment Claims are made with the same Reference Date, only the first is a valid Payment Claim.
13. The Long Stop provisions explained below may prevent a Payment Claim being sent after completion of the work, even if a Reference Date has not been used up.

## The Long Stop

14. If the work under the contract has reached completion, the contract will often specify a date by which the final Payment Claim must be made. If the contract does not include a term of this nature, the Payment Claim must be made within 6 months of the date on which the last work was performed.<sup>8</sup>

## How to make a Payment Claim

15. There are four requirements for a Payment Claim. A Payment Claim must:
  - 15.1. identify the works or services to which the Payment Claim relates, discussed below under the heading "[Details to include in a Payment Claim](#)";
  - 15.2. state the amount of the payment requested ("**the Claimed Amount**"). This is discussed below under the heading "[Calculating the Claimed Amount](#)";
  - 15.3. include the following words: "*This claim is made under the Building and Construction Industry Security of Payment Act 2009 (SA)*". This is discussed below under the heading "[Endorsement to include on a Payment Claim](#)"; and
  - 15.4. be delivered to the person liable to make the payment. This is discussed below under the heading "[Service of documents under the Act](#)".

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<sup>8</sup> s13(4) of the Act.

## Details to include in a Payment Claim

16. The Payment Claim should include a detailed description of the work done, or the materials supplied, or the services provided. Anyone who is not familiar with the construction contract should be able to understand what has been done for the amount claimed. A Payment Claim should be drafted so that the reader cannot easily deliberately misunderstand what is claimed.<sup>9</sup>
17. In many construction contracts, the terms of the contract will set out what level of detail should be supplied. If the contract specifies requirements to be supplied with a progress payment, adding that information to a Payment Claim is prudent.
18. Where appropriate, a Payment Claim might include:
  - 18.1. delivery docket;
  - 18.2. photographs of the work done, or the materials supplied;
  - 18.3. a statutory declaration stating all employees and subcontractors have been paid all amounts owing to them.

## Calculating the Claimed Amount

19. The amount claimed in a Payment Claim should be calculated by referring to the terms of the contract or, if there are no applicable terms, the amount should be based on the value of the work done or services provided. If any of the work or services were defective, a reduction should be made to allow for the defects.<sup>10</sup>

## Endorsement to include on a Payment Claim

20. A Payment Claim must include the following words:

*"This claim is made under the Building and Construction Industry Security of Payment Act 2009 (SA)."*

21. The words must be placed on each Payment Claim. While the Act does not specify it, the words should be included in a font size similar to that of the remainder of the document.

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<sup>9</sup> Section 13(2) of the Act sets out the requirements for a Payment Claim.

<sup>10</sup> Sections 9 and 10 of the Act describe how the amount claimed is to be calculated and valued.

## How to send a Payment Claim – Service of documents under the Act

22. It is important to ensure that any document sent under the Act, including a Payment Claim, Payment Schedule or any adjudication document, is sent in the manner prescribed in the Act.<sup>11</sup> This will assist in proving that the document has been sent and in establishing the date upon which it was received. The Act includes the following three alternative methods of service:
  - 22.1. personal delivery;
  - 22.2. sending by post or fax to the person's ordinary place of business; and/or
  - 22.3. sending by the method prescribed in the construction contract.
23. Unless the contract specifies it, service by email is not acceptable.
24. Given the potential serious consequences of a failure to respond to some documents under the Act, a Respondent will occasionally deny receipt of a document, requiring the Claimant to prove service as required by the Act. Claimants should always ensure they have a method of independent proof of service. Personal delivery by a courier with a signed acknowledgement of receipt is one method that is difficult to refute.
25. If the Respondent is a company, personal delivery to the registered office is an effective method of proven service. The address of the registered office of every private company is available by an online search.
26. Where a Respondent acknowledges receipt, such as by responding to the document by email, service is established beyond doubt.

## When payment is due

27. Payment of a Payment Claim is due to be made either:
  - 27.1. if the contract does not specify a due date, within 15 business days of when the Payment Claim is received; or
  - 27.2. if the contract does specify a due date, when required by the terms of the contract.<sup>12</sup>

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<sup>11</sup> Section 34 of the Act sets out the requirement for service of documents.

<sup>12</sup> s11 of the Act.

## RESPONDING WITH A PAYMENT SCHEDULE

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28. Any person who receives a Payment Claim must respond, within 15 business days, by sending back a Payment Schedule, unless they propose to pay (in full) the Claimed Amount.
29. How to provide a Payment Schedule is discussed under the following headings:
  - 29.1. When is the Payment Schedule due;
  - 29.2. When is the payment due to be made;
  - 29.3. What content must be in the Payment Schedule; and
  - 29.4. How to send the Payment Schedule.

### When is the Payment Schedule Due

30. The Act allows a period of 15 business days for a response to a Payment Claim unless the construction contract specifies a shorter period. In this booklet, we have assumed the construction contract does not specify a shorter period.<sup>13</sup>
31. The term "**Business Day**" is defined in the Act as "*any day other than:*
  - (a) *a Saturday, Sunday or public holiday; or*
  - (b) *27, 28, 29, 30 or 31 December; or*
  - (c) *any other day on which there is a Statewide shut down of the operations of the building and construction industry.*"<sup>14</sup>
32. To calculate the last date upon which a Payment Schedule can be sent, one adds 15 Business Days to the date of receipt of the Payment Claim. Any document received after that date will not be deemed to be a valid Payment Schedule.
33. The terms of the construction contract cannot extend this time limit of 15 Business Days but can reduce it.

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<sup>13</sup> s14(4) of the Act.

<sup>14</sup> s4 of the Act.

## When is the payment due to be made

34. In most cases, the terms of the construction contract state the due date for payment of Payment Claims and the Act does not override those terms.
35. If the terms of the construction contract do not specify the timeframe for payments to be made:
  - 35.1. the Respondent must pay the Claimed Amount within 15 Business Days after receipt of the Payment Claim, unless a Payment Schedule has been provided offering to pay a lesser amount;
  - 35.2. if a Payment Schedule has been provided offering a lesser amount than the Claimed Amount, that lesser amount must be paid within 15 Business Days. Failure to pay by that date leaves the Respondent with the options set out in paragraph 46 below.

## What content must be in the Payment Schedule

36. A Payment Schedule must:
  - 36.1. identify the Payment Claim to which the Payment Schedule relates. When drafting a Payment Schedule, include words such as "*This Payment Schedule responds to your Payment Claim dated [Insert Date] requesting payment of [Insert Claimed Amount]*" to ensure compliance with this requirement.
  - 36.2. state the amount of the payment proposed to be made; and
  - 36.3. if the payment proposed in the Payment Schedule is less than the Claimed Amount, state all the reasons why the payment proposed is less than the Claimed Amount. This requirement is discussed below under the heading "Payment Schedule Reasons".

## Payment Schedule Reasons

37. If the proposed payment is less than the Claimed Amount, it is mandatory to include reasons in the Payment Schedule to explain the shortfall. Every valid reason should be listed in the Payment Schedule.

38. A failure to include a reason in the Payment Schedule means the Respondent cannot later raise that reason in any adjudication.<sup>15</sup>

## How to send the Payment Schedule

39. The requirements for sending a Payment Schedule are the same as the requirements applicable to sending a Payment Claim. For details, refer to the section above at paragraph 22 as to serving a Payment Claim. Failure to follow these requirements may mean the Payment Schedule has not been validly served and therefore is not effective.<sup>16</sup>

## STEPS TOWARDS A DETERMINATION

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40. Choosing the first step towards getting a determination depends on whether a Payment Schedule was provided in response to the Payment Claim. There are two alternatives:
- 40.1. Payment Schedule was provided – but states a lesser amount than the Claimed Amount, sometimes nil, will be paid by the Respondent. This is discussed below under the heading "[Payment Schedule provided - Scheduled Amount too low](#)"; or
  - 40.2. no Payment Schedule was provided, and the full Claimed Amount is not paid on the due date, discussed below under the heading "**No Payment Schedule**".

### Payment Schedule provided - Scheduled Amount too low

41. In this scenario, the Respondent has provided a Payment Schedule but has proposed to pay an amount less than the Claimed Amount stated on the Payment Claim. The amount proposed to be paid is called the ("**Scheduled Amount**"). The Claimant has two options:
- 41.1. Wait until the due date for payment, hoping the Scheduled Amount will be paid on that date. For an explanation of this option see below under the heading "[Wait and See](#)"; or

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<sup>15</sup> s20(4) of the Act.

<sup>16</sup> Section 34 of the Act deals with service of documents.

- 41.2. Take action under the Act to challenge the Payment Schedule. For an explanation of this option, see below under the heading "[Challenge the Payment Schedule now](#)".
42. As well as choosing one of these options, the Claimant is entitled to serve notice on the Respondent of its intention to suspend work or to suspend supplying related goods and services. The right to suspend work is discussed in the final section of this booklet under the heading "[Suspending Work](#)".

## Wait and See

43. Under the wait and see option, nothing further is done until the date on which the promised Scheduled Amount should be paid.
44. If the contract terms do not state a due date for payment, the Scheduled Amount is due to be paid 15 Business Days following the receipt by the Respondent of the Payment Claim. In these cases, payment of the Scheduled Amount is due at or before delivery of the Payment Schedule.<sup>17</sup>
45. If the Scheduled Amount is paid on the due date, that is the end of this Payment Claim. The Claimant loses any right to take further action on this Payment Claim. In order to pursue any unpaid balance between the Claimed Amount and the Scheduled Amount, the Claimant will need to issue another Payment Claim seeking the unpaid balance. However, any new Payment Claim must comply with all of the requirements set out above under the heading "[Making a Payment Claim](#)" and, for that reason, the time limitations in that section should be considered.
46. If the Scheduled Amount is not paid in full on the due date, the Claimant has two options:
- 46.1. File proceedings in Court seeking payment of the Scheduled Amount. For an explanation of this step, see below under the heading "[Filing Proceedings in Court](#)"; or
- 46.2. Refer the dispute to an adjudicator. For an explanation of this step, see below under the heading "[Commencing Adjudication](#)". In the adjudication, the Claimant can seek payment of the Scheduled Amount or the full Claimed Amount.

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<sup>17</sup> s11(1)(b) of the Act.

## Challenge the Payment Schedule now

47. If the Claimant considers the Scheduled Amount stated on the Payment Schedule is inadequate when compared with the Claimed Amount on the Payment Claim, they can refer the dispute to adjudication at any time from receipt of the Payment Schedule up to 15 Business Days after that date. This limit is extended if the Scheduled Amount is not paid on the due date. For an explanation of this step, see the heading below "[Commencing Adjudication](#)".

## No Payment Schedule

48. If the Respondent does not serve a Payment Schedule within 15 Business Days from receipt of the Payment Claim, the Respondent becomes liable to pay the full Claimed Amount.<sup>18</sup>
49. The date upon which the Claimed Amount must be paid depends on the terms of the contract.
50. If the contract does not specify a date by which progress payments should be made, the Claimed Amount must be paid on or before the same day the Payment Schedule should have been provided (that is, 15 Business Days after the Payment Claim was served).
51. If the Respondent, having not provided a Payment Schedule, then fails to pay the Claimed Amount to the Claimant by the due date, the Claimant has two options:
  - 51.1. File proceedings in Court seeking payment of the Claimed Amount. For an explanation of this step, see below under the heading "[Filing Proceedings in Court – no Payment Schedule](#)"; or
  - 51.2. Issue a notice ("**Second Chance Notice**") as the first step towards commencing an adjudication. For an explanation of the requirements for this notice, see below under the heading "[Second Chance Notice](#)".
52. In addition to these two options, the Claimant is also entitled to serve notice on the Respondent of its intention to suspend work or to suspend supplying related goods

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<sup>18</sup> This assumes the contract does not specify a shorter time frame for service of the Payment Schedule. See s14(4) of the Act.

and services. The right to suspend work is discussed in the final section of this booklet under the heading "[Suspending Work](#)".

## Filing Proceedings in Court – no Payment Schedule

53. If the Respondent does not provide a Payment Schedule and fails to pay the Claimed Amount to the Claimant by the due date, the Claimant may decide to file proceedings in Court.
54. The detailed procedures to follow are set out below at paragraph 64 and following in the section detailing how claims in Court are commenced.

## Second Chance Notice

55. Where a Respondent fails to provide a Payment Schedule and then fails to pay the Claimed Amount on the due date, before a Claimant can refer the claim to an adjudicator, the Act requires the Claimant to give notice to the Respondent of a second chance to provide the Payment Schedule. The Second Chance Notice must be sent within 20 Business Days of the date on which the Claimed Amount was due to be paid.<sup>19</sup>
56. The following is an example of the words that could be included in Second Chance Notice:

*Dear [insert name of contracting party]*

*We sent you a payment claim on [INSERT DATE] asking you to make a payment to us. You should have paid by now. You haven't even written back providing a payment schedule. If you don't respond with a payment schedule within the next week, we will apply for adjudication.*

*Yours sincerely*

*[insert name of your contracting entity].*

57. If a Payment Schedule is provided in response to the Second Chance Notice, and the Claimant considers the Scheduled Amount promised is inadequate when compared with the Claimed Amount, the Claimant may immediately refer the claim to an adjudicator as set out below under the heading "[Commencing Adjudication](#)".

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<sup>19</sup> s17(2)(a) of the Act.

58. A Second Chance Notice must be served in the same way as a Payment Claim. For details, refer to the heading "[How to send a Payment Claim – Service of documents under the Act](#)" at paragraph 22 above. Failure to follow these requirements may mean the Second Chance Notice has not been validly served and therefore is not effective.

## Commencing Adjudication

59. A Claimant can commence an adjudication by making an application to an authorised nominating authority ("**ANA**"). An ANA can be found at:

[https://www.sasbc.sa.gov.au/security\\_of\\_payment/authorised\\_nominating\\_authorities](https://www.sasbc.sa.gov.au/security_of_payment/authorised_nominating_authorities)

60. Applications for adjudication must be completed before the deadline imposed by the Act. The deadline depends on the facts that lead up to the decision to apply for adjudication. There are three alternative deadlines:

60.1. If a Payment Schedule was provided but the Claimant considers the Scheduled Amount is inadequate when compared with the Claimed Amount - within 15 Business Days after the Payment Schedule was received;

60.2. If a Payment Schedule was provided but the Scheduled Amount was not paid on the due date – within 20 Business Days after the due date for payment; or

60.3. If no Payment Schedule was provided and the Claimed Amount was not paid – within 20 Business Days after service of the Second Chance Notice.

61. Most ANAs provide an online form for completion that will be the index to the application for adjudication. An adjudication application must be in writing and must identify the Payment Claim and any Payment Schedule. Generally, submissions should be included with the application to expand on the information. An explanation of what is meant by submissions is set out below under the heading "[Adjudication Submissions](#)".

62. It is essential to serve a copy of the adjudication application and all accompanying documents on the Respondent. For details of methods of service, refer to the heading "[How to send a Payment Claim – Service of documents under the Act](#)" at paragraph 22 above. Failure to follow these requirements may mean the adjudication application has not been validly served and therefore is not effective.

## Adjudication Submissions

63. The submissions are the story behind the claim for payment. As the adjudicator will know nothing about the parties or the contract, the submissions are the Claimant's opportunity to tell the adjudicator why the Payment Claim should succeed. The extent of submissions that should accompany an adjudication application will be determined by the complexity of the dispute. This might include a description of the contract, the background to the Payment Claim and any additional details that might support the amount claimed. Where the issues are complex, it is usual to seek legal assistance in drafting the submissions.

## Filing Proceedings in Court

64. As an alternative to applying for adjudication, the Claimant may file proceedings in Court. There are two scenarios where this alternative applies:
- 64.1. If the Respondent, having not provided a Payment Schedule, then fails to pay the Claimed Amount to the Claimant by the due date, the Claimant can file proceedings in Court seeking payment of the Claimed Amount; and
  - 64.2. If the Scheduled Amount is not paid in full on the due date, the Claimant can file proceedings in Court seeking payment of the Scheduled Amount.
65. There is no time limit specified in the Act for the filing of proceedings in Court.
66. Most Claimants will engage a lawyer to act for them when filing proceedings in Court.

## Advantages and disadvantages of filing proceedings in Court

67. The Respondent is not permitted to raise defences under the contract or counterclaim against the proceedings. If the merits of the Payment Claim are not straightforward, it might be more prudent to file proceedings in Court rather than to opt for adjudication. However, the timeframe and cost of Court proceedings is always likely to be much longer and greater than the timeframe and cost of adjudication procedures. Once an adjudication determination has been obtained, it is not necessary to file proceedings in Court to obtain a judgment. Instead, an adjudication certificate can be registered as a judgment, as discussed below at paragraph 81 under the heading "[Judgment Following Adjudication](#)".

## RESPONDING TO AN ADJUDICATION APPLICATION

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### When the adjudication response must be sent

68. If no Payment Schedule was served within the required time, the Respondent is not permitted to serve any adjudication response. Even if the Respondent ignores this restriction and sends in a response, the adjudicator is not permitted to consider it.
69. If a Payment Schedule was served within the required time, the Respondent has 5 Business Days to respond, unless that period is extended by a late notification of the adjudicator's acceptance of nomination. If the notice informing the Respondent that the adjudicator has accepted nomination is delayed, the Respondent will have 2 Business Days, following receipt of that notice, to respond.
70. Usually, the notice informing the Respondent of the adjudicator's acceptance is received within 2 or 3 business days after the application for adjudication is made. Hence it is not usual for the 5 Business Day period to be extended.
71. A late adjudication response must not be considered by the adjudicator.

### What must be in the adjudication response

72. An adjudication response must be in writing, must identify the adjudication application it responds to, and may contain submissions. For an explanation of the usual content of submissions, see the paragraph below headed "[Adjudication Response Submissions](#)".

### Adjudication Response Submissions

73. The submissions in an adjudication response should tell the story behind the reason for not paying the Amount Claimed. The submissions can expand on the reasons included in the Payment Schedule but cannot include new reasons that were not included in the Payment Schedule. The submissions should identify any flaws in the Payment Claim. The submissions are the Respondent's opportunity to tell the adjudicator why the Payment Claim should not succeed. The extent of submissions that should accompany an adjudication response will be determined by the complexity of the dispute. This might include a description of the contract, the background to the Payment Claim and any additional details that might make the

adjudicator decide the Claimed Amount should not be awarded. Where the issues are complex, it is not unusual to seek legal assistance in drafting the submissions.

74. It is essential to serve a copy of the adjudication response and all accompanying documents on the Claimant. For details, refer to the heading "[How to send a Payment Claim – Service of documents under the Act](#)" at paragraph 22 above. Failure to follow these requirements may mean the adjudication response has not been validly served and therefore is not effective.

### What happens next in an adjudication

75. Following receipt of the adjudication response, the adjudicator can ask for more submissions from either party, call a conference and/or carry out an inspection. It is not uncommon for more submissions to be requested. The adjudicator is required to deal expeditiously with the adjudication and generally, unless the parties agree to extend the period, within 10 Business Days of receipt of the latest valid submission.
76. The adjudicator will issue a written determination. The ANA retains the determination until the adjudicator's fee is paid. Once the determination is delivered to the Claimant and the Respondent, the Claimant (if successful) can take steps towards enforcing the determination.
77. The adjudicator's determination should be in writing and include:
  - 77.1. the amount of the payment that should be made;
  - 77.2. the date on which it should be paid;
  - 77.3. the rate of interest applicable; and
  - 77.4. reasons for the determination.
78. If the adjudicator determines the payment to be immediately due, it becomes due to be paid 5 Business Days following the service of the determination on the Respondent.

### STEPS TOWARDS GETTING PAID

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79. If the Respondent fails to pay the amount determined by the adjudicator, there are further steps that can be taken to enforce the determination and obtain payment.

80. The steps are as follows:

- 80.1. Obtain judgment from a Court. This step is explained below under the heading "[Judgment following adjudication](#)";
- 80.2. Enforce the judgment. This step is explained below under the heading "[Final enforcement procedures](#)".

### Judgment following adjudication

81. The determination from the adjudicator will specify the amount that should be paid by the Respondent and the date upon which the payment should be made. If the Respondent fails to pay the amount, the Claimant may write to the ANA that appointed the adjudicator, asking for an adjudication certificate to be issued.
82. The ANA will then issue a certificate stating the name of the Claimant and the Respondent, the adjudicated amount and the date on which the amount should have been paid. If interest was awarded by the adjudicator and remains unpaid, the additional amount for interest can be added to the amount stated on the certificate. Similarly, any adjudicator's fees owed to the Claimant can be added to the amount stated on the certificate. The total certificate amount ("**Certificate Amount**") will be the sum of the adjudicated amount, the interest and the fees.<sup>20</sup>
83. The Claimant must prepare an affidavit stating how much of the Certificate Amount remains unpaid. The Claimant then files the affidavit and the certificate in Court. The Court will then provide the Claimant with a document showing a judgment has been entered for the Certificate Amount.
84. Typically, the document showing judgment has been entered can be obtained within a few days of the due date for payment specified by the adjudicator.
85. Most Claimants engage the services of a lawyer to assist in obtaining judgment.

### Final enforcement procedures

86. A judgment from a Court may be used as a step towards insolvency proceedings. There are two common types insolvency proceedings; winding up of a company, or, personal bankruptcy.

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<sup>20</sup> s24 of the Act.

87. If the Respondent is a company, the judgment can form the basis of a statutory demand against the company. Most companies will have the words "Pty Ltd" at the end of the trading name. A statutory demand must be answered within 21 days, either by payment or by application to Court to have the statutory demand set aside. A failure to take action within 21 days of service will entitle the Claimant to wind the company up in insolvency.
88. If the Respondent is an individual or a partnership, the judgment can form the basis of bankruptcy proceedings.
89. In most cases, Respondents pay or negotiate a settlement before the conclusion of the steps set out in this section.
90. Most claimants engage a lawyer to undertake the final enforcement procedures.

## SUSPENDING WORK

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91. If the Respondent:
  - 91.1. Fails to provide a Payment Schedule and then fails to pay the Claimed Amount to the Claimant by the due date;
  - 91.2. Provides a Payment Schedule where the Scheduled Amount is less than the Claimed Amount; or
  - 91.3. Fails to pay an amount on the date determined by an adjudicator,then, the Claimant is entitled to serve notice on the Respondent of its intention to suspend work or to suspend supplying related goods and services.<sup>21</sup>
92. Before suspending work, the Claimant must serve a written notice stating an intention to suspend. The notice must give 2 Business Days' warning of the impending suspension and must state the notice is given under the *Building and Construction Industry Security of Payment Act 2009 (SA)*.
93. If the Respondent subsequently pays the amount due, unless there is some other legal basis to not perform the remainder of the contract, the Claimant must

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<sup>21</sup> s28(1) of the Act.

recommence performance of the contract within 3 Business Days of receipt of the payment.<sup>22</sup>

## STRATEGIES FOR CHALLENGING ADJUDICATIONS

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94. It is not uncommon for the Respondent to be disappointed about the determination of an adjudicator. Generally, a Respondent will have contested the adjudication on the basis that they did not consider they owed the money claimed by the Claimant.
95. There are two broad strategies available to an unhappy Respondent:
  - 95.1. Pay the amount determined by the adjudicator and then take steps to recover that amount. This is discussed below under the heading "[Recovering after Paying](#)"; or
  - 95.2. Attempt to have the adjudicator's determination quashed before the money is paid. This is discussed below under the heading "[Challenging the Determination](#)".

### Recovering after Paying

96. An adjudication is not a final resolution of the dispute between the parties. The Act is a "pay now argue later" scheme. An unhappy Respondent is not precluded from taking further steps to recover any money paid to a Claimant as a result of an adjudication.
97. The contract between the parties may include dispute resolution procedures. If so, the Respondent should follow these terms of the contract.
98. If the contract does not include dispute resolution procedures, the Respondent is at liberty to issue proceedings in Court to recover the payment.
99. Most Respondents engage lawyers when considering taking these steps.

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<sup>22</sup> s28(2) of the Act.

## Challenging the Determination

100. The Courts exercise a supervisory role over the administration of the Act. On many occasions, Courts have quashed the determination of an adjudicator on the basis that the adjudicator has not properly performed their role as set out in the Act.
101. If an adjudicator has acted outside the of the powers granted under the Act, or not given the parties natural justice, a Court will intervene and set aside the determination.
102. However, if the adjudicator has acted within the boundaries imposed by the Act, even if the decision made by the adjudicator is wrong, a Court will not set aside the determination. This is a highly technical area of administrative law relating to the concept of jurisdictional error.
103. If a Respondent commences Court proceedings seeking to set aside a determination, a Court will almost always require the Respondent to deposit into the Court's trust fund the full amount of the determination. That amount is usually retained in the trust fund until the Court decides the issue, or the parties negotiate a resolution.
104. A Respondent wishing to have a determination set aside would invariably engage a lawyer who specialises in this area of the law.